

The institutional framework of the Digital Markets Act: a novel but thoughtful experiment in regulatory design?

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Key Points

- By comparison to the enforcement-based model of antitrust that relies on punishment, this article sheds light on the new more complex and hybrid institutional structure of the Digital Markets Act ('DMA') that is focused on 'cooperative' compliance based on dialogue between regulator and regulated firms and third parties at first instance and leaves the 'punitive' model of enforcement as an option of last resort.
- The Commission as the key institutional actor has discretion to escalate or deescalate the process of the DMA's implementation along this compliance–enforcement continuum through different instruments.
- The central role of the Commission is supported and counterbalanced by a wide array of decentralized institutional actors and procedures, which render the DMA's institutional architecture less hierarchical and more participatory and flexible.
- The openness in the DMA's procedural and institutional design effectively complements the closed nature of its substantive obligations imposed on digital gatekeepers.

1. Introduction

The DMA brings a sea change in the regulatory landscape of digital markets and gatekeepers.¹ The reason for this is not only the intrusive substantive obligations imposed on gatekeepers but also its highly innovative and creative procedural and institutional framework that surrounds and facilitates implementation of those obligations. Scholars have already underscored that a groundbreaking innovation of the DMA is placing the Commission at the centre of its institutional design: introducing it as the pan-European regulator for large digital gatekeepers and opting for a model of 'centralised' enforcement at the EU level.² This is undisputed. Yet, if one pays close attention, the DMA

reveals a more intricate and balanced institutional architecture that reflects its pursuit of multiple procedural and substantive objectives. Indeed, the institutional depth and novelty of the DMA lies beyond its surface. On one hand, one needs to not only study the text but also appreciate the broader context within which the DMA is set to take effect. On the other hand, it is important to appreciate that the Commission does not operate alone in an 'institutional vacuum'; rather there are a broad set of public and private actors who are called upon to enable the Commission to effectively carry out its mission. Against this backdrop, the DMA is an intriguing piece of legislation whose institutional structure itself is a natural experiment in the theory of effective regulation that is now put to the test.

¹ 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) [2022] OJ L 265/1.

² Pierre Larouche and Alexandre de Stree, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021) 12 JECL & Pract 542, 558–559; Giorgio

Monti, 'Procedures and Institutions in the DMA' in Alexandre de Stree and others (eds), *Effective and Proportionate Implementation of the DMA* (Centre on Regulation in Europe, CERRE, 2023) 184.

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This article proceeds as follows. First, it outlines the role and competences of the Commission, along with other institutional actors, in the effective implementation of the DMA. Then, it moves on to explain the individual choices and the overall design of the DMA from an institutional perspective. In this context, it discusses the institutional innovations featuring in the DMA and their underlying logic. Following up from that, it rationalizes the overall institutional design of the DMA within a conceptual framework of ‘responsive regulation’³ where substantive compliance is conceptualized to be of different quality along a continuum of escalating procedural requirements. We distinguish between three types of compliance that follow the new DMA procedures we classify as: (i) self-compliance, (ii) cooperative compliance, and (iii) enforced compliance. The most interesting insight drawn from this article is the ‘space’ that may be employed by newly instituted ‘cooperative’ mechanisms to ensure compliance, such as the ‘regulatory dialogue’ between the gatekeeper and the Commission⁴ and a ‘participative approach’ to ensuring and monitoring compliance with substantive obligations and designing remedial action for non-compliance by engaging other stakeholders and agencies in the process of the effective implementation of the DMA.⁵

This flexible and open-ended design that de-emphasises ‘punitive’ enforcement and deterrence-based compliance and prioritizes non-adversarial and speedy solutions and wider participation is also a distinguishing feature of the DMA compared to antitrust’s institutional structure and procedures.⁶ The procedural openness in the set of actors engaged and their mode of interaction counterbalances the closed nature of the substantive rules, showcasing a novel and unique set of institutional complementarities that the DMA encapsulates. Accordingly, the Commission may rightly appear at the top of the enforcement pyramid but what lies at the base and its lower levels is, by design, critical, albeit often less salient, for the successful application of the DMA. Under the veil of centralization, a sound supporting floor of decentralized actors and initiatives is placed that guarantees not only the effectiveness but also the efficiency and legitimacy of the DMA.

2. Institutional actors and allocation of competences

From an institutional point of view, the DMA is an elaborate and multilevel legal instrument. The intricacy of the DMA begins with the institutional composition of the European Commission as the guardian of its enforcement and implementation. Two different Directorates-General—DG Connect and DG Competition—are tasked with dedicating personnel for implementing the DMA, who however will not be based under a common physical structure but are expected to cooperate on cases remotely. This work will be done in collaboration with the Legal Service and possibly the JRC European Centre for Algorithmic Transparency, while decisions will be formally taken by

³ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992); Monti (n 2) 175.

⁴ See Recital 65 and Art 8(2) and (3) DMA. The regulatory dialogue extends to and enables comments by third parties on gatekeepers’ compliance measures. Art 8(6) DMA.

⁵ Christophe Carugati, ‘A Model for a Participative Approach to Digital Competition Regulation’ (2023) Policy Brief Issue 05/23, *Bruegel*.

⁶ Daniel A. Crane, *The Institutional Structure of Antitrust Enforcement* (Oxford University Press 2011). Antitrust enforcement on the contrary is backward-looking, deterrence-oriented, and focuses on certain types of prior ‘bad acts’ and ‘binary adjudication’.

the College of Commissioners.⁷ The institutional novelty is noteworthy. Yet, the technical complexity of the subject matter regulated under the DMA and its objectives, which are closely related to but go beyond traditional competition law, may justify this choice.

Zooming into the individual competences of the different institutions and actors involved in the DMA’s application, we note a complex set of interactions between public national and EU bodies as well as private actors in support of the Commission’s system-centric role as the sole enforcer of the DMA. In turn, we outline below the multiple tasks and competences of the Commission under the DMA as well as the particular and complementary role of the EU Courts, third parties and private enforcement, national authorities, and newly created EU-level bodies for the effective implementation of the DMA.

A. The role of the Commission

As an institution the Commission is central to the DMA. Over three-fourths of the articles contained in the DMA mention the Commission. This picture is further accentuated by the ‘one-stop shop’ principle and the special role that the Commission has in the compliance phase, the enforcement phase, its expanded administrative powers, its ability to initiate market investigations, and its role in overseeing the special merger regime for gatekeepers.

The ‘one-stop shop’ principle is embodied by the mandatory notification and the Commission’s exclusive competence. It is only the Commission that is in charge of designating an undertaking as a gatekeeper.⁸ This power of the Commission is backed in two ways. First, a notification requirement is imposed on undertakings that provide core platform services and meet the turnover and user thresholds.⁹ Second, the Commission has the sole power to designate undertakings as gatekeepers¹⁰ that did not meet the thresholds, or which have not notified, or did not provide the relevant information.

As it is only the Commission that can designate undertakings as gatekeepers, it is essentially the Commission’s designation decision that determines whether or not an undertaking has to comply with the obligations under the DMA. This centrality of the Commission in the process is further reinforced by the primacy of EU law. This is a principle restated in Article 1 of the DMA which prevents national authorities from adopting decisions that contradict Commission decisions under the DMA.¹¹ However, the Commission’s power with regard to the designation of gatekeepers is not only one of application and interpretation of the criteria of the DMA. The powers go further. In particular, the Commission is able to specify the methodology¹² that is used to determine whether the quantitative thresholds for being presumed to be a gatekeeper¹³ are met. A similar power exists regarding defining and calculating important indicators such as ‘active end users’ and ‘active business users’, which are in turn used in quantitative thresholds of the presumption.¹⁴

⁷ Monti (n 2) 184.

⁸ Art 3(1) and (8) DMA.

⁹ Art 3(2, 3) DMA. On the content of the notification, see Commission Implementing Regulation (EU) 2023/814 of 14 April 2023 on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to Regulation (EU) 2022/1925 of the European Parliament and of the Council [2023] OJ L 102/6.

¹⁰ In such cases a special procedure applies, that of Art 17 DMA.

¹¹ Art 1(7) DMA.

¹² According to Art 3(6) DMA.

¹³ Under Art 3(2) DMA.

¹⁴ According to Art 3(7) DMA.

The Commission maintains its central role also after the designation of undertakings as gatekeepers. In the compliance phase, it is the relevant body to whom the gatekeepers must report whether this concerns concentrations¹⁵ or their general compliance with their obligations under the DMA.¹⁶ The undertakings designated as gatekeepers need to demonstrate their compliance to the Commission.¹⁷ In fact, the undertakings must report their compliance efforts to the Commission and must update that report at least once annually.¹⁸ The compliance report must describe in a detailed and transparent manner the measures the gatekeeper has implemented to ensure compliance with the obligations laid down in Articles 5, 6, and 7.¹⁹ It is on this basis that the gatekeeper can demonstrate actual compliance and the Commission can keep track of the effectiveness of its efforts and the actual implementation of the DMA.²⁰ A gatekeeper must moreover submit an audited description of the profiling techniques it uses for its consumers.²¹ These reports are complemented and further enhanced by the so-called compliance function.²² In an unprecedented fashion, the DMA prescribes the introduction of a mandatory compliance team that is internal to the gatekeeper's organization and operates within its governance structure. An independent part of the company, which is separate from its operational functions, with access to the management body of the gatekeeper, and to which the company needs to provide sufficient resources, is expected to organize and oversee compliance with the DMA.²³ The head of the compliance function shall be an independent senior manager with distinct responsibility and shall report directly to the management body.²⁴ This compliance function also links back to the central function of the Commission as the name and the contact details of the head of the compliance function need to be communicated to the Commission and the internal compliance team is supposed to 'cooperate' with the Commission.²⁵ The compliance function would also be in charge of ensuring fulfilment of any commitments given to the Commission.²⁶ It is further made explicit that the setup of the compliance function does not dissolve the gatekeeper's management from its own responsibility in ensuring

the quality and independence of the compliance function as well as the management and supervision of compliance with the DMA.²⁷ The Regulation essentially imposes a self-funded private monitor on designated gatekeepers with a quasi-public function, which motivates management to comply internally but also interacts externally with the Commission in complying with and enforcing the DMA.

This cooperation with the Commission is legally supported not only by the compliance function but equally by the right of the gatekeepers to ask the Commission for advice on whether their intended compliance measures are sufficient or may be further specified.²⁸ This 'cooperative' interaction with the Commission can take two forms that entail slightly different procedures: (i) an informal 'regulatory dialogue'²⁹ or (ii) a formal 'specification decision'.³⁰ The gatekeeper may request and initiate the process of regulatory dialogue with the Commission, which begins with a reasoned submission by the gatekeeper of how it intends to comply with its obligations and may conclude by the company receiving informal guidance from the Commission on its compliance measures. A non-confidential version would also need to be submitted, which the Commission can then share with third parties so that they are able to provide comments.³¹ A more formal procedure may be followed upon the Commission's own initiative or upon request of the gatekeeper, which entails the opening of formal proceedings and as a result of which the Commission may provide individual guidance in a decision specifying what compliance measures it considers to be effective.³² The gatekeeper's request for a specification 'does not stop the compliance clock'.³³

These constructive, dialogue and specification, processes also highlight the strong position of the Commission. Not only does the Commission have discretion as to whether to engage in such an informal dialogue,³⁴ but also it is free to adopt an implementing act and specify the measures that according to its judgement the gatekeeper must adopt for effective compliance.³⁵ The DMA purposefully leaves room for useful exchange and cooperation that redress information asymmetries between gatekeepers and the Commission and lead to quick solutions while giving a strong³⁶ positioning to the Commission to negotiate, propose, and secure effective compliance with the DMA. Indeed, dialogue and cooperation may occur outside the specification process and may not only occur between the gatekeeper and the Commission but also between the gatekeeper and third parties or national authorities, or between third parties and the Commission.³⁷ In addition, to facilitate multilateral dialogue between

¹⁵ Art 14 DMA.

¹⁶ Arts 5, 6, 7, and 15 DMA. The compliance requirement starts immediately after designation for the reporting obligation under Art 14 DMA, whereas for the obligations under Arts 5, 6, 7, and 15 DMA reporting must take place within six months after designation. See Arts 11(1) and 15(1) DMA and Report from the Commission to the Council and the Parliament, Annual Report on Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), COM (2025) 166 final (Brussels, 25 April 2025) 4.

¹⁷ Art 8(1) DMA.

¹⁸ Art 11 DMA.

¹⁹ Art 11(1) DMA. The Commission has published a template that specifies the minimum information gatekeepers should provide in the compliance report, including information on compliance with the obligations laid down in Art 5–7 and information about its compliance function and monitoring. See Template Form for Reporting Pursuant to Article 11 of Regulation (EU) 2022/1925 (Digital Markets Act) (Compliance Report), last updated 9 October 2023.

²⁰ Compliance reports that designated gatekeepers have submitted can be found on the Commission's website: <https://digital-markets-act-cases.ec.europa.eu/reports/compliance-reports>.

²¹ Art 15 DMA.

²² Art 28 DMA.

²³ Art 28(1), (2) and (5)(a) DMA.

²⁴ Art 28(3) and (4) DMA.

²⁵ Art 28(6) and (5)(d) DMA. The Commission's Compliance Report Template (n 19) is demanding more information not only about the head of the compliance function but also about any other compliance officers and the compliance function's operation. In addition, the Commission had two in-person meetings with the compliance officers of each gatekeeper in 2024 [whose] purpose was for the Commission to understand how the compliance function was set up and organised and take stock of the ongoing regulatory dialogue' according to its second annual report on the DMA implementation (n 16) 5.

²⁶ Art 28(5)(c) DMA. Although the Commission can still decide to appoint an independent monitor.

²⁷ Art 28(3) and (7)–(9) DMA.

²⁸ Art 8(2)–(9) DMA.

²⁹ Art 8(3) DMA.

³⁰ Art 8(2) DMA. See Monti (n 2) 168 on how the two processes contrast.

³¹ Art 8(3) DMA. The Commission has published a template that specifies the information the Commission needs when assessing a reasoned request for specification dialogue. See Template Relating to the Reasoned Request for a Specification Process Pursuant to Article 8(3) of Regulation (EU) 2022/1925 (Digital Markets Act), last updated 9 October 2023.

³² Art 8(2) DMA.

³³ See Richard Feasey and Giorgio Monti, 'DMA Process and Compliance' in Alexandre de Stree and others (eds), *Implementing the DMA: Substantive and Procedural Principles* (CERRE 2024) 97; and Specification Template (n 31), s 2.2.

³⁴ Art 8(3) DMA, subject to the principles of equal treatment, proportionality, and good administration.

³⁵ Art 8(2), (5), and (7) DMA, subject to the principle of proportionality in light of the circumstances of the particular case.

³⁶ A discretionary and mostly unchecked position.

³⁷ Feasey and Monti (n 33) 103. In fact, there might be an 'expectation' that gatekeepers engage in dialogue with third parties in some cases, while (lack of) dialogue may be an indicator of (non)compliance. Engagement with third parties reduces 'the likelihood of subsequent complaints' on the one hand and potential Commission intervention to ensure effective compliance on the other. *Ibid* 105–14.

gatekeepers and interested stakeholders, the Commission is organizing public DMA compliance workshops that follow up on gatekeepers' compliance reports and seek feedback on the specific or amended compliance solutions they propose.³⁸ As the ultimate arbiter of what constitutes effective compliance, the Commission gets to decide where the 'cooperative' compliance phase ends and more coercive methods for ensuring compliance may be needed.

More naturally, the Commission also has a central role in the enforcement stage. This stage typically starts when the previous 'self-regulatory' (based on the internal compliance function) and 'cooperative' (based on regulatory dialogue) compliance phases have not yielded the desired result. During the enforcement phase, the Commission has a wide range of tools in its arsenal, which are similar to those available in antitrust procedures. It can not only pursue numerous investigative measures, such as requests for information and carrying out interviews and inspections,³⁹ it can also impose interim measures,⁴⁰ it can warn about and issue a non-compliance decision, including a 'cease and desist' order,⁴¹ or impose fines or periodical penalty payments.⁴² Furthermore, on its own initiative, the Commission is able to launch wide-ranging market investigations,⁴³ for example into systematic non-compliance, with the possibility of taking further remedial action. Overall, the DMA foresees an escalating sanctioning process for non-compliance. Moreover, the proceedings for non-compliance need to be viewed in light of the strong enforcement powers of the Commission. The non-compliance proceedings for simple violations mirror closely those under competition law.⁴⁴ Surprisingly, the DMA does not specifically foresee commitments in situations other than systematic non-compliance.⁴⁵ But the Commission would most likely be able to settle such situations informally where there is an interest on the part of the gatekeeper, as a way to de-escalate the process and take it back to a previous enforcement stage.⁴⁶

However, the enforcement toolbox of the DMA also foresees an escalation where three non-compliance decisions within eight years have been issued against a gatekeeper.⁴⁷ In this case, a market investigation into systematic non-compliance can be conducted.⁴⁸ If systematic non-compliance with the DMA is concluded, the Commission has an array of strong enforcement tools at hand. Obviously, it can impose periodic penalty payments when decisions under Article 18(1) are not complied with.⁴⁹ But in cases of systematic non-compliance the Commission is allowed to impose any behavioural or structural remedies deemed proportionate and necessary to ensure effective

compliance,⁵⁰ or it can even make a prohibition of further mergers by the gatekeeper for a time-limited period.⁵¹ Those remedies are under regular review by the Commission and subject to potential modification.⁵² For such remedies to be imposed or modified, the Commission would need to open a market investigation,⁵³ communicate its preliminary findings to the gatekeeper,⁵⁴ and publish a non-confidential summary of the case and its intended remedies for comments by third parties.⁵⁵ Similarly, if the Commission aims to accept commitments offered by the gatekeeper,⁵⁶ it should also publish those together with a non-confidential summary of the case for public comment.⁵⁷

Beyond these enforcement tools in cases of systematic non-compliance, the Commission has further options to use market investigations. It can use market investigations to determine whether and in which area an undertaking may be a gatekeeper. This power seems a natural *ex officio* power to ensure that undertakings that fulfil the gatekeeper conditions but have not notified can still be designated as gatekeepers.⁵⁸ It also applies to undertakings that may fulfil the substantive criteria for designation under Article 3(1) but not all the thresholds for the presumption in Article 3(2) of the DMA.⁵⁹ However, the Commission's market investigation powers are much more far-reaching. The Commission is able to essentially change the content of the obligations of gatekeepers,⁶⁰ or add new ones to the list, by means of a delegated act⁶¹ in order to address practices that are unfair or limit contestability of core platform services, once it has conducted a market investigation into new services and new practices.⁶²

The DMA, moreover, provides for a special transparency regime for gatekeepers' mergers. Designated gatekeepers must inform the Commission of any intended concentration with companies offering core platform or digital services or enabling the collection of data.⁶³ This information is then forwarded to the Member States, which may refer the case to the Commission and request an investigation under the EU Merger Regulation ('EUMR')⁶⁴ by means of Article 22 EUMR.⁶⁵ The DMA makes clear that this procedural obligation applies whenever the envisaged merger or acquisition fulfils the definition of a concentration under Article 3 of the EUMR, regardless of whether it also meets the turnover thresholds of the EUMR or the relevant thresholds of national merger rules.⁶⁶ There is a further obligation

⁵⁰ Art 18(1) DMA. Compliance with such remedies then confirms that there is no breach. See Feasey and Monti (n 33) 102.

⁵¹ Art 18(2) DMA.

⁵² Art 18(8) DMA. According to Feasey and Monti (n 33) 102, this suggests that there is a 'special surveillance regime' for gatekeepers who have been found to have systematically failed to comply.

⁵³ Art 18(1) DMA.

⁵⁴ Art 18(4) DMA.

⁵⁵ Art 18(5) DMA.

⁵⁶ Art 25 DMA.

⁵⁷ Art 18(6) DMA.

⁵⁸ Art 17(1) and (3) DMA.

⁵⁹ Arts 3(8) and 17(4) DMA.

⁶⁰ Arts 5, 6 and 7 DMA.

⁶¹ Art 12 DMA.

⁶² Art 19 DMA. Obviously, the Commission can always propose changes to any regulation; however, the market investigation under Art 19 specifically identifies a possible need to extend the reach of the DMA to other services, which can be proposed by the Commission after such a market investigation.

⁶³ Art 14 DMA.

⁶⁴ Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings [2004] OJ L 24/1.

⁶⁵ Art 14(4) and (5) DMA.

⁶⁶ Art 14(1) DMA. Art 14 DMA and Art 22 EUMR were intended to work in tandem. This way, the Commission avoided a cumbersome reform of the EUMR while it radically revised its Article 22 EUMR policy encouraging referrals from Member States even if they did not have original jurisdiction over the case. However, contrary to the Commission's attempt to extend its jurisdiction over mergers

³⁸ These institutionalised 'DMA compliance workshops', or 'DMA industry roundtables' as Feasey and Monti (n 33) 109 call them, are organized separately for each gatekeeper every year. All the past workshops can be accessed on the Commission's website: https://digital-markets-act.ec.europa.eu/events/workshops_en.

³⁹ Arts 21–23 DMA.

⁴⁰ Art 24 DMA.

⁴¹ Art 29(1), (3), and (5) DMA.

⁴² Arts 30–31 DMA.

⁴³ Articles 16–19 DMA.

⁴⁴ With an opening decision (Article 20 DMA), a statement of preliminary findings, which resembles a statement of objection in competition law, explains to the company what the Commission intends to request (Article 29(3) DMA) an advisory committee procedure (Article 50(2) DMA which makes the advisory procedure of the Article 4 of Regulation (EU) No 182/2011 applicable), a final decision (Article 29 DMA), and possibly fines (Article 30 DMA).

⁴⁵ The relevant Article 25 DMA only applies in the case of systematic non-compliance.

⁴⁶ Monti (n 2) 176.

⁴⁷ Article 18(3) DMA.

⁴⁸ Article 18 DMA.

⁴⁹ Art 31(1)(b) DMA.

to inform the Commission about consummated concentrations of gatekeepers.⁶⁷ In particular, any concentration that induces additional core platform services to meet the quantitative thresholds of the DMA regarding ‘active end users’ and ‘active business users’ shall be made known to the Commission by the gatekeeper within two months of its implementation. The Commission is to publish a yearly overview of reported concentrations.⁶⁸

In addition, as already highlighted with regard to market investigations into new services and new practices,⁶⁹ the EU legislature has provided the Commission with expanded administrative powers. The Commission does not only have the power to facilitate compliance and steer enforcement by means of general guidelines,⁷⁰ and implementing measures⁷¹ as in traditional competition law. Instead, the EU legislature has also provided the Commission the power to adopt numerous delegated acts for the implementation of the DMA.⁷² For example, it can explicitly change and update the obligations of gatekeepers under Article 12 of the DMA. Under this provision, the Commission is able to change existing obligations and impose new obligations on gatekeepers,⁷³ whether these are subject to further specification or dialogue,⁷⁴ or standalone obligations that do not require such further specification.⁷⁵ The same applies to the list of basic functionalities for which interoperability should be ensured regarding number-independent interpersonal communications services.⁷⁶ With regard to such services, the Commission can also specify the manner in which these interoperability obligations need to be performed.⁷⁷

This brief overview makes clear how the Commission is not only institutionally the central enforcement organ of the DMA but how it has been given extensive powers to shape markets in the digital sphere for business involving gatekeepers and thus ensure their ‘fairness and contestability’. These strong powers will be taken into account by the gatekeepers when they interact with the Commission and thus ensure that the Commission will be in a strong (bargaining) position vis-à-vis the gatekeepers in any regulatory dialogue to secure compliance.⁷⁸

B. The role of EU courts

The EU courts will have their usual two distinct roles, also in the context of the DMA. First, they perform judicial review with regard to the actions or decisions of the Commission. Second, they provide guidance in preliminary reference procedures.

below the EUMR thresholds in an unlimited way via the ‘back door’ pursuant to its 2021 Guidance on Article 22, the European Court of Justice in its *Illumina/Graill* judgment narrowed the applicability of the Art 22 referral mechanism to cases where Member States have competence to review such mergers under national law. Following this judgment, the Commission has accepted referral of merger cases based solely on national ‘call-in’ powers but this decision has been challenged before the EU Courts. For an overview of these cases, the history and implications of the Art 22 policy, and the current debate about EU merger control reforms, see Anna Tzanaki, ‘Dynamism and Politics in EU Merger Control: The Perils and Promise of a Killer Acquisitions Solution through a Law and Economics Lens’ (2025) 87 ALJ 173.

⁶⁷ Art 14(3) DMA.

⁶⁸ Art 14(4) DMA. The Commission publishes a list of acquisitions for each designated gatekeeper based on the information received on its website: <https://digital-markets-act-cases.ec.europa.eu/acquisitions>.

⁶⁹ See n 62.

⁷⁰ Art 47 DMA.

⁷¹ Art 46 DMA, covering notification forms, etc.

⁷² Art 49 DMA.

⁷³ Under Art 12(1) DMA.

⁷⁴ Obligations under Art 6 DMA.

⁷⁵ Obligations under Art 5 DMA.

⁷⁶ According to Art 12(3) DMA.

⁷⁷ According to Art 12(4) DMA.

⁷⁸ See also Monti (n 2) 164ff.

In the context of judicial review,⁷⁹ the General Court will have jurisdiction at first instance with the possibility of an appeal to the Court of Justice. As the DMA makes clear, the latter has unlimited jurisdiction in respect of fines and periodic penalty payments.⁸⁰ Thus, the Courts’ review will essentially take place *ex post* once a fine or periodic penalty payment has been imposed for non-compliance. In the compliance phase, the EU courts seem to have no role given the ‘cooperative’ or informal nature of the procedure.⁸¹ However, any specification decision issued by the Commission with regard to obligations under Articles 6 and 7 of the DMA is binding on the gatekeeper and as such reviewable by the Courts.⁸² The only other role the courts have been given during the investigation stage is the reviewing of requests for information⁸³ and dawn raids.⁸⁴

The second role that the Court of Justice has is in the context of questions by national courts as part of the preliminary reference procedure.⁸⁵ Given that the DMA is a regulation, it is directly applicable by national courts or enforcement bodies.⁸⁶ Thus, there can be private enforcement of the DMA.⁸⁷ This will most likely concern the obligations imposed on the gatekeepers and questions of damages. The DMA itself is silent on damages, so it will fall on the Court of Justice to determine whether and under which conditions damages may be claimed. Finally, the Court of Justice may also have to deal with questions on pre-emption of national laws addressed to gatekeepers.⁸⁸ In other words, whether and to what extent national law might impose similar or additional obligations upon gatekeepers is a subject to be decided by the courts at the EU level.⁸⁹

All in all, the European Court of Justice has an important role to play. Although the Commission seems still in the driving seat with its power to designate gatekeepers, specify their obligations, and impose fines or remedies, the content and contours of these powers will be also forged by the EU Courts.

C. The role of third parties and private enforcement

Third parties and private enforcement seem to have a supporting yet pivotal role to the Commission’s central position. On one hand, third parties are directly supporting and providing input into the public enforcement procedure initiated by the Commission, for example as whistleblowers⁹⁰ or complainants, or by market testing compliance

⁷⁹ Art 261 of the Treaty on the Functioning of the European Union (‘TFEU’).

⁸⁰ Recital 94 and Art 45 DMA.

⁸¹ For instance, the compliance officer of a designated gatekeeper, as part of its mandatory internal compliance function, is expected to ‘cooperate’ with the Commission (Art 28(5)(d) DMA), while any regulatory dialogue initiated on the request of the gatekeeper takes place within a framework of informal negotiation and is fully subject to the Commission’s discretion (Art 8(3) DMA).

⁸² Art 8(2) and (5)–(7) DMA.

⁸³ Art 21(3) DMA.

⁸⁴ Art 23(6) and (10) DMA.

⁸⁵ Art 267 TFEU.

⁸⁶ On the scope of the direct effect, see Assimakis Komninos, ‘Private Enforcement of the DMA Rules before the National Courts’ (2024) 3 *Mededingingsrecht in de Praktijk* (Competition Law in Practice) 31.

⁸⁷ On private enforcement and the DMA, see further Section 2.3 below.

⁸⁸ On the subject of pre-emption, see Julian Nowag and Carla Valeria Patiño, ‘Enough of Fairness: Pre-emption and the DMA’ 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) 61–74; and Or Brook and Magali Eben, ‘Who Should Guard the Gatekeepers: Does the DMA Replicate the Unworkable Test of Regulation 1/2003 to Settle Conflicts between EU and National Laws?’ (December 2022) *CPI Antitrust Chronicle*.

⁸⁹ See Art 1(5) DMA.

⁹⁰ The DMA Whistleblower Tool on the Commission’s website enables secure and anonymous, if one so wishes, reporting of gatekeeper practices considered non-compliant with Arts 5, 6, and 7 of the DMA: https://digital-markets-act.ec.europa.eu/whistleblower-tool_en. Whistleblowers are protected pursuant to the EU Whistleblower Directive. See Recital 102 and Art 43 DMA.

measures subject to a specification decision,⁹¹ or contemplated remedies⁹² or commitments⁹³ in cases of systematic non-compliance after a market investigation. On the other hand, private parties may additionally rely on private enforcement once the Commission has designated an undertaking as a gatekeeper.⁹⁴

In terms of supporting the Commission in its supervisory and public enforcement role, the input of third parties might help the Commission with its designation decision, although third parties are not mentioned specifically in this regard. The most important role for third parties in public enforcement is foreseen in monitoring compliance with the obligations of gatekeepers. Third parties are allowed to inform and make complaints to the Commission.⁹⁵ However, the Commission has full discretion but no duty to respond to or follow up on such complaints.⁹⁶ Third parties also have a specific role in the regulatory dialogue between the Commission and the gatekeepers that should ensure the proper functioning of the gatekeepers' compliance measures.⁹⁷ This role can be informal when providing input in the context of the regulatory dialogue initiated by the gatekeeper to clarify whether its compliance measures are effective.⁹⁸ Where the Commission initiates an investigation, the specification process includes a more formal role for third parties.⁹⁹ The Commission has to publish a non-confidential summary of the case, after communicating its preliminary findings to the gatekeeper, and its intended measures¹⁰⁰ and allow third parties to comment on these.¹⁰¹ Where the Commission goes further and aims to adopt a non-compliance decision, it can also consult third parties.¹⁰² Third parties also have an important role in market investigations. In particular, in market investigations into systemic non-compliance, the Commission has to communicate its preliminary findings to the gatekeeper, and publish a non-confidential summary of the case and the remedies it considers imposing, to allow third parties to comment.¹⁰³ The same right to comment applies if the Commission aims to close the market investigation by adopting a decision to make the commitments offered by the gatekeeper binding.¹⁰⁴ While such rights to provide comments do not exist with regard to

market investigations into new services and practices, the Commission may still ask third parties for input.¹⁰⁵

Whereas third-party involvement is explicitly prescribed by the DMA in these areas, the role of private enforcement is far less clear. The DMA itself does not contain much regarding the role of private enforcement. In fact, it does not even mention private damages.¹⁰⁶ Yet, it hints at private enforcement indirectly.¹⁰⁷ It also mentions the Directive on representative actions by consumers,¹⁰⁸ which shall apply to infringements by gatekeepers of DMA provisions 'that harm or may harm the collective interests of consumers'.¹⁰⁹ Having said that, in an official press release following the adoption of the DMA, the Commission notes that as a Regulation the DMA is directly enforceable by national courts and explicitly refers to the possibility of private damages actions.¹¹⁰

Some have spoken out against private enforcement suggesting that the DMA only imposes obligations on gatekeepers but does not create entitlements for users.¹¹¹ Others would at least want to limit it to follow-on damages to avoid fragmentation of the application of the law across Member States.¹¹² However, two things would need to be kept in mind. First, given that collective redress is mentioned, private enforcement is foreseen directly by the DMA.¹¹³ Second, the DMA is a Regulation and as such directly applicable. On one hand, this means that a violation of it may result in damages claims as we know from *Muñoz* that the effectiveness of EU law may require the recognition of damages for violations of rights provided by a Regulation.¹¹⁴ Such rights can stem in particular from the obligations imposed on the gatekeeper.¹¹⁵ On the other hand, national procedural autonomy applies where EU law has not specifically occupied the area.¹¹⁶ In fact, some national systems have made arrangements for private enforcement actions regarding the DMA. For example, the

⁹¹ Art 8(6) DMA.

⁹² Art 18(5) DMA.

⁹³ Art 18(6) DMA.

⁹⁴ Private enforcement is possible then because only after the Commission's designation decision do the obligations under Arts 5, 6, and 7 DMA become binding on the designated gatekeeper. As Komninos notes, a challenge by the gatekeeper of its designation 'does not stand in the way of the DMA obligations' direct effect, unless the EU Courts have ordered the suspension of the designation decision'. Similarly, a possible specification process under Art 8 DMA regarding effective compliance measures for Art 6 and 7 DMA obligations does not affect direct effect. See Komninos (n 86) 33.

⁹⁵ Art 27(1) DMA. The article also foresees the possibility to inform national competent authorities instead of the Commission. These authorities may in turn inform the Commission if they suspect non-compliance with the DMA (Art 27(3)).

⁹⁶ Art 27(2) DMA. This limits the role of private parties. On one hand, 'there will be no decisions rejecting complaints, which again could be relied upon before national courts, like in the competition enforcement field.' See Komninos (n 86) 38. On the other hand, 'private third parties are unlikely to be able to prove individual standing before the courts to appeal the Commission's decisions' unless they are addressees of acts. See Jasper van den Boom and Rupprecht Podszun, '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' (2025) ECJ 1, 28–29.

⁹⁷ See n 37 and 38 above and surrounding text.

⁹⁸ Art 8(3) DMA.

⁹⁹ Art 8(2) DMA.

¹⁰⁰ These can be distinguished from 'real' (*ex post*) remedies at the enforcement stage when the Commission may issue a (systematic) non-compliance decision, pursuant to Arts 29 and 19 DMA.

¹⁰¹ Art 8(6) DMA.

¹⁰² Art 29(4) DMA; although it is not bound to do so.

¹⁰³ Art 18(5) DMA.

¹⁰⁴ Art 18(6) DMA.

¹⁰⁵ Art 19(2) DMA.

¹⁰⁶ The EU Damages Directive (Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1) is inapplicable in this context as it governs private actions for violations of competition law and not the DMA.

¹⁰⁷ Komninos (n 86) 32 notes that the fact that 'Recital 92 and Article 39 DMA refer to cooperation mechanisms between the Commission and national courts and also include a duty for national courts to pay respect to Commission DMA decisions [...] obviously presupposes that actions before the national courts are available.' Besides, even if its final text did not mention this at all, private enforcement of the DMA would be possible as a matter of general principles of EU law. *Ibid* 32–35.

¹⁰⁸ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L 409/1.

¹⁰⁹ Art 42 DMA.

¹¹⁰ European Commission, 'Questions and Answers: Digital Markets Act: Ensuring Fair and Open Digital Markets', Brussels, 6 September 2023, available at https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349 accessed 15 October 2023. 'The DMA is a Regulation, containing precise obligations and prohibitions for the gatekeepers in scope, which can be enforced directly in national courts. This will facilitate direct actions for damages by those harmed by the conduct of non-complying gatekeepers.'

¹¹¹ Oles Andriychuk, 'Do DMA Obligations for Gatekeepers Create Entitlements for Business Users?' (2023) 11 JAE 123.

¹¹² Assimakis Komninos, 'The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement' in Nicolas Charbit and Sébastien Gachot (eds), *Eleanor M. Fox - Antitrust Ambassador to the World Liber Amicorum* (Concurrences 2021) 425.

¹¹³ And limiting private actions to collective consumer actions based on EU law is unlikely.

¹¹⁴ Case C-253/00 *Antonio Muñoz v Frumar Limited*, EU:C:2002:497, paras 29–31.

¹¹⁵ Komninos (n 112) 425–434.

¹¹⁶ As seen in the context of damages for antitrust violations, the Damages Directive brought in a certain harmonization, yet even then areas still remain within the competence of the Member States. See Max Hjärtröm and Julian Nowag, 'EU Competences and the Damages Directive: The Continuum between Minimum and Full Harmonisation' in Magnus Strand, Vladimir Bastidas and Marios C Iacovides (eds), *EU Competition Litigation: Transposition and First Experiences of The New Regime* (Hart Publishing 2019).

11th amendment to the German Competition Act made the injunctive relief and damages provisions of the Competition Act also applicable to violations of the DMA.¹¹⁷ Thus, it can be expected that the drive as to private enforcement will start at the Member State level and reach the Court of Justice, which can then provide further clarification, elaboration, and harmonization of remedies in this area.

Overall, we can imagine direct actions in the form of injunctions and follow-on actions.¹¹⁸ However, direct action in the area of the DMA is substantially different from direct action under traditional EU antitrust rules. Any direct action such as injunctive relief regarding the DMA is dependent on prior action by the Commission because without a designation decision by the Commission such action is not possible. This dependence on prior Commission action is even more pronounced with regard to possible follow-on damages. These rely, just as in antitrust, on a prior non-compliance decision. This particular interaction between public and private enforcement further highlights the special role of the Commission. Moreover, it is expected to lead to questions that will ultimately end up at the Court of Justice. The judgment of *DB Station*¹¹⁹ raises additional questions about the relationship between public and private enforcement of the DMA. In that case, the Court of Justice, with regard to railroad regulation, made the availability of damages actions under Article 102 TFEU dependent on a prior complaint to (and decision of) the national railroad regulator. If such an approach equally applied to the DMA, it might weaken the overall effectiveness of enforcement while strengthening the public enforcement role of the Commission even further.

D. The role of national competition and other authorities

National authorities have an explicitly supporting role in the effective implementation of the DMA. While the text recognizes the Commission as the sole enforcer of the DMA,¹²⁰ it still provides for cooperation of a different kind and depth with national authorities enforcing competition laws¹²¹ and other national competent authorities such as sector-specific regulators.¹²²

Cooperation with national competition authorities is indeed described in some detail. This may indicate an intent to manage the ‘complementary’ and potentially concurrent application of the DMA and national competition law whereby the Commission and national competition authorities may address the same conduct of gatekeepers under different legal instruments.¹²³ It also seems to point to a compromise position between providing the EU with new competence and Member States wishing to maintain powers.

Some question the extent to which these attempts to have EU regulation on gatekeepers pre-empt and exclude the application of (other EU or) national competition laws have been successful or clearly carved out.¹²⁴ Others suggest that the seemingly exclusive

role of the Commission in enforcing the DMA and its sought-after ‘complete harmonisation effect’ are limited by the recognition of the ‘complementary’ and different objectives pursued under the DMA and by EU and national competition laws.¹²⁵ Against this backdrop, enhanced cooperation between the Commission and national competition authorities and coordination of their enforcement actions is of the essence and well catered for in the DMA provisions. Specifically, there is an expectation that national competition authorities cooperate with the Commission and that these national authorities and the Commission inform each other regarding their enforcement actions through the European Competition Network.¹²⁶ This cooperation includes exchange of confidential information. In addition, national competition authorities are obliged to inform the Commission in two prescribed situations: (i) when they intend to launch an investigation on gatekeepers based on their national competition laws¹²⁷ and (ii) when they intend to impose obligations on the gatekeepers based on these competition laws.¹²⁸ This information may also be made available to national competition authorities of other Member States.¹²⁹ However, any information exchanged should only be used for the purpose of coordinating enforcement under the DMA and national competition laws.¹³⁰

The final text of the DMA clarified the underlying rationale for these coordination and information mechanisms while it also strengthened the investigative powers of national competition authorities with reference to the DMA. On one hand, the Commission and relevant national authorities in general should coordinate their enforcement, especially as regards fines, to ensure respect for the principles of proportionality and *ne bis in idem*.¹³¹ On the other hand, national competition authorities in particular may have a more visible and active role in investigations relating to the DMA. For instance, the Commission can ask for the support and assistance of national authorities in market investigations pursuant to the DMA.¹³² Officials of national competition authorities may also assist the Commission with inspections and interviews in their territory or with the monitoring of obligations and measures taken to ensure compliance with the DMA.¹³³ Moreover, national competition authorities may conduct on their own initiative an investigation into possible non-compliance with any DMA obligations in their territory after having informed the Commission.¹³⁴ Member States may thus empower their national authorities particularly in cases where it cannot be determined from the outset whether a gatekeeper’s behaviour is capable of infringing the DMA, the competition rules which the national competent authority is empowered to enforce, or both.¹³⁵ As noted above, Germany has taken steps in this direction under its latest amendment of its Competition Act.¹³⁶ However, the opening of proceedings by the Commission to investigate any non-compliance by the gatekeeper will short-circuit such an investigation by national competition authorities.

¹¹⁷ See Ellen Braun, Bórris Ahrens and Ioannis Thanos, ‘11th Amendment of German Competition Act Enters into Force, Introducing Significant Reforms’ (A&O Sherman 18 July 2023), available at <https://www.aoshearman.com/en/insights/11th-amendment-of-german-competition-act-enters-into-force-introducing-significant-reforms> accessed 15 October 2023.

¹¹⁸ See also Komninos (n 86) 35–36, who provides an overview of remedies national courts can grant.

¹¹⁹ Case C-721/20 *DB Station & Service*, EU:C:2022:832.

¹²⁰ Recital 91 and Art 38(7) DMA.

¹²¹ Art 38 DMA.

¹²² Art 37 DMA.

¹²³ Recital 11 DMA.

¹²⁴ Brook and Eben (n 88); Nowag and Valeria Patiño (n 88).

¹²⁵ Nicolas Petit, ‘The Proposed Digital Markets Act (DMA): A Legal and Policy Review’ (2021) 12 JECL & Pract 529, 539.

¹²⁶ Art 38(1) DMA.

¹²⁷ Art 38(2) DMA.

¹²⁸ Art 38(3) DMA. This obligation includes communicating any interim measures imposed on gatekeepers.

¹²⁹ Art 38(2) and (3) DMA.

¹³⁰ Art 38(5) DMA.

¹³¹ Recital 86 DMA.

¹³² Arts 38(6) and 16(5) DMA.

¹³³ Arts 22(2), 23(3) and (7), and 26(2) DMA.

¹³⁴ Art 38(7) DMA.

¹³⁵ Recital 91 DMA.

¹³⁶ See n 117 above.

The Commission, in other words, remains the ultimate enforcer of the DMA at all times. The national authorities have to report their previous findings on possible non-compliance to it, but the Commission has full discretion on whether to open proceedings or not.¹³⁷

As regards other national authorities, the DMA text is more succinct. There is nonetheless provision for close cooperation and enforcement coordination between the Commission enforcing the DMA and Member States with other applicable laws in place with the aim to ensure coherent, effective, and complementary enforcement of available legal instruments applied to gatekeepers.¹³⁸ The Commission may also consult national authorities on issues relating to the application of the DMA when needed.¹³⁹ In this context, no confidential information is supposed to be exchanged between agencies.¹⁴⁰

The overall ambition is that national authorities will respect and facilitate the Commission's exclusive competence in enforcing the DMA without overriding it indirectly via national laws and regulations that serve distinct legal objectives but apply concurrently to gatekeepers, such as privacy, consumer protection, telecommunications regulations, or national competition laws. To achieve this, the Commission may request the assistance and support of national competent authorities such as data and consumer protection authorities. For instance, appointed experts or auditors from these agencies may assist the Commission with monitoring the effective implementation and compliance of the gatekeepers with the DMA.¹⁴¹ Additionally, national authorities should provide it with any information in their possession or otherwise assist it to carry out its duties under the DMA.¹⁴² The goal is not only avoiding conflicting decisions by national authorities with decisions adopted by the Commission under the DMA¹⁴³ but also facilitating a more harmonious application of those other laws in practice. The Commission's annual reports to the European Parliament and the Council on the DMA implementation must provide an overview of this cooperation between the Commission and national authorities.¹⁴⁴

E. The role of new EU-level institutional structures under the DMA

A similar spirit animates coordination mechanisms provided for under the DMA at the EU level. However, this is through the creation of novel bodies that assist the Commission as sole enforcer of the DMA and tap on existing networks and regulatory authorities: (i) the High-Level Group¹⁴⁵ and (ii) the Digital Markets Advisory Committee.¹⁴⁶

In particular, the High-Level Group is set up to comprise of an equal number of representatives of five specific European bodies and networks: (a) Body of the European Regulators for Electronic Communications; (b) European Data Protection Supervisor and European Data Protection Board; (c) European Competition Network; (d) Consumer Protection Cooperation Network; and (e) European Regulatory Group of Audiovisual Media Regulators.¹⁴⁷ The High-Level Group

meets upon the request of the Commission at least once per year, or when so requested by the majority of its members to address a specific issue.¹⁴⁸ Its mission is manifold. First, the High-Level Group may provide advice and expertise within the competences of its members regarding either the application and enforcement of the DMA or the promotion of a consistent regulatory approach across different regulations.¹⁴⁹ Second, it is tasked with submitting an annual report to the Commission identifying and assessing interactions between the DMA and sector-specific rules applied at the national level, which may include recommendations on how to achieve convergence towards consistent transdisciplinary approaches and synergies between the implementation of the DMA and other sectoral regulations.¹⁵⁰ Third, it may provide advice and expertise during market investigations into new services and new practices¹⁵¹ in order to decide whether to amend, add, or remove rules.¹⁵²

The other new organ created is the Digital Markets Advisory Committee, which is modelled on a similar committee structure under antitrust procedures.¹⁵³ The Committee is composed of representatives of Member States and is expected to review and deliver its opinion on draft implementing acts to be adopted by the Commission.¹⁵⁴ This DMA Advisory Committee, notwithstanding its name, operates under two different modes: (i) an advisory procedure¹⁵⁵ and (ii) an examination procedure.¹⁵⁶ The majority required for the DMA Advisory Committee to form an opinion under each of these procedures differs.¹⁵⁷ In addition the Committee's opinion is binding on the Commission when the examination procedure applies.¹⁵⁸ In contrast, the Commission must 'take the utmost account' of the discussions and opinion of the Committee when the advisory procedure is followed.¹⁵⁹ But it is not bound to adopt or not the draft implementing act according to the Committee's opinion. The examination procedure should be used for the adoption of an implementing act on the practical arrangements for the cooperation and coordination between the Commission and Member States (national authorities),¹⁶⁰ whereas the advisory procedure is used for the remaining implementing acts under the DMA.¹⁶¹ Generally, the DMA Advisory Committee

¹⁴⁸ Art 40(4) DMA.

¹⁴⁹ Art 40(5) DMA.

¹⁵⁰ Art 40(6) DMA.

¹⁵¹ Under Art 19 DMA.

¹⁵² Art 40(7) DMA.

¹⁵³ Art 50(1) DMA. In fact, in the area of EU competition law, there are two such advisory committees—one on Concentrations and one on Restrictive Practices and Dominant Positions—that are set up and operate in a similar fashion. See Rachel Brandenburger, 'Advisory Committee' in Deborah Healey, Bill Kovacic, Pablo Trevisán and Richard Whish (eds), *Competition Law Dictionary*, Concurrences, Art. N° 118302.

¹⁵⁴ Arts 1 and 3(2)–(4), Regulation 182/2011, laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L55/13. It is further noted that '[a]s a committee providing Member State (MS) oversight of Commission delegated legislation, it is governed by well-established comitology procedures [Regulation 182/2011] as well as its own rules of procedure,' adopted on 13 January 2023. National delegations include mainly representatives of national competition authorities or experts from other competent authorities. See Imelda Maher, 'Regulatory Design in the EU Digital Markets Act: No Solo Run for the European Commission' (2024) 12 JAE 273, 274–275; and Recital 101 DMA.

¹⁵⁵ Art 50(2) DMA.

¹⁵⁶ Art 50(3) DMA.

¹⁵⁷ Arts 4(1) and 5(1), Regulation 182/2011 (n 154).

¹⁵⁸ Art 5(2) and (3), Regulation 182/2011 (n 154). This means that a negative opinion by the Committee compels the Commission not to adopt the draft implementing act.

¹⁵⁹ Art 4(2), Regulation 182/2011 (n 154).

¹⁶⁰ Provided for in Arts 37 and 38 DMA.

¹⁶¹ Recital 100 and Art 46(2) DMA. The examination procedure is only prescribed under Art 46(1)(i) DMA. The advisory procedure is followed in other cases such as during a specification decision by the Commission under Art 8(2), during market investigations under Arts 17 and 18, when deciding interim measures under

¹³⁷ Recital 91 and Art 38(7) DMA.

¹³⁸ Art 37(1) DMA.

¹³⁹ Art 37(2) DMA.

¹⁴⁰ Monti (n 2) 184.

¹⁴¹ Recital 85 DMA.

¹⁴² Recital 90 and Art 21(5) DMA.

¹⁴³ Art 1(7) DMA.

¹⁴⁴ Art 35(2)(d) DMA. As provided by Art 35(3), DMA annual reports are published on the Commission's website: https://digital-markets-act.ec.europa.eu/about-dma/dma-annual-reports_en.

¹⁴⁵ Art 40 DMA.

¹⁴⁶ Art 50 DMA.

¹⁴⁷ Art 40(2) and (3) DMA.

has a role when the Commission intends to adopt certain substantive decisions and procedural acts or regulations under the DMA. Yet, there is no requirement of consultation when the Commission issues notices or guidelines, for example, or possible discussion of national cases involving gatekeepers as these by definition do not relate to the enforcement of the DMA, which is dealt with exclusively by the Commission.¹⁶²

3. Institutional innovation and the overall institutional design

Overall, the DMA exemplifies a highly innovative institutional design. It combines elements of broad and continuous ‘participation’ and ‘responsiveness’ in regulation that aim to make the DMA reflect and safeguard the dynamism of the digital markets it addresses. For the same reasons, it nurtures a mutual ‘learning culture’,¹⁶³ instead of a pure ‘supervisory’ or ‘punitive’ ethos, which is supported by opportunities for ‘cooperative’ solutions and ‘experimentalist’ governance.¹⁶⁴ Notably, the institutional design transcends existing stylized classifications as it synthesizes elements of different systems or models of regulation with the aim to ensure effectiveness. Namely, the DMA offers a composite institutional system based on three pillars: (i) compliance (based on guidance and self-regulation), (ii) supervision (based on transparency regulation and reporting), and (iii) enforcement (based on *ad hoc ex post* punishment and *ex ante* deterrence). The first two pillars may be less visible as they operate in the shadow of enforcement, which may happen more rarely, but its occurrence and consequences are quite salient when it does happen.¹⁶⁵ On the contrary, compliance for gatekeepers and supervision by the Commission under the DMA are ongoing and based on a philosophy of decentralization. This contrasts sharply to the ‘centralized’ enforcement role of the Commission, which although central to the DMA design is supposed to operate as a discontinuous mechanism and a powerful looming threat only exceptionally to be triggered.

Paradoxically, the more powerful an enforcer the Commission is, the less we expect to see it exercise its powers because its strong powers in themselves save enforcement actions and discipline gatekeepers that may be more willing to engage in regulatory dialogue and effective compliance with the DMA at earlier stages. This hybrid institutional design shows maturity and depth that may not be appreciated at first glance. Yet, despite all its merit and virtues, it also crystallizes trade-offs. Most remarkable among others, cooperation and participation to monitor and ensure compliance may lead to quick

Art 24 or commitments under Art 25, when adopting a non-compliance decision under Art 29, and for all other implementing acts under Art 46.

¹⁶² By contrast to the Advisory Committee on Restrictive Practices and Dominant Positions, which has such a broader role. See Brandenburger (n 153) and Maher (n 154) 275.

¹⁶³ Larouche and de Streeel (n 2) 560.

¹⁶⁴ Yane Svetiev, *Experimentalist Competition Law and the Regulation of Markets* (Hart Publishing 2020).

¹⁶⁵ The Commission has adopted its ‘first non-compliance decisions’ under the DMA, including ‘cease and desist’ orders and significant fines to gatekeepers Apple and Meta for failing to comply with certain of their DMA obligations. According to Commissioner Teresa Ribera, the decisions ‘send a strong and clear message’ and signal the Commission’s commitment to enforcing the DMA. At the same time, the Commission’s press release notes that ‘the two decisions come after extensive dialogue with the companies,’ based on which the Commission decided to close non-compliance proceedings into certain other practices or to cancel its previous designation decision regarding certain core platform services of these gatekeepers, and that it ‘continues its engagement with Apple and Meta to ensure compliance with the Commission’s decisions and the DMA more generally’. See press release IP/25/1085, ‘Commission Finds Apple and Meta in Breach of the Digital Markets Act’ (Brussels, 23 April 2025), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1085 accessed 15 July 2025.

and forward-looking solutions with increased legitimacy but those come at the potential price of Commission discretion and third party ‘bias’.¹⁶⁶ The key to the successful implementation of the DMA may then be to what extent those risks may be minimized by resorting to likely countermechanisms, for instance by issuing administrative guidelines¹⁶⁷ or adhering to general legal principles such as legal certainty, proportionality, and equal treatment.¹⁶⁸ While the openness of DMA institutional design that prioritizes ‘cooperative compliance’ may to some extent render such concerns endemic, countermechanisms may effectively narrow the Commission’s discretion or ensure the consistent and predictable exercise of its powers.

Against this backdrop, the following sections discuss in more detail the institutional choices of the DMA at the micro and macro level, respectively.

A. Institutional innovation in the DMA and its logic

Institutional innovation is not a theme that EU regulators are eager to advertise; it is nonetheless a common theme that manifests in many ways and different forms under the DMA. First, the Commission is the ‘principal actor’ in the DMA’s institutional architecture.¹⁶⁹ By opting for a model of centralized public enforcement at the EU level, the DMA makes a strong commitment to ensuring swift and harmonized enforcement and furthering European integration.¹⁷⁰ This choice, however, breaks with the tradition of decentralized enforcement of EU law at the national level, which we know from sector-specific regulations and EU law in general, or the parallel enforcement of competition law at national and EU levels.¹⁷¹ Yet, if one goes back in history, the structure of the DMA brings back memories of the early days of EU antitrust law. More specifically, the DMA institutional setup resembles ‘the governance system of Regulation 17/62 in competition law in which the Commission enjoyed a quasi-monopoly on enforcement’ before the comprehensive reform of the antitrust enforcement system under Regulation 1/2003.¹⁷²

This portrait of the Commission as the exclusive enforcer of the DMA and a ‘super regulator’ for digital gatekeepers is partial and not representative of the overall institutional reality. In other words, while the Commission has a central role, it is framed by an array of other supporting actors that either have (i) a parallel quasi-regulatory or monitoring role in the implementation of and compliance with the DMA or (ii) a complementary investigation and cooperation role to ensure the coherence and successful and sustainable enforcement of the DMA. These are private actors, including the designated gatekeepers themselves, which are encumbered by a mandatory ‘compliance function’, or private parties such as competitors, suppliers, or customers of gatekeepers, which may be involved in public or private

¹⁶⁶ Monti (n 2) 181.

¹⁶⁷ The issuing of any guidelines under the DMA is at the discretion of the Commission. See Recital 95 and Art 47 DMA.

¹⁶⁸ Such provision exists in the context of the informal regulatory dialogue under Art 8(3) DMA. For a discussion of limiting principles on the Commission’s exercise of its discretion at different stages of the process, see van den Boom and Podszun (n 96). See also Monti (n 2) 181, who suggests that third party bias ‘can be countered by consulting other sources’ such as privacy and security experts on specific technical issues.

¹⁶⁹ Monti (n 2) 184.

¹⁷⁰ Art 1(1) and (5) DMA.

¹⁷¹ Larouche and de Streeel (n 2) 558–59 (also noting that this choice for centralization stands in sharp contrast to the ‘principle of indirect administration’ in EU law governance); Monti (n 2) 164 (noting as another exception that ‘supervision of systematically significant banks is now also centralised’ at EU level and exercised by the European Central Bank).

¹⁷² Petit (n 125) 539.

enforcement pursuant to the DMA.¹⁷³ They can be also public actors such as national competition authorities or other national authorities that may assist the Commission undertake its enforcement duties during investigations of non-compliance or market investigations on systematic non-compliance or revision of the DMA's scope of application.¹⁷⁴ In addition, new EU institutions and expert committees such as the High-Level Group and the DMA Advisory Committee also actively advise and assist the Commission in its regulatory and public enforcement role.¹⁷⁵ The picture is completed by adding national and EU courts that seek to apply and safeguard the private and public enforcement of the DMA obligations imposed on gatekeepers.¹⁷⁶ Therefore, the Commission is not to act alone but in interplay with and within a web of several institutional actors. The justification behind this more intricate architecture is the desire to ensure above all the effectiveness of the DMA (i) by avoiding conflicts in competences and decisions between complementary laws and regulators addressing gatekeepers and (ii) by promoting its streamlined and responsible application through a careful institutional system of 'soft' checks and balances. In this light, there is a delicate balance struck between the national and EU level, private actors and public authorities, and other actors guarding and validating the Commission's centralized authority as the undoubtedly key guardian of the DMA.

Second, the Commission's central role when understood beyond the narrow enforcement context, is on one hand, more powerful and pivotal, and on the other hand, reliant on decentralized elements. The DMA essentially envisages the Commission to have an institutional duty of 'enhanced supervision' throughout the implementation of the DMA, i.e. that starts at the compliance stage and continues into the enforcement stage.¹⁷⁷ For instance, the Commission shall keep the compliance efforts of gatekeepers 'under regular review'.¹⁷⁸ However, the DMA takes a revolutionary step further by making the internal compliance efforts of companies—the so-called compliance function—mandatory and very specifically prescribed. This 'organisational' obligation on gatekeepers on how to structure internally their affairs and comply with the law, including the positive duty on compliance officers to cooperate with the Commission, is unprecedented.¹⁷⁹ Having said that, there may be valid reasons for this *prima facie* odd institutional choice. The DMA seems to take on board insights from the science on corporate compliance and how the internal dynamics and governance structures within companies operate, which may generally be counterproductive to compliance efforts being effective and credible.¹⁸⁰ By raising the stature, legitimacy, and power of the compliance function within gatekeepers and making management responsible for the proper setup and operation of this mandatory function as well as requiring annual reports regarding DMA implementation, compliance with the DMA is made a corporate priority. That is, institutionalizing internal compliance as 'mandatory' and essential by law mandate, backed by the threat of

enforcement if compliance is deemed inadequate or ineffective,¹⁸¹ will have two positive effects from a policymaker's perspective: (i) altering gatekeepers' incentives and their governance dynamics, making corporate compliance measures credible and effective, and (ii) facilitating the Commission's public enforcement role in terms of efficiency of resources, asymmetry of information held by gatekeepers, and effectiveness of the DMA's deterrence and enforcement.

On the other hand, this institutional choice clearly breaks with antitrust tradition. Antitrust consciously has chosen to abstain from regulating the internal affairs of firms, leaving these to corporate law and rather focusing on market conduct and outcomes.¹⁸² Further, unlike more fixed and *ex post* antitrust procedures, the Commission's enforcement under the DMA is not simply *ad hoc* but continuously 'responsive' to previous actions (or inactions) of gatekeepers.¹⁸³ In this sense, the Commission's role is designed to be more dynamic to intervene when needed, flexible in proposing, assessing, or updating remedies but also quasi-decentralized in that it 'outsources' compliance reporting and monitoring to the gatekeepers and their compliance officers to begin with, and possibly also third parties and national authorities. From that point of view, the DMA also differs institutionally from the centralized system of *ex ante* EU merger control where the Commission has exclusive jurisdiction to review concentrations meeting the turnover thresholds under the EUMR.¹⁸⁴ That is, while the Commission here too is the key bottleneck for companies to notify their transactions in advance, once these are approved, the Commission no longer has the ability to intervene and unwind the merger or order additional or new remedies.¹⁸⁵ In other words, the Commission's power under EU merger control is also *ad hoc* and fixed albeit in an *ex ante* setting—not dynamic and 'responsive' as the DMA intentionally allows. Ironically, the DMA has been accused of being a largely fixed, *ex ante* type of regulation by looking at the nature of its substantive obligations imposed on gatekeepers. Yet, once one looks at its complementary institutional structure, a more balanced view may be due: the DMA relies on flexible means (institutions and procedures) to achieve fixed ends (set obligations and objectives). Effectiveness, harmonization, and cost efficiency may justify this institutional choice for centralized EU enforcement and supervision on the basis

¹⁸¹ The Commission's Compliance Report Template (n 19) explicitly states that 'failure by the gatekeeper to provide such true, correct and complete information [regarding its compliance efforts and function] may influence the Commission's prioritisation in opening proceedings with a view to the possible adoption of a non-compliance decision' under Art 29(1)(a) DMA. Further, van den Boom and Podszun (n 96) 11 note that '[t]he procedure under Art. 8(2) and (3) is a kind of second chance compliance report' through which 'the gatekeeper may avoid a non-compliance decision and fines', yet nothing—including a specification decision—binds the Commission from reopening proceedings or issuing fines for non-compliance if need be.

¹⁸² Anna Tzanaki, 'Common Ownership and Minority Shareholding at the Intersection of Competition and Corporate Law: Looking through the Past to Return to the Future?' in Marco Corradi and Julian Nowag (eds), *Intersections between Corporate and Antitrust Law* (Cambridge University Press 2023) 296–297.

¹⁸³ Ayres and Braithwaite (n 3); Monti (n 2) 175.

¹⁸⁴ Arts 1, 3, 4, and 21 EUMR.

¹⁸⁵ Case referrals under the EUMR allow for generally narrow exceptions to the rigid threshold-based allocation of merger cases between the EU and Member States and the mandatory *ex ante* notification system under the EUMR. Through the 'expanded' Art 22 referral mechanism, the Commission may be able to exceptionally capture and assess *ex post* mergers that in the first instance fall outside the scope of the EUMR upon referral from competent Member States. This provision is particularly important in the context of digital mergers, in light of Art 14 DMA that creates a mechanism for the Commission to be informed about M&A of gatekeepers and in turn to communicate this information to Member States, which are then entitled to refer potentially problematic cases to the Commission for merger review. On the scope of Art 22 EUMR and its interaction with the DMA, see Tzanaki (n 66). The fact however remains that even in the case of mergers reviewed pursuant to the referral procedure at EU level, once those mergers are assessed and cleared, conditionally or unconditionally, that decision is final and cannot be revisited by the Commission.

¹⁷³ See Sections 2.1 and 2.3 above.

¹⁷⁴ See Section 2.4 above.

¹⁷⁵ See Section 2.5 above.

¹⁷⁶ See Sections 2.2 and 2.3 above.

¹⁷⁷ Cf Art 26 DMA.

¹⁷⁸ Monti (n 2) 164.

¹⁷⁹ Art 28 DMA; although there are certain obligations with regard to banking supervision and their co-operation with banking regulators.

¹⁸⁰ Jennifer Arlen, 'The Potentially Perverse Effects of Corporate Criminal Liability' (1994) 23 JLS 833; Jennifer Arlen and Reiner Kraakman, 'Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes' (1997) 72 NYULR 687.

of decentralized private initiative (gatekeepers' internal compliance and annual reports and third parties' tips or complaints and private enforcement) and public assistance (national competition and other authorities' monitoring and investigation powers).

The philosophy here is aiming to constantly fill gaps and advance a pro-competition market environment at minimal public cost. The burden of compliance is primarily placed on the gatekeepers.¹⁸⁶ The Commission retains the upper hand if compliance is not up to the standard, which may be evolving. By being able to go up and down the 'enforcement pyramid', the Commission may escalate or de-escalate sanctions or enforcement actions against non-compliant or ineffectively compliant gatekeepers.¹⁸⁷ In this way, the Commission enjoys discretion and freedom to intervene or impose remedies, independently of the gatekeepers' initiative but depending on their prior (lack of) cooperation. This unties it from procedural fixtures, experienced in antitrust, with regard to both infringement and commitment decisions.¹⁸⁸ In contrast, the DMA relies on 'repeated engagement' between the regulator and gatekeepers¹⁸⁹ and as such it should allow the Commission to minimize gatekeepers' strategic behaviour. Knowing that regulators may catch them up later on, gatekeepers may well have incentives to be constructive and take effective measures to ensure compliance since the outset. This pattern completely overturns the familiar public regulator–private regulatee dynamic evidenced in antitrust law that gives the benefit of the doubt to regulated firms. Again, this change is intentional. The *de jure* asymmetry in procedure, with the Commission being on top, rebalances the *de facto* asymmetry in substance, in which case the digital platform designated as gatekeeper is perceived to shape market outcomes as a *de facto* standard setter and a bottleneck for market access tilting the rules of the competitive game to its potential advantage, which the DMA seeks to redress.

Third, opening up the perspective even further, the above novelties reflect and require a broader cultural change. The interaction between the Commission and gatekeepers is not viewed as strictly hierarchical or adversarial to begin with. The Commission is not merely designed to police gatekeepers within a bureaucratic or reactive framework.¹⁹⁰ The two can also engage in regulatory dialogue, upon the initiative of gatekeepers.¹⁹¹ Moreover, the Commission need not prove non-compliance of designated gatekeepers with the DMA based on fault or specific prohibited conduct or a causal link between harm and conduct. The gatekeepers are perceived to also take 'responsibility for preserving market contestability'.¹⁹² At the same time, the Commission is expected to 'learn from the very platforms it will regulate' and to 'move from its more traditional bureaucratic culture to something more akin to "geek" culture'.¹⁹³ The DMA goes past antitrust's 'deterrence-punishment' model¹⁹⁴ towards an institutional

framework of 'participative'¹⁹⁵ and 'negotiated'¹⁹⁶ regulation that is more democratic, cooperative, and informed. It sees the Commission and the gatekeepers in a bilateral bargaining relationship forming regulatory outcomes, in an interactive process in the first instance. The relationship is more properly conceived as horizontal yet with the *status quo* or the 'threat point' favouring the Commission.¹⁹⁷ This more cooperative, dialectic, and 'soft' approach to regulation and enforcement does not stop at the DMA's main actors but expands to other supporting actors (national competent authorities, EU expert bodies and sector regulators, private third parties) that are consulted at various stages of policymaking, potential updating of the DMA, and compliance with the DMA. In this sense, the DMA replicates institutionally and procedurally some 'competitive process' in regulating, and gains from it in substantive terms too. This broader view further exposes the fact that the portrait of the Commission as the touted singular centralized enforcer of the DMA is a fiction. Dynamic markets require dynamic institutions and processes for regulation to be effective.

The intriguing quality of the DMA however is that it brings on this new institutional vision while keeping parts of the old world—it combines elements of 'experimentalist' governance with 'hierarchical' institutions and processes. Experimentalism encompasses a learning culture, solutions proposed by regulated firms or other 'local actors' such as national authorities, flexible solutions subject to revision, networks of institutions fostering dialogue and convergence, and 'central' actors to pool information and draw lessons from local experiences, and is motivated as a response to strategic uncertainty.¹⁹⁸ The 'shadow of hierarchy'¹⁹⁹ on the other hand entails a more rigid and prescriptive approach, which is less inclusive and relies on a central authority (Commission) to impose solutions and sanctions for non-compliance and on the uniformity of the solutions imposed from the top.²⁰⁰ In a sense, the DMA systematizes the nascent experimentalist efforts and tools used to tackle allegedly anticompetitive behaviours of Big Tech firms and digital platforms under abuse of dominance rules (Article 102 TFEU) and procedures (commitments) within the context of EU antitrust law.²⁰¹ Against this background, the choice of institutional architecture in the DMA is less of a revolution and a riddance with the past (at least its closest cousin, antitrust enforcement in abuse cases) and more an exercise in pragmatism.

¹⁹⁵ Carugati (n 5); Kathuria (n 188).

¹⁹⁶ This model of state–corporate cooperation that the DMA introduces is not unprecedented within antitrust law and policy. See William Murphey, 'Theodore Roosevelt and the Bureau of Corporation: Executive-Corporate Cooperation and the Advancement of the Regulatory State' (2013) 14 *American Nineteenth Century History* 73. The Bureau of Corporations founded by Roosevelt was the predecessor of the US Federal Trade Commission. Similarly to the DMA, negotiations between the executive and corporations were based on private corporate information received and public reporting as well as regulators' discretion that had 'implicit leverage' over companies. In this way, the author argues that the Bureau 'investigations illustrate pragmatic means by which Roosevelt pursued a conservative, yet effective, reigning in of big business power'.

¹⁹⁷ Ken Binmore, Ariel Rubinstein and Asher Wolinsky, 'The Nash Bargaining Solution in Economic Modelling' (1986) 17 *RAND J Econ* 176 (elaborating the economic theory of bargaining or negotiation based on disagreement or threat points).

¹⁹⁸ Giorgio Monti and Bernardo Rangoni, 'Competition Policy in Action: Regulating Tech Markets with Hierarchy and Experimentalism' (2022) 60 *J Common Mark Stud* 1106; Gráinne De Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006); Gráinne De Búrca, Robert O. Keohane and Charles F. Sabel, 'Global Experimentalist Governance' (2014) 44 *Br J Political Sci* 477.

¹⁹⁹ Adrienne Héritier and Dirk Lehmkuhl, 'The Shadow of Hierarchy and New Modes of Governance' (2008) 28 *Journal of Public Policy* 1.

²⁰⁰ Monti and Rangoni (n 198) 1109, 1111; De Búrca and Scott (n 198).

²⁰¹ Monti and Rangoni (n 198) 1115–16.

¹⁸⁶ Art 8(1) DMA. Wolf Sauter, 'Responsive Competition Law' (2024) 3 *European Law Open* 768, 782, suggests that the DMA effectively adopts a 'comply and explain' approach to gatekeeper compliance with their substantive obligations under the DMA.

¹⁸⁷ Monti (n 2) 175.

¹⁸⁸ Vikas Kathuria, 'The Rise of Participative Regulation in Digital Markets' (2022) 13 *JECL & Pract* 537, 540–541.

¹⁸⁹ *Ibid* 541; Monti (n 2) 175.

¹⁹⁰ Cf Crane (n 6) 201.

¹⁹¹ Art 8(2) and (3) DMA.

¹⁹² Larouche and de Streel (n 2) 560.

¹⁹³ *Ibid*.

¹⁹⁴ See Daniel A Crane, 'Antitrust Antifederalism' (2008) 96 *CLR* 1. Crane suggests that the founders of antitrust chose a 'crime-tort' model focused on deterring and compensating for prohibited conduct. The reason for this choice was partially the fear of regulatory capture and administrative discretion on the part of business and government, respectively.

B. A macro view of the DMA's institutional design

Zooming out of these microincidents of institutional innovation, one may further rationalize the overall design of the DMA within a comprehensive narrative of 'responsive regulation'²⁰² with novel footprints too. As suggested above, one may imagine the institutional edifice of the DMA relying on three broad and parallel pillars, that is a regime of (i) ongoing compliance of the gatekeeper, (ii) ongoing supervision by the Commission, and (iii) *ad hoc* enforcement by the Commission for gatekeeper non-compliance pursued *ex post*, coupled with a wide arsenal of malleable remedy tools. The overall system is constructed in such a way so that the first two pillars strengthen the latter, which thus becomes more effective and efficient, so much so that in the extreme we should rarely see this third pillar to apply in practice. Conversely, this third mostly inactive pillar is conceived to constructively support and stimulate the two constantly active ones regarding the implementation of the DMA in a manner that makes their operation more effective and efficient. With the shadow of enforcement looming as a threat and last resort option to ensure compliance,²⁰³ greater emphasis is placed on self-regulatory and 'cooperative compliance' approaches. Greater recourse is also made to 'supervisory measures' rather than 'punitive measures'.²⁰⁴ The newly tailored complementarities are striking in the unique fit of mixed institutions and procedures put together to achieve the strategic objectives of the DMA, namely fairness and contestability in digital markets.

Within this web of institutional arrangements one can also imagine a continuum of actions of gatekeepers and counteractions (or responses) by the Commission, which over time intensify in character and in intrusiveness. Thus, depending on the gatekeepers' engagement and compliance or not with the DMA obligations, the Commission may 'respond' in supportive, guiding, dialogic, or more coercive ways to ensure effective compliance.²⁰⁵ Contingent on the Commission's designation decision,²⁰⁶ a gatekeeper that comes within the scope of the DMA is bound by this progression of rules, procedures, and remedies applicable to secure its conformity with the law, as shown in Fig. 1.²⁰⁷ At the bottom end of this figure, one may see the two ongoing and mutually reinforcing pillars of gatekeeper compliance and Commission supervision that represent the base of the 'enforcement pyramid' in a 'responsive regulation' matrix. Towards the base (green), application of the DMA relies more on 'self-compliance' that is both decentralized and least intrusive. As one moves towards the middle layers of this figure, compliance with the DMA intensifies somewhat in that the regulator (Commission) is set to induce the regulated firms (gatekeepers) to abide by the law by engaging in constructive dialogue, offering guidance both general and more individualized to gatekeepers (specification process), and including other market participants in expressing their views on the need and design of intervention to remedy and flatten asymmetries

in digital markets. This middle range of options (yellow) offers a new space of 'cooperative compliance' solutions that the Commission may deploy to achieve quick, inclusive, and tested compliance of gatekeepers with the DMA.

Further, as one moves up the 'enforcement pyramid,' at its higher levels (red) one may encounter the most intrusive, punitive, and demanding measures the Commission may unilaterally rely on to redress (repeated) non-compliance with the DMA obligations. At this enforcement stage, available sanctions, remedies, and procedures look more familiar given the noted affinity to antitrust law. Towards the climax, the DMA and the Commission as its guardian may finally resort to 'enforced compliance' to achieve their goals. In other words, as we move up the 'enforcement pyramid', the DMA design favours old-style antitrust enforcement and traditional deterrence-oriented instruments for compliance. However, as it can be observed from the colour-coding in Fig. 1, even at the highest 'enforced compliance' stage, there is room for *negotiated* solutions, for instance by the gatekeepers offering commitments to be made binding by the Commission, that de-escalate the process and possibly the measures taken. This possibility exists even for instances of systematic non-compliance with the DMA,²⁰⁸ whereas in a parallel world of antitrust enforcement, companies would usually expect increased sanctions for repeated violations and recidivism, rather than any room for settlement and cooperation (outside of leniency).²⁰⁹ As digital regulation of gatekeepers involves 'repeat players' under constant supervision, the DMA's institutional structure presupposes and encourages a possible 'learning effect' regarding the application of the law.²¹⁰ This is a clear illustration of, first, the philosophical gap evidenced between the institutional design of the DMA and competition law, and second, the hybrid nature of the DMA as an instrument of dynamic and proactive regulation also from an institutional point of view.

Portrayed in this way, the DMA architecture shows considerable depth, maturity, and sophistication as it is designed to operate through different progressive stages and to rely on multiple dimensions and actors at the same time. Although not as visible at first sight by

²⁰⁸ Monti (n 2) 176 underscores that this approach 'makes good sense because it maps onto the expectation of a responsive regulator: to de-escalate once the gatekeeper is willing to comply with a less intense means of enforcement'.

²⁰⁹ In reality, the picture is more complex. On one hand, the DMA provides for increased (up to double) fines on gatekeepers in case of repeat violations. See Art 30(2) DMA. On the other hand, as per the Commission's Fining Guidelines (para 28), recidivism is an aggravating circumstance that justifies increased fines for competition law violations. This practice is common in Art 101 TFEU cases. See Wouter PJ Wils, 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' (2012) 35 World Competition 5. In Art 102 TFEU cases, effective remedies are often more important in practice than 'one-off' fines. In general, more intrusive structural remedies are saved for antitrust cases where there is a risk of lasting and repeated infringement and where behavioural remedies that are generally preferred are ineffective. Given the difficulty of meeting this standard, it is argued that 'structural remedies have been extremely rare in conduct cases' and that an alternative, better way to strike the 'balance between effectiveness and proportionality' and to 'deal with the difficulties of behavioural remedies in digital markets [under Article 102] is to make the process more iterative'—similarly to the spirit of 'responsive' DMA enforcement—by prioritizing (i) more modest and speedier remedies that are subject to review and potential future revision and (ii) solutions through commitment decisions (when undertakings are cooperative on their own initiative and come forward to propose a proportionate remedy) or infringement decisions (where cooperation could be incentivized with a fine reduction for remedy design cooperation). See Friso Bostoen and David van Wamel, 'Antitrust Remedies: from Caution to Creativity' (2023) 14 JECL & Pract 540, 549–51. See also n 201 above and surrounding text noting the trend of resorting to more experimentalist tools in Art 102 enforcement.

²¹⁰ Sauter (n 186) 774 analysing the relatively greater scope of this 'learning effect' in 'responsive' sectoral regulation compared to competition law. Sauter adds that the benefit from learning effects is compound as 'undertakings do not only learn directly from their own experiences, but also from each other, and therefore indirectly' and also that 'responsive regulation aims to control the market as a whole: there is interaction between supervision and all market parties collectively.' Both of these aspects are reflected in undertakings' decisions.

²⁰² Ayres and Braithwaite (n 3).

²⁰³ Yet, as Monti (n 2) 177 explains, 'the DMA does not require the Commission to adopt this [responsive] enforcement strategy. The Commission is free to move directly to apply punitive measures if it so wishes: the DMA does not have a hierarchy of remedies.'

²⁰⁴ Alexandre de Stree (coordinator), 'Recommendations for the Effective and Proportionate DMA Implementation' in Alexandre de Stree and others (eds), *Effective and Proportionate Implementation of the DMA* (CERRE 2023) 24–25.

²⁰⁵ See Monti (n 2) 175–177; Sauter (n 186) 771–772 on how they see Ayres and Braithwaite's enforcement pyramid following a 'responsive regulation' approach to adapt and apply to the DMA and competition law, respectively.

²⁰⁶ Under Art 3 DMA.

²⁰⁷ But not necessarily the Commission that is not bound by 'a hierarchy of remedies' under the DMA. This approach is sensible as a matter of policy but not binding legally speaking. See Monti (n 2) 176–77.

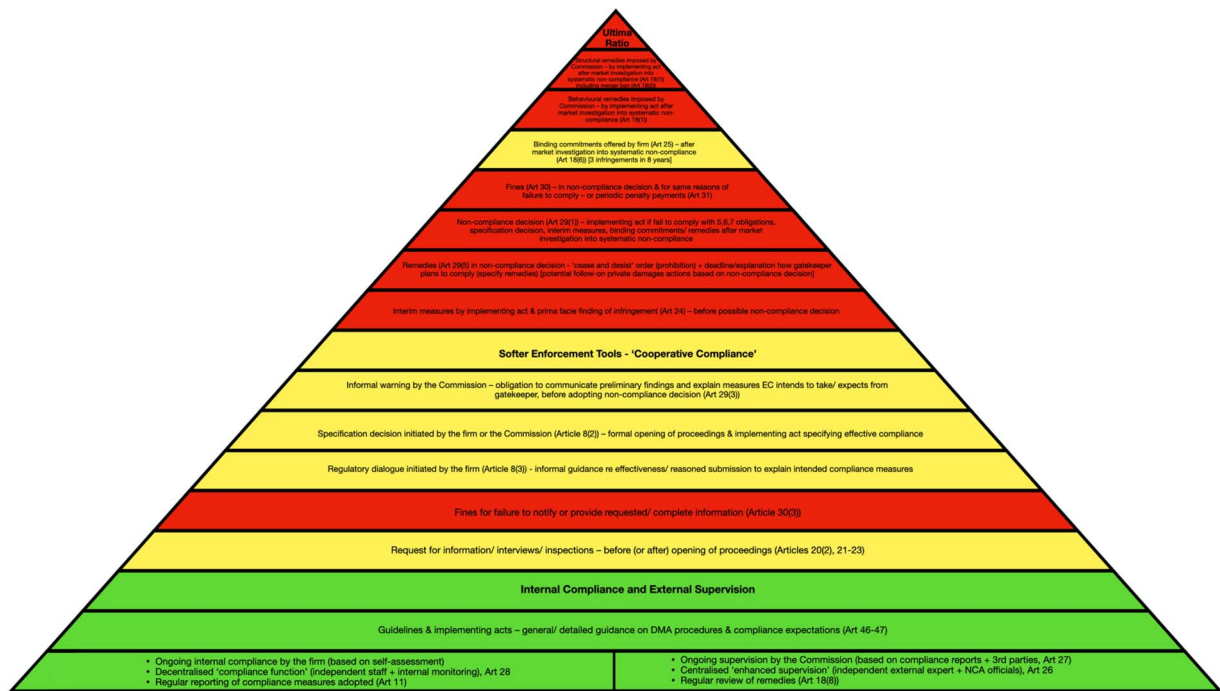


Figure 1 Progression of the different stages and instruments for DMA compliance in Ayres and Braithwaite's enforcement pyramid.

looking at this 'enforcement pyramid', the role of third parties is as critical: by informing on, monitoring, and market testing gatekeepers' compliance efforts and solutions, throughout all three stages of self-, cooperative, and enforced compliance, the integrity and effectiveness of the 'responsive regulation' approach and the constructive and disciplined bilateral exchange between the Commission and gatekeepers are safeguarded.²¹¹

The lingering question then is whether there is a price for this hybrid and complex institutional set-up. On one hand, the pursuit of effectiveness in the implementation of the DMA that seems to be prioritized brings trade-offs with it. On the other hand, the model of 'responsive regulation' as explained to apply to the DMA setting also presents challenges. For instance, the central and powerful role of the Commission is not only a strength in that it may effectively bargain with gatekeepers and shape digital markets in ways that ensure their contestability and fairness but also a source of potential procedural and legal weakness.²¹² At this point in time, the Commission enjoys almost absolute discretion in the choice of remedies, procedures, complaints, and concerns it may seek to prioritize in the implementation of the DMA. There are no clear limiting principles to the exercise of its discretion or a set hierarchy of compliance and enforcement processes, transparency in priority setting, and handling of cases or complaints by the Commission, especially within the

²¹¹ Monti (n 2) 176–177. Van den Boom and Podszun (n 96) 23 suggest that without third party input, 'Commission officials that are in constant informal close contact with representatives of the gatekeepers' may be vulnerable to 'capture'.

²¹² Katalin J Cseres and Laurens C de Korte, 'Participation of Third Parties in the Public Enforcement of the Digital Markets Act: Between Democracy and Technocracy' (2025) 13(3) JAE 595 (discussing how 'the lack of third parties' formal participation raises concerns about the transparency and accountability of the Commission's administrative decision-making'); Alexandre de Stree, 'Substantive and Procedural Principles' in Alexandre de Stree and others (eds), *Implementing the DMA: Substantive and Procedural Principles* (CERRE 2024) 8 (noting that the Commission's 'important procedural discretion is justified by the complexity of the enforcement process, the need to deter non-compliance or ineffective compliance, and the novelty of the law' but 'the Commission must exercise its discretion in a non-discriminatory and impartial manner').

context of informal procedures such as the regulatory dialogue.²¹³ The absence of institutional checks and balances, including judicial review, at the bottom of the 'enforcement pyramid' may not only raise concerns about accountability, transparency, and capture²¹⁴ but also raise the concern that the Commission with its unquestioned powers can induce gatekeepers to 'over-comply'.²¹⁵ In addition, despite its laudable objectives, it is not clear when it comes to third party remedies and private plaintiffs whether DMA compliance is a 'one-size-fits-all' or whether differential treatment of users by the gatekeeper may be justified or even encouraged to comply with the DMA.²¹⁶

These potential procedural and conceptual downsides of the DMA are not fully understood yet, but they raise a wide array of unresolved questions implicating fundamental notions of legal certainty, legitimacy, and due process and the interaction of the principles of effectiveness, proportionality, and the rule of law.²¹⁷ At minimum, as legislators, policymakers, and scholars set to reflect on these questions, a starting point that would help safeguard the successful and sustainable application of the DMA is the development of detailed guidelines for gatekeepers and third parties. The aim of these guidelines would be to provide transparency and showcase best practice while explicitly taking into account and carefully balancing the pursuit of effectiveness of the DMA against foundational legal principles that any liberal, market-based system is built upon and relies on. It remains to be seen how far, and under what conditions, dynamic regulation may still be considered law.²¹⁸

²¹³ Monti (n 2) 177; Feasey and Monti (n 33) 114; van den Boom and Podszun (n 96) 3, 11.

²¹⁴ van den Boom and Podszun (n 96) 23.

²¹⁵ Monti (n 2) 177.

²¹⁶ *Ibid* 183.

²¹⁷ de Stree (n 204) 14–15; van den Boom and Podszun (n 96); Cseres and de Korte (n 212).

²¹⁸ For similar discussions in the context of commitment decisions in antitrust cases, see Florian Wagner-Von Papp, 'Best and Even Better Practices in Commitment Procedures after Alrosa: The Dangers of Abandoning the "Struggle for Competition

4. Conclusion

The key contribution of this article is its conceptual focus on and analysis of the innovative and evolving notion of ‘compliance’ as enshrined in the DMA. It compares and contrasts the enforcement-based model of antitrust that relies basically on punishment with the new more complex and hybrid institutional structure of the DMA. The latter relies at first instance on a ‘dialogic’ framework of compliance and leaves the ‘punitive’ model of enforcement as an option of last resort. The Commission as the central institutional actor has discretion to escalate or deescalate the process of the DMA’s implementation along this compliance–enforcement continuum through different instruments. Besides, unlike antitrust, the DMA is based on cooperation between the Commission and gatekeepers and ongoing supervision by regulators and compliance by designated companies. Its institutional identity and sophistication are thus unique. By shedding light on the institutional framework of the DMA and the particular interplay between enforcement and compliance, we suggest that another type of ‘cooperative compliance’ emerges, in light of the available regulatory dialogue and negotiation tools between gatekeepers and the Commission, beyond the ones we know from antitrust or other regulations.

At the same time, the institutional role of the Commission, central as it might be to the implementation of the DMA, is supported and

counterbalanced by a wide array of decentralized institutional actors and procedures. These features suggest a less hierarchical view of the DMA’s institutional structure that relies as much on participation and cooperation by third parties and national authorities or EU bodies as on centralized enforcement and supervision. Therefore, looking at the bigger picture, the openness in the DMA’s procedural and institutional design effectively complements the closed nature of its substantive obligations imposed on digital gatekeepers. The DMA embraces flexible means to achieve fixed ends. This flexibility renders the DMA a truly dynamic piece of regulation that guarantees its maximal effectiveness, yet it remains to be seen to what extent foundational legal principles may set institutional constraints that also ensure its legitimacy. In light of the revolutionary character of its institutional structure, a balance is needed for the successful and sustainable application of the DMA.

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Conflicts of interest

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Law” (2012) 49 CML Rev 929; Ryan Stones, ‘Commitment Decisions in EU Competition Enforcement: Policy Effectiveness v. the Formal Rule of Law’ (2019) 38 YEL 361. In addition, the appointment of a third-party monitor with extensive investigative powers to safeguard compliance with remedies ordered in an infringement decision and the obligation imposed on the undertaking to pay for it were found to exceed the Commission’s powers and hence unlawful in Case T-201/04 *Microsoft v Commission*. Since then, no monitoring trustee has been appointed in any Art 7 case of Regulation 1/2003, in contrast to Art 9 commitment decisions, where there are no such restrictions. See Ex Post Evaluation of the Implementation and Effectiveness of EU Antitrust Remedies, Final Report, prepared for the European Commission, 2025.