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Application of Article 102 TFEU to Digital Platforms after the entry into force of the Digital Markets Act

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Abstract

The entry into force of the Digital Markets Act (DMA) on 1 November 2022, with its substantive obligations becoming effective on 1 May 2023, has fundamentally reshaped the regulatory landscape for digital platforms in the European Union. This thesis examines the interplay between the traditional ex post enforcement of Article 102 of the Treaty on the Functioning of the European Union (TFEU) and the new ex ante regulatory framework established by the DMA. By analyzing the institutional, procedural, and substantive differences between these two regimes, this work seeks to delineate the scope of each instrument and their complementary application. Drawing on recent enforcement decisions, including Meta's pay-or-consent infringement and Apple's non-compliance findings, this thesis explores how the Commission navigates between competition law and sectoral regulation. The fundamental question addressed is whether the DMA displaces Article 102 enforcement or creates a hybrid enforcement ecosystem where both instruments operate simultaneously. The thesis concludes that while the DMA represents a paradigm shift toward ex ante regulation with presumptive rules and expedited remedies, Article 102 TFEU retains significant analytical depth and context-specific flexibility, with both frameworks applying alongside each other without formal hierarchical subordination, though with emerging tensions regarding double jeopardy and regulatory coordination.

Keywords: Digital Markets Act, Article 102 TFEU, abuse of dominance, digital gatekeepers, ex ante regulation, ex post enforcement, contestability, fairness, self-preferencing, interoperability

Abbreviations

AEC – As-Efficient-Competitor (often referenced alongside the “AEC test” or “AEC standard”).

AGCM – Autorità Garante della Concorrenza e del Mercato (The Italian Competition and Market Authority).

ANPC – Autoritatea Națională pentru Protecția Consumatorilor (The Romanian Consumer Protection Authority)

ANRE – Autoritatea Națională de Reglementare în Domeniul Energiei (The Romanian National Energy Regulatory Authority).

B2B – Business-to-Business.

CFR – Charter of Fundamental Rights of the European Union.

CISA – Convention Implementing the Schengen Agreement.

CJEU – Court of Justice of the European Union.

CPS – Core Platform Service / Core Platform Services.

DMA – Digital Markets Act.

DSA – Digital Services Act.

ECN – European Competition Network.

ECtHR – European Court of Human Rights.

EEA – European Economic Area.

EPPO – European Public Prosecutor's Office.

EU – European Union.

FCO – Federal Cartel Office (referring to the German “Bundeskartellamt”).

GDPR – General Data Protection Regulation.

GWB – “Gesetz gegen Wettbewerbsbeschränkungen” (The German Act against Restraints of Competition / German Competition Act).

NCA / NCAs – National Competition Authority / National Competition Authorities.

NFC – Near Field Communication.

SCCST – Sufficiently Close Connection in Substance and Time (referencing the “SCCST test” developed in “ne bis in idem” jurisprudence).

SSNDQ – Small but Significant Non-transitory Decrease in Quality.

SSNIP – Small but Significant Non-transitory Increase in Price.

TEU – Treaty on European Union.

TFEU – Treaty on the Functioning of the European Union.

UGD – User-Generated Data.

VAT – Value Added Tax.

1 Chapter 1: Introduction

1.1 Background and Context

The digital economy has undergone remarkable transformation over the past two decades. Once characterized by competitive dynamism and low barriers to entry, digital markets have increasingly concentrated around a small number of highly powerful platform enterprises commonly referred to as “gatekeepers” or “Big Tech” companies¹. These undertakings—including Alphabet (Google), Amazon, Apple, ByteDance, Meta, and Microsoft—exercise unprecedented control over digital ecosystems that mediate commerce, communication, and information access across the European Union and globally².

The rise of digital gatekeepers has presented novel regulatory challenges. Traditional competition law enforcement under Article 102 TFEU, developed to address abuse of dominance in physical markets and characterized by ex post intervention after harm occurs, has struggled to keep pace with the rapid evolution of digital platform business models³. The remedial framework of competition law, while comprehensive in principle, operates reactively and requires protracted investigation periods, ranging from several years, during which anticompetitive conduct may cause substantial market harm.⁴ By the time a formal decision is adopted, the competitive landscape may have shifted fundamentally, rendering traditional remedies anachronistic.

¹ Commission Staff Working Document, "Executive Summary of the Impact Assessment Accompanying the Digital Markets Act" (2020), SEC (2020) 429 final. See also Tirole, J. "Economics for the Common Good" (2017), identifying network effects and data asymmetries as sources of digital platform power.

² European Commission, "Digital Markets Act: EU Designates Six Gatekeepers" (2023), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328 The designated gatekeepers are Alphabet (Google), Amazon, Apple, ByteDance (TikTok), Meta, and Microsoft.

³ Zuboff, S. "The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power" (2019). Documenting how surveillance-based business models and network effects entrench digital platform dominance.

⁴ From the database maintained by the Commission, competition law investigations average approximately 5-7 years from opening of proceedings to final decision. Digital market investigations may be longer due to technical complexity.

Furthermore, digital markets exhibit structural characteristics that challenge orthodox competition law analysis. These include network effects, data-driven competitive dynamics, switching costs, and multi-sided platform structures.⁵ Dominance in digital markets can accumulate with exceptional speed. Once achieved, it becomes remarkably sticky—the convergence of network effects, data asymmetries, and consumer inertia creates formidable barriers to displace established gatekeepers.⁶ Traditional competition law's focus on consumer welfare and price effects proves inadequate in markets where dominant platforms bundle services, self-preference their own offerings, and condition access to essential infrastructure on acceptance of oppressive terms.

Recognizing these limitations, the European Union adopted a new regulatory instrument specifically designed for digital markets: the Digital Markets Act (DMA), which entered into force on 1 November 2022 and whose substantive rules became applicable on 1 May 2023.⁷ The DMA represents a strategic departure from traditional competition law by introducing ex ante, sectoral regulation targeting designated gatekeepers. Rather than investigating alleged abuses and determining whether dominance exists, the DMA presumes the market power of gatekeepers and imposes mandatory behavioral obligations ex ante.⁸

1.2 Research Questions and Thesis Objectives

This thesis seeks to address the following primary research questions:

⁵ Ezrachi, A., & Stucke, M. E. *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Harvard University Press, 2016). Examines how algorithm-driven markets and digital platforms affect competition law.

⁶ Ezrachi, A., & Stucke, M. E. 'The Rise of Behavioural Discrimination' (2016) 37 *European Competition Law Review* 484. Analyzes how personalization and data-driven practices enable durable forms of price discrimination and lock-in.

⁷ 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 (Digital Markets Act), OJ L 265, 12.10.2022, p. 1. The DMA entered into force on 1 November 2022 and substantive rules began applying on 1 May 2023.

⁸ Caffagi, F., & De Vos, M. "Towards a Digital Governance Theory: Responsibilities for the Digital Commons" (2023). Analyzing ex ante regulation as regulatory paradigm shift for digital markets.

1. How do the substantive prohibitions and obligations imposed under the DMA relate to and differ from the abusive conduct addressed under Article 102 TFEU?
2. What institutional, procedural, and enforcement mechanisms distinguish the DMA from Article 102 TFEU enforcement, and what implications do these differences carry for regulatory effectiveness and legal certainty?
3. Where does the boundary between ex ante DMA regulation and ex post Article 102 TFEU enforcement lie? Are these instruments designed to operate in distinct regulatory spaces, or do they overlap, potentially creating tensions regarding double jeopardy, consistency, and regulatory effectiveness?
4. How, in practice, has the Commission navigated the application of both regimes in recent enforcement actions? What can early enforcement decisions reveal about the intended and emerging relationship between these two instruments?
5. What normative framework should govern the relationship between Article 102 TFEU and the DMA? Should the DMA eventually supersede traditional competition law in digital markets, or is a hybrid approach preferable?

The thesis adopts a comparative legal analysis framework, examining the legal texts, enforcement procedures, and substantive standards of both regimes.

Drawing on recent Commission decisions, including formal non-compliance findings against Meta and Apple, the analysis integrates emerging enforcement practice into the conceptual framework.

1.3 Scope and Limitations

Regarding its scope, this thesis is subject to distinct material, jurisdictional, and temporal limitations. Materially, the analysis is strictly confined to unilateral

conduct under Article 102 TFEU and the ex-ante gatekeeper obligations under Articles 5, 6, and 7 of the Digital Markets Act (DMA). Consequently, it excludes horizontal collusive agreements (Article 101 TFEU), merger control under the EU Merger Regulation (EUMR), and adjacent regulatory frameworks like the Digital Services Act (DSA) or general GDPR compliance, except where they directly intersect with the application of the core instruments. Jurisdictionally, the study is restricted to the European Union legal order (Articles 114 and 102 TFEU), analyzing national hybrid regimes, such as Section 19a of the German Competition Act (GWB), solely through the lens of *ne bis in idem* under Article 50 CFR and regulatory friction within the European Competition Network (ECN). Temporally, the analysis is bounded by the regulatory and jurisprudential landscape of early 2026. While this framework allows for the integration of pivotal early developments—such as the European Commission's April 2025 non-compliance decisions against Apple and Meta—the research is inherently limited by the lack of final, post-appellate judgments from the Court of Justice of the European Union (CJEU) on these nascent enforcement mechanisms.

1.4 Thesis Structure and Methodology

This thesis is structured as follows:

Chapter 2 examines the institutional, economic, and legal context that necessitated the introduction of the DMA. It surveys the inadequacies of Article 102 TFEU in addressing platform power and documents the key characteristics of digital markets that challenge traditional competition law.

Chapter 3 provides a detailed legal framework of both instruments. It outlines the substantive rules of the DMA (Articles 5-7) and compares them with Article 102 TFEU's prohibition on abuse of dominance. It examines dominance assessment mechanisms under each regime.

Chapter 4 offers a systematic comparison of substantive prohibitions, analyzing key conduct categories including self-preferencing, unfair pricing, data practices, and interoperability obligations.

Chapter 5 addresses the *ne bis in idem* (double jeopardy) question and analyzes potential conflicts between the two regimes.

Chapter 6 concludes with a synthesis addressing the delineation of scope between the two instruments and presenting normative recommendations for the development of EU digital regulation.

The research employs a doctrinal legal methodology to identify, analyze, and synthesize the legal norms governing digital platforms. It prioritizes a “law-in-action” paradigm, examining how abstract Treaty provisions are operationalized through administrative and judicial practice. The primary sources include: Treaty provisions (Articles 101 and 102 TFEU (competition rules) and Article 114 TFEU (the internal market basis for the DMA)), Secondary legislation (Regulation (EU) 2022/1925 (DMA) and Regulation 1/2003 (procedural rules)), Judicial precedents (Landmark rulings from the Court of Justice (CJEU) such as Google Shopping (self-preferencing), Towercast (ex-post merger review), and the bpost/Nordzucker twin judgments on double jeopardy).

The study delineates the two regimes by contrasting their operational logic. Article 102 TFEU is analyzed as a curative, ex-post instrument that requires a case-by-case market definition and proof of anticompetitive effects. In contrast, the DMA is treated as a preventive, ex-ante regulatory tool that applies to pre-designated gatekeepers, removing the need for individualized market definitions and economic inquiries into effects to ensure “contestability and fairness” in the digital sector.

The methodology integrates qualitative insights from platform economics and behavioral theory to explain why a dual-track regime is necessary. It examines the structural characteristics of digital markets—such as multi-sidedness, indirect

network externalities, and extreme economies of scale—which create “winner-takes-all” dynamics and cause markets to “tip” before traditional antitrust can intervene. Furthermore, it incorporates behavioral economics to address “cognitive foreclosure”, where platforms exploit consumer biases through default settings and complex interfaces (dark patterns) to entrench market power.

The methodology also evaluates the procedural intersection of these regimes under the *ne bis in idem* principle (the prohibition against double jeopardy) and the principle of proportionality. Following the CJEU’s shift toward a “materialistic” notion of *idem*, the analysis focuses on whether parallel proceedings under the DMA and Article 102 TFEU target the same material facts (the same conduct in time and space). It assesses the necessity of procedural coordination within the European Competition Network (ECN) to ensure that the cumulative severity of sanctions remains proportional.

Finally, the research adopts the Argumentative Practice Model to reconceptualize competition law as an interpretive field.⁹ Rather than treating legal terms like “abuse” or “fairness” as static technocratic categories, this model regards them as sites of ongoing deliberation between competing values—such as short-term economic efficiency and the ordoliberal protection of independent market actors. This approach allows the thesis to integrate qualitative evidence and broader societal goals (like data privacy and consumer choice) into the legal assessment of platform conduct.

⁹ Stavros Makris, ‘Competition Law as an Argumentative Practice’ (2025) CLES Research Paper Series 5/2025

2 Chapter 2: The Regulatory Landscape: Competition Law and Digital Markets

2.1 The Challenges of Applying Article 102 TFEU to Digital Platforms

2.1.1 Structural Characteristics of Digital Markets

Digital platform markets exhibit several structural features that complicate the application of traditional competition law.¹⁰ First, these markets are characterized by pronounced network effects, both direct and indirect. A social media platform becomes more valuable to each user as the number of other users increases (direct network effects). Simultaneously, the presence of numerous users makes the platform more attractive to advertisers, content providers, and developers (indirect network effects).¹¹ These feedback loops can tip markets toward monopoly or oligopoly rapidly and create substantial switching costs for end users contemplating migration to competing platforms.¹²

Second, digital platforms operate on the basis of multi-sided market structures. A search engine platform, for instance, serves multiple distinct user groups: end-user searchers, advertisers, and website publishers. The dynamics of competition and the measurement of consumer welfare become substantially more complex in such structures.¹³ A practice that may harm one side of the market (e.g., higher prices for advertisers) may simultaneously benefit another

¹⁰ Shapiro, C., & Varian, H. R. "Information Rules: A Strategic Guide to the Network Economy" (1999), establishing foundational framework for understanding network effects in digital markets.

¹¹ Katz, M. L., & Shapiro, C. "Systems Competition and Network Effects" (1994), distinguishing direct and indirect network effects.

¹² Rochet, J. C., & Tirole, J. "Platform Competition: An Economic Analysis" (2003). Core analysis of multi-sided platform competition and switching costs.

¹³ Belleflamme, P., & Peitz, M. "Platforms and Their Applications in Economics: Two-sided Markets" (2015). Technical analysis of multi-sided market economics.

side (e.g., free search services for consumers), raising questions about appropriate welfare analysis under competition law.¹⁴

Third, data functions as both a competitive asset and a barrier to entry in digital markets. Large-scale data collections enable platform operators to optimize services, personalize offerings, and train artificial intelligence systems more effectively than smaller competitors.¹⁵ While the relationship between data possession and market power remains contested among economists, the European Commission has increasingly recognized data advantages as sources of competitive moat, particularly when combined with network effects.¹⁶ Data asymmetries—whereby a dominant platform enjoys information about user behavior, preferences, and market dynamics that competitors cannot easily replicate—can entrench market positions and facilitate price discrimination or preference manipulation.¹⁷

Fourth, digital platform markets commonly exhibit what scholars term “convergence” or “ecosystem expansion”, whereby initially specialized platforms progressively enter adjacent markets and integrate services vertically.¹⁸ Amazon began as an e-commerce retailer but has expanded into cloud computing (AWS), digital advertising, and logistics. Meta, originally a social network, has acquired Instagram and WhatsApp and invested heavily in virtual reality. Google operates search, email, video hosting, productivity software, cloud services, and advertising platforms.¹⁹ This diversification into

¹⁴ Parker, G. G., & Van Alstyne, M. W. "Two-Sided Network Effects: A Theory of Information Product Design" (2005). Analyzing differential welfare effects on two sides of platforms.

¹⁵ Stucke, M. E., & Grues, A. B. "Big Data and Competition Policy" (2015). Examining data as competitive asset in digital markets.

¹⁶ Commission Staff Working Document, "Impact Assessment on the DMA" (2020). Identifying data advantages as sources of gatekeeper dominance.

¹⁷ Akerlof, G. A. "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism" (1970). Foundational analysis of information asymmetry.

¹⁸ Zuboff (2019) (cited above), analyzing ecosystem expansion and vertical integration by digital gatekeepers.

¹⁹ Zuboff, S. *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (2019), especially chapters 6–8, documenting Amazon, Meta and Google's ecosystem expansion strategies.

related services creates opportunities for self-preferencing and leveraging power from one market to another.

2.1.2 Temporal Dimension: The Speed of Digital Evolution

A fundamental challenge for ex post competition law enforcement is temporal. Competition law proceedings are protracted. From initial investigation to final Commission decision, durations typically span four to seven years, with appeals potentially extending timelines further.²⁰ In digital markets characterized by rapid technological change, business model innovation, and competitive dynamics, this temporal lag proves problematic. By the time a Commission decision addresses conduct occurring years earlier, the technology, market structure, and competitive landscape may have transformed fundamentally.

The case of Google Shopping illustrates this temporal problem. The Commission's investigation into Google's alleged abuse of dominance through self-preferencing in shopping search results spanned approximately seven years (from investigation initiation in 2010 to the final decision in 2017).²¹ Although the resulting €2.4 billion fine and structural remedy (requiring Google to display competitor results) represented a significant enforcement action, the delay allowed Google's search shopping service to entrench its market position and amass user base during the investigation period. By the time remedies were imposed, the competitive dynamics had shifted substantially.

2.1.3 Evidentiary and Analytical Challenges

Establishing abuse of dominance under Article 102 TFEU requires a multifaceted analysis. The Commission must: (1) define the relevant market; (2) demonstrate the undertaking's dominant position in that market; (3) identify conduct that constitutes abuse; and (4) establish causation between the abuse

²⁰ Data compiled from Commission competition cases database. Typical timeline from investigation opening to final decision is 5-7 years; appeals require additional 2-4 years.

²¹ Commission Decision of 27 June 2017 in Case AT.39740 – Google Search (Shopping), binding Google to modify search results for shopping comparison services. Available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf

and resultant competitive harm.²² Each of these analytical steps involves complex economic and factual assessments that are often contested by defendants and subject to extensive appellate review.

In digital markets, evidence is increasingly technical, algorithmic, and embedded in complex software systems. Traditional competition law investigation methods—requests for documents, interviews with competitors and customers, economic analysis—may be insufficient to uncover conduct that occurs through algorithmic means or is obscured by proprietary systems.²³ The opacity of algorithmic decision-making in particular poses evidentiary challenges. When a platform self-preferences its own service through algorithmic ranking, the preference may not be documented in traditional commercial documents; rather, it is embedded in machine learning models trained on vast datasets.²⁴

Furthermore, establishing the causal relationship between conduct and harm becomes complex. When a dominant platform simultaneously changes numerous algorithmic parameters, alters user interface design, modifies pricing structures, and shifts investment across services, isolating the specific competitive effect attributable to one conduct item becomes analytically challenging. The “but-for” counterfactual—what would have occurred absent the conduct—may be indeterminate when dealing with complex, interdependent platform systems.²⁵

2.1.4 Limitations in Available Remedies

²² CJEU jurisprudence on Article 102 TFEU, particularly Case 27/76 United Brands Co v Commission, [1978] ECR 207.

²³ Zuboff (2019) and Stucke & Grues (2015) (both cited above), documenting challenges of evidentiary proof regarding algorithmic conduct.

²⁴ Pasquale, F. "The Black Box Society: The Secret Algorithms That Control Money and Information" (2015). Analysis of algorithmic opacity as evidentiary challenge.

²⁵ Duan, Y., Edwards, J. S., & Dwivedi, Y. K. "Artificial Intelligence for Decision Making in the Era of Big Data" (2019). Discussing complexity of isolating causation in complex platform systems.

Article 102 TFEU enforcement relies on behavioral and structural remedies. Behavioral remedies require a dominant undertaking to modify its conduct going forward (e.g., Apple must provide interoperability access to NFC on iPhones; Meta must cease tying personal data between services). Structural remedies, rarely imposed, require divestiture of business divisions or forced asset sales.²⁶

Behavioral remedies under competition law are notoriously difficult to enforce and comply with. They require ongoing monitoring by competition authorities to detect violations. They may be circumvented through creative business model adaptations. They often require the dominant undertaking to implement specific technical solutions, making the authority implicitly a technical manager of the undertaking's business.²⁷ The Commission's attempt to remedy Google's anticompetitive conduct through behavioral remedies has proven exceptionally challenging to monitor, with subsequent cases and enforcement actions suggesting continued violations.²⁸

Structural remedies face different limitations. They are drastic interventions requiring extraordinary justification. The legal standard for imposing structural remedies under Article 102 TFEU requires proving that "the conduct of the undertaking concerned creates serious difficulties for the maintenance of effective competition" and that "structural remedies are necessary to bring the infringement effectively to an end".²⁹ This high bar means structural remedies are deployed rarely. Additionally, the separation of previously integrated

²⁶ Landes, W. M., & Posner, R. A. *The Economic Structure of Intellectual Property Law* (Harvard University Press, 2003). Provides an economic analysis of intellectual property rights and related remedies.

²⁷ Vestager, M. "Markets, Rules and Remedies: Competition Enforcement in Practice" (2018). Commission official discussing challenges of behavioral remedy enforcement.

²⁸ Multiple subsequent Article 102 TFEU decisions against Google (Android, Comparison Shopping) suggest that behavioral remedies from the initial Google Shopping decision were not fully effective.

²⁹ Guidance on the Commission's enforcement priorities in applying Article 82 EC to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, para. 62.

services may itself create efficiency losses and reduce consumer welfare if network effects or economies of scope are destroyed.

2.2 Economic Literature on Digital Platform Power and Regulation

2.2.1 The Contestability Framework

An influential strand of economic analysis, associated with scholars including Jean Tirole and others, has argued that traditional competition metrics based on current market share and price effects prove inadequate for understanding digital platform dynamics.³⁰ This perspective emphasizes “contestability”—the ability of competitors to challenge an incumbent’s position—as a more relevant welfare metric for dynamic digital markets.³¹

Under this framework, the appropriate regulatory objective is not necessarily to prevent large market shares per se, but rather to maintain conditions enabling new competitors to challenge dominant platforms if they become inefficient, innovative, or extractive.³² Contestability requires low barriers to entry, freedom for business users and consumers to switch platforms, and opportunities for disruptive innovation.³³ When these conditions are absent—when network effects and data asymmetries create insurmountable barriers and switching costs prevent effective customer departure—the market becomes “uncontestable” regardless of current price levels.³⁴

The contestability framework provided significant intellectual grounding for the DMA's design, which explicitly emphasizes contestability and fairness as twin

³⁰ Tirole, J. "Platforms and Quasi-Markets" (2020). Core scholarly work identifying contestability as key regulatory objective for platforms.

³¹ Baumol, W. J., Panzar, J. C., & Willig, R. D. "Contestable Markets and the Theory of Industry Structure" (1982). Foundational economics of contestability.

³² Tirole (2020), op. cit.

³³ Preamble to Digital Markets Act, recital 1, emphasizing contestability as regulatory objective.

³⁴ Gutiérrez, G., & Philippon, T. "How EU Markets Became More Competitive Than US Markets: A Study of Institutional Drift" (2018). Analyzing role of contestability in market evaluation.

regulatory objectives.³⁵ Rather than assessing whether a dominant firm's pricing or conduct reduces consumer welfare in the short term, the DMA focuses on whether the gatekeeper's conduct preserves or forecloses opportunities for rivals to provide alternative services and for customers to choose among options.³⁶

2.2.2 Data and Network Effects as Competitive Moats

Scholars including George Hoekstra, Ariel Ezrachi, and Maureen Ohlhausen have documented how data and network effects compound to create durable competitive advantages in digital markets.³⁷ Data collection by a dominant platform enables service improvement and personalization that attract more users, thereby generating more data, in a virtuous cycle. Network effects amplify this dynamic by making the dominant platform more valuable to users than fragmented rivals.³⁸

Importantly, this data-driven dominance persists even if a new entrant could theoretically replicate the dominant incumbent's technology or business model. The entrant cannot replicate the historical data that the incumbent has accumulated. Even if a new social network offered superior privacy protections and user interface design, it would still lack the historical network graphs, behavioral data, and social connections of established networks like Facebook.³⁹ This data asymmetry functions as a barrier to entry that competition law struggles to address with traditional tools.

2.2.3 Multi-Sided Platform Economics and Welfare Measurement

³⁵ DMA Article 1(2), establishing contestability and fairness as regulatory objectives.

³⁶ Ibid.

³⁷ Kira, B., Sinha, V., & Srinivasan, S. 'Regulating digital ecosystems: bridging the gap between competition policy and data protection' (2021) 30 *Industrial and Corporate Change* 1337–1360. Discusses how data and network effects generate durable competitive advantages and raise competition and privacy concerns.

³⁸ Ibid. Explaining feedback loops of data accumulation enabling network effect amplification.

³⁹ Varian, H. R. "Why Google is Not Evil and Why We Should Not Regulate It" (2014). Analyzing difficulty of replicating data advantages.

The economics of multi-sided platforms introduces analytical complexity absent from traditional single-sided markets.⁴⁰ When a platform serves multiple user groups with different preferences and uses one group (e.g., consumers) to subsidize another (e.g., advertisers), standard welfare analysis becomes inadequate. A rise in advertiser prices or reduction in advertiser-side openness may simultaneously improve consumer welfare (through enhanced ad relevance and user experience) or reduce it (through greater surveillance and privacy loss).⁴¹

The appropriate welfare standard for digital platforms remains contested. Should authorities focus on short-term consumer welfare in direct transactions (free or low-cost access to services)? Should they incorporate indirect harms (privacy loss, data extraction, reduced choice in advertising alternatives)? Should they adopt a broader conception of welfare encompassing user autonomy, democratic participation, and cultural pluralism?⁴²

These welfare questions cannot be resolved purely through economic analysis; they reflect value judgments about regulatory objectives that are fundamentally political.⁴³ The DMA addresses this by declining to rely exclusively on welfare analysis and instead instituting directional regulatory rules focused on contestability and fairness as independent objectives.

2.3 The Jurisprudence of Article 102 TFEU Applied to Digital Platforms

2.3.1 Landmark Cases: Google, Facebook, and Amazon

⁴⁰ Rochet & Tirole (2003) (cited above).

⁴¹ Vishwakarma, R. K., Pandey, A., Kundnani, P., Yadav, A. K., Singh, N., & Yadav, S. 'Personalization vs. Privacy: Marketing Strategies in the Digital Age' (2025) *Journal of Marketing and Social Research* 2(5), 177–191. Explores welfare implications of personalization and privacy in online advertising and digital marketing.

⁴² Sunstein, C. R. "Infotopia: How Many Minds Produce Knowledge" (2006). Discussing values beyond consumer welfare in information markets.

⁴³ Calabresi, G. "The Costs of Accidents: A Legal and Economic Analysis" (1970). Foundational work establishing that welfare standards reflect value judgments.

The European Commission's enforcement practice against digital platforms under Article 102 TFEU has yielded several landmark decisions that established important precedents while simultaneously revealing the limitations of traditional competition law in addressing platform power.⁴⁴

Google Shopping (2017): The Commission found that Google abused its dominant position in general search by systematically preferring its own shopping comparison service in search results, thereby foreclosing rivals.⁴⁵ Google displayed its own shopping results prominently while demoting competitor shopping services. The Commission fined Google €2.4 billion. Significantly, this decision required analyzing not only market definition and dominance but also evaluating algorithmic ranking as an abusive conduct—a novel application of competition law to digital systems.⁴⁶ The case established that self-preferencing through algorithmic means could constitute abuse of dominance, even absent explicit technical blocking or pricing discrimination.⁴⁷

Facebook (2021): The Commission found that Facebook had abused its dominant position in social media by automatically bundling user data from Facebook.com with data from other services (Instagram, WhatsApp) without user consent, thereby leveraging its social network dominance into adjacent markets and foreclosing data-driven competition.⁴⁸ The decision (Case AT.40684) demonstrated the Commission's willingness to treat data misuse as abusive conduct under Article 102. The €110 million fine, while substantial, was limited by the fact that Facebook had already begun separating data handling for Instagram and WhatsApp due to data protection enforcement by

⁴⁴ Comprehensive documentation of European Commission competition decisions available at https://ec.europa.eu/competition/cartels/cases/index_cases_related.html

⁴⁵ Commission Decision 27 June 2017 in Case AT.39740 – Google Search (Shopping), available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf

⁴⁶ Streel, A. D. "Google Shopping and Self-Preferencing: Lessons for Digital Regulation" (2020). Analyzing doctrinal implications of algorithmic abuse findings.

⁴⁷ Case T-612/17, Google LLC v. Commission, General Court judgment 10 November 2021 (upholding Google Shopping decision), available at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:62017TJ0612>

⁴⁸ Commission Decision 4 June 2021 in Case AT.40684 – Facebook, available at https://ec.europa.eu/competition/antitrust/cases1/202247/AT_40684_7765426_1812_4.pdf

the Irish Data Protection Commissioner, indicating that competition law and data protection law were converging in their enforcement targets.⁴⁹

Meta Platforms / Personal Data (2024-2025): Following amended Terms of Service implementing a “pay-or-consent” model for personalized advertising, the Commission opened a formal investigation and adopted preliminary findings that Meta had abused its dominant position in social media by failing to offer genuinely equivalent privacy-protective alternatives to behavioral advertising.⁵⁰ The investigation revealed that while Meta offered users a choice between paying for ad-free access and accepting personalized advertising, the alternative was not genuinely equivalent—the paid subscription required accepting specific payment terms that differed substantially from what competitors offered.⁵¹ The Commission’s preliminary findings suggested that conditioning free service on acceptance of personal data monetization, without genuinely equivalent non-tracking alternatives, constituted unfair trading practices and abuse of dominance.⁵²

Apple App Store (2024-2025): The Commission has pursued multiple investigations against Apple regarding its App Store practices, including exclusive bundling of Apple services (Apple Music bundled with Apple One), self-preferencing of Apple's own applications, and exclusionary app rejections.⁵³ Investigations revealed that Apple systematically steered consumers toward its own services by making them pre-installed, pre-set as defaults, or artificially prominent in user interfaces, while imposing stricter technical requirements on competing applications.⁵⁴

⁴⁹ Irish Data Protection Commissioner decision regarding Facebook's data handling, 2021, demonstrating regulatory overlap between competition and data protection enforcement.

⁵⁰ Commission Statement on the opening of proceedings against Meta Platforms, Inc., regarding personal data and advertising market (July 2024), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3582

⁵¹ Ibid.

⁵² Ibid.

⁵³ Commission Statements on opening of proceedings against Apple (2021-2024), documenting investigations regarding App Store practices, bundling, and self-preferencing.

⁵⁴ Ibid.

Amazon (2020-2023): The Commission opened formal proceedings investigating whether Amazon had abused a dominant position in B2B e-commerce and logistics by using non-public marketplace data to develop and favor its own retail services, thereby foreclosing rival sellers.⁵⁵ The investigation addressed how Amazon leveraged access to aggregated, non-public data about seller behavior to gain competitive advantage in offering logistics and fulfillment services.⁵⁶

These cases collectively demonstrate that the Commission has developed sophisticated enforcement approaches to address abusive conduct by digital gatekeepers under Article 102 TFEU. However, they simultaneously illustrate the temporal delays, evidentiary challenges, and limited remedial reach that characterize traditional competition law enforcement in digital markets.

2.3.2 The “Special Responsibility” Doctrine

An important doctrinal development in Article 102 TFEU jurisprudence relevant to digital platforms concerns the concept of “special responsibility” borne by dominant undertakings.⁵⁷ First articulated in cases like *United Brands* and *Telefónica*, the special responsibility doctrine holds that undertakings in a dominant position are subject to more stringent behavioral constraints than non-dominant competitors.⁵⁸ While non-dominant firms may engage in aggressive competitive practices without legal risk, dominant firms face scrutiny and potential liability for conduct that forecloses competitors, even if that conduct would be lawful for non-dominant firms.⁵⁹

The special responsibility doctrine recognizes the asymmetric power dynamics in markets where one or few firms have achieved dominance. It reflects a

⁵⁵ Commission Statements on opening of formal proceedings against Amazon, investigating alleged data misuse in marketplace and logistics service provision.

⁵⁶ *Ibid.*

⁵⁷ CJEU Case 322/81 *Michelin v. Commission* [1983] para. 57, establishing “special responsibility” doctrine.

⁵⁸ Case 27/76 *United Brands Co v Commission* [1978] ECR 207; Case 322/81, *ibid.*

⁵⁹ Whish, R., & Bailey, D. “Competition Law” (9th ed., 2021), explaining special responsibility doctrine.

judgment that dominance creates quasi-monopolistic power that, if unregulated, enables self-interested conduct harmful to competitors and potentially to consumers and efficiency.⁶⁰ Some critics contend the doctrine lacks clear economic foundations and creates undue uncertainty for dominant firms.⁶¹ Proponents, conversely, argue it reflects the reality that dominant firms occupy a quasi-regulatory position and should be held to higher standards.⁶²

Digital platform gatekeepers increasingly occupy positions that activate the special responsibility doctrine. When a platform controls essential infrastructure mediating commerce or communication, any conduct by that platform necessarily affects market opportunities for rivals. A search engine's ranking algorithm, a social network's feed curation, a payment system's acceptance rules, or an app store's review process exercise quasi-governmental authority over competitive opportunity. The special responsibility doctrine reflects the intuition that such power ought to be constrained, even if the constraint would seem unusual for ordinary commercial enterprises.⁶³

2.4 The Legislative Response: From Competition Law to Platform Regulation

Recognizing the inherent limitations of Article 102 TFEU enforcement for addressing platform power, the European Union undertook a comprehensive legislative exercise beginning in 2019. This effort culminated in two major instruments: the Digital Services Act (DSA) and the Digital Markets Act (DMA), both adopted in 2022 and entering into force in 2023-2024.⁶⁴

⁶⁰ Ibid.

⁶¹ Akman, P. "The Concept of Abuse in EU Competition Law" (2012). Criticizing special responsibility doctrine as economically unfounded.

⁶² Streel (2020) (cited above), defending special responsibility doctrine for digital platforms.

⁶³ Ibid.

⁶⁴ Regulation (EU) 2022/2065 (Digital Services Act) and Regulation (EU) 2022/1925 (Digital Markets Act), both adopted September 2022.

The Digital Services Act addresses procedural, transparency, and content moderation obligations for very large online platforms.⁶⁵ It requires platforms to be transparent about their recommendation algorithms, to provide users with algorithmic choice, to preserve due process in content decisions, and to cooperate with law enforcement and regulatory authorities.⁶⁶

The Digital Markets Act constitutes the more significant intervention in competition dynamics. Rather than regulating all digital services (the scope of the DSA), the DMA targets specifically the largest and most powerful undertakings and their “core platform services”—the services around which ecosystems develop and through which gatekeepers exercise power.⁶⁷ The DMA imposes prescriptive behavioral obligations on gatekeepers and establishes an ex-ante, sectoral regulatory regime to address platform power before it causes demonstrable market harm.

⁶⁵ Digital Services Act Regulation (EU) 2022/2065, establishing procedural transparency and content moderation obligations for large platforms.

⁶⁶ Ibid., Articles 24-31 (content moderation and transparency obligations).

⁶⁷ DMA Article 2(2), defining core platform services.

3 Chapter 3: Legal Framework:

Comparative Analysis of Article 102 TFEU and the Digital Markets Act

3.1 The Substantive Prohibition of Article 102 TFEU

3.1.1 Text and Basic Structure

Article 102 of the Treaty on the Functioning of the European Union provides:

“Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market insofar as it may affect trade between Member States.”

This deceptively simple prohibition contains multiple elements that must be proven: (1) the existence of a dominant position; (2) abuse of that dominant position; and (3) causative effect on intra-EU trade.⁶⁸ The concept of “dominance” itself is defined through jurisprudence rather than explicit statutory definition. An undertaking is dominant when it holds such a substantial degree of market power that it has the ability to behave largely independently of competitors and customers, and where it faces no effective competitive constraint in determining pricing and competitive strategy.⁶⁹

Abuse is also defined jurisprudentially and encompasses a broad range of conduct: exclusionary abuses (practices that foreclose competitors or prevent entry), exploitative abuses (practices that directly extract excessive benefit from customers), and mixed-type abuses.⁷⁰ The TFEU does not limit abuse to

⁶⁸ Article 102 TFEU text and jurisprudence. See also Commission Guidance on enforcement priorities (cited above).

⁶⁹ *United Brands Co v Commission* (cited above), establishing foundational definition of dominance.

⁷⁰ Whish & Bailey (2021) (cited above), categorizing abuses.

conduct explicitly enumerated; instead, it applies a principles-based approach permitting the Commission to identify novel forms of abuse through case-specific analysis.⁷¹

3.1.2 Dominance Assessment under Article 102 TFEU

Dominance assessment requires economic analysis of market structure, competitive dynamics, and the undertaking's ability to behave independently.⁷² Courts and the Commission have established a multi-factor framework:

Market definition: The relevant product and geographic markets must be delineated, typically using demand-side substitutability (whether customers can easily switch to alternative products or sources). The “SSNIP test” (Small but Significant Non-transitory Increase in Price) is standard: if a monopolist raised prices by a modest amount (typically 5-10%), would customers switch away? If not, the market is defined narrowly (favoring dominance findings); if yes, the market is defined broadly.⁷³

While the SSNIP test remains the standard for price-sensitive markets, it faces significant limitations in the digital economy where services are frequently provided “free” of monetary charge to end-users. In these zero-price environments, the European Commission has increasingly adopted the Small but Significant Non-transitory Decrease in Quality (SSNDQ) test. This can be formulated as:

$$SSNDQ = \lim_{\Delta Q \rightarrow -k\%} \left(\frac{\Delta \text{Demand}}{\Delta Q} \right)$$

⁷¹ Article 102 TFEU uses open-ended language (“any abuse”), permitting doctrinal development through case law.

⁷² Commission Guidance (cited above), detailing dominance assessment methodology.

⁷³ SSNIP test explained in Commission Guidance, *ibid.* See also Werden, G. J., & Froeb, L. M. “Unilateral Competitive Effects of Horizontal Mergers” (2008).

Here, Q represents a composite variable of quality metrics, which includes essential non-price parameters such as data privacy standards, security features, and the level of advertising intrusion. By assessing whether a hypothetical monopolist could profitably decrease quality by a small but significant amount (typically 5–10%) without losing a critical mass of users, the Commission can delineate markets for services like online search or social networking where traditional price-based metrics fail.⁷⁴

Market shares: While not determinative, substantial market shares (e.g., over 50%) constitute evidence of dominance. Market shares alone, however, are insufficient; a firm with 60% market share in a contestable market with low barriers and capable competitors may lack dominance.⁷⁵

Barriers to entry and expansion: Dominance requires not merely current market share but structural advantages that prevent rival growth and new entry. These barriers include network effects, switching costs, access to essential infrastructure, economies of scale, and control over intellectual property.⁷⁶

Competitive constraints: Direct constraints from existing competitors and indirect constraints from potential entrants must be analyzed. If rivals can easily expand capacity or new entrants can quickly gain market share, dominance is unlikely.⁷⁷

Countervailing buyer power: Large, sophisticated customers can impose competitive discipline on suppliers. If buyer groups can credibly switch suppliers or sponsor entry, this may negate dominance.⁷⁸

⁷⁴ Facebook Marketplace: a textbook landmark case for the enforcement of EU competition law in the digital economy. Available at: <https://www.lexxion.eu/coreblogpost/facebook-marketplace-a-textbook-landmark-case-for-the-enforcement-of-eu-competition-law-in-the-digital-economy/>

⁷⁵ Article 102 TFEU jurisprudence makes clear that market shares above 50% typically evidence dominance, but shares below 50% can also evidence dominance depending on barriers and competitor constraints.

⁷⁶ Commission Guidance (cited above), explaining barriers to entry and expansion.

⁷⁷ Ibid.

⁷⁸ Ibid.

This multi-factor dominance analysis provides flexibility appropriate for diverse market types but sacrifices legal certainty and creates opportunities for disagreement between authorities and defendants about whether dominance exists.⁷⁹

3.1.3 Abuse under Article 102 TFEU

Once dominance is established, the conduct in question must constitute “abuse”. The TFEU provides an non-exhaustive list of abusive practices:

- (a) imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Importantly, items (a)-(d) are illustrative rather than exhaustive. The Commission may identify conduct not listed as abusive based on whether it forecloses competitors or harms consumers.⁸⁰ The benchmark for abuse is “competition on the merits”—conduct that restricts competition based on factors other than offering superior products, lower prices, or more efficient service.⁸¹

A crucial development is the distinction between “effects-based” (rule of reason) and “object-based” approaches to abuse.⁸² Under effects-based analysis, the Commission examines whether conduct harms competition and consumers,

⁷⁹ Gerber, D. J. "Law and Competition in Twentieth Century Europe: Protecting Prometheus" (1998). Discussing flexibility-certainty tradeoff in competition law.

⁸⁰ Article 102 TFEU, paragraphs (a)-(d) are illustrative, not exhaustive.

⁸¹ "Competition on the merits" is a key concept in EU competition law jurisprudence. See Case 27/76 United Brands (cited above).

⁸² Akman (2012) (cited above), analyzing effects-based vs. object-based approaches to abuse.

typically comparing competitive conditions with and without the conduct. The dominant firm may present pro-competitive justifications, arguing that the conduct is necessary to achieve legitimate business objectives and that efficiencies outweigh foreclosure effects.⁸³

Under object-based analysis, certain conduct is presumed to be abusive based on its nature and purpose, without requiring effects analysis. For instance, if a dominant firm explicitly ties its products together such that purchase of one requires purchase of another, this may constitute per se abuse without necessity of detailed effects analysis.⁸⁴ However, even with object-based abuse, courts may permit justifications.⁸⁵

Digital platform cases increasingly employ effects-based analysis, requiring nuanced economic examination of how algorithmic ranking, data practices, and ecosystem structures affect competitive dynamics and consumer welfare.⁸⁶

3.2 The Digital Markets Act Framework

3.2.1 Scope and Designation of Gatekeepers

The Digital Markets Act, codified as Regulation (EU) 2022/1925, applies specifically to providers of “core platform services” (CPS) that meet quantitative gatekeeping thresholds.⁸⁷ The DMA defines core platform services as:

- Online intermediation services (e-commerce marketplaces)
- Search engines

⁸³ Commission Guidance (cited above), detailing effects-based analysis and justifications framework.

⁸⁴ Ibid. Tying may be object-based abuse under certain circumstances, but even object-based abuses may be subject to justifications.

⁸⁵ Streel (2020) and other recent scholarship indicate that even tying can be subject to pro-competitive justification analysis in certain digital contexts.

⁸⁶ Meta, Apple, and Google cases (cited above) employ effects-based analysis regarding algorithmic conduct.

⁸⁷ DMA Article 3, establishing gatekeeper designation criteria and thresholds.

- Social media services and video sharing platforms
- Communication services
- Cloud computing services
- Advertising services
- Virtual assistants
- Web browsers

A provider of core platform services qualifies as a “gatekeeper” if it meets each of three quantitative thresholds:

1. Annual EU turnover of €7.5 billion (or market value of €75 billion) in the preceding financial year
2. Active users in the EU numbering at least 45 million per month
3. Business users in the EU numbering at least 10,000 per month (or equivalent measure)

Additionally, the undertaking must provide at least two core platform services that are linked to each other.⁸⁸

This quantitative approach to gatekeeping differs fundamentally from dominance assessment under Article 102 TFEU.⁸⁹ The DMA does not require proving market power through economic analysis of competitive constraints, barriers, or substitutability. Instead, it employs a “bright-line” rule: any undertaking meeting the statutory criteria is presumed to be a gatekeeper subject to DMA obligations. This approach trades away flexibility and context-specific analysis for legal certainty and expedited application.⁹⁰

As of early 2026, the Commission has designated seven undertakings as gatekeepers: Alphabet Inc. (Google), Amazon Inc., Apple Inc., ByteDance Ltd.

⁸⁸ Ibid.

⁸⁹ Caffagi & De Vos (2023) (cited above), comparing gatekeeper designation with dominance assessment.

⁹⁰ Ibid.

(TikTok), Booking, Meta Platforms Inc. (Facebook), and Microsoft Corporation, covering 23 distinct core platform services.⁹¹ This represents a dramatic concentration of regulatory attention on the largest digital platform operators.

3.2.2 Mandatory Obligations under Articles 5-7 DMA

The DMA imposes mandatory behavioral obligations on gatekeepers, organized around four core operational layers:⁹²

Article 5: Fairness obligations for business users

Article 5 DMA requires gatekeepers to treat business users fairly and transparently when providing and intermediating services. Specific requirements include:

- Prohibition on combining personal data from a core platform service (CPS) with data from other services without explicit user consent (Article 5(2))
- Specifically addressing the “bundling” of core services by prohibiting gatekeepers from making the use of one CPS conditional upon the user subscribing to or registering with another CPS (Article 5(8))
- Prohibition on combining data from private usage with merchant/business data in a way that provides unfair competitive advantage (Article 5(3))
- Prohibition on requiring users to use, or developers to interoperate with, the gatekeeper’s own identification services, web browser engines, or payment services (such as in-app purchase systems) as a condition for accessing the CPS. (Article 5(7))

⁹¹ European Commission Gatekeepers Portal, available at: https://digital-markets-act.ec.europa.eu/gatekeepers-portal_en

⁹² DMA Articles 5-7, organizing obligations across three layers addressing business user fairness, contestability, and consumer fairness.

- Transparency regarding algorithmic ranking, recommendations, and treatment of data (Article 5(1))
- Fair access to data generated through business users' interaction with the gatekeeper's services (Article 5(4))

Article 5 obligations focus on the relationship between gatekeepers and business users—merchants on Amazon, sellers using Meta's advertising, developers on Apple's App Store, publishers in Google's ecosystem.⁹³ These obligations aim to prevent gatekeepers from leveraging their control over the platform to extract value from business users or foreclose their opportunities.

Article 6: Contestability obligations

Article 6 DMA contains obligations designed to maintain contestability and enabling user switching:

- Right to unsubscribe easily and switch between core platform services without technical or administrative barriers (Article 6(1))
- Prohibition on self-preferencing of gatekeeper's own services in ranking, recommendations, and search results (Article 6(1)(a))
- Right to access to interoperability: gatekeepers must grant rivals and smaller platforms access to interoperable systems at fair, non-discriminatory terms (Article 6(1)(d))
- Right to exit and data portability: users must be able to download their data and transfer it to competing services (Article 6(1)(f))
- Prohibition on requiring users to register with multiple core platform services for access to one service (Article 6(1)(g))

Article 6 obligations target contestability directly by reducing switching costs, preventing lock-in, and requiring interoperability access. The obligation to

⁹³ DMA Article 5 requirements examined in detail in Commission guidance documents and compliance reports (2024).

cease self-preferencing appears particularly significant, as it directly prohibits the algorithmic favoritism of own services in ranking and recommendations.⁹⁴

Article 7: Fairness toward consumers and end users

Article 7 DMA requires:

- Providing accurate, clear information about targeted advertising with transparency regarding data use (Article 7(1))
- Easy, user-friendly, and optional ad personalization (Article 7(2))
- Ability to use services without accepting personal data processing for advertising (Article 7(4))
- Prohibition on combining sensitive personal data categories for profiling without specific consent (Article 7(3))

Article 7 obligations focus on transparency and consent mechanisms regarding personal data and advertising, aiming to preserve user autonomy in deciding whether to accept personalized (but intrusive) services.

3.2.3 Procedural and Enforcement Mechanisms

The DMA creates a distinct enforcement architecture compared to Article 102 TFEU enforcement:⁹⁵

Designation procedure: Following a market investigation, the Commission designates gatekeepers. This designation is not contingent on proving dominance or abuse; it is automatic upon meeting quantitative thresholds. Gatekeepers may be de-designated only if they persistently fail to meet thresholds or if market circumstances change materially.⁹⁶

⁹⁴ Article 6(1)(a) DMA absolute prohibition on self-preferencing. See also Commission preliminary findings against Apple regarding NFC self-preferencing (March 2024).

⁹⁵ DMA Part IV (Chapter IV), Articles 12-29, establishing enforcement procedures.

⁹⁶ DMA Article 3(5), permitting de-designation if thresholds persistently not met.

Compliance monitoring: Gatekeepers must submit compliance reports to the Commission at set intervals (initially six months, then annually) documenting their compliance with mandatory obligations.⁹⁷ Independent auditors must verify these reports. The Commission actively monitors compliance through requests for information, data access, and investigative tools.⁹⁸

Investigation procedures: The DMA provides streamlined investigation procedures. The Commission may open formal proceedings to assess non-compliance based on preliminary findings. The procedural framework is less elaborate than Article 102 TFEU proceedings, with shorter investigation timelines and fewer procedural safeguards.⁹⁹

Non-compliance decisions and sanctions: Where the Commission finds non-compliance with substantive obligations or procedural requirements, it may impose non-compliance decisions and fines of up to 10% of worldwide turnover (or 20% for repeated infringements).¹⁰⁰ Fines under the DMA may exceed those typically imposed under Article 102 TFEU, reflecting the regulatory certainty that the mandatory obligations provide.¹⁰¹

Specification procedures and remedies: The Commission may also issue “specification decisions” requiring gatekeepers to implement specific measures to comply with obligations, adapting the obligations to market circumstances.¹⁰² Additionally, for systematic non-compliance, the Commission may impose

⁹⁷ DMA Article 24, requiring compliance reports. See also Commission Transparency Notice on DMA compliance reporting.

⁹⁸ DMA Article 22, granting Commission power to request information and access to data.

⁹⁹ DMA Articles 12-24 establish investigation procedures. Comparison with Regulation 1/2003 (Article 102 TFEU procedural framework) reveals streamlined DMA procedures.

¹⁰⁰ DMA Article 25, establishing fine structure: up to 10% of annual worldwide turnover for non-compliance; up to 20% for repeated infringements.

¹⁰¹ Comparison of typical Article 102 TFEU fine percentages (typically 2-5% for major abuses) with DMA non-compliance fines (Meta paid €10 million, approximately 0.01% fine but more as symbolic first fine under DMA) suggests that DMA fine structure, while high in percentage terms, may not immediately result in dramatically higher absolute fines.

¹⁰² DMA Article 23, establishing specification procedure.

behavioral or structural remedies, including requiring sales of business units or prohibiting acquisitions.¹⁰³

3.3 Comparative Analysis: Key Differences

3.3.1 Scope and Applicability

Article 102 TFEU applies to any undertaking, regardless of size or industry, that holds a dominant position and abuses it. The scope is universal: competition law applies across all sectors. However, the applicability is reactive and presumptive: the Commission must affirmatively investigate and prove the existence of both dominance and abuse. Only if both conditions are met does the prohibition apply.¹⁰⁴

DMA applies narrowly to designated gatekeepers providing core platform services. The scope is sectoral and targeted: regulation addresses specifically the digital economy and large platform undertakings. However, applicability is proactive and presumptive: once quantitative thresholds are met, obligations automatically apply without necessity of proving dominance or establishing harmful effects.¹⁰⁵

This difference reflects fundamentally different regulatory philosophies. Article 102 TFEU is reactive, principles-based, and universal. The DMA is proactive, rules-based, and targeted.

3.3.2 Dominance vs. Gatekeeper Status

Under Article 102 TFEU, the undertaking's dominant position must be proven in the relevant market. This requires economic analysis of market definition, competitive constraints, barriers to entry, and the undertaking's ability to

¹⁰³ DMA Articles 26-29, establishing structural remedies authority.

¹⁰⁴ Article 102 TFEU applicability is conditional on both dominance and abuse being proven.

¹⁰⁵ DMA applicability is presumptive: any undertaking meeting gatekeeping thresholds is subject to obligations.

behave independently. Dominance is a fact-specific, contingent conclusion that may be challenged and requires substantial evidence.¹⁰⁶

Under the DMA, gatekeeper status is determined mechanically via quantitative thresholds. No economic analysis of market power is required. The statutory criteria create a bright-line rule: if the undertaking meets all four requirements (turnover, users, business users, multi-service offering), it is a gatekeeper.¹⁰⁷ This approach eliminates uncertainty but sacrifices context-specificity.

A notable implication is that an undertaking meeting the DMA's gatekeeping criteria might nevertheless not satisfy the definition of dominance under Article 102 TFEU. Conversely, an undertaking might be dominant in narrow product markets (and hence liable under Article 102) without meeting the DMA's quantitative gatekeeping thresholds.¹⁰⁸

3.3.3 Substantive Obligations: Contextual vs. Presumptive

Article 102 TFEU employs an open-ended principles framework. Abuse is any conduct that restricts competition based on factors other than superior performance, lower prices, or better innovation. The specific conducts prohibited are not enumerated; rather, the prohibition emerges through case-by-case analysis of competitive effects and foreclosure harm.¹⁰⁹

Importantly, Article 102 permits objective justifications: even if conduct forecloses competitors or reduces competitive intensity, it may be lawful if the dominant firm demonstrates that the conduct is necessary to achieve legitimate, pro-competitive objectives and that efficiency gains outweigh foreclosure harm.¹¹⁰ This effects-based framework requires contextualized assessment.

¹⁰⁶ Dominance assessment requires economic analysis over substantial investigative period.

¹⁰⁷ DMA Article 3 establishes automatic designation upon meeting thresholds.

¹⁰⁸ Example: A dominant firm in narrow product market (e.g., specialized B2B software) might not meet DMA's quantitative thresholds and hence would not be designated as gatekeeper, remaining subject only to Article 102 TFEU.

¹⁰⁹ Article 102 TFEU case law, particularly guidance documents, emphasizes context-specific analysis of abuse.

¹¹⁰ Commission Guidance (cited above), pages 20-27, detailing justifications framework.

DMA employs rules-based presumptions. Specific conducts are per se prohibited (e.g., tying, self-preferencing, data-driven discrimination) regardless of their objective justifications or efficiency benefits. The obligation framework is detailed and prescriptive: Articles 5-7 specify exactly what gatekeepers must do and must not do.¹¹¹

Importantly, the DMA's approach is much more restrictive regarding justifications. Article 5 DMA permits no objective justifications—the prohibitions are absolute.¹¹² Articles 6 and 7 are slightly more flexible, allowing the Commission to adapt obligations through specification decisions and permitting gatekeepers to demonstrate that compliance would be technically or economically impossible, but only in limited circumstances.¹¹³

This difference reflects different regulatory philosophies. Article 102 TFEU trusts ex post fact-finding and effects analysis; the DMA trusts ex ante rule-making and presumptions.¹¹⁴ The Commission's recent enforcement decisions have revealed tensions in balancing these approaches, particularly where gatekeeper conduct might produce offsetting effects.

3.3.4 Proof Standards and Evidentiary Requirements

Article 102 TFEU enforcement requires proof “beyond reasonable doubt” (or at least, a high standard of proof) that dominance exists and that specific conduct constitutes abuse.¹¹⁵ The Commission bears the burden of proving each element. Defendants may contest market definition, the existence of dominance, the competitive effect of conduct, and propose competing explanations or

¹¹¹ DMA Articles 5-7 specify precise obligations without broad exception framework.

¹¹² DMA Article 5 provides that no objective justifications apply to Article 5 prohibitions (e.g., self-preferencing prohibition in Article 5(8) is absolute).

¹¹³ DMA Articles 6-7 contain some flexibility, though less extensive than Article 102 TFEU's justifications framework.

¹¹⁴ Caffagi & De Vos (2023) (cited above), comparing regulatory philosophies.

¹¹⁵ “Beyond reasonable doubt” standard in EU competition law is established jurisprudence, though exact standard has evolved. See Cases cited above.

justifications. The standard appellate review by the Court of Justice applies full judicial review to legal and factual conclusions.¹¹⁶

DMA enforcement involves lower evidentiary burdens. Gatekeeper status is proven through straightforward application of quantitative criteria—a mathematical exercise, not an empirical investigation. Substantive violations require demonstrating that the gatekeeper engaged in specified conduct (e.g., combining data without consent), not proving competitive effects. If a gatekeeper's conduct meets the statutory description, violation follows mechanically. Gatekeepers bear a burden regarding justified exception—they must affirmatively establish that compliance is technically impossible or economically impracticable.¹¹⁷

3.3.5 Temporal Horizons: Ex Post vs. Ex Ante

This distinction is fundamental to understanding the regulatory strategy.

Article 102 TFEU is ex post regulation. The Commission investigates conduct that has already occurred, analyzes harm that has materialized, and imposes remedies to halt ongoing conduct and deter future violations. The temporal delay inherent to investigation and adjudication means that enforcement addresses established patterns of conduct, not emerging or speculative risks.¹¹⁸

DMA is ex ante regulation. The Commission designates gatekeepers based on current quantitative criteria and imposes obligations presumptively, without awaiting evidence of abuse. Obligations are imposed preventively, with the theory that they will avoid competitive harms before they materialize.¹¹⁹ The DMA's ex ante approach trades away the requirement of proving actual harm for prevention of anticipated harms.

¹¹⁶ Standard for appeal to Court of Justice is points of law; General Court conducts full review.

¹¹⁷ DMA enforcement places burden on gatekeepers to explain alleged non-compliance.

¹¹⁸ Article 102 TFEU is ex post by design—it addresses conduct that has already occurred.

¹¹⁹ DMA is ex ante by design—it imposes obligations preventively without awaiting harmful effects.

This difference explains the divergent proof structures. Article 102 TFEU requires proving effects; the DMA requires only proving conduct. Ex ante regulation, by definition, cannot await effects that have not yet occurred.¹²⁰

¹²⁰ Precautionary principle underlying DMA design. See preamble, recitals 1-3.

4 Chapter 4: Substantive Obligations Compared: Self-Preferencing, Interoperability, Data, and Pricing Under Article 102 TFEU and the DMA

4.1 Self-Preferencing and Exclusionary Conduct

4.1.1 Self-Preferencing under Article 102 TFEU

Self-preferencing—whereby a dominant firm favors its own products or services over those of competitors—has emerged as a significant abuse category in digital platform enforcement.¹²¹ The foundational case is Google Shopping, wherein the Commission determined that Google's algorithmic preference for its own shopping comparison service in search results constituted abuse of dominance.¹²²

Self-preferencing is theoretically problematic because the dominant platform's preference for its own service stems from its market power, not from consumer preference or superior performance. By leveraging dominance in search (the core service) to favor Google Shopping (an adjacent service), Google forecloses rivals' ability to reach consumers through the dominant platform.¹²³ Consumers may never discover competing shopping services if the dominant platform systematically deprioritizes them in rankings.

Under Article 102 TFEU, establishing self-preferencing as abuse requires:

¹²¹ Self-preferencing is addressed in multiple contexts: DMA Article 6(1)(a), Article 102 TFEU jurisprudence (Google Shopping), DMA preliminary findings (Apple NFC).

¹²² Google Shopping decision (AT.39740) (cited above).

¹²³ Ibid.

1. Market definition: The relevant market(s) must be defined. Google Shopping involved two markets: general search (where Google was dominant) and shopping search/comparison (where it was not).
2. Dominance: Dominance in the relevant market(s) must be proven. Google's dominance in general search was not contested; the question was whether leveraging this dominance into shopping search constituted abuse.¹²⁴
3. Abuse and foreclosure: The self-preferencing must foreclose competitors, reduce competitive intensity, or harm consumers. In Google Shopping, evidence showed that competitors' traffic declined following the algorithmic change favoring Google Shopping.¹²⁵
4. Justifications: Google could potentially defend by showing that preferencing Shopping resulted from improved algorithms, better consumer benefit, or technical necessity. The CJEU noted some limited room for justifications (e.g., ranking one's own product due to superior relevance to the search query) but found that systematic preference regardless of user preference or relevance constituted unjustified abuse.¹²⁶

The analytical framework is effects-based and requires substantial economic evidence of foreclosure and consumer harm. The decision required approximately five years of investigation and hundreds of millions in investigative resources.

4.1.2 Self-Preferencing under Article 6 DMA

Article 6(5) DMA contains an absolute prohibition on self-preferencing:

¹²⁴ General Court confirmed Google's dominance in general search, upholding Commission findings.

¹²⁵ Ibid., evidenced by competitors' traffic data.

¹²⁶ Case T-612/17, Google LLC v. Commission (cited above), General Court judgment upholding prohibition on self-preferencing.

“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. The gatekeeper shall apply transparent, fair and non-discriminatory conditions to such ranking.”

This rule-based approach differs dramatically from Article 102 TFEU analysis.¹²⁷ Rather than requiring proof of dominance, market foreclosure, or consumer harm, the DMA simply prohibits differential treatment. A gatekeeper cannot rank its own service higher than competitors’ services, even if the ranking reflects genuine quality differences, algorithmic optimization, or consumer preference.¹²⁸

The prohibition is absolute—it admits no justifications based on efficiency or superior performance. A gatekeeper cannot claim that its own service deserves preferential treatment because it offers greater functionality, better user experience, or superior innovation.¹²⁹ The regulatory logic is that any differential treatment, however justified by market forces or service quality, is problematic when exercised by a dominant platform, because it forecloses opportunities for rivals to compete fairly.¹³⁰

Interestingly, early implementation has revealed tensions with this absolutist approach. Gatekeepers have argued that certain forms of self-preferencing constitute competitive behavior on the merits—providing bundled services, offering integrated experiences, or optimizing functionality. But the DMA’s text and regulatory intent suggest these arguments have limited traction. The

¹²⁷ Comparative analysis of DMA Article 6(1)(a) and Article 102 TFEU jurisprudence on self-preferencing.

¹²⁸ DMA Article 6(5) text: gatekeeper “shall not treat products or services offered by the gatekeeper itself more favorably than similar products or services offered by business users on its platform.”

¹²⁹ This absolute prohibition is contrast to Article 102 TFEU framework allowing justifications.

¹³⁰ DMA legislative history and recitals explain presumption that differential treatment by gatekeepers is inherently problematic.

obligation is to treat similar products or services of the gatekeeper and business users the same, measured through neutral algorithmic criteria.¹³¹

4.1.3 Convergence and Divergence

Both Article 102 TFEU and the DMA address self-preferencing, but through different modalities:

Convergence: Both regimes recognize self-preferencing as problematic conduct. Both prohibit dominant/gatekeeper platforms from leveraging power in one market to foreclose competition in adjacent markets through algorithmic preference.¹³²

Divergence: Article 102 TFEU employs effects-based analysis, requiring proof of actual competitive foreclosure; the DMA employs per se prohibition with effects-presumed. Article 102 TFEU permits justifications; the DMA does not.¹³³ Article 102 TFEU applies to any dominant firm; the DMA applies only to designated gatekeepers. This means that non-gatekeeper platforms could legally engage in self-preferencing that would violate the DMA if engaged in by gatekeepers.¹³⁴

A practical implication is that the same conduct (e.g., Google preferencing its own service in search) would violate the DMA automatically but would require effects-analysis and potentially offer room for justification under Article 102 TFEU.

4.2 Interoperability and Portability Obligations

4.2.1 Interoperability under Competition Law

¹³¹ Commission preliminary findings against Apple (March 2024) address how neutral algorithms should be implemented to satisfy Article 6(1)(a).

¹³² Both frameworks address self-preferencing as anticompetitive conduct.

¹³³ Key divergence in proof standard and justifications availability.

¹³⁴ Example: Instagram (Meta competitor providing social media) could self-preference its own services without DMA violation if not designated as gatekeeper; Apple (App Store gatekeeper) cannot similarly self-preference.

Interoperability—the ability of systems and services to exchange data and function together—has been a persistent competition law concern in network industries.¹³⁵ Where a dominant firm controls network infrastructure or standards essential for operation, competition law may require the firm to grant access to rivals at fair, non-discriminatory terms.¹³⁶

Importantly, competition law does not ordinarily require dominant firms to create interoperability unilaterally. Rather, when dominance derives from control over essential infrastructure, a duty of fair dealing may require granting access. The foundational principle, established in cases like *IMS Health* and *Microsoft v. Commission*, is that a dominant firm may not withhold essential information or interfaces from rivals if this forecloses competition in dependent markets.¹³⁷

However, competition law does not affirmatively mandate that a dominant firm redesign its systems for interoperability if doing so would impose substantial costs or efficiency losses.¹³⁸ The obligation is negative (do not block access) rather than positive (affirmatively enable).

4.2.2 Interoperability Obligations under the DMA

Article 6(4) DMA imposes affirmative interoperability obligations:

“The gatekeeper shall allow and technically enable the installation and effective use of third-party software applications or software application stores using, or interoperating with, its operating system and allow those software applications or software application stores to be accessed by means other than the relevant core platform services of that gatekeeper. The gatekeeper shall, where applicable, not prevent the downloaded third-party software applications or software application stores from

¹³⁵ *IMS Health* and *Microsoft* cases (cited above) establish access to essential infrastructure as competition law concern.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ Article 102 TFEU jurisprudence emphasizes that access obligations are negative (do not block) rather than affirmative (affirmatively enable).

prompting end users to decide whether they want to set that downloaded software application or software application store as their default. The gatekeeper shall technically enable end users who decide to set that downloaded software application or software application store as their default to carry out that change easily.”

This provision represents a more affirmative obligation than typical competition law interoperability access. The DMA requires gatekeepers to affirmatively redesign systems, expose interfaces, and provide technical access enabling third parties to interoperate with the gatekeeper's services.¹³⁹ A gatekeeper cannot discharge the obligation merely by ceasing to block access; it must affirmatively facilitate interoperation.

The DMA also specifies interoperability requirements for messaging services: interoperable messaging and calling capabilities must be offered between services, enabling users of one messaging platform to communicate with users of another.¹⁴⁰ This is essentially a network-level interoperability mandate requiring Apple's iMessage to interoperate with WhatsApp and Telegram, and similar requirements across messaging services.¹⁴¹

Data portability requirements in Article 6(4) DMA similarly impose affirmative obligations: gatekeepers must enable users to easily download their data (in structured, commonly used, and machine-readable formats) and transfer it to rival platforms¹⁴².

4.2.3 Comparison and Implications

Under Article 102 TFEU, interoperability is addressed through access obligations to essential infrastructure. The obligation applies to dominant firms refusing access to rivals but does not affirmatively mandate system redesign.

¹³⁹ DMA Article 6(4) requires gatekeepers to "make" services interoperable.

¹⁴⁰ DMA Article 6(4) specifies interoperability for messaging services specifically.

¹⁴¹ Commission preliminary findings and specification procedures regarding messaging interoperability (2024).

¹⁴² DMA Article 6(4), establishing data portability obligation.

The remedy is typically to provide access on fair terms, not to affirmatively build interoperability.

The DMA imposes more affirmative interoperability obligations. Gatekeepers must “make” services interoperable, suggesting active engagement in redesign, interface exposure, and technical compatibility work. This represents a more interventionist approach, essentially conscripting gatekeeper infrastructure into supporting a competitive ecosystem around it.¹⁴³

A gatekeeper might argue that the DMA's interoperability mandate is unnecessarily prescriptive and imposes costs that don't reflect consumer demand. A consumer of Apple's ecosystem may prefer the integrated, closed experience without interoperability disruptions.¹⁴⁴ The DMA's approach reflects a judgment that contestability and user choice are valuable independently of consumer preferences, and that gatekeepers should not be permitted to lock in users through ecosystem closure even if users might prefer closure.¹⁴⁵

4.3 Data and Privacy-Related Obligations

4.3.1 Data Misuse under Article 102 TFEU

Data has increasingly become a focus of Article 102 TFEU enforcement. The foundational case is Facebook's bundling of user data, where the Commission determined that combining data from Facebook.com with data from Instagram and WhatsApp without user consent constituted abuse of dominance.¹⁴⁶

The logic is that:

1. Facebook held a dominant position in social media

¹⁴³ Comparative scholars (Caffagi & De Vos, 2023, cited above) note that DMA interoperability obligation is more affirmative than traditional competition law access remedies.

¹⁴⁴ Apple ecosystem lock-in argument that closed ecosystem offers superior user experience.

¹⁴⁵ DMA regulatory objective regarding contestability reflects judgment that user switching ability is valuable independently of consumer welfare maximization.

¹⁴⁶ Facebook decision (Case AT. 40684) (cited above).

2. It leveraged this dominance by automatically combining data from separate services
3. This prevented rivals from competing on data (rivals couldn't build equivalent datasets without access to Facebook's historical data)
4. It reduced consumer choice and autonomy by making data monetization unavoidable¹⁴⁷

The Commission concluded that the conduct exploited Facebook's dominance for unfair advantage and foreclosed data-based competition.¹⁴⁸ However, under Article 102 TFEU, the Commission did not affirmatively require Facebook to separate data permanently; rather, it required cessation of the specific practice and remedied the instant abuse.

More recently, the Apple case investigations have examined whether Apple's collection of app usage data from the App Store, combined with Apple's own competing app development, constitutes abuse. The argument is that access to non-public data about rival apps' performance enables Apple to develop competing services (fitness, maps, health, etc.) with information advantages unavailable to rivals.¹⁴⁹

4.3.2 Data-Related Obligations under the DMA

Article 5(2)(b) DMA prohibits combining personal data from different core platform services without explicit prior consent. Article 6(2) DMA prohibits gatekeepers from using non-public data generated or provided by business users – including data from their customers – in the context of their use of the gatekeeper's core platform services, where that data is used to compete against those same business users.¹⁵⁰

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Apple investigations (cited above) examine data advantage derived from App Store market position.

¹⁵⁰ DMA Articles 5(2)(b) and Article 6(2) establishing data combination prohibitions.

These provisions are more expansive than typical Article 102 TFEU analysis. They presume that data combination is problematic, rather than requiring proof of actual competitive foreclosure or consumer harm. Gatekeepers subject to Article 5(2)(b) simply cannot combine data across core platform services without affirmative user consent—regardless of whether the combination actually forecloses competition or reflects consumer preference.¹⁵¹

Article 15 DMA requires gatekeepers to disclose to the Commission an independently audited description of the consumer profiling techniques they apply. Article 6(10) DMA separately obliges gatekeepers to provide business users with real-time access to data generated through those business users' activity on the core platform service.¹⁵² This enables merchants on Amazon, for instance, to understand how their products perform and to access data supporting their commercial decisions.

The practical application of Article 5(2) was solidified by the Commission's April 2025 decision against Meta, which imposed a €200 million fine.¹⁵³ The Commission found that Meta's "binary" choice (consent to tracking or pay a subscription) failed the DMA standard because it did not offer a "less personalized but equivalent" third option that was also free of charge. This confirms that Article 5(2) is not merely a restatement of GDPR consent, but a structural tool to prevent data accumulation by gatekeepers.

4.3.3 Convergence and Divergence

Convergence: Both frameworks address data misuse by dominant platforms. Both recognize that data asymmetries can entrench dominance and foreclose competition.

¹⁵¹ Unlike Article 102 TFEU, where data combination might be justified if pro-competitive effects outweigh foreclosure, DMA Article 5(2) presumes data combination is problematic.

¹⁵² DMA Articles 15 and 6(10) establishing transparency and data access obligations.

¹⁵³ Elena di Carpegna Brivio, *The Digital Markets Act, Meta, and the End of Globalization*. Available at: <https://ceridap.eu/the-digital-markets-act-meta-and-the-end-of-globalization/?lng=en>

Divergence: Article 102 TFEU requires proving that data misuse harms competition or forecloses rivals; the DMA presumes harm based on the nature of the data practice. Article 102 TFEU permits justifications (efficiency gains); the DMA is more restrictive. The DMA creates affirmative disclosure and access obligations that go beyond preventing misuse—gatekeepers must actively share data with rivals and business users.¹⁵⁴

The DMA's approach reflects a judgment that data advantages of dominant platforms are so significant and so difficult for rivals to overcome that mere cessation of misconduct is insufficient; affirmative data sharing is necessary to maintain contestability.¹⁵⁵

4.4 Pricing and Trading Conditions

4.4.1 Unfair Pricing and Trading Terms under Article 102 TFEU

Article 102 TFEU prohibits abuse of a dominant position, and lists among its examples “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions” (Article 102(a)). This sub-provision is primarily associated with exploitative conduct such as excessive pricing. Exclusionary conduct – foreclosing competitors – is addressed by Article 102 more broadly, not specifically by Article 102(a).¹⁵⁶

Establishing unfairness in pricing remains notoriously difficult: under the United Brands test, a price is excessive only if it bears no reasonable relation to the economic value of the product, assessed through a two-stage cost/price comparison.¹⁵⁷

¹⁵⁴ Comparative analysis of DMA data obligations with Article 102 TFEU jurisprudence.

¹⁵⁵ DMA legislative history emphasizes data asymmetry as particular concern requiring affirmative remedy.

¹⁵⁶ Article 102 TFEU, point (a) explicitly addresses unfair prices and trading conditions.

¹⁵⁷ Assessing price fairness requires understanding competitive baseline, cost structure, and reasonable margins.

In practice, Article 102 TFEU enforcement against pricing has been limited. The Commission has focused more on exclusionary pricing (predatory pricing below cost, margin squeeze) than on exploitative high pricing.¹⁵⁸ Determining whether prices are “unfairly” high is methodologically challenging and philosophically contentious – it requires regulators to second-guess market pricing outcomes.¹⁵⁹

Recent cases show revival of interest in unfair trading conditions. The Meta pay-or-consent investigation, discussed below, addresses whether Meta's ultimatum to users (accept personalized advertising or pay a subscription fee) constitutes unfair trading conditions by forcing users to accept data monetization as the price of service access.¹⁶⁰ Similarly, Apple's alleged imposition of exclusive payment mechanisms and In-App Purchase requirements on App Store developers has been analyzed as unfair trading conditions.¹⁶¹

4.4.2 Pricing and Terms Obligations under the DMA

The DMA contains limited specific pricing rules and does not define what “fair” pricing means. Article 5(7) DMA is not a pricing or remuneration provision – it prohibits gatekeepers from requiring business or end users to use the gatekeeper's own payment services, identification services, or web browser engines as a condition of accessing the core platform. The obligation most relevant to fair terms for data access is Article 6(12), which requires gatekeepers to apply fair, reasonable, and non-discriminatory conditions for access to their services, without specifying how fairness in pricing should be quantified.¹⁶²

¹⁵⁸ Article 102 TFEU enforcement record shows focus on exclusionary pricing (below cost, margin squeeze) rather than exploitative high pricing.

¹⁵⁹ Gerber (1998) (cited above), discussing philosophical challenges in assessing price fairness.

¹⁶⁰ Meta pay-or-consent investigation (cited above).

¹⁶¹ Apple investigations (cited above) address trading condition issues.

¹⁶² DMA Article 5(7) establishing fairness requirement regarding remuneration and data access terms.

More generally, the DMA's pricing and terms obligations are integrated with the fairness framework: gatekeepers cannot impose terms that discriminate against comparable business users or that lock business users into unfavorable arrangements.¹⁶³

4.4.3 Comparison

Article 102 TFEU's unfair pricing and trading conditions prohibitions are broad in principle but narrow in application, because establishing unfairness is methodologically challenging. The DMA's "fairness" obligation is more open-ended but operates in context of other more specific DMA requirements (non-discrimination, transparency, etc.) that operationalize fairness.¹⁶⁴

Notably, the DMA does not generally limit prices themselves but rather requires fairness in terms, non-discrimination, and transparency. This preserves gatekeepers' pricing autonomy while constraining terms that foreclose or lock in business users.¹⁶⁵

¹⁶³ DMA Article 5 addressing discrimination and unfair terms more broadly.

¹⁶⁴ Comparison of DMA fairness language with Article 102 TFEU unfair pricing provision.

¹⁶⁵ DMA generally does not control prices directly but constrains terms that lock users in or discriminate.

5 Chapter 5: The Ne Bis In Idem Question and Regulatory Coordination

5.1 The Ne Bis In Idem Principle in EU Law

5.1.1 Scope and Rationale

The ne bis in idem principle—literally “no person should be punished twice for the same offence”—is a fundamental element of EU law and human rights.¹⁶⁶ Codified in the Charter of Fundamental Rights (Article 50) and the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 4, Protocol 7), the principle protects against double jeopardy in criminal and quasi-criminal proceedings.¹⁶⁷

While the ECHR guarantee historically applied only within the jurisdiction of a single State, Article 50 CFR, read in conjunction with Article 54 of the Convention Implementing the Schengen Agreement (CISA), expands this protection to the transnational sphere.¹⁶⁸ This cross-border dimension establishes that a final acquittal or conviction in one Member State acts as an absolute bar to subsequent prosecutions based on the same acts in another Member State.

Structurally, the principle serves three core rationales:

1. Protection of the Individual: It shields undertakings and natural persons from the double psychological, procedural, and financial burdens of parallel or consecutive investigations, trials, and punishments.
2. System Coherence and Finality: It prevents inconsistent adjudication where different regulatory authorities or courts adjudge the same set of

¹⁶⁶ Ne bis in idem principle codified in Charter of Fundamental Rights Article 50 and ECHR Protocol 7 Article 4.

¹⁶⁷ Protection against double jeopardy in criminal and quasi-criminal proceedings.

¹⁶⁸ Limitations of the Transnational ne bis in idem Principle in EU Law | eucrim, Date of last access: May 16, 2026, <https://eucrim.eu/articles/limitations-of-the-transnational-ne-bis-in-idem-principle-in-eu-law/pdf/>

material facts differently, which would undermine the legitimacy of the rule of law.

3. Institutional Efficiency: It enforces the finality of judicial determinations (*res judicata*), encouraging regulatory authorities to coordinate ex-ante and manage public resources efficiently.

In the context of European market regulation, the principle is formulated as requiring that an undertaking not be tried or sanctioned twice “for one and the same infringement on the basis of the same facts and the same conduct”.

Historically, this principle primarily governed horizontal interactions between parallel antitrust enforcers or vertical overlaps between the European Commission and National Competition Authorities (NCAs). However, the rapid expansion of ex-ante digital regulations, sector-specific market liberalization directives, and consumer protection instruments has created a dense, multi-layered enforcement matrix where multiple authorities can simultaneously exercise punitive powers over a single market conduct.¹⁶⁹

5.1.2 Defining the “Criminal Nature” of Sanctions

Because the protection of Article 50 CFR is formally confined to “criminal proceedings”, its applicability to administrative or regulatory enforcement depends on whether the administrative sanctions in question are “criminal in nature”. To make this determination, both the CJEU and the ECtHR rely on the autonomous three-pronged test established in *Engel and Others v. The Netherlands* (ECtHR) and subsequently endorsed by the CJEU in *Bonda* (Case C-489/10).¹⁷⁰ The “Engel criteria” require authorities to evaluate:

1. The legal classification of the offence under national law: This serves as a starting point but is not conclusive, preventing Member States from

¹⁶⁹ Ne bis in idem at the intersection between prudential and AML/CFT supervision - UU Research Portal, Date of last access: May 16, 2026, https://research-portal.uu.nl/ws/portalfiles/portal/237358814/Ne_bis_in_idem_at_the_intersection_between_prudential_and_AMLCFT_supervision.pdf

¹⁷⁰ Cross-Border Application of the Ne Bis In Idem Principle in the Context of Administrative Penalties Criminal in Nature Imposed for Unlawful Commercial Practices in - Brill, Date of last access: May 17, 2026, <https://brill.com/view/journals/eccl/aop/article-10.1163-15718174-bja10093/article-10.1163-15718174-bja10093.xml>

avoiding fundamental rights guarantees simply by labeling a punitive mechanism as “administrative”.

2. The intrinsic nature of the offence: This is of much greater significance and examines whether the sanction pursues a punitive and deterrent objective, rather than merely repairing material damage or providing civil compensation.¹⁷¹
3. The degree of severity of the potential penalty: This is measured by the potential impact on the undertaking's assets, operations, or liberties.

The application of these criteria has brought a vast array of regulatory and competition penalties within the protective scope of Article 50 CFR.¹⁷² Fines imposed under EU and national competition law—which can reach up to 10% of an undertaking’s global annual turnover—have long been classified as criminal in nature due to their highly punitive and deterrent objectives and their immense financial severity.

This classification was significantly consolidated by the CJEU in its landmark ruling in Volkswagen (Case C-27/22, 14 September 2023).¹⁷³ The Court confirmed that a €5 million administrative fine imposed by the Italian Competition and Market Authority (AGCM) for unfair commercial practices under national provisions transposing Directive 2005/29/EC was “criminal in nature”. Despite its administrative classification under Italian law, the fine’s punitive purpose and high severity triggered the full protection of Article 50 CFR.

¹⁷¹ The Principle of Ne Bis In Idem (Article 50 of the Charter) at the Cross-Border Interface of Punitive Administrative and Criminal Proceedings in the European Union - UU Research Portal, Date of last access: May 17, 2026, https://research-portal.uu.nl/ws/files/237355512/The_Principle_of_Ne_Bis_In_Idem_Article_50_of_the_Charter_at_the_Cross-Border_Interface_of_Punitive_Administrative_and_Criminal_Proceedings_in_the_European_Union.pdf

¹⁷² CJEU Clarified Duplication of Punitive Administrative Proceedings in Competition Law - eucrim, Date of last access: May 17, 2026, <https://eucrim.eu/news/cjeu-clarified-duplication-of-punitive-administrative-proceedings-in-competition-law/>

¹⁷³ The Idem Component in CJEU Case Law on Ne Bis in Idem: How Factual is Factual? in - Brill, Date of last access: May 17, 2026, <https://brill.com/view/journals/cccl/aop/article-10.1163-15718174-20262006/article-10.1163-15718174-20262006.xml>

This principle was further extended on 30 January 2025 in Engie România SA (Case C-205/23).¹⁷⁴ The CJEU ruled that administrative fines imposed on a natural gas supplier by both the National Energy Regulator (ANRE) and the Consumer Protection Authority (ANPC) for obscure price adjustments must be regarded as “criminal penalties” under Article 50 CFR. The Court emphasized that if a sanction has a punitive and deterrent purpose—even if it is coupled with a consumer-protection or market-stabilization objective—it falls within the scope of the double-jeopardy prohibition. Consequently, the autonomous definition of “criminal” ensures that the constitutional protection against double jeopardy is applied uniformly across the entire EU regulatory landscape, regardless of the domestic legal labels chosen by Member States.

5.1.3 The Doctrinal Shift: From Idem Crimen to Idem Factum

For several decades, the application of *ne bis in idem* in EU competition law diverged sharply from general criminal and administrative law. This divergence was driven by the CJEU's adherence to the restrictive *idem crimen* standard in antitrust matters.¹⁷⁵ Under the jurisprudence of *Walt Wilhelm* (1969), *LVM* (2002), and *Aalborg Portland* (2004), the CJEU maintained that a violation of *ne bis in idem* required a “triple identity”: identity of the facts, identity of the offender, and identity of the “protected legal interest”.

This narrow *idem crimen* standard allowed regulatory authorities and courts to bypass double-jeopardy claims by arguing that parallel proceedings pursued different legal interests. For instance, an anticompetitive cartel could be prosecuted and fined by both a national competition authority and the European Commission because they were deemed to protect distinct national and European market interests. Similarly, general competition rules and sector-specific rules (such as telecommunications or postal regulations) were allowed

¹⁷⁴ ECJ: Double Penalties for an Energy Company May be Justified - eucrim, Date of last access: May 17, 2026, <https://eucrim.eu/news/ecj-double-penalties-for-an-energy-company-may-be-justified/>

¹⁷⁵ *Ne bis in idem* and the DMA: the CJEU's judgments in *bpost* and *Nordzucker* – Part I, Date of last access: May 17, 2026, <https://the-platform-law.com/2022/03/28/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-i/>

to run in parallel because they protected different regulatory objectives. This approach drew intense criticism from legal scholars and several Advocates General, who argued that it insulated competition law from general fundamental rights standards and diluted the protection of the Charter. A profound constitutional shift occurred on March 22, 2022, when the Grand Chamber of the CJEU delivered two landmark judgments: *bpost* (Case C-117/20) and *Nordzucker* (Case C-151/20). In these rulings, the CJEU unified its *ne bis in idem* jurisprudence by abandoning the “protected legal interest” (*idem crimen*) requirement in competition law.¹⁷⁶ The Court aligned antitrust enforcement with its general Charter jurisprudence and transnational criminal law (such as Article 54 CISA and the ECtHR's factual standard in *Zolotukhin v. Russia*).

The Grand Chamber ruled that the sole decisive criterion for establishing *idem* is the identity of the material facts (*idem factum*), defined as “a set of concrete circumstances stemming from events which are, in essence, the same, in that they involve the same perpetrator and are inextricably linked together in time and space”. Under this unified factual test, whenever two proceedings concern the same historical conduct of the same offender, the *idem* condition is met. Legal classifications and the diversity of legal interests protected are entirely irrelevant at this stage.¹⁷⁷

This absolute factual standard was subsequently reinforced by the CJEU on 11 September 2025 in *MSIG* (Case C-802/23). In *MSIG*, which arose from a cross-border prosecution of a terrorist association, the CJEU ruled that the concept of “same acts” under Article 54 CISA, read in the light of Article 50 CFR, refers strictly to the material nature of the acts. The Court declared that divergent legal classifications of said acts between Member States, or the fact

¹⁷⁶ *BPost and Nordzucker: Searching for the Essence of Ne Bis in Idem in European Union Law*, Date of last access: May 17, 2026, <https://www.cambridge.org/core/journals/european-constitutional-law-review/article/bpost-and-nordzucker-searching-for-the-essence-of-ne-bis-in-idem-in-european-union-law/192CD2867134F1B1209CDB12845512B0>

¹⁷⁷ CJEU Case C-802/23 / Judgment | European Union Agency for Fundamental Rights, Date of last access: May 17, 2026, <https://fra.europa.eu/fr/caselaw-reference/cjeu-case-c-80223-judgment>

that different states pursue different legal interests, cannot preclude the application of the *ne bis in idem* principle.

Consequently, any duplication of proceedings based on identical material facts constitutes a *prima facie* violation of Article 50 CFR, which can only be saved if it satisfies the strict conditions of the general limitation clause under Article 52(1) CFR.

5.1.4 Cross-Border Application, Res Judicata, and the Race to Finality

The transnational application of *ne bis in idem* is structurally intertwined with the principle of *res judicata*, which guarantees the finality and binding nature of judicial and administrative determinations.¹⁷⁸ Under Article 50 CFR, the double-jeopardy protection is activated only when a prior decision has become final. This procedural requirement was clarified by the CJEU in *Ferriere Nord* (Case C-31/23 P), which confirmed that the principle applies exclusively to prior decisions that have ruled on the substance of the facts, and not to decisions annulling an action for procedural defects. Once a decision ruling on the substance of a case acquires the force of *res judicata*, it acts as an absolute procedural bar to any subsequent or parallel proceeding based on the same factual conduct within the European Union.

This structural interaction creates a “race to finality” among regulatory and judicial authorities across different Member States. Because *ne bis in idem* operates as a procedural bar, the authority that secures a final decision first effectively blocks all other parallel proceedings across the Union.

This dynamic was vividly illustrated in the Volkswagen case. The Italian AGCM initiated its investigation and imposed its €5 million fine on August 4, 2016. While the appeal against this Italian decision was still pending, the Public Prosecutor’s Office of Brunswick in Germany initiated a separate proceeding

¹⁷⁸ *Ne bis in idem* in light of the *res judicata* principle: procedural guarantee or first come first served rule? | Review of European Litigation, Date of last access: May 17, 2026, <https://europeanlitigation.eu/en/2024/03/04/ne-bis-in-idem-in-light-of-the-res-judicata-principle-procedural-guarantee-or-first-come-first-served-rule/>

and imposed a €1 billion fine on Volkswagen AG on June 13, 2018, for negligent breach of supervisory duties. Because Volkswagen paid the German fine and formally waived its right to appeal, the German decision became final on the very same day (*res judicata*).¹⁷⁹

The CJEU held that despite the Italian proceedings having commenced and resulted in a decision first, the finality of the German decision immediately activated the *ne bis in idem* protection under Article 50 CFR. This finality barred the Italian courts from maintaining or enforcing the prior Italian administrative fine, as the Italian decision had not yet become final.¹⁸⁰

This outcome shows how the principle of *res judicata* operationalizes *ne bis in idem*. However, it also introduces a severe risk of "forum shopping" and strategic behavior by corporate actors.¹⁸¹ Undertakings facing overlapping investigations can strategically choose to settle rapidly in a jurisdiction that imposes lower penalties or offers favorable leniency terms, effectively securing a final decision that shields them from more rigorous prosecutions in other Member States. To prevent this structural dysfunction, the CJEU has established rigorous standards for the coordination of parallel proceedings under the limitation clause of the CFR.¹⁸²

5.2 Parallel Application of the Digital Markets Act and Article 102 TFEU

5.2.1 Same Conduct, Different Legal Bases: The Risk of Overlapping Sanctions

The entry into force of the DMA (Regulation (EU) 2022/1925) has made the overlapping application of ex-ante digital regulations and traditional ex-post

¹⁷⁹ Case C-27/22 Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft v Autorità Garante della Concorrenza e del Mercato ECLI:EU:C:2023:663.

¹⁸⁰ *Ibid.*

¹⁸¹ Opinion of AG Campos Sánchez-Bordona in Case C-27/22 Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft ECLI:EU:C:2023:256, paras 81-85.

¹⁸² *Ibid.*

competition rules a pressing reality. Designated gatekeepers providing core platform services are subject to a series of self-executing obligations under Articles 5, 6, and 7 of the DMA, many of which directly mirror historic abuses prosecuted under Article 102 TFEU. This structural convergence creates a significant risk of parallel enforcement actions targeting the same material conduct under different legal bases.¹⁸³

A clear example of this tension is found in a hypothetical scenario involving a designated gatekeeper engaging in self-preferencing behavior. If a platform continues to manipulate its search algorithms to display its own downstream services more prominently than those of rivals, the conduct simultaneously implicates multiple legal frameworks:

- It violates the ex-ante prohibition on self-preferencing codified in Article 6(5) of the DMA.
- It violates the general prohibition against the abuse of a dominant position under Article 102 TFEU, through the leveraging of market power from the upstream platform market into adjacent downstream services.

The European Commission could theoretically launch parallel investigations under both instruments, resulting in separate decisions and sanctions. Under the DMA, the Commission can impose non-compliance fines of up to 10% of the gatekeeper's total worldwide turnover (rising to 20% for repeated infringements). Concurrently, the Commission or NCAs can impose fines of up to 10% of turnover under Article 102 TFEU. In the absence of constitutional limits on double jeopardy, a gatekeeper could face an aggregate penalty of up to 20% of its worldwide turnover for a single course of conduct.¹⁸⁴

Following the CJEU's transition to the *idem factum* standard in *bpost* and *Nordzucker*, such aggregate sanctioning is a clear duplication of penalties based

¹⁸³ 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) OJ L265/1, arts 5, 6, 7.

¹⁸⁴ 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 OJ L1/1, art 23(2); Regulation (EU) 2022/1925 (Digital Markets Act), art 30.

on identical material facts.¹⁸⁵ Because both a DMA non-compliance fine and an Article 102 TFEU antitrust fine are highly punitive, deterrent, and severe, they qualify as “criminal in nature” under the Engel criteria. The imposition of dual sanctions for a single self-preferencing practice constitutes a *prima facie* violation of Article 50 CFR. The simultaneous imposition of these punitive sanctions for a single self-preferencing practice constitutes a *prima facie* violation of the right not to be tried or punished twice.

5.2.2 The Legal Basis Paradox: Article 114 TFEU and the *Lex Specialis* Doctrine

The co-existence of the DMA and Article 102 TFEU rests on a fundamental legal base paradox. The EU legislator adopted the DMA under Article 114 TFEU, which is the competence for the approximation of laws to ensure the functioning of the internal market, rather than Article 103 TFEU, the legal basis for competition law. This choice was deliberate: by positioning the DMA as an internal market harmonizing measure, the legislator aimed to establish a centralized ex-ante regulatory mechanism that avoids the procedural delays, case-by-case market definitions, and rigorous evidentiary standards required under Articles 101 and 102 TFEU.¹⁸⁶

However, this legal framing creates a profound constitutional tension. Despite the formal internal market label, the substantive provisions of the DMA are heavily derived from competition law principles and prior abuse of dominance investigations. For example, the self-preferencing prohibition in Article 6(5) of the DMA is a direct legislative codification of the principles established in the Google Shopping case. This overlap reveals a conceptual inconsistency: while the DMA claims to “complement” competition law by pursuing distinct objectives—namely “market contestability” and “fairness”—it targets the same

¹⁸⁵ Case C-117/20 *bpost SA v Autorité belge de la concurrence* ECLI:EU:C:2022:202, paras 22-25; *Engel and Others v The Netherlands* (1976) Series A no 22, paras 82-83.

¹⁸⁶ Consolidated Version of the Treaty on the Functioning of the European Union OJ C326/47, arts 103, 114.

physical market conduct and seeks to resolve the same underlying market failures as antitrust law.¹⁸⁷

From a constitutional perspective, the choice of Article 114 TFEU as the sole legal basis reverses the traditional *lex specialis derogat legi generali* principle into a novel *lex generalis derogat legibus specialibus* practice. In standard EU law drafting, when two potential legal bases are available, the more specific provision should be chosen. By choosing the broader internal market competence, the legislator bypassed the specific competition framework of Article 103 TFEU, allowing the DMA and Article 102 TFEU to run in parallel. This dual-track architecture is formally preserved by Article 1(6) of the DMA, which states that the regulation is “without prejudice” to the application of EU competition rules.¹⁸⁸

However, this legislative preservation does not resolve the fundamental question of whether the duplication of proceedings under these parallel tracks can be justified under the CFR. If a court finds that the DMA’s objectives of contestability and fairness are essentially competition objectives, the dual-track system will struggle to satisfy the first requirement of the limitation clause, making parallel enforcement unconstitutional.¹⁸⁹

5.2.3 The Three-Step Justification Test under Article 50 CFR

To determine whether the parallel application of the DMA and Article 102 TFEU is constitutionally permissible, the CJEU relies on the three-step justification test developed in *bpost*, *Nordzucker*, and *Volkswagen* under Article 50 CFR. This test requires that any duplication of proceedings and penalties must be provided for by law, respect the essence of the right, and adhere to the principle of proportionality.

¹⁸⁷ Case C-48/22 P *Google LLC and Alphabet, Inc. v European Commission* (Google Shopping) ECLI:EU:C:2024:726, paras 135-140.

¹⁸⁸ Annegret Engel, 'Licence to Regulate: Article 114 TFEU as Choice of Legal Basis in the Digital Single Market' in Annegret Engel, Xavier Groussot and Gunnar Thor Petursson (eds), *New Directions in Digitalisation: Perspectives from EU Competition Law and the Charter of Fundamental Rights* (Springer 2025) 13.

¹⁸⁹ Charter of Fundamental Rights of the European Union OJ C326/391, art 52(1).

- **Complementary and Distinct Legal Objectives:** The first step requires that the dual-track proceedings pursue distinct and complementary legitimate objectives. In *bpost*, the CJEU held that duplicate proceedings under postal sector regulations and general competition law were justified because they pursued complementary public interests—namely the liberalization of the postal market and the maintenance of undistorted competition. Conversely, in *Nordzucker*, the Court established that a duplication of proceedings under identical competition provisions (such as parallel national and EU antitrust enforcement) cannot be justified if they pursue identical objectives, as this would violate the essence of the *ne bis in idem* right. In the digital sphere, the Commission argues that the DMA and Article 102 TFEU satisfy this step because the former targets “contestability and fairness” *ex-ante*, while the latter protects “undistorted competition” *ex-post*.¹⁹⁰
- **Clear and Precise Legal Rules:** The second step requires that the possibility of duplication be provided for by clear and precise rules, allowing undertakings to predict which acts or omissions are liable to be subject to parallel investigations. Under this requirement, the legislative frameworks must clearly define the jurisdictional boundaries and the potential for overlapping sanctions. This condition is met by the explicit “without prejudice” clause in Article 1(6) of the DMA, which makes the potential for parallel antitrust proceedings *ex-ante* predictable for gatekeepers.¹⁹¹
- **The Coordination and Proportionality Requirement:** The third step requires that the dual proceedings be conducted in a sufficiently coordinated manner and within a proximate timeframe to ensure that the cumulative burden on the undertaking is limited to what is strictly

¹⁹⁰ Case C-117/20 *bpost SA v Autorité belge de la concurrence* ECLI:EU:C:2022:202, paras 40-45; Case C-151/20 *Bundeswettbewerbsbehörde v Nordzucker AG and Others* ECLI:EU:C:2022:203, paras 48-52.

¹⁹¹ 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) OJ L265/1, art 1(6).

necessary.¹⁹² This requirement was the decisive factor in the Volkswagen judgment. The CJEU confirmed that the lack of coordination between the German and Italian authorities was fatal to the justification under Article 50 CFR, meaning that the Italian consumer authority's fine could not be maintained once the German criminal penalty became final.¹⁹³

To institutionalize this coordination requirement, the EU updated Recital 86 of the DMA following the bpost and Nordzucker rulings. Recital 86 mandates that the Commission and national authorities actively coordinate their enforcement efforts. It specifically requires the Commission to take into account any prior fines and penalties imposed on the same legal person for the same facts, ensuring that the overall cumulative sanctions correspond to the seriousness of the infringement committed. This legislative mechanism is designed to prevent excessive punishment and ensure compliance with the principle of proportionality.¹⁹⁴

5.2.4 The Paradox of Temporal Mismatch in Dual-Track Enforcement

The operationalization of the *ne bis in idem* justification test under the DMA and Article 102 TFEU is hindered by a fundamental temporal paradox. The third step of the bpost test requires that parallel proceedings be conducted within a proximate timeframe to ensure that the duplication is strictly necessary. This “proximate timeframe” requirement is difficult to reconcile with the different operational speeds of ex-ante regulation and ex-post antitrust enforcement.¹⁹⁵

¹⁹² ECJ: Art. 50 of the Charter Protects Volkswagen from Further Administrative Penalties in Italy, Date of last access: May 18, 2026, <https://eucrim.eu/news/ecj-art-50-of-the-charter-protects-volkswagen-from-further-administrative-penalties-in-italy/>

¹⁹³ Case C-27/22 Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft v Autorità Garante della Concorrenza e del Mercato ECLI:EU:C:2023:663, paras 102-106.

¹⁹⁴ 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) OJ L265/1, recital 86.

¹⁹⁵ Case C-117/20 bpost SA v Autorité belge de la concurrence ECLI:EU:C:2022:202, paras 51-54.

By design, ex-ante regulation under the DMA is intended to be rapid and preemptive. The Commission monitors gatekeeper compliance with clearly defined, self-executing obligations, allowing for swift enforcement and the rapid imposition of non-compliance penalties within months of detecting a violation. In contrast, ex-post antitrust enforcement under Article 102 TFEU is a lengthy, complex, and effects-based process. A typical abuse of dominance investigation—requiring extensive market definitions, economic analysis of anticompetitive foreclosure, and lengthy administrative hearings—routinely takes five to seven years to complete.

This temporal mismatch creates an unavoidable procedural gap. If the Commission detects a self-preferencing practice, it can impose a DMA non-compliance penalty quickly. If it also attempts to pursue the same conduct under Article 102 TFEU, the resulting antitrust decision will be adopted years later. This extensive delay violates the "proximate timeframe" requirement of the *bpost* and *Volkswagen* standards.

Because the parallel proceedings are not conducted within a proximate timeframe, the duplication fails the strict necessity test under Article 50 CFR. As a result, the subsequent ex-post antitrust penalty constitutes an unjustified and unconstitutional violation of Article 50 CFR. This temporal mismatch makes the dual application of the DMA and Article 102 TFEU to the same factual conduct structurally precarious. In practice, it forces the European Commission to choose between rapid regulatory compliance under the DMA or effects-based antitrust enforcement under Article 102 TFEU, rendering the “without prejudice” clause of Article 1(6) of the DMA practically ineffective for identical conduct.¹⁹⁶

5.3 Comparative Analysis and Operationalization of Jurisdictional Boundaries

¹⁹⁶ Case C-27/22 *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft v Autorità Garante della Concorrenza e del Mercato* ECLI:EU:C:2023:663, paras 103-105.

5.3.1 Scope-Based and Institutional Divisions of Labor

To manage the overlapping jurisdictions of the DMA and Article 102 TFEU and prevent systemic violations of the *ne bis in idem* principle, enforcement authorities must establish clear scope-based boundaries. The most direct division of labor is institutional: the DMA applies exclusively to designated gatekeepers providing core platform services, whereas Article 102 TFEU applies to any dominant undertaking within the internal market.

This scope-based distinction supports a clear categorization of enforcement tasks:

- **Centralized Gatekeeper Regulation:** Conduct undertaken by designated gatekeepers (such as Apple or Alphabet) that directly involves their designated core platform services (such as the iOS Operating System or Google Search) must be addressed under the ex-ante provisions of the DMA. This centralizes digital regulation under the European Commission, utilizing the speed and efficiency of the DMA's self-executing rules.
- **Decentralized Antitrust Enforcement:** Conduct by non-designated undertakings, or by dominant undertakings in non-digital sectors, remains under the jurisdiction of Article 102 TFEU, enforced by the Commission and NCAs under Regulation 1/2003.

For example, App Store practices by Apple are subject to primary enforcement under the DMA, while similar practices by non-designated platforms (such as Booking.com, if not designated for that specific service) are prosecuted under Article 102 TFEU. However, this division is not absolute. Gatekeepers remain subject to Article 102 TFEU for non-core platform conduct. If a designated gatekeeper engages in predatory pricing of physical hardware (such as smartphones) to foreclose device competitors, this behavior falls outside the software-and-service-oriented obligations of the DMA, yet constitutes a clear abuse of dominance under Article 102 TFEU.

5.3.2 Conduct-Based Distinctions: Presumptive Rules versus

Open-Textured Standards

A second operational distinction is based on the nature of the anticompetitive conduct. The DMA relies on a static list of per se prohibitions and obligations designed to address well-understood, systemic digital market failures.

Conversely, Article 102 TFEU is a flexible, open-textured framework capable of adapting to novel, complex, or emerging forms of unilateral market abuse.

This supports a conduct-based division of labor:

- **Presumptive DMA Enforcement:** Standardized, well-defined behaviors explicitly covered by Articles 5, 6, and 7 of the DMA—such as self-preferencing, data-siloing, and anti-steering provisions—should be enforced under the DMA for gatekeepers.
- **Flexible Antitrust Enforcement:** Novel, emerging, or highly complex behaviors that do not fit into the DMA's explicit list—such as predatory algorithmic pricing, novel data aggregation schemes, or exclusionary tying of emerging AI technologies—should be addressed through the flexible, effects-based analysis of Article 102 TFEU.

By channeling mainstream digital behaviors through the DMA and reserving Article 102 TFEU for novel abuses, the European Commission can maintain the effectiveness of both frameworks while avoiding duplicate investigations targeting the same conduct.

5.3.3 Temporal and Procedural Jurisdictional Boundaries

The operationalization of these boundaries also follows a temporal trajectory, reflecting the maturation of digital market regulation. In the early stages of digital regulation, traditional competition law served as the primary tool for addressing digital market failures, resulting in lengthy investigations like the Google Shopping saga. As the DMA matures and its obligations become well understood, the ex-ante framework should recede Article 102 TFEU into a residual role for gatekeepers.

Under this temporal model:

- Ex-Ante Primacy for Future Conduct: The DMA acts as the primary regulatory framework for all forward-looking conduct undertaken by gatekeepers in digital markets, establishing clear compliance standards.
- Ex-Post Antitrust for Historical and Non-Covered Conduct: Article 102 TFEU remains relevant for historical conduct (prosecuting violations that occurred before a gatekeeper's designation) and for addressing abusive behaviors that fall outside the temporal or material scope of the DMA.

This temporal division allows the specialized regulatory framework to govern the newly regulated domain, while reserving the broader competition law rules for situations that the ex-ante regime cannot address.

5.3.4 National Hybrid Regulations and Regulatory Friction

The establishment of clear operational boundaries is complicated by the rise of national hybrid regulations. Under Articles 1(5) and 1(6) of the DMA, Member States are prohibited from adopting national regulations that impose obligations on gatekeepers for the purpose of ensuring contestability and fairness, which is the sole competence of the European Commission. This centralization was intended to prevent the fragmentation of the Digital Single Market.

Despite this prohibition, several Member States have enacted hybrid national laws that overlap with the DMA. The most notable example is Section 19a of the German Competition Act (GWB), which grants the Federal Cartel Office the power to designate undertakings of “paramount significance for competition across markets” and prohibit them from engaging in practices like self-preferencing and data bundling.¹⁹⁷ These national hybrid rules create significant regulatory friction.

Because they combine competition law mechanisms with ex-ante regulatory obligations, they increase the risk of overlapping investigations targeting the same gatekeeper for the same conduct. If a national competition authority and the European Commission initiate parallel proceedings under Section 19a GWB

¹⁹⁷ German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen - GWB), s 19a; Regulation (EU) 2022/1925 (Digital Markets Act), arts 1(5), 1(6).

and the DMA, the resulting dual-track enforcement must satisfy the strict *ne bis in idem* standard. Following the Volkswagen judgment, any such duplication must meet the coordination and proximate timeframe requirements under Article 50 CFR.¹⁹⁸

The lack of a formalized coordination mechanism between national authorities and the Commission for hybrid digital regulations makes it difficult to satisfy these requirements. This institutional gap creates a risk of uncoordinated parallel proceedings, leaving hybrid national enforcement actions vulnerable to being struck down by courts as unconstitutional violations of Article 50 CFR.

Operational Dimension	Article 102 TFEU	Digital Markets Act (DMA)	National Hybrid Rules (e.g., Sec. 19a GWB)
Legal Basis	Article 103 TFEU.	Article 114 TFEU.	National Competition Law.
Primary Enforcer	European Commission & NCAs.	European Commission.	National Competition Authority (e.g., FCO).
Operational Speed	Slow; ex-post effects-based analysis (5-7 years).	Rapid; ex-ante presumptive monitoring (months).	Intermediate; ex-ante designation with ex-post elements.
Evidentiary Standard	Requires proof of dominance and anticompetitive foreclosure.	Fact-based compliance; behavior is prohibited <i>per se</i> .	Presumptive behavior based on paramount market significance.
Scope of Application	All dominant undertakings.	Designated Gatekeepers.	Undertakings of paramount significance across markets.
CFR Article 50 Exposure	Highly vulnerable if preceding ex-ante sanctions exist.	Subject to Recital 86 coordination and offsetting.	High risk of unconstitutional duplication without EU coordination.

The comparative matrix shows how the operational speeds and legal bases of these frameworks create friction. While the “without prejudice” clause of

¹⁹⁸ Case C-27/22 Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft v Autorità Garante della Concorrenza e del Mercato ECLI:EU:C:2023:663, para 106.

Article 1(6) of the DMA and national competition law exemptions aim to preserve parallel enforcement, the structural differences in their evidentiary standards and operational speeds make it difficult to satisfy the temporal and coordination requirements of the *bpost* and *Volkswagen* tests. Consequently, to prevent systemic violations of the *ne bis in idem* principle, the European Union must transition toward a model where the ex-ante DMA serves as the primary tool for gatekeeper regulation, with Article 102 TFEU reserved for novel abuses and non-gatekeeper conduct.

5.4 The “Revolution” in Digital Enforcement

The intersection of the *bpost* and *Nordzucker* judgments with the operationalization of the Digital Markets Act prompts a fundamental constitutional question: does this post-DMA jurisprudence constitute a revolution for the enforcement of EU competition law? As powerfully argued by Annegret Engel, Xavier Groussot, and Emilia Holmberg, the recent evolution of the *ne bis in idem* principle represents a profound structural and conceptual shift that fundamentally reorders the relationship between fundamental rights protection and economic regulation within the European Union.¹⁹⁹

This “revolution” is characterized by two distinct dimensions. Conceptually, the revolution lies in the complete abandonment of the traditional competition-specific “triple identity” test.²⁰⁰ By eradicating the requirement of an identical protected legal interest (*idem crimen*), the CJEU demolished the doctrinal insulation that previously protected regulatory authorities from double-jeopardy challenges.²⁰¹ In doing so, the Court established a highly integrated, Charter-centric model of adjudication that elevates the fundamental rights of

¹⁹⁹ Annegret Engel, Xavier Groussot and Emilia Holmberg, ‘The Digital Markets Act and the Principle of *Ne Bis in Idem*: A Revolution in the Enforcement of EU Competition Law?’ in Annegret Engel, Xavier Groussot and Gunnar Thor Petursson (eds), *New Directions in Digitalisation: Perspectives from EU Competition Law and the Charter of Fundamental Rights* (Springer 2025) 187.

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

undertakings to a uniform constitutional standard across all fields of Union law.²⁰²

Practically and procedurally, however, the Engel, Groussot, and Holmberg thesis highlights a deeper, more challenging paradox: the shift in case law effectively moves the primary battleground of digital enforcement from the substantive definition of the right to the procedural and administrative management of enforcement tracks.²⁰³ Because a finding of *idem factum* is now practically unavoidable when the DMA and Article 102 TFEU target the same platform conduct, the entire legality of dual enforcement depends on satisfying the strict necessity and proportionality criteria under Article 50 CFR.

Crucially, as Engel et al. observe, compliance with the strict necessity test can only be fully verified *ex post*—after the respective proceedings have matured sufficiently to evaluate the total cumulative burden and the specific coordination between the authorities. Because this assessment occurs downstream, the *bpost* test does not—and cannot—prevent the initial duplication of investigations under the DMA and concurrent EU or national competition rules. Both the European Commission and various National Competition Authorities retain the legal competence to launch simultaneous parallel investigations into the same gatekeeper behavior, generating substantial procedural friction and compliance costs for market actors.

As a result, the operational success of this “revolution” relies entirely on the robust implementation of the administrative cooperation and coordination mechanisms codified in Articles 37 and 38 of the DMA. Article 37 mandates close institutional cooperation between the Commission and national competent authorities, while Article 38 establishes explicit rules for cooperation and coordination with the national authorities enforcing competition rules. These provisions include mandatory requirements for the exchange of information, notification protocols prior to taking enforcement steps, and mechanisms to align overlapping procedures.²⁰⁴

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ Ibid.

The post-DMA case law establishes that these statutory coordination mechanisms are no longer merely matters of administrative convenience or political courtesy; they are strict constitutional prerequisites under the Charter. If the Commission and national authorities fail to demonstrate real-time procedural alignment, information sharing, and a concerted effort to minimize the administrative burden on an investigated gatekeeper, any secondary sanction or parallel proceeding will fail the strict necessity test and be struck down as a violation of Article 50 CFR.²⁰⁵

This procedural standard is further complicated by the constitutional tension between the “SCCST test” and the traditional “test of effectiveness” originating from Åkerberg Fransson.²⁰⁶ While the “SCCST test” acts as a procedural gateway under Article 50 CFR to justify a duplication of proceedings based on close connection in substance and time, the “test of effectiveness” from Åkerberg Fransson requires that the cumulative penalties imposed by Member States remain “effective, proportionate and dissuasive”.²⁰⁷

The CJEU is therefore called to clarify the relationship between these two standards in the digital era. In Volkswagen (C-27/22), the Court of Justice opted for a rigorous interpretation of the coordination requirement under Article 50 CFR, choosing to strike down the Italian fine due to the absence of sufficient coordination rather than validating the second penalty under a broad “effectiveness of enforcement” rationale. The CJEU confirmed this strict constitutional approach in Engie România (C-205/23).²⁰⁸ By treating the coordination requirement as an absolute legal prerequisite, the Court ensures that the “SCCST test” operates as a constitutional check on the state's power to

²⁰⁵ 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) OJ L265/1, arts 37, 38.

²⁰⁶ Case C-617/10 Åklagaren v Hans Åkerberg Fransson ECLI:EU:C:2013:105, para 36; Case C-205/23 Engie România SA v Autoritatea Națională de Reglementare în Domeniul Energiei ECLI:EU:C:2025:43, paras 63-68.

²⁰⁷ Ibid.

²⁰⁸ Case-law consistency on ne bis in idem: judgment of the CJEU in Engie România SA, Date of last access: May 19, 2026, <https://johan-callewaert.eu/case-law-consistency-on-ne-bis-in-idem-judgment-of-the-cjeu-in-engie-romania-sa/>

punish, rather than allowing the “test of effectiveness” to serve as a blanket license for duplicative enforcement.²⁰⁹

The true revolution in EU competition law enforcement is therefore not the absolute prohibition of dual tracks, but rather a constitutional mandate for deep institutional integration, transparency, and administrative self-restraint.²¹⁰

5.5 Conclusion to Chapter 5

The evolution of the *ne bis in idem* principle within the EU digital ecosystem marks a turning point in the constitutionalisation of European administrative law. By replacing the restrictive, interest-based *Walt Wilhelm* standard with a uniform, fact-based *idem factum* test, the Grand Chamber in *bpost* and *Nordzucker* fundamentally elevated the Charter’s role in multi-level market regulation. When applied to the digital economy, this standard recognizes that a gatekeeper’s single marketplace action cannot be artificially segmented to bypass fundamental rights guarantees.

Simultaneously, the Article 50 CFR justification framework ensures that the EU is not left structurally defenseless against the complex systemic failures of digital gatekeepers. The distinct but complementary legal objectives of the DMA (“contestability and fairness”) and Article 102 TFEU (“undistorted competition”) provide a valid basis for parallel enforcement tracks, provided that strict procedural boundaries are maintained. Whether through functional distinctions separating core platform services from peripheral behaviors, or temporal distinctions that position the DMA as the forward-looking primary framework, the legal order offers coherent paths to balance regulatory effectiveness with legal certainty.

Ultimately, the conceptual revolution identified by Engel, Groussot, and Holmberg reveals that the future of digital enforcement belongs to institutional coordination. Because the strict necessity test can only be verified *ex post*, the

²⁰⁹ Ibid.

²¹⁰ Ibid.

guardrails against excessive enforcement must be built directly into the daily operational habits of the European Commission and National Competition Authorities through Articles 37 and 38 of the DMA. Only through flawless administrative cooperation, rigorous information sharing, and strict proportionality in the accumulation of fines can the Union achieve its goal of creating fair and contestable digital markets while fully respecting the fundamental rights of the undertakings it regulates.

6 Chapter 6: Conclusions and Delineation of Scope

6.1 Synthesis: The Complementary Relationship

This thesis has examined the interplay between Article 102 TFEU and the Digital Markets Act, seeking to delineate their respective scopes. The analysis yields several conclusions:

6.1.1 Distinct Regulatory Objectives, Compatible Instruments

Article 102 TFEU and the DMA pursue related but distinct regulatory objectives.²¹¹

Article 102 TFEU aims to ensure that the internal EU market functions competitively by prohibiting undertakings in dominant positions from abusing that dominance to foreclose competition or exploit customers. The objective is to maintain competitive processes, prevent monopolistic outcomes, and protect both dynamic competition and consumer welfare.²¹²

The DMA aims to ensure that digital markets remain contestable and fair for business users and consumers, particularly where gatekeepers exercise market power. The objective is explicitly stated as maintaining “contestability” and “fairness”, values that extend beyond narrow consumer welfare maximization to include user autonomy, business user opportunity, and structural independence of digital services.²¹³

These objectives are compatible and overlapping. Both instruments seek to constrain market power and prevent anticompetitive foreclosure. However, the DMA's explicit reference to “contestability” and “fairness” as independent

²¹¹ Article 102 TFEU and DMA pursue related but distinct regulatory objectives.

²¹² Article 102 TFEU objective: maintain competitive processes and prevent monopolistic outcomes.

²¹³ DMA objectives: contestability and fairness, explicitly including values beyond consumer welfare.

regulatory objectives signals a broader normative agenda than traditional competition law's focus on competition and consumer welfare.²¹⁴ The DMA incorporates values including user autonomy, democratic participation, and platform neutrality that exceed traditional competition law's purview.²¹⁵

6.1.2 Complementary Methodologies

The instruments employ complementary methodologies:²¹⁶

Article 102 TFEU employs ex post, effects-based enforcement. Conduct is prohibited only after being proven to violate the prohibition through investigation, evidence-gathering, and adjudication. The framework is flexible and contextual, accommodating diverse market circumstances and permitting defendant justifications. However, this flexibility comes at the cost of temporal delay and evidentiary burden.²¹⁷

The DMA employs ex ante, rules-based regulation. Conduct is prohibited presumptively through prescriptive rules applied to designated undertakings. Obligations are mandatory and exclude broad justifications. This approach sacrifices flexibility for certainty and speed.²¹⁸

These methodologies are not mutually exclusive; they may operate in tandem. The DMA's bright-line rules prevent the most predictable and harmful conduct (self-preferencing, tying, data combination without consent). Article 102 TFEU's contextual approach remains available to address novel, complex, or contextual conduct not plainly within DMA rules.²¹⁹

The combination of ex ante and ex post enforcement may be more effective than either alone.²²⁰ Ex ante rules prevent obvious harms quickly; ex post

²¹⁴ DMA's contestability objective extends beyond traditional welfare maximization.

²¹⁵ Regulatory values in DMA: user autonomy, business opportunity, platform neutrality.

²¹⁶ Complementary methodologies: Article 102 TFEU ex post/effects-based; DMA ex ante/rules-based.

²¹⁷ Article 102 TFEU flexibility trades off against temporal delay and evidentiary burden.

²¹⁸ DMA certainty and speed trade off against lack of flexibility.

²¹⁹ Combination of both frameworks' approaches enables strengths of each.

²²⁰ Hybrid approach potentially more effective than either alone.

enforcement addresses sophisticated, circumstantial, or novel conduct requiring factual analysis.²²¹

6.1.3 Institutional Specialization

The instruments reflect institutional specialization.²²²

The DMA is enforced by a specialized, politically-accountable institution (the European Commission) with dedicated resources (the Digital Markets Unit) and unified responsibility.²²³ The Commission can develop expertise in digital markets, coordinate enforcement across Member States, and implement technical remedies through specification procedures.²²⁴

Article 102 TFEU is enforced by a broader competition authority (DG COMP) and by national competition authorities, with distributed institutional responsibility and variable resources.²²⁵ This distributed enforcement permits adaptation to local markets but sacrifices coordination and consistency.²²⁶

For digital markets with cross-border implications, centralized DMA enforcement may be more appropriate. For sector-specific or localized conduct, Article 102 TFEU's distributed enforcement structure may better suit circumstances.²²⁷

6.2 Delineation of Scope: Proposed Framework

²²¹ Ex ante rules prevent obvious harms quickly; ex post enforcement addresses complex, novel conduct.

²²² Institutional specialization reflects appropriate division of enforcement labor.

²²³ DMA enforced by specialized Commission unit with dedicated resources and unified responsibility.

²²⁴ Centralized DMA enforcement enables expertise development and coordinated implementation.

²²⁵ Article 102 TFEU distributed enforcement among Commission and NCAs.

²²⁶ Distributed structure permits local adaptation but sacrifices coordination.

²²⁷ Centralized DMA enforcement appropriate for cross-border digital markets; distributed Article 102 TFEU for localized conduct.

On the basis of this analysis, the following framework is proposed to delineate the scope of Article 102 TFEU and the DMA:²²⁸

6.2.1 Primary Enforcement Jurisdictions

The DMA should be the primary enforcement tool for:

1. Designated gatekeepers' conduct involving core platform services and explicitly addressed in Articles 5-7 DMA (self-preferencing, data combination, tying, interoperability, fairness to business users, consumer transparency)
2. Conduct that can be efficiently addressed through DMA's presumptive rules and specification procedures, i.e., conduct that does not require substantial factual or economic analysis to establish infringement
3. Conduct affecting contestability and fairness in digital markets, particularly conduct that limits business users' opportunity or consumer choice

Article 102 TFEU should be the primary enforcement tool for:

1. Non-designated undertakings that achieve dominance through exclusionary or exploitative conduct
2. Designated gatekeepers' conduct involving non-core-platform services or conduct not clearly addressed in Articles 5-7 DMA
3. Novel or emerging forms of digital market abuse not anticipated in DMA's design
4. Conduct requiring substantial factual or economic analysis to establish infringement (contextual foreclosure, effects analysis)

²²⁸ Proposed framework delineates scope-based division of enforcement labor.

5. Conduct where defendant justifications based on efficiency or pro-competitive objectives are plausible and merit evaluation

6.2.2 Coordinated Enforcement and Ne Bis In Idem

To address ne bis in idem concerns:

1. The Commission should elect to enforce under the DMA rather than Article 102 TFEU for conduct falling clearly within both frameworks. This enforces the regulatory preference implicit in the DMA's design.²²⁹
2. If enforcement under both frameworks occurs for the same factual conduct, the Commission should consolidate sanctions to ensure total fines do not exceed the maximum under either regime alone.²³⁰
3. The Commission should establish internal procedures ensuring that investigation units coordinate across DMA and Article 102 TFEU to prevent redundant parallel investigations of the same conduct.²³¹
4. The Court of Justice should be invited to pronounce on whether the DMA displaces Article 102 TFEU for designated gatekeepers and on the applicability of ne bis in idem principles to parallel DMA and Article 102 TFEU enforcement.²³²

6.3 Critical Assessment: Advantages and Tensions

6.3.1 Advantages of the Hybrid System

The DMA-Article 102 TFEU hybrid system offers several advantages:²³³

²²⁹ Commission's preference for DMA enforcement reflects regulatory preference embodied in DMA's design.

²³⁰ Consolidated sanctions avoid double jeopardy while maintaining both frameworks' applicability.

²³¹ Coordination procedures minimize redundant parallel investigations.

²³² CJEU guidance needed to clarify double jeopardy principles in DMA context.

²³³ Hybrid system offers multiple advantages including flexibility, adaptability, and institutional learning.

Flexibility: The system accommodates multiple enforcement mechanisms suited to different conduct types and circumstances. Bright-line DMA rules address predictable harms; flexible Article 102 TFEU addresses sophisticated or novel conduct.²³⁴

Adaptive regulation: As digital markets evolve, the DMA's specification procedure and Article 102 TFEU's development of new abuse categories enable regulatory adaptation without requiring legislative amendment.²³⁵

Institutional learning: Competition authorities gain experience with digital market regulation through Article 102 TFEU enforcement, informing DMA implementation.²³⁶

Democratic accountability: The DMA's prescriptive rules, adopted through legislative process, are democratically accountable. Article 102 TFEU's ex post enforcement, subject to judicial review, is judicially accountable.²³⁷

International coordination: The EU can harmonize digital regulation through the DMA while maintaining flexibility in applying competition law consistent with international norms.²³⁸

6.3.2 Persistent Tensions and Challenges

Nevertheless, tensions remain.²³⁹

Legal uncertainty: Gatekeepers face uncertainty regarding which legal framework will govern their conduct and what standards will apply. A practice that violates the DMA might have a different status under Article 102 TFEU.

²³⁴ Flexibility of hybrid approach accommodates diverse conduct types.

²³⁵ Adaptive capacity through DMA specification procedures and Article 102 TFEU case development.

²³⁶ Institutional learning: experience with Article 102 TFEU informs DMA implementation.

²³⁷ Democratic accountability (DMA legislation) balanced with judicial accountability (Article 102 TFEU judicial review).

²³⁸ International coordination easier when maintaining traditional competition law alongside specialized regulation.

²³⁹ Persistent tensions: legal uncertainty, double jeopardy, resource allocation, doctrinal consistency.

Different investigation timelines, proof standards, and sanctions create complexity.²⁴⁰

Double jeopardy: Despite proposals for coordination, risk of overlapping enforcement and inconsistent outcomes remains. Judicial development of ne bis in idem principles regarding the DMA is pending and creates uncertainty.²⁴¹

Enforcement resource allocation: Parallel enforcement frameworks require duplicative investigative resources. The Commission may face incentive to pursue conduct under both frameworks to maximize sanctions rather than selecting the most appropriate framework.²⁴²

Doctrinal tension: The DMA's presumptive rules and Article 102 TFEU's contextual analysis reflect different assumptions about digital markets and may reach different conclusions about the same conduct. This creates potential inconsistency.²⁴³

Global coordination challenges: Non-EU jurisdictions employ traditional competition law approaches to digital markets (e.g., US consumer welfare standard). The EU's hybrid DMA-competition law approach differs from global norms, creating coordination challenges and potential forum-shopping.²⁴⁴

6.4 Normative Perspective: Should the DMA Eventually Displace Article 102 TFEU?

A normative question remains: should the DMA eventually displace Article 102 TFEU's application to digital markets?²⁴⁵

²⁴⁰ Gatekeepers face complexity navigating multiple legal frameworks with different timelines and standards.

²⁴¹ Ne bis in idem uncertainty pending CJEU guidance creates compliance challenges.

²⁴² Risk of enforcement inefficiency if Commission pursues both frameworks opportunistically.

²⁴³ Doctrinal tension between DMA presumptions and Article 102 TFEU contextualism may yield inconsistency.

²⁴⁴ Global coordination challenging when EU employs unique DMA-competition law hybrid.

²⁴⁵ Normative question: should DMA eventually displace Article 102 TFEU?

6.4.1 The Case for Displacement

Some scholars and practitioners argue that the DMA should eventually become the exclusive regulatory framework for digital markets.²⁴⁶ Arguments include:

1. The DMA is specialized, modern regulation designed specifically for digital platforms. Article 102 TFEU is old, general law developed for diverse markets. Specialized regulation is more appropriate.²⁴⁷
2. DMA's prescriptive rules provide greater legal certainty than Article 102 TFEU's contextual analysis. Gatekeepers can understand their obligations clearly under the DMA.²⁴⁸
3. DMA enforcement is faster than Article 102 TFEU investigations. Exclusive DMA enforcement would reduce investigation timelines and enable faster remedial response.²⁴⁹
4. Multiple legal regimes addressing the same conduct create inconsistency and confusion. A single, unified framework would be coherent.²⁵⁰
5. The DMA was adopted through democratic legislative process; Article 102 TFEU enforcement is quasi-judicial. Democratic rule-making is preferable to judge-made law.²⁵¹

6.4.2 The Case for Retention of Article 102 TFEU

²⁴⁶ Arguments for DMA displacement: specialization, certainty, efficiency, coherence, democratic accountability.

²⁴⁷ Specialized regulation argument: DMA tailored for digital platforms versus Article 102 TFEU's universal application.

²⁴⁸ Certainty argument: DMA's prescriptive rules versus Article 102 TFEU's contextual analysis.

²⁴⁹ Efficiency argument: faster DMA enforcement versus prolonged Article 102 TFEU investigations.

²⁵⁰ Coherence argument: single framework eliminates inconsistency from multiple legal bases.

²⁵¹ Democratic accountability argument: legislative DMA versus quasi-judicial Article 102 TFEU enforcement.

Conversely, retention of Article 102 TFEU alongside the DMA offers advantages.²⁵²

1. Article 102 TFEU's contextual approach accommodates novel conduct and diverse circumstances. Exclusive reliance on prescriptive DMA rules might miss important forms of abuse.²⁵³
2. Article 102 TFEU's effects-based framework enables proportionate enforcement—conduct causing minimal harm receives minimal enforcement.²⁵⁴ DMA's absolute prohibitions lack this proportionality.²⁵⁵
3. Article 102 TFEU's framework for pro-competitive justifications is more sophisticated. Exclusive DMA enforcement might prohibit beneficial conduct that could be justified.²⁵⁶
4. Article 102 TFEU reflects globally-shared competition law principles. The DMA is uniquely European. Maintaining Article 102 TFEU facilitates global legal convergence.²⁵⁷
5. Article 102 TFEU is subject to full judicial review by EU Courts. DMA decisions receive potentially more deferential review. Judicial oversight provides important constraints on administrative power.²⁵⁸

6.4.3 The Presumption Favoring Coexistence

²⁵² Arguments for retaining Article 102 TFEU: flexibility, proportionality, justifications, global convergence, judicial oversight.

²⁵³ Flexibility argument: Article 102 TFEU accommodates novel conduct DMA cannot anticipate.

²⁵⁴ Proportionality argument: Article 102 TFEU's effects-based approach enables proportionate enforcement.

²⁵⁵ Justifications argument: Article 102 TFEU's framework for pro-competitive justifications more sophisticated than DMA's.

²⁵⁶ Concern that DMA might prohibit beneficial conduct unreasonably.

²⁵⁷ Global convergence argument: Article 102 TFEU reflects worldwide competition law principles.

²⁵⁸ Judicial oversight argument: Article 102 TFEU's full judicial review versus potentially deferential DMA review.

On balance, this thesis concludes that preserving both frameworks is preferable to complete displacement:²⁵⁹

The DMA’s presumptive approach is valuable for addressing predictable, widespread harms that could not be efficiently addressed through effects-based competition law. However, law and regulation require flexibility to accommodate novel circumstances, changed market dynamics, and competing policy objectives. Article 102 TFEU’s continued availability preserves regulatory flexibility without sacrificing the DMA’s benefits.²⁶⁰

Rather than conceiving the DMA as displacing Article 102 TFEU, the relationship might be understood as a “layered” enforcement regime, with the DMA providing the primary, anticipated regulatory layer and Article 102 TFEU providing a secondary, adaptive layer for unanticipated or contextual conduct.²⁶¹

The Commission should, however, adopt clear principles governing when each framework is appropriate, developing predictable practice regarding enforcement selection. Gatekeepers should have reasonable ability to anticipate which framework governs their conduct, even if both frameworks remain technically available.²⁶²

6.5 Future Developments and Evolution

6.5.1 Anticipated Regulatory Evolution

²⁵⁹ Conclusion favoring preservation of both frameworks rather than DMA displacement.

²⁶⁰ Layered enforcement approach: DMA primary for anticipated harms; Article 102 TFEU secondary for complex/novel conduct.

²⁶¹ Conceptual framework: DMA as primary regulatory layer; Article 102 TFEU as adaptive secondary layer.

²⁶² Gatekeepers should have reasonable ability to anticipate which framework applies to their conduct.

Several developments are likely to shape the DMA-Article 102 TFEU relationship:²⁶³

Maturation of DMA enforcement: As the DMA matures beyond its initial phase (2023-2024), enforcement practice will stabilize and case law will develop. Interpretation of DMA obligations will become more settled.²⁶⁴

CJEU guidance on double jeopardy: The Court of Justice will likely be called upon to pronounce on *ne bis in idem* in the DMA context. This guidance will clarify whether parallel enforcement is permissible.²⁶⁵

Specification procedures and technical standards: The Commission will develop detailed specification decisions implementing DMA obligations. These technical standards may eventually consolidate and formalize, effectively creating secondary “technical law” complementing the DMA.²⁶⁶

DMA amendment and scope expansion: The Commission has suggested that the DMA’s scope might be expanded to include additional core platform services (cloud computing, AI services) and that DMA obligations might be strengthened based on enforcement experience. Amendment processes will reveal the DMA’s evolution trajectory.

National and sectoral variations: Member States and sectoral regulators may develop complementary or competing regulatory frameworks. Germany’s Digital Markets Act §19a GWB, Italy’s Digital Markets Directive, and similar national instruments create a patchwork of digital regulation.²⁶⁷ This fragmentation may create pressure for EU-level harmonization, potentially strengthening or modifying the DMA.²⁶⁸

²⁶³ Future regulatory evolution will be shaped by maturation of DMA enforcement and CJEU guidance.

²⁶⁴ DMA enforcement practice will stabilize and interpretive jurisprudence will develop.

²⁶⁵ CJEU guidance on *ne bis in idem* in DMA context is anticipated and essential.

²⁶⁶ Specification decisions will develop into *de facto* technical law complementing DMA.

²⁶⁷ National initiatives (e.g., Germany’s § 19a GWB) create patchwork of digital regulation.

²⁶⁸ Fragmentation pressure may drive EU-level harmonization through DMA amendments.

6.5.2 Institutional Innovations

Future developments may include institutional innovations addressing current tensions:

1. The Commission might develop unified investigation protocols ensuring consistent application of both frameworks.²⁶⁹
2. The Commission might develop model specification decisions for common DMA obligations, providing gatekeepers guidance regarding expected compliance.²⁷⁰
3. The Commission might establish formal liaison with national competition authorities and sectoral regulators to coordinate enforcement.²⁷¹
4. The Commission might develop coordination mechanisms with non-EU regulators (US, UK, others) to achieve convergence regarding digital platform regulation.²⁷²

6.6 Final Conclusions

This thesis has examined the relationship between Article 102 TFEU and the Digital Markets Act, seeking to delineate their respective scopes and determine the appropriate division of enforcement labor.

First, the thesis concludes that these instruments pursue compatible but distinct objectives. Article 102 TFEU enforces competition law's traditional objective of maintaining competitive markets and protecting consumer welfare. The DMA explicitly pursues contestability and fairness as regulatory objectives, reflecting expanded concern for user autonomy, business user opportunity, and structural independence of digital services.

²⁶⁹ Unified enforcement protocols would enhance consistency across DMA and Article 102 TFEU.

²⁷⁰ Model specification decisions would provide gatekeepers guidance regarding expected compliance.

²⁷¹ Formal liaison with national authorities and sectoral regulators would improve coordination.

²⁷² International coordination mechanisms with US, UK, others would support regulatory convergence.

Second, the thesis concludes that the instruments employ complementary methodologies. Article 102 TFEU's ex post, effects-based approach enables flexible, contextualized enforcement of universal competition law. The DMA's ex ante, rules-based approach enables swift, certain enforcement of digital platform-specific obligations. Neither methodology is superior; both offer distinct advantages suited to different circumstances.

Third, the thesis concludes that current practice reflects an emerging division of labor, with the DMA becoming the primary enforcement tool for designated gatekeepers' core platform services conduct and Article 102 TFEU retaining significance for non-designated undertakings and contextual, novel, or complex conduct.

Fourth, the thesis identifies persistent tensions regarding double jeopardy, legal certainty, and institutional coordination. These tensions cannot be fully resolved without further legislative or judicial guidance. The Court of Justice's pronouncements on *ne bis in idem* in the DMA context will prove crucial.

Finally, the thesis concludes that preserving both frameworks, with clear principles governing enforcement selection, is preferable to complete displacement of Article 102 TFEU by the DMA. The DMA represents important regulatory progress in addressing digital platform power through specialized, prospective regulation. However, law requires adaptive flexibility to accommodate novel circumstances and competing policy objectives. Article 102 TFEU's continued availability preserves this flexibility while enabling the DMA's benefits.

The EU's hybrid regulatory approach—combining specialized, prescriptive digital platform regulation (the DMA) with flexible, universal competition law (Article 102 TFEU)—represents a sophisticated response to unprecedented regulatory challenges. Future development and maturation of both frameworks will determine whether this hybrid approach proves durable and effective in addressing digital market power.

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