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# Procedures in the DMA: non-compliance navigation – Exploring the European Commission’s space for discretion and informality in procedure and decision-making in the Digital Markets Act

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## ABSTRACT

The enforcement of the Digital Markets Act (DMA) against digital gatekeepers has reached the stage of non-compliance cases. The European Commission as the sole enforcer needs to navigate the unclear procedural territory foreseen in the DMA for such cases. The potential paths differ from procedures in competition law enforcement. The DMA offers a range of options in case of suspected non-compliance, including specification procedures. Yet, there is less space for informal activities of the Commission, such as settlements. The DMA also gives very limited room to commitment decisions that became a standard in antitrust. A particular problem arises when gatekeepers adapt their behaviour during proceedings. In the logic of the DMA, such delayed compliance must still lead to a finding of non-compliance. The procedural routes show that the DMA is a hybrid of top-down-enforcement and negotiated enforcement with a three-step-enforcement escalation.

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## 1. Introduction

What happens when the European Commission suspects non-compliance of a gatekeeper firm with the obligations from the Digital Markets Act (DMA)? The procedural framework for decision-making under the DMA is new and unique and will be tested over the coming months

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and years. Some elements have been copied from competition law, others have not. In this paper, we look into three questions:

- What are the procedural routes that the Commission can take when it suspects non-compliance (part I)?
- What are the limits of the Commission's discretion and unwritten powers? How much room is there for informal activities (part II)?
- What do the findings reveal about the DMA as a novel act of regulation (part III)?

These questions are currently highly relevant. The European Commission has entered the enforcement phase of the Digital Markets Act (DMA). The first non-compliance investigations into Alphabet, Apple, and Meta are in progress,<sup>1</sup> and the Commission also opened its first procedures under Art. 8(2) DMA to impose implementing decisions related to Apple's interoperability.<sup>2</sup> These cases will shape the principles for DMA enforcement.

The DMA represents an interesting hybrid between a top-down classic enforcement model and a more consensual, negotiation-oriented regulatory model. While negotiations and dialogue are – to a certain extent – unavoidable in a relationship between regulator and regulated, the DMA also gives a clear mandate to the Commission for tough enforcement. Once a non-compliance investigation is opened, the Commission must see the procedure through and either establish compliance or non-compliance. There is no competence to issue binding commitment decisions outside of investigations into systemic non-compliance. Moreover, we find that there is, or should be, no option for the Commission to stop an investigation without findings. While a broad reading of Art. 8(7) DMA may lead to the impression that the Commission has the discretion to end cases without establishing either compliance or non-compliance, we argue that a narrow reading of this provision is required in light of the mandate given to the Commission through the text, design, and legislative history of the DMA.

There are opportunities for the gatekeeper and Commission to negotiate before a non-compliance investigation is opened, possibly with the involvement of third parties, under Art. 8(3) DMA. The Commission also

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<sup>1</sup>European Commission, Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Markets Act, Press Release of 25 March 2024; DMA.100055, Meta - Article 5(2), Decision to open proceedings based on Art.20 and Art.29 of 25 March 2024; DMA.100193, Alphabet - Online Search Engine - Google Search - Art. 6(5), Decision to open proceedings based on Art.20 and Art.29 of 25 March 2024; DMA.1000185, Apple - Operating systems - iOS - Art. 6(3), Decision to open proceedings based on Art.20 and Art.29 of 25 March 2024.

<sup>2</sup>European Commission, Commission starts first proceedings to specify Apple's interoperability obligations under the Digital Markets Act, Press Release of 19 September 2024.

has the ability to impose Implementing Decisions without attaching sanctions. This demonstrates that there is discretionary space for the Commission to choose between the “carrot” or the “stick”. We aim to categorize the repertoire of formal and informal options available to the Commission and establish some limiting principles to this discretion. Where negotiations between the gatekeeper and the Commission do take place, third party involvement is important.

The article is structured as follows: in section 2, we discuss the different procedures that the Commission can use to intervene on the basis of the DMA, these include the non-compliance procedure, specification procedure, anti-circumvention procedure, market investigations, and the use of fines and penalties. Section 3 discusses the Commission’s discretionary space within these procedures, as well as possibilities to resolve cases by informal means. Here, we argue that the space for the Commission to create new powers or rely on informal activities should be considered limited as to ensue the effectiveness of the DMA. Section 4 contains our conclusions, where we argue in favour of rigorous enforcement and a strict interpretation of the mandate of the Commission in order to safeguard the effectiveness of the DMA in resolving structural competition issues in digital markets.

## 2. Procedural routes in the DMA

The starting point of DMA enforcement is the compliance report by the gatekeeper (Art. 11 DMA). According to Art. 8(1) it is the gatekeeper’s duty to “ensure and demonstrate” effective compliance with the DMA. The yearly compliance report has to be “detailed and transparent”. It serves as the first “line of defence” of an entity under observation. Reporting may reveal the critical points of implementation, but the gatekeepers can also use it strategically – and they did in the first round – to test the limits of what can be considered compliant.<sup>3</sup> Still, it is a remarkable turn in comparison to traditional enforcement, e.g. in competition law, that the subject of regulation must pre-emptively explain its adherence to the law, and even prove *effective* implementation.<sup>4</sup>

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<sup>3</sup>See Jasper van den Boom and Sarah Hinck, ‘A Week of Workshops: Observations from the DMA Compliance Workshops’ (*SCiDA Blog*, 27 March 2024), available at <https://scidaproject.com/2024/03/27/a-week-of-workshops-observations-from-the-dma-compliance-workshops/> Van den Boom and Hinck (2024a).

<sup>4</sup>Torsten Körber, Lessons from the Hare and the Tortoise: Legally Imposed Selfregulation, Proportionality and the Right to Defence Under the DMA, *Neue Zeitschrift für Kartellrecht* 2021, 379–84 (Part 1), 436–44 (Part 2): [t]he DMA goes far beyond such a mere reversal of the burden of proof. By making the obligations in Art. 5 and 6 DMA self-executing, the DMA not only reverses the burden of proof, but also the “burden of intervention”. According to Art. 7 (1) DMA, the gatekeepers – not the Commission – have to make sure that the measures are effective in achieving the objective of the relevant obligation”.

What next if the Commission suspects that a gatekeeper is non-compliant with the obligations from Articles 5, 6 and 7 DMA? In this part, we explore the procedural routes that are clearly set out in the law.

## **2.1. Non-compliance procedure**

If the Commission wants to take action against non-compliance (Art. 29), the normal route is opening a non-compliance procedure under Art. 20. Opening a procedure happens by means of decision, triggering an official investigation in the conduct, thus binding the Commission by the provisions in the DMA governing the procedure officially.

### **2.1.1. Opening of the procedure**

Art. 20 DMA sets an official starting point for the procedural route. This is different from competition law where there is no formal decision to open a case at an early stage.<sup>5</sup> The decision triggers the formality of proceedings, a timeframe and the need to close an investigation formally by means of decision.<sup>6</sup>

Art. 20 does not specify which elements have to be written down in the opening decision. In the first decisions to open a case, the Commission named the core platform service, cited the relevant provisions and recitals, referred to measures named in the Compliance Report, gave a first idea of what it looks into and also pointed at Art. 38(7), relieving national authorities of their parallel powers.<sup>7</sup>

During the investigation, the Commission has the powers granted to it under Articles 21-23. It can request information, carry out interviews and take statements, and conduct inspections on-site.

Opening a procedure following Art. 20 thus provides the Commission with the tools and information to establish non-compliance and to collect evidence. However, once the procedure has been opened, the Commission has to respect time limits and procedural safeguards. The Commission should endeavour to end a non-compliance investigation within 12 months after starting it. Implementing procedures should be concluded within 6. We argue that, once an investigation has been opened, the

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<sup>5</sup>See for example Case DMA.100206, Apple – new business terms, Decision to open proceedings based on Art.20 and Art.29 of 24 June 2024. For an example from antitrust cf. the investigation into possible anticompetitive practices by Microsoft regarding Teams, Commission press release of 27 July 2023. In the latter, announcing the opening of an investigation is sufficient.

<sup>6</sup>Rupprecht Podszun in Rupprecht Podszun (ed), Digital Markets Act (Beck Nomos Hart 2024), Art. 20 paras 1–5.

<sup>7</sup>See eg COM 25.3.2024, DMA.100193 – Alphabet Online Search Engine – Google Search – Article 6(5).

Commission does not have the competence to simply stop investigating.<sup>8</sup> It must thus select cases carefully, for which it can reach a decision within the relevant timeframe, or at least within a reasonable timeframe.

For the Commission, sticking to the timeframe is not a must, but a should. The word “endeavour” implies that there is a “best effort” obligation on the Commission to resolve cases in a timely manner, but the 12 months should not be considered a definitive deadline.<sup>9</sup> Such a provision by the legislator still has a significant meaning. Firstly, it requires the Commission to act swiftly and pursue cases with full force. The Commission must not leave a case unattended for a while. Secondly, it defines the rights of defence for the parties concerned: The parties, which are under a compliance-obligation anyway, must cooperate. If they try to drag out the proceedings, they must not get away with this. It follows from the time constraints that the defence must be reduced to main points and must be equally time-efficient.

### ***2.1.2. Decisions after opening a non-compliance procedure***

The decision issued by the Commission can either be a decision that no violation of the DMA rules had been found (Art. 29(7) DMA) or that there is a case of non-compliance (Art. 29(1) DMA). In case of a non-compliance finding, the Commission issues a cease-and-desist order and requires a compliance plan from the gatekeeper (Art. 29(5) DMA). It may also hand down a fine (Art. 30 DMA). This is the straightforward “Plan A” for top-down enforcement of the Regulation.

There is still some ambiguity as to the meaning of Art. 29(7) and the ending of procedures. Art. 29(7) merely states that the Commission must end its investigation by means of decision if it *decides not to adopt a non-compliance decision*. Conceptually, this is different from a requirement of the Commission to find that there is no non-compliance or, without the double negative, without affirming that the behaviour by the gatekeeper was compliant in the first place.

The discretionary space maintained by the Commission is then determined by a broad or narrow reading of Art. 29(7). A broad reading would suggest that the Commission can indeed find that the gatekeeper has made sufficient changes and that it is no longer necessary to continue the investigation. It may then decide to close the investigation by finding that the issue has been resolved. The Commission cannot,

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<sup>8</sup>See the discussion *infra* in section 3.

<sup>9</sup>See Zachary Miller, Best Efforts: Differing Judicial Interpretations of a Familiar Term, 2006 48 Ariz. L. Rev. 615 on the idea of best effort obligations.

however, make these changes binding. Thus, there is a risk that the undertaking reverts the changes (or the effects thereof) after the Commission ends its investigation.

A narrow reading would suggest that the Commission should establish that the behaviour that was initially investigated was either non-compliant or compliant.<sup>10</sup> This would mean that the Commission's ability to take a decision is binary: it either takes an Art. 29(1) decision and establishes non-compliance, or an Art. 29(7) decision and finding that the investigated behaviour was compliant. It would not be possible to end the investigation without making findings, nor is it possible to make the voluntary commitments offered by the gatekeeper binding. Once non-compliance is established, the Commission must obligate the investigated gatekeeper to issue a new compliance plan, even if the changes have already been made (and possibly informally accepted by the Commission as compliant).

In competition law, the Commission clearly has a wider range of options. According to Art. 7 Regulation 1/2003 it can order the undertaking in question to end the infringement. To this extent, it can introduce behavioural and structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.<sup>11</sup> The Commission has discretion in how the remedies are developed. In some instances, the Commission will give clear orders to the undertaking to end certain types of behaviour by issuing strict and comprehensive behavioural measures. In *Baltic Rail*, where the infringing party had removed a part of a railroad track to prevent competition, the Commission ordered specifically that the infringing party had to either (a) restore the part of the track that was removed or (b) remove any disadvantages faced by competitors on alternative routes to seaports.<sup>12</sup> Conversely, in *Google Shopping*, the Commission left the design of the mechanism for ending the infringement up to Google itself. The Commission found that Google should end the infringement and refrain from taking any measures with an equivalent effect.

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<sup>10</sup>Juristically, one could argue that the Commission may also find that behaviour is not non-compliant. The double negative – not non-compliant – would mean that the Commission does not express that the behaviour is compliant but that it does find there was no infringement. For practical purposes, this would be the same conclusion as finding that the investigated behaviour is considered compliant, at least at the time that the decision is taken.

<sup>11</sup>On remedies see also Friso Bostoen and David van Wamel, 'Antitrust Remedies: From Caution to Creativity' (2023) 14(8) *Journal of European Competition Law & Practice*, December, 540–52, <https://doi.org/10.1093/jeclap/lpad051>.

<sup>12</sup>Commission Decision C(2017) 6544 final of 2 October 2017 relating to proceedings under Article 102 TFEU (Case AT.39813 – *Baltic Rail*).

However, “[A]s there is more than one way in conformity with the Treaty of bringing that infringement effectively to an end, it is for Google and Alphabet to choose between those various ways”.<sup>13</sup>

The DMA – in principle – works differently. It is the gatekeeper’s responsibility to effectively comply with the obligations. The Commission does not impose remedies, but instead investigates whether the standard of effective compliance is met.<sup>14</sup> This means that interventions by the Commission simply state that the gatekeeper has to change the behaviour to comply to an ex-ante standard. This does not entail the implementation of a remedy designed by the Commission.

With this approach, the DMA attempts to resolve the issues related to remedy design. In major cases against Google, the imposed remedies were widely considered ineffective.<sup>15</sup> Not only did the remedies come too late, but they were also designed in a way that did not restore competition or end the anti-competitive effects associated with the harms in the first place.<sup>16</sup> Competition law, with its focus on clearly defined markets and its nature as resolving anti-competitive behaviour through “one-off” interventions, showed an inability to capture the complex conduct and the harms associated with digital markets, where cross-market effects are prevalent and pronounced. The DMA works as a continuous ex-ante regime.<sup>17</sup> With the threat of sanctions and systematic non-compliance looming, the Commission is able to keep gatekeepers around the table in an ongoing process.<sup>18</sup>

### 2.1.3. *Delayed compliance*

It is not yet clear what happens if the Commission starts an investigation and sees an infringement, but the infringement is stopped before a decision is taken. We call this “delayed compliance”.

In competition law, the Commission may take such a situation and simply stop the investigation if it no longer has priority. It is also

<sup>13</sup>Case AT.39740, Commission Decision C(2017) 4444 final in Google Search (Shopping) of 27 June 2017, para. 698.

<sup>14</sup>Körber (2021), 15–17.

<sup>15</sup>Podszun (2024), para. 10.

<sup>16</sup>Philipp Marsden, ‘Google Shopping for the Empress’s New Clothes – When a Remedy Isn’t a Remedy (and How to Fix It)’ (2020) 11(10) *JECLAP*, 553–60; Thomas Höppner, Google’s (Non-) Compliance with the EU Shopping Decision, 2020 *SSRN Electronic Journal*, online: <https://ssrn.com/abstract=3700748>; see also Fiona Scott Morton Alissa Cooper and others, ‘Judicial Remedies To Restore Competition in the Market for General Search’ 2024 *Research Paper for Yale Tobin Center*, online: <https://tobin.yale.edu/research/judicial-remedies-restore-competition-market-general-search>.

<sup>17</sup>Heike Schweitzer, The art to make gatekeeper positions contestable and the challenge to know what is fair: A discussion of the Digital Markets Act Proposal, 2021 *Zeitschrift für Europäisches Privatrecht*, 503.

<sup>18</sup>*ibid* 505.

expressly empowered to find that an infringement had been committed in the past, Art. 7(1)4 Regulation 1/2003, when it has a legitimate interest to issue such a decree. The DMA is silent on this, but it makes clear that a proceeding that has been formally opened by decision must be closed by decision – either finding non-compliance (Art. 29(1) DMA) or closing the proceedings with no such finding.

The wording of Art. 29(1) (“does not comply”) seems to indicate an on-going violation. This interpretation would not make sense in light of the text and design of the DMA. It would allow gatekeepers to adapt their behaviour a moment before the Commission is to take a non-compliance decision. This would give no safeguard to the Commission that the change is durable. Right after closing the proceedings, the behaviour could be changed again. Since the Commission is under a duty to close proceedings (and in a strict timeframe), this could deprive the Commission of its enforcement power. As noted in Rec. 65(3) DMA, the Commission’s use of its discretion should not undermine the effectiveness of the Regulation.

This could be avoided if the Commission, under the DMA, could make commitments binding before closing a procedure. This is a standard in competition law. Yet, the Commission has no power to take commitments. In the original proposal of the DMA text, the Commission had included a provision allowing it to make commitments binding, but this was removed in subsequent versions.<sup>19</sup> We argue that the European Parliament – with the removal to accept commitments in the adopted version – has expressed the intent to investigate and take binding decisions also in the case of delayed compliance: if a deliberate choice has been made to remove a formal means of accepting commitments, the use of informal means is certainly not intended.

In our view, accepting delayed compliance is also not a tenable option to achieve effective compliance in practice. Once the Commission has opened an investigation and finds that the gatekeeper did not adhere to its obligations at the time the investigation was opened, it

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<sup>19</sup>The original proposal included the power to take binding commitments for any type of non-compliance investigation in Art. 23, see European Commission, Proposal for a regulation of the European parliament and of the council on contestable and fair markets in the digital sector, 2020 COM/2020/842 final. This article was removed by the European Parliament. In the subsequent negotiation between the European Council and the Parliament, the option for commitments related to non-systematic compliance was introduced in art. 25 DMA. This has found its way into the final text. See European Parliament, Amendments adopted by the European Parliament on 15 December 2021 on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector, 2021 TA/2021/0499, amendment 185, online: [https://www.europarl.europa.eu/RegData/seance\\_pleniere/textes\\_adoptes/definitif/2021/12-15/0499/P9\\_TA\(2021\)0499\\_EN.pdf](https://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2021/12-15/0499/P9_TA(2021)0499_EN.pdf)

must see it through and issue a non-compliance decision (Art 20 io. 29 DMA).

The risks of accepting delayed compliance are a particularly thorny issue in the DMA. In their early compliance efforts, gatekeepers have demonstrated that they have the ability and often the incentive to comply in a manner that best serves their own interests and is – in practice – ineffective.<sup>20</sup> This has resulted in the Commission opening non-compliance investigations within 2 weeks after the compliance reports were submitted by the gatekeepers.<sup>21</sup> If gatekeepers have a chance to adjust their behaviour later, without fear of sanctions and in a non-binding way, to end a non-compliance investigation, this invites regulated entities to commit attempts to game the system.<sup>22</sup> It allows the gatekeeper to submit inadequate compliance proposals, see which ones are investigated, and then make changes to the investigated behaviours. It could also mean that constant adjustments are made that keep the Commission busy in the tight timeframe. In order to keep the gatekeepers seriously engaged, the stick is just as much needed as the carrot. The Commission should thus offer guidance and specification where suitable (the carrot) and impose sanctions where there was or is actual non-compliance (the stick).

The Commission could however consider taking voluntary delayed compliance into account in the imposed fines and penalties as a means of stimulating quick changes in behaviour. Where a gatekeeper rapidly and voluntarily changes its behaviour to comply with its obligations, the Commission may lower the fine or even forego fining the gatekeeper in question. This would allow the Commission to end the investigation by means of official decision – which counts towards the thresholds for systemic non-compliance – while also recognizing

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<sup>20</sup>Case DMA.100055, Meta - Article 5(2), Decision to open proceedings based on Art.20 and Art.29 of 25 March 2024; Case DMA.100193, Alphabet - Online Search Engine - Google Search - Art. 6(5), Decision to open proceedings based on Art.20 and Art.29 of 25 March 2024; Case DMA.1000185, Apple - Operating systems - iOS - Art. 6(3), Decision to open proceedings based on Art.20 and Art.29 of 25 March 2024.

<sup>21</sup>See European Commission, Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Markets Act, Press Release of 25 March 2024; See Case DMA.100206, Apple – New Business Terms, Commission Decision of 25 June 2024; Case DMA.100193, Alphabet – Online Search Engine – Google Search – Art. 6(5), Commission Decision of 25 March 2024; Case DMA.100185, Apple – Operating Systems – iOS -Art. 6(3) DMA, Commission Decision of 25 March 2024; Case DMA.100075, Alphabet – Online Intermediation services – App Stores – AppStore – Art. 5(4), Commission Decision of 25 March 2024; DMA.100055, Meta – Article 5(2), Commission Decision of 25 March 2024.

<sup>22</sup>See Jan den Hertog, 'Review of Economic Theories of Regulation', 2021 *Discussion Paper Series nr: 10–18* on how allowing arbitrariness and too much discretion into a regulatory decision may increase the risk of capture, especially when paired with information asymmetry between the regulator and the regulated entity.

the efforts of the gatekeeper in resolving the investigated non-compliance.<sup>23</sup>

## **2.2. Specification procedure**

The Commission has opportunities to provide guidance to gatekeepers on the desired remedies, even before an investigation is opened. When finding non-compliance of Articles 6 or 7 DMA, the Commission may decide to open the specification procedure under Art. 8(2) and (3) with a decision according to Art. 20 DMA. This is an alternative to the non-compliance route set out above as “plan A”. The self-executing obligations under Art. 5 DMA are expressly excluded from the specification procedure. This indicates that for Art. 5 DMA the Commission is limited even further in its discretion to rely on negotiations – both formal and informal – and thus has a stronger mandate to investigate and sanction potential non-compliance through formal means. Here, the stage of deliberation between the Commission, the gatekeeper, and third-parties should be short and aim at establishing or rebutting non-compliance.<sup>24</sup>

Where it does pertain to the obligations under Art. 6 and 7 DMA, the specification process under Art. 8 DMA opens up the possibility for a gatekeeper to negotiate with the Commission to a certain extent.

According to Art. 8(3) DMA, a gatekeeper may request the Commission to engage in a process to determine whether the measures to ensure compliance with Art. 6 and 7 DMA are effective in achieving the objective of the relevant obligations. The Commission has the discretion to decide whether it wants to enter into such negotiations. However, it has to respect the principles of equal treatment, proportionality, and good administration. The Commission must therefore motivate why it accepts or refuses a gatekeeper’s request to enter into negotiations. It must act consistently towards any gatekeeper with similar requests in the future. This indicates that the Commission must be careful with either accepting or refusing negotiations and publish relevant information so that other gatekeepers can form reasonable expectations, thereby limiting the risk of the idea that “secret negotiations” are taking place between certain gatekeepers and the

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<sup>23</sup>This may also prevent debate on whether the imposed fines and penalties are proportional in light of the changed behaviour of the firm. On the proportionality of fines in EU competition law see Hans Gilliams, *Proportionality of EU Competition Fines: Proposal for a Principled Discussion*, 2014 *World Competition* 37/4, 435–58.

<sup>24</sup>See *supra*, informal negotiations on the side of the Commission under Art. 8(2) DMA should be limited to establishing whether there are indicators of non-compliance, if negotiations go further on the substance, the Commission should open an investigation following Art. 8(2) io. 20 DMA.

Commission. The gatekeeper must also publish a summary of their request, according to Art. 8(3).

Following the first paragraph of Art. 8(2), the Commission may only initiate negotiations with the gatekeeper if it opens an official investigation under Art. 20 DMA. Thus, the Commission is precluded from starting informal negotiations with the gatekeeper on its own accord. The Commission also retains the right to impose sanctions under Art. 29, 30 and 31 DMA in this procedure, if it deems it desirable to do so. Art. 8(2) DMA is a step towards formalizing the negotiation and debate between the Commission and the gatekeeper. Following Art. 8(2), the Commission can open a procedure to adopt an implementing act. This implementing act specifies for the gatekeeper how they must comply with the law, at least with respect to Art. 6 and 7 DMA.

The procedure under Art. 8(2) and (3) is a kind of second chance compliance report. Again, it is the gatekeeper putting a proposal on the table. If these measures (or the version thereof after the assessment by the Commission) are made binding through an implementing act (Art. 8(2)), the gatekeeper *may* avoid a non-compliance decision and fines.<sup>25</sup> This comes close to a true commitment decision as known under Art. 9 Regulation 1/2003 in competition law, with some notable differences: first, fines and sanctions are still on the table even if an implementing decision is reached; second, the Commission may reopen the investigation at any time and for a broad spectrum of reasons if it suspects non-compliance or circumvention (Art. 8(9) & 13 DMA).

The procedure as set out in Article 8 prevents that negotiations between the Commission and gatekeepers become too drawn out, at least where it concerns points of priority on the Commission's agenda. By allowing the gatekeeper to come forward about issues not yet investigated, the DMA provides an opening to show goodwill towards effective compliance. Here, the Commission has been granted a mandate to negotiate with the gatekeeper. However, where the Commission moves on its own accord, it must open negotiations through a decision under Art. 20 so that it is bound by the timelines and standards associated with formalized procedures.

By limiting the procedure to six months, the DMA prevents a proverbial game of regulatory ping pong between gatekeeper and Commission in cases initiated by the Commission, while allowing for longer

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<sup>25</sup>Emphasis added on *may* because the Commission still retains the power to impose fines in Art. 8(2) DMA procedures, but can choose to forego fining the gatekeeper if they cooperate faithfully in the specification procedures (Art. 30(1)(b)).

negotiations and more back-and-forth in cases brought forward by the gatekeeper. The design of the DMA also ensures that gatekeepers cannot abuse this right, for instance by overloading the Commission with requests for specification, by clearly and explicitly stating that it is up to the Commission to decide whether it will enter into negotiations. This again affirms the idea that the Commission has a mandate to enforce the law, and that negotiations are secondary.

While Art. 8 DMA contains multiple hints that third parties should be heard and that their interests should be served in the specification procedure, their actual rights are limited. Firstly, the wording of Art. 8 prohibits business users or other interested users from requesting the opening of a specification procedure under Art. 8(2) or even requesting the Commission to enter into negotiations under Art. 8(3). According to Art. 8(5), the Commission shall specify possible measures to be taken to ensure effective compliance. According to Art 8(6), the Commission shall publish a non-confidential summary of these measures to “enable interested third parties to provide comments”.

This would allow business users and third parties to react but does not invite them to participate in the procedure formally. Following Art. 8(8), the Commission must also ensure that there is no imbalance between the rights and obligations on business users, and that the measures do not themselves confer an advantage on the gatekeeper that is disproportional. However, the scope of this obligation is limited as it applies only to Art. 6(11) and (12) DMA, and it does not state how business users or third parties can comment or contribute to this balancing act.

The rights granted under Art. 8(5) and (6) are important to ensure transparency of the proceeding, especially because the specification procedure has an element of deal-making in the twilight where Commission and gatekeeper may compromise without taking due account of third-party rights. In the DMA, this should be viewed as even more undesirable than in competition law since Art. 1(1) stipulates that the DMA benefits business users and end users. This explicit cause prompts a strong role for third party involvement. In practice however, the role of third parties seems limited, as they cannot formally participate in these procedures but only give comments from the sidelines.

### ***2.3. Anti-circumvention procedure***

As we have just seen, for Articles 6 and 7-obligations, the DMA provides for the possibility of specification in proceedings with the Commission.

This route is not open for the more straight-forward Article 5-obligations which are thought to be self-executing and self-explanatory.<sup>26</sup> Yet, the Commission can decide on its own initiative that it investigates a case of circumvention (Art. 13 DMA) which it then can use to make specifications even for Article 5 (Art. 8(2)4). The Commission may thus, in cases of Art. 5 non-compliance, determine that it finds a circumvention.

In a move that may look surprising at first sight, the DMA extends the procedure of specification to cases of circumvention of the obligations, even if Art. 5 is concerned. According to Art. 13(7), the Commission may adopt an implementing act that specifies the measures the gatekeeper is to implement. One may think that it makes a huge difference – if a gatekeeper *infringes* Art. 5 DMA, it is hit with a non-compliance decision and a fine. If it *circumvents* the provision, it may get guidance in the form of a specification of measures (that it proposes itself to the Commission). Yet, Art. 8(8) makes it clear that the Commission can still exercise its power of finding non-compliance in such a case. For reasons of equal treatment, the Commission will usually have to use this procedure, otherwise there is an imbalance between proceedings against differing gatekeepers. As *Seeliger* puts it: “This makes it clear that circumvention is equivalent to direct infringement”.<sup>27</sup>

Furthermore, the use of sanctions may again ensure that gatekeepers effectively refrain from attempting to circumvent their obligations – much like they effectively need to refrain from non-compliance. If the gatekeeper can engage in practices that circumvent effective compliance and receive guidance on how to resolve this behaviour after it has been investigated, this may invite gatekeepers to innovate in a way that produces regulatory arbitrage, or circumventive innovation, where they focus their innovative efforts to avoid compliance, rather than achieve it.<sup>28</sup>

The anti-circumvention procedure has at its core the possibility for the gatekeeper to go into specification discussions with the Commission. This makes a distinction between infringement and circumvention necessary. *Franck & Peitz* have observed that – in order to establish that there is circumvention – the Commission will have to identify

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<sup>26</sup>Cf. Rec. 31 DMA; Rupprecht Podszun and Andreas Schwab in Rupprecht Podszun (ed), *Digital Markets Act* (Nomos Beck Hart, 2024), Art. 5 para. 3.

<sup>27</sup>Daniel Seeliger, Article 8, in Rupprecht Podszun (ed.), *Digital Markets Act* (Beck Nomos Hart 2024), Art. 13 para 30.

<sup>28</sup>Elizabeth Pollman, *Tech, Regulatory Arbitrage, and Limits*. 2019 *Eur Bus Org Law Rev* 20, 567–90, <https://doi.org/10.1007/s40804-019-00155-x>; Luke A Stewart, *The Impact of Regulation on Innovation in the United States: A Cross-Industry Literature Review*, 2010 *Information and Technology Foundation*; Knut Blind, *The Impact of Regulation on Innovation*, 2012 Nesta working paper series 12/02.

some type of market effect or harm associated with this behaviour. This opens up the matter of how to interpret DMA obligations. There will have to be some information exchange between the Commission and the regulated entity (and potentially third parties) to establish these effects. These effects will have to show that there is some level of equivalence between non-compliance with the obligation and the circumvention of it.<sup>29</sup> Combined, these steps of the effects analysis give the gatekeeper an opportunity to persuade the Commission that it is not circumventing the obligation, or that the circumvention does not lead to a market effect (and thereby does equate ineffective compliance).

Even after circumvention has been established, the gatekeeper still has the opportunity to negotiate with the Commission if this should result in a sanction or an implementing decision. Here, the leading question is whether the gatekeeper could have foreseen that its behaviour would be considered circumvention, or that it would lead to non-compliance.<sup>30</sup> A balance can be struck between legal certainty of the undertaking and the effectiveness of the anti-circumvention obligation to establish categories of “illegal” attempts at circumventions – which can be sanctioned – and other attempts at circumventions for which an effects-based approach is used.<sup>31</sup>

#### **2.4. Market investigations**

The DMA opens up the possibility to conduct market investigations. Such investigations are foreseen for three aims: the designation of gatekeepers (Art. 17), the finding of systematic non-compliance (Art. 18) and the addition of new services and practices to the DMA ambit (Art. 19). For the purposes of this paper – how to react to non-compliance – Art. 18 is the relevant element. It provides the Commission with the tool of market investigation where it suspects that the gatekeeper has engaged in systematic non-compliance.

The Commission must establish that two criteria have been met. First, it must demonstrate that the gatekeeper has systemically infringed the substantive obligations laid down in Art. 5, 6 and 7 DMA. According to Article 18(3), this can be assumed “where the Commission has issued at least three non-compliance decisions pursuant to Article 29 DMA against a gatekeeper in relation to any of its core platform services

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<sup>29</sup>Jens-Uwe Franck and Martin Peitz, ‘The Digital Markets Act and the Whack-A-Mole Challenge’ 2024 61 Common Market Law Review (CMLRev), 299–344.

<sup>30</sup>ibid 22–24.

<sup>31</sup>ibid 38–39.

within a period of 8 years prior to the adoption of the decision opening a market investigation in view of the possible adoption of a decision pursuant to this Article”. Secondly, the Commission must prove that the gatekeeper must have “maintained, strengthened, or extended its gatekeeper position”, which relates to the gatekeeper having at least maintained the strong position required to be designated a gatekeeper in Article 3(1).<sup>32</sup> Thus, systematic non-compliance sets itself apart as a wholly distinct category from non-compliance with the obligations laid down in Art. 5, 6 and 7 DMA itself, and should be treated as such.

To be considered systematically non-compliant raises a number of new conditions and risks for gatekeepers, as this allows the Commission to impose structural remedies if necessary.<sup>33</sup> Art. 18 also opens up the possibility for commitments being made binding according to Art. 25 DMA. This is the only instance in the DMA where commitments are explicitly mentioned.

In the light of the harsh potential consequences of a finding of systematic non-compliance, the ability of the gatekeeper to put forward possible commitments may be considered as a measure of last resort: it allows the gatekeeper to offer commitments to prevent a structural separation.<sup>34</sup> Thus, commitments may be an option for systemic non-compliance due to the gravity of the sanctions that may be the result of such a market investigation. Commitments become a part of the package to remedy the most egregious violation of DMA obligations, the systematic one. They help the authority as they diminish the risk of litigation, while the undertaking may avoid more drastic sanctions. This may safeguard proportionality in imposing the most stringent sanctions available to the Commission. The commitments mechanism in Articles 18 and 25 is framed as an integral part of finding a suitable cure for the systematic element of the gatekeepers’ infringement. It is not part of the individual non-compliance decision. Put differently: a finding of systematic non-compliance triggers the nuclear option. The Commission can impose “any behavioural or structural remedies”. This can include the breaking

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<sup>32</sup>Toine Knapstad, ‘Breakups of Digital Gatekeepers under the Digital Markets Act: Three Strikes and You’re Out?’ (2023) 14(7) *Journal of European Competition Law & Practice* 397.

<sup>33</sup>Art. 18 DMA; see also Knapstad (2023); Anna Tzanaki and Julian Nowag, ‘The Institutional Framework of the DMA: From Hybrid to Mature?’ in Christian Ahlborn, Pablo Ibáñez Colomo and William Leslie (eds), *The Law and Economics of the Digital Markets Act* (Hart Publishing, Forthcoming), preprint accessed via SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4574518](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4574518).

<sup>34</sup>The intrusive nature of structural remedies is highlighted in Alfonso Lamadrid de Pablo and Nieves Bayón Fernández, ‘Why the Proposed DMA Might Be Illegal under Article 114 TFEU, and How to Fix It’ (2021), 12(7) *Journal of European Competition Law & Practice*. Here, it is discussed that structural remedies can be viewed as a quasi-criminal sanction.

up of a gatekeeper. Offering commitments according to Articles 18 and 25 is not the easy exit for both parties out of a protracted case. It is the final mercy granted to a gatekeeper on the brink of being divested or subjected to far-reaching behavioural rules.

### **2.5. Fines and penalty payments**

Following Art. 30 and 31 DMA, the Commission may impose fines (up to 10% of global turnover for the first infringement) or periodic penalty payments (up to 5% of daily average global turnover per day) when non-compliance is established. Fines and periodic penalty payments have an important function in compliance procedures. Fines may pursue one or more objectives: deterrence, punishment, disgorgement, or compensation. In the EU, deterrence is often seen as the most important pursuit in the imposition of sanctions.<sup>35</sup> Periodic penalty payments – aside from having similar effects – may be used to move the firm to comply more rapidly.<sup>36</sup>

However, according to Art. 29-31 DMA, the Commission *may* impose fines or periodic penalty payments. It is not under a duty to do so. This may provide the Commission with some space to reward delayed compliance or issue a non-compliance decision (or equivalent) in the case of circumvention. If the Commission simply establishes non-compliance, the decision is not necessarily punitive in nature.

By introducing a margin of discretion for the Commission, it gains another opportunity to weigh whether the stick or the carrot is better suited to ensure effective compliance: if gatekeepers have the opportunity to avoid fines and periodic penalty payments through catch-up compliance, they may make efforts to do so even if this does not avoid the finding of non-compliance in itself. This, in turn, allows the Commission to create a better insight into what future compliance attempts may look like during the investigation, thereby giving them more opportunities to steer the efforts of the gatekeeper to becoming effective.

## **3. Unwritten powers of the commission**

In the preceding part, we have looked into the formal and explicit possibilities of pursuing a case of non-compliance. In this part, we explore the

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<sup>35</sup>OECD, Sanctions in Antitrust cases – Background note by the Secretariat, 2016 DAF/COMP/GF(2016)6, 9.

<sup>36</sup>Okeoghene Odudu, Periodic Penalty Payment, 2009 Concurrences Dictionary, online: <https://www.concurrences.com/en/dictionary/periodic-penalty-payment>.

discretionary power of the Commission and informal, non-explicit routes.

### 3.1. Discretionary power

When suspecting non-compliance, the Commission can decide to do nothing. It is in the discretion of the Commission to pursue cases of non-compliance. The wording of Art. 29 does not suggest otherwise.<sup>37</sup> In competition law, the limits to this discretion were drawn broadly: The Commission has to be able to set its own priorities in enforcement (not least due to the limited resources it has).<sup>38</sup> This is all the more true in the field of DMA enforcement where third parties do not have a formal right to complain.

The Commission is not completely beyond limits in exercising its discretion: It has to respect the interest of the Union, must not make manifest errors of appraisal or misuse of powers.<sup>39</sup> In extreme cases, some kind of limit could stem from the principle of equal treatment – if the Commission goes fiercely against Apple, but does not investigate the same behaviour from Microsoft, this may give rise to irritation and, legally speaking, issues of equality before the law (Art. 20, 21 Charter of Fundamental Rights) when it amounts to a tangible discrimination.<sup>40</sup> Such an understanding of discretion is supported by the wording of Art. 8(3) DMA, where the Commission must use it in a way that respects equal treatment, proportionality, and good administration. Having said that, it looks unlikely that the Commission will ever be forced to pick up a case on these grounds.

If the Commission abuses its discretion by not enforcing the DMA, there is a (theoretical) legal possibility for a member state or another institution to bring an action under Art. 263 TFEU to the court.

The broad discretionary power of the Commission points at the Achilles' heel of the DMA: If the Commission as the "sole enforcer" (cf. recital 91) remains passive, just rubber-stamping compliance reports, there is no other authority to step in and no court to force it. The only chance for DMA-action then is that private parties decide to go the difficult way of private enforcement without a preceding Commission decision.

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<sup>37</sup>Ines Neves, 'A Reading of the Digital Markets Act in the Light of Fundamental Rights' 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 -European Union and its Neighbours in a Globalized World 13 (2024), 181, remarks the wide margin of discretion for the Commission in the DMA compared to other areas of enforcement.

<sup>38</sup>Cf. General Court 18.9.1992, T-24/90 – Automec para 77.

<sup>39</sup>Cf. General Court 25.5.2000, T-77/95 – UFEX II para 42.

<sup>40</sup>Cf. Court of Justice 14.9.2010, C-550/07 P – Akzo paras 54 ff.

### 3.2. Creating new powers

Can the Commission create new powers that are not explicitly provided for in the DMA? Two examples come to mind: The Commission may wish to have the power to make commitments binding. The Commission could also wish to settle disputes with companies in the form of a settlement agreement. Both these options are widely used in competition law cases with a notable difference: Making commitments binding is explicitly foreseen in Art. 9 Regulation 1/2003. Settlements are provided for in an implementing regulation<sup>41</sup> and further spelt out in a Commission Notice.<sup>42</sup> For both powers, the Commission has clear mandates in competition law. This is different in the DMA.

The DMA was legislated in full knowledge of the competition law tools available. The lawmakers took deliberate choices for the procedures available. A possibility to accept binding commitments was part of the original proposal of the Commission,<sup>43</sup> but the use of commitments was limited to cases of systematic non-compliance in the adopted text. This is a strong indication against the creation of new powers. The Court's ruling in the merger control case *Illumina/Grail* has set limits for the Commission to establish powers on its own.<sup>44</sup>

As a legal argument in favour of non-explicit powers one may invoke the rule of proportionality: If the Commission has the power to fine a company – does that not automatically entail the power to settle with that company as a milder, more proportionate means?

Yet, while settlements or commitments may be less intrusive for the company concerned, two counter-arguments may be made.

First, it is unclear whether the principle of proportionality is applicable to questions of procedure in this sense. Can it be disproportionate to subject a company to the lawful procedure (assuming that the procedure as such is not flawed)? Are there even grounds for a proportionality test in the abstract? Proportionality is usually used as a defence in concrete cases, when a company – in an individual situation – is overburdened

<sup>41</sup>Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty.

<sup>42</sup>2008 Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases.

<sup>43</sup>See Art. 23 of the initial proposal (European Commission, Proposal for a Regulation of the European Parliament and the of the Council on Contestable and fair markets in the digital sector, 2020/0374(COD) (2020)), this Article has been removed in the adopted text on the initiative of the European Parliament, see European Parliament, P9\_TA(2021)0499, Digital Markets Act - Amendments adopted by the European Parliament on 15 December 2021 on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (COM(2020)0842 – C9- 0419/2020–2020/0374(COD)).

<sup>44</sup>Case C-611/22 P & C-625/22 P, *Illumina v. Commission* [2024], ECLI:EU:C:2024:677, (*Illumina/Grail*).

(e.g. with a request for information or a too heavy fine).<sup>45</sup> Being overburdened by a normal procedure seems a doubtful concept (and certainly vis-à-vis gatekeeper companies, which are regulated precisely due to their significant economic power).

Secondly, procedures do not only pave a formal way and grant rights to the subjects of the procedure. They also ensure rights for third parties and guarantee transparency and control for the wider public. If such procedures are abridged or amended with informal elements, the rights of the public and of third parties, enshrined in the explicit procedures, are at risk.<sup>46</sup>

We do not see room in the DMA for the simple creation of new powers at will of the Commission without a proper legislative procedure, in particular in light of the legislative history of the DMA.<sup>47</sup> The closest alternative, the implementing decision, is formally available and includes proper safeguards to prevent the exclusion of third parties.<sup>48</sup>

### **3.3. Informal activities**

Regulatory authorities and the subjects of regulation do not only meet in formal proceedings. There are also informal venues to discuss compliance. One early example in the DMA experience were the compliance workshops, organized by the Commission with representatives of gatekeepers and stakeholders.<sup>49</sup> There may also be behind-the-doors meetings with representatives of the gatekeepers and the DMA team. The question is, how far this may go and whether it can trigger any formal steps.

#### **3.3.1. Informal steps without opening a procedure**

The first constellation may be that the Commission decides to signal to a gatekeeper that it wishes a certain behaviour to be changed without directly opening a non-compliance procedure. By avoiding the formal step of Art. 20 DMA, the Commission could venture onto an informal path. This could take the form of a public statement by a Commission official during a conference, it could be a letter by a Commissioner to a gatekeeper (as Thierry Breton did with X in August 2024),<sup>50</sup> or it could be in behind-the-doors talks between the Commission and the gatekeeper.

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<sup>45</sup>Cf. Court of Justice 29.6.2010, Case C-441/07 P, *Alrosa*, [2010] ECLI:EU:C:2010:377 at paras 41 et seq.

<sup>46</sup>Podszun and Schwab (2024), Art. 5 para. 5.

<sup>47</sup>See European Parliament, TA/2021/0499 (2021).

<sup>48</sup>See the discussion *supra*.

<sup>49</sup>See eg Van den Boom and Hinck (2024a).

<sup>50</sup>See Julia Tar, EU Commissioner Breton reminds X owner Musk of EU digital rulebook compliance ahead of Trump debate (Euractiv, 12 August 2024).

In competition law, informal activities play a large role, for instance in the informal pre-notification talks before the official notification of a merger,<sup>51</sup> or – for lack of an early opening decision – in antitrust matters.<sup>52</sup>

The DMA envisions the role of the actors differently: Undertakings are under a constant compliance and reporting obligation, the Commission acts as enforcer first, and negotiator second. It is clear that informal negotiations can only happen on the initiative of the gatekeeper (Art. 8(3)). The Commission must open an investigation in accordance with Art. 20 DMA to start a case on its own accord. Art. 20(2) acknowledges that there is some room for investigations (and then logically discussions) before taking an official opening decision. Without prejudice to the discretionary space that is available to the Commission, such informality has its limits:

Firstly, the informal steps cannot trigger any formal sanctions or legal consequences. The Commission cannot expect any action on behalf of the gatekeeper or attach any consequences to adherence or non-adherence.<sup>53</sup>

Secondly, there must not be an error in using discretion or a manifest discrimination. For instance, the Commission must make sure that different gatekeepers are not treated unequally (one struck with a tough non-compliance procedure, the other just getting a friendly hint). If the conduct is a serious and persistent conduct with grave consequences for third parties, it does not suffice to act informally.<sup>54</sup>

Thirdly, the behaviour must not amount to a circumvention of procedural limits for the Commission and rights for third parties. The legislator has decided that formal procedures in the DMA should have a decision taken on the basis of Art. 20 DMA as an official starting point. The procedures grant rights to and safeguard the interests of gatekeepers, third parties and the wider public. Not following these procedures can only be the exception, it must never become the rule.

With a view to these arguments, we can imagine informal steps without opening of a procedure for minor issues or as simple hints and for establishing a first indication whether the opening of a proceeding is merited at all. It would be impossible and undesirable to ban the casual conversation

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<sup>51</sup>See part 3 of the DG Competition Best Practices on the conduct of EC merger proceedings, 20.01.2004.

<sup>52</sup>"Preliminary investigations" according to the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, 2011/C 308/06, para. 15.

<sup>53</sup>See the discussion *supra* on non-binding conclusions of cases.

<sup>54</sup>Rec. 65 DMA.

of Commission and gatekeepers. However, the limits in the DMA are stricter than in competition law. In particular any preliminary investigations and discussions must only serve to establish whether the threshold of opening a procedure is met. If this leads to a quick resolution of a minor issue of compliance it is not necessary to open the big toolbox.

### **3.3.2. Informal steps within a procedure**

The Commission could also open a formal procedure according to Art. 20 DMA but decide to take informal steps within this framework. For example, the Commission could open proceedings and decide to invite the gatekeeper for informal discussions and negotiations how to end the behaviour. Yet, once an investigation has been opened the discretion for the Commission to take informal steps is limited. It does not extend beyond the question whether or not the Commission imposes sanctions in the case of delayed compliance (or unintentional non-compliance), implementing decisions, or anti-circumvention procedures.

The DMA enforcement process can be categorized in escalating steps of interventions for potential non-compliance. *Monti* has presented DMA enforcement as a pyramid, for simple non-compliance investigations (excluding systematic non-compliance) an investigation would range from least to most intrusive: (a) regulatory dialogue (the short phase of investigations before opening a formal procedure, as sketched above), (b) specification decisions, (c) non-compliance decisions without fines, (d) non-compliance decisions with fines.<sup>55</sup> The idea has been raised that the Commission may be able to de-escalate a process after it has taken it to the next enforcement stage.<sup>56</sup> However, we believe that looking at the text of the DMA and the mandate given by the legislature, the opportunities for de-escalation are limited to two situations.

First, the Commission may decide not to pursue a case on the basis of the very limited preliminary investigations and discussions as set out above. This can be the case, for instance, if the Commission finds no indication of possible non-compliance or if a negotiation between business user and gatekeeper has been successfully concluded.

The second option, after the decision to open the investigation has been taken, is to de-escalate from a non-compliance or implementing decision *with sanctions* to a non-compliance or implementing decision

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<sup>55</sup>Giorgio Monti, *Procedures and Institutions in the DMA, 2020 CERRE Issue paper*.

<sup>56</sup>Tzanaki and Nowag (preprint, SSRN), 17, in reference to Monti 2020.

*without* sanctions. Once the Commission has opened its investigation, the ability to informally conclude cases no is no longer present, and it is acting within its mandate to enforce.

In a 2024 CERRE report, *De Streel et al.* discuss the role of commitment decisions. The authors suggest that the Commission may take a commitment decision with stating that “there are no further grounds for action”.<sup>57</sup> This indicates that according to these authors commitment decisions may still be available as an informal tool to the Commission in relation to non-compliance investigations pursuant to Art. 29 DMA. As stated above, we do not see this possibility as compatible with the law, the Commission must decide either compliance or non-compliance (or – juristically – no non-compliance).

### **3.3.3. The commission as facilitator of discussions**

The role of the Commission as an informal negotiator may be particularly relevant where it comes to discussions with third parties. The Compliance Workshops were an example of this. Under Art. 8 DMA it is not clear what happens when a business user or other third party asks the Commission to investigate a certain behaviour, or mediate negotiations between the business user(s) and the gatekeeper. In fact, the DMA is particularly silent on third party rights and the involvement of third parties. It has been argued that there is space for the consultation of stakeholders (including the gatekeeper) outside of the guise of Art. 8(2) or (3) DMA.<sup>58</sup> There is nothing in Art. 8 DMA that precludes or promotes the Commission to take up the role of mediator or facilitator in debates between stakeholders.

According to Art. 1(1) DMA, the Commission must enforce the DMA to the benefit of business users and end users. Third parties are also invited to comment – but not participate – in Art. 8(5). Furthermore, according to Art. 12, the Commission must extend an obligation to the benefit of business users and – perhaps most importantly – Art. 6 often grants rights to business users. Through its recitals, the DMA has also envisioned a whistleblower tool, launched by the Commission in early 2024.<sup>59</sup> This shows that on the topic of third-party involvement, the DMA is particularly divisive: it barely grants substantive procedural

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<sup>57</sup>Giorgio Monti and Richard Feasey, *DMA Process and Compliance*, in Alexandre De Streel and others, ‘Implementing the DMA: substantive and procedural principles, 2024 CERRE Report, 102 De Streel and others (2024).

<sup>58</sup>*ibid* 13, 166, 168.

<sup>59</sup>Sarah Hinck and Jasper Van den Boom, ‘Closing Information Gaps in DMA Enforcement – Expectations, Incentives, and the Role of Anonymity for Whistleblowers’, *forthcoming*.

rights to third parties, yet it somehow relies on heavy involvement of this group. This can only be resolved if the Commission takes an open stance towards involvement of third parties and facilitates negotiations between business users, end users and gatekeepers.

This discretionary space seems desirable both from an interpretation of the mandate given by the legislator and for the practical enforcement of the DMA. However, one may wonder if it is not better if these rights are strengthened or formalized. For the time being, the Commission can act as a supporter and neutral facilitator of discussions between the different sides.

### **3.4. Limits to discussions with gatekeepers**

To conclude the discussion on the limitations to informality, we note that the Commission will hold talks with gatekeepers in general and in concrete proceedings. On the one hand, informal talks seem normal in a continuous working relationship between an administrative body and a subject of regulation.<sup>60</sup> An exchange of views and informal guidance can help companies and the Commission alike to understand each other and find suitable solutions.<sup>61</sup> Informality may save resources and be efficient.

But such informal talks bear risks, and must therefore be used with care and restraint.<sup>62</sup> There is the risk of capture of Commission officials that are in constant informal close contact with representatives of the gatekeepers.<sup>63</sup> The informalities happen without third parties involved who can raise the quality by their substantive contributions and who control the activities.<sup>64</sup> The judiciary is not able to have a say. It has to be taken into account that the European Commission acts as a decision-making body, similar to a court. It would not be accepted

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<sup>60</sup>Cary Coglianese, 'Rule Design: Defining the Regulator–Regulatee Relationship' in J C Le Coze and B Journé (eds), *The Regulator–Regulatee Relationship in High-Hazard Industry Sectors*, (Springer, Cham 2024), 89–91 (Coglianese 2024).

<sup>61</sup>In competition law, informal guidance is mostly welcomed, cf. Gianni Di Stefano, *Covid-19 and EU Competition Law: Bring the Informal Guidance On*, 2020 *JECLAP* 121.

<sup>62</sup>For "soft tools" in competition law cf. Nicolas Petit and Miguel Rato, *From Hard to Soft Enforcement of EC Competition Law - A Bestiary of 'Sunshine' Enforcement Instruments* (September 18, 2008), SSRN: <https://ssrn.com/abstract=1270109>, 25 ff.

<sup>63</sup>Cf. Oliver Budzinski and Juliane Mendelsohn, 'Regulating Big Tech: From Competition Policy to Sector Regulation?' (2022) 27(168) *Ilmenau Economics Discussion Papers* 23.

<sup>64</sup>Richard Posner, 'The Concept of Regulatory Capture: A Short, Inglorious History' in Daniel Carpenter and David Moss, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge University Press, 2013), 49–56; Eva Heims, *Mechanisms of regulatory capture: Testing claims of industry influence in the case of Vioxx*, 2024 *Regulation & Governance* 18, 142: information capture may occur if the regulator relies overwhelmingly on evidence provided by the regulated entity, without seeking enough information from third parties; for general information on regulatory capture and its mechanisms.

by other parties if judges in courts held meeting behind closed doors with parties to a concrete case.

It needs to be pointed out that Recital 38 of Regulation 1/2003 contains a statement explicitly allowing for informal guidance by the Commission. There is no comparable statement in the DMA. For competition law, the Commission issued a Notice on informal guidance (if not on informal talks).<sup>65</sup> Once contacts are submitted to formal rules, they obviously lose their informal character. It will not be possible to completely regulate such soft enforcement, and it would not even be desired to stop all contacts.

Yet, for the DMA, we advocate a sensible approach to informal discussions, not least due to the fact that the lawmakers deliberately decided against a more extensive regulatory dialogue. The risk of undue influence of gatekeepers in informal talks seems higher in DMA-negotiations than in competition law, due to the sheer power of gatekeepers and the small number of actors.<sup>66</sup> The Commission is bound to impartiality under Art. 41 of the Charter of Fundamental Rights.<sup>67</sup> Also, the DMA is more explicit in its aim to protect users than competition law is (Art. 1(1) DMA). We therefore suggest a very restrained approach for informal discussions. This includes that all meetings and talks have to be documented and minutes of all meetings have to be passed on to other actors or be made publicly available. Third parties with a clear interest need to be notified. It must be clearly communicated that all informal discussions do not have any binding effect in law or in practice.<sup>68</sup>

With this cautious approach towards negotiations and informality, it must also be borne in mind that the DMA foresees a constant relationship between the regulated entities and the sole enforcer. This stems from the need for compliance and is further exemplified in Art. 8(9)

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<sup>65</sup>European Commission, 3.10.2022, Commission Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters), C(2022) 6925 final.

<sup>66</sup>Shanya Ruhela, Multi-level banking regulatory landscape: Crisis & opportunities to lobby for trade associations, 2024 Doctoral Thesis Tilburg University, 54 describes that there are certain factors that increase the risk of regulatory capture in any particular industry, which include complexity, profitability and lack of awareness among the public.

<sup>67</sup>Cf. Hearing Officer, Final Report in Case Merck/Sigma-Aldrich M.8181, OJ 25.3.2022, C 134/13, paras 23 ff.

<sup>68</sup>In a ministerial authorisation procedure following a German merger case, the Düsseldorf Higher Regional Court held that the failure to take minutes of a conversation and the failure to inform other parties involved about this conversation between the deciding minister and representatives of a party gave rise to concerns of partiality, Oberlandesgericht Düsseldorf, 12.7.2016, Case VI-Kart 3/16 (V), para 48.

DMA: the Commission may reopen its investigations where it suspects that there has been a material change, the provided information was misleading, or, most importantly, where the measure as specified simply turns out not to be effective. Besides this, the Commission also has the anti-circumvention prohibition at its disposal as a means of opening an investigation. Thus, unlike competition law, even after changes or specifications have been agreed upon, the Commission retains the right to reopen the investigation at any time for a variety of reasons. This indicates that while the gatekeeper can be found non-compliant, it can never be sure that it is or remains compliant.

This may lead to an approach that sees communication and negotiation between regulator and the regulated company as unavoidable in coming to effective compliance.<sup>69</sup> A back-and-forth between the regulator and the regulated entity is typical for the enforcement of sector-specific regulation.<sup>70</sup> However, this also comes at the risk of undue influence over regulator's views and capture.<sup>71</sup>

So, if negotiations are considered an inherent characteristic of DMA enforcement, where and how do they take place, and where does the discretion for the Commission to engage in them end? Based on our analysis, negotiations are suitable when

- (a) it is the 6 month period between designation and mandatory compliance;
- (b) there is a request by the gatekeeper or third party related to whether behaviour is compliant, and negotiations take place in light of Art. 8(3) DMA;
- (c) the Commission itself is unclear on what constitutes effective compliance, and whether there actually is non-compliance in this case (dialogue preceding the opening of an investigation under Art. 8(2) or Art. 20 DMA, until there are indications that there is a case of non-compliance that must be resolved); or
- (d) after an investigation is opened, negotiations can take place on the imposition of sanctions.

Negotiations should primarily take place in category (a). After the 6 month period post designation has passed, compliance is mandatory

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<sup>69</sup>ibid 30.

<sup>70</sup>Coglianese (2024), 89–91.

<sup>71</sup>Posner (2013), 49–56 finds that while the idea of regulatory capture may be overstated, repeated interactions between the regulator and the sector (as well as other interest groups) may lead to infiltration which weakens the regulatory obligations.

and the gatekeeper should be effectively compliant. If the gatekeeper is not, enforcement becomes an option. In categories (b) and (c), the Commission can still choose to not open an investigation. If negotiations take place on the initiative of the gatekeeper, the Commission may find that their behaviour or proposed changes are sufficient to be compliant and that an investigation is no longer necessary. For category (c), the Commission may find that there is no indication of non-compliance at this point in time, and refrain from opening the investigation after an initial check.<sup>72</sup> For category (d), where an investigation has been opened, the Commission does not have a mandate to end investigations without making findings. It can however agree with the gatekeeper in question to not impose sanctions when there is genuine cooperation in ending the matter of non-compliance by working dutifully to end the process of specification under Art. 8(2) DMA or by voluntarily ensuring delayed compliance.

### **3.5. A need for third party involvement**

The latter comments lead to a general point of importance – the role of third parties for shaping competition in the digital age. The DMA declares that it should benefit end users and business users of core platform services. Their interests will not be achieved unless they have representation and voice in proceedings. Where this is not the case, the DMA loses the procedural link to its core aim. Deals between gatekeepers and the Commission and informal activities come at the expense of third parties. Their procedural rights are not well secured in the DMA. They must not be compromised further.

Third parties do not play a formalized role in many procedures in the DMA, and where they are formally involved their role is limited. However, there is nothing that precludes the Commission from involving third parties to strengthen their enforcement capacities. Third parties are consulted in the process of establishing compliance mechanisms, albeit through informal means. They are also active participants in identifying potential non-compliance by notifying the Commission or whistleblowing and can be formally involved in designing effective compliance through the procedure for implementing decisions. There are other potential roles for third parties, for instance in market testing, as

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<sup>72</sup>To conduct a screening, or enter into a pre-investigation phase, is common practice with enforcers of competition law or sectoral regulation, see a.o. Cedric Argenton, Jasper van den Boom, Eric van Damme, Inge Graef and Giorgio Monti, *Can Abuse of a Dominant Position be Tackled More Effectively?*, 2023 Report for the Ministry of Economic Affairs.

sources of information or evidence for ongoing investigations, or through private enforcement against the gatekeeper.

Third parties in the DMA context are particularly weak. Business users depend on the services of the gatekeepers and are likely to shy away from taking action. End users will often be locked in in the ecosystem and too weak to oppose. It is telling that the DMA contains a specific obligation in Art. 5(6) that users enjoy free access to authorities and courts to raise issues of non-compliance – something that should be self-evident in a rule-of-law-system. Formal procedures and rights are the protection against further weakening this position. Therefore, we view any circumvention of the formal navigation route very critical.

## **4. Conclusions**

The procedural routes of the DMA are currently explored by the Commission and by the gatekeepers. As a sole enforcer it is the Commission's prerogative to lead. Yet, navigating the different routes in the DMA is not trivial since the DMA deliberately deviates from what is known in competition law, and acknowledges the importance of procedures for safeguarding good outcomes.

### ***4.1. The three-step-enforcement escalation***

When the DMA was born out of the enforcement deficits of antitrust, it was meant as a way to have clear-cut and swift enforcement decisions. This is what the procedural rules of the DMA aim at – they represent a deliberate choice of lawmakers. The DMA aims at compliance and therefore gives a lot of room to the gatekeepers in how to achieve compliance. But where they fail to comply, the system strikes back in a tough manner. This is a logical three step process of intervention that escalates the enforcement:

- Obligations that are clear-cut, but narrow in scope;
- Compliance can be determined by the affected companies (broad leeway);
- Non-compliance meets a tough reaction by the regulator.

With a view to this course, procedures and decisions play a higher role. Decisions in non-compliance proceedings serve as a basis for private

enforcement and may lead up to systematic non-compliance decisions. This may trigger structural remedies. Politically, this was the desired outcome. To adhere with the spirit of the DMA, the Commission should rely predominantly on the written powers available to it, limiting the use of informal options.

#### **4.2. Strict interpretation**

While the provisions and procedures of the DMA clearly give a mandate to enforce, negotiations are an inherent part of the DMA.<sup>73</sup> With regulation where continuous monitoring is required, and where the gatekeeper must receive instructions from the regulator on how to comply, contact between the parties is inevitable, both formal and informal.<sup>74</sup> We have identified several reasons as to why a narrow interpretation of the Commission's discretion to act informally is supported by the text and design of the law. Here, we wish to add three further rationales underlying such an interpretation.

Firstly, the Commission has entered a new field where it needs to establish its power vis-à-vis some of the most powerful companies on earth. The lawmakers return to a stricter approach. This minimizes the risk of being tricked by gatekeepers, or regulatory capture.<sup>75</sup> The novelty of the process in a field where policy options are clear speaks in favour of giving the Commission less leeway.

Secondly, the Commission is the sole enforcer of the DMA. It is not possible for national authorities to make up for shortcomings and it is difficult to do so through private enforcement. This responsibility mandates a different approach from competition law.<sup>76</sup> By setting out more straight-forward routes of enforcement, the legislators made it clear that the Commission must achieve the aims of the DMA instead of being comfortable with easy solutions. The need for formal means of enforcement is further exacerbated by the fact that opportunities to appeal against a decision not to designate gatekeepers or not to investigate their behaviour will be limited. The DMA often refers to the interests of third parties and in some cases invites their comments, but private third parties are unlikely to be able to prove

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<sup>73</sup>This is reflected in the many workshops that have taken place in preparation for the first designations and mandatory compliance, as well as the compliance workshops after the fact, see Van den Boom and Hinck (2024a).

<sup>74</sup>Cf. Coglianese (2024), 89–91.

<sup>75</sup>Posner (2013), 49–56; Heims (2024), 142.

<sup>76</sup>See Podszun (2024), Art. 20 para. 1.

individual standing before the courts to appeal the Commission's decisions.<sup>77</sup>

Thirdly, there have been doubts whether the small-scale regulatory approach of the DMA is sufficient. Do markets really become more contestable and fairer by providing these rules? We submit that there was a sentiment by some to favour structural solutions, i.e. a divestiture of Big Tech companies.<sup>78</sup> Yet, this did not seem possible at the time.<sup>79</sup> The DMA still provides for structural solutions in the case of systematic non-compliance. Yet, getting there requires three non-compliance decisions in eight years. For people who favour structural solutions to the problem, clear procedural routes leading to non-compliance decisions (instead of informal exit options or making commitments binding) has a strong appeal. This is the way to get closer to breaking up gatekeepers.

Informal negotiations between gatekeepers and the Commission should be mostly business user-driven. Formally, negotiations can take place only on the initiative of the gatekeeper (Art. 8(3)), or if the Commission has opened an investigation following Art. 20 DMA. The DMA is however silent on the Commission acting as a facilitator, mediator, participant, or observer in negotiations between gatekeepers and business users. In these conversations, the Commission can provide informal guidance without opening an investigation and choose to open an investigation if the needs of business users are not met. This way, business users gain more space to participate in the DMA and its enforcement while the Commission secures a communications channel with business users to help resolve its information gaps.<sup>80</sup>

### **4.3. A clear mandate**

The Digital Markets Act is a new type of hybrid enforcement model that lies somewhere between an enforcement-based and negotiations-based model. We have established, by looking at the text and design of the

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<sup>77</sup>On the rules to establish direct standing before the Court see Catherine Barnard and Steve Peers, *European Union Law* (Oxford University Press, 2016), 274–89: the possibilities of private parties (non-privileged complainants) that are not addressees of acts are very limited.

<sup>78</sup>See Scott Morton and others (2024) for an example of the different remedies proposed beyond the purview of the DMA.

<sup>79</sup>As noted by Marco Cappai and Giuseppe Colangelo, *Taming Digital Gatekeepers: The 'More Regulatory Approach' to Antitrust Law*, 2021 *Computer Law & Security Review* 41, the regulatory approach opted for in the DMA was already a quick departure from the consensus reached by the G7 in 2019 that competition law would suffice to regulate digital markets, see G7 Competition Authorities, 'Common Understanding on "Competition and the Digital Economy"', 2019.

<sup>80</sup>See Hinck and Van den Boom (forthcoming).

DMA, that the Commission has to take up the role as enforcer first, and negotiator second. Looking at the procedures related to non-compliance, we see that the space given to the Commission to accept commitments or end investigations informally is limited. The closest option to commitments available to the Commission is to take an Implementing decision, but also here the Commission retains the right to impose sanctions.

The Commission has been given a clear mandate by the legislature: to enforce the law as to ensure effective compliance. It is a downside of the straight-forward approach that the rights of third parties are not spelt out in detail. We suggest that the Commission involves third parties as the beneficiaries of the DMA and the market actors who know best what is going on. But the most important thing is that the Commission must make use of its enforcement tools. This will help the Commission to keep the gatekeepers in their seats, as a credible threat of enforcement ensures that gatekeepers are limited in their ability and incentives to delay or avoid compliance by gaming the system. The Commission has some opportunities to offer a carrot, such as in the case of delayed compliance, by foregoing fines to gatekeepers. However, it should always be ready to use the stick once it has opened an investigation: even in cases of delayed compliance, the law still expects the Commission to issue a decision on the initial infringement. This approach sets the DMA apart from competition law and other hybrid forms of regulation and reflects the spirit of the DMA.

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