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# SPECIAL SECTION

# ADVANCING FAIR DIGITAL COMPETITION:
## A CLOSER LOOK AT THE DMA FRAMEWORK

***Abstract***

The emergence of digital platform firms has escalated international antitrust inquiries, especially targeting the "Big Five"—Meta, Apple, Microsoft, Amazon, and Alphabet. These enterprises have significantly impacted the economy and society, exceeding conventional sectors in terms of market value, making antitrust legislation, particularly within the European Union, inadequate. *The Digital Markets Act* (DMA) was created to serve as a regulatory framework to curb the misuse of power by these dominant players and safeguard consumer interests. The DMA monitors digital gatekeepers and promotes equitable competition while safeguarding the rights of EU citizens and encouraging openness and equitable competition in the digital space. The DMA enhances current competition regulations by clarifying "gatekeepers" and establishing guidelines for their conduct within the digital marketplace. Gatekeepers adhere to DMA regulations, which ban unfair practices such as data misuse and favouritism toward their services. The European Commission can identify gatekeepers and monitor compliance, providing a schedule for businesses to meet DMA standards. Additionally, the DMA imposes fines and penalties for violations, highlighting the significance of compliance. This paper examines the DMA framework, the requirements for identifying gatekeepers, the regulatory responsibilities assigned to them, and the enforcement strategies established. The DMA emphasises the EU's dedication to combating anti-competitive behaviour and preserving an equitable digital marketplace, positioning the DMA as essential for protecting consumer rights and promoting fair competition worldwide. While the DMA' 's framework aims to tackle anti-competitive behaviour and promote transparency in the digital marketplace, it is essential to question whether the DMA can strike the right balance between competition and innovation. Could its strict obligations on gatekeepers unintentionally stifle innovation or discourage new market entrants? Moreover, as the digital economy continues to evolve rapidly, is the DMA' 's broad scope truly adaptable, or might it impose unnecessary burdens on emerging technologies? These concerns underscore the importance of a nuanced evaluation of the DMA' 's impact on competition without hindering progress in the digital space.

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**SUMMARY**



## 1 Facing Digital Competition: Tackling Risks Head-On

The profound transformation in the global economic landscape, propelled by the ascent of digital platform corporations, has catapulted antitrust investigations to the forefront of legal discourse on a global scale. Notably, the "Big Five" tech giants- Meta, Apple, Microsoft, Amazon and Alphabet (MAMMA) - have exceeded the market capitalisation of traditional industry behemoths.[1] This unparalleled financial prowess, exemplified by Apple's historic achievement of reaching a $1 trillion market capitalisation in August 2018, highlights MAMMA's economic significance and position as formidable actors with influence permeating multiple dimensions of societal functioning.[2]

'The shift in market dynamics necessitates a meticulous examination. Comparative analyses highlight the ascendance of Big Tech over formerly dominant entities, emphasizing a paradigmatic change in economic power structures and the consequential legal implications. In recent years, Big Tech have become a focal point for competition scrutiny.[3]

EU competition law is essential for protecting the economy from market power issues. Its main principles aim to prevent dominant market entities from abusing their power and solidifying their positions through agreements that harm consumers. However, traditional competition law faces challenges, particularly in the EU. The European Commission, responsible for enforcement, struggles to adequately respond to threats to free competition posed by Big Tech.[4] The limitations of competition law in addressing the nuanced dynamics of the digital economy prompt a paradigm shift toward regulation. This shift is the changing role of economics within the competition framework, which is

[1] The term "Big Tech" progressively associated with the quintet of major technology corporations, encapsulates the collective influence wielded by those entities.

[2] JP Whittaker, *Tech Giants, Artificial Intelligence and the Future of Journalism* (1st edn, Routledge 2019).

[3] M Moore and D Tambini, *Regulating Big Tech: Policy Responses to Digital Dominance* (Oxford University Press 2022). Recent developments in antitrust cases against Big Tech firms underscore the heightened scrutiny these companies are facing. The ongoing *United States vs. Google LLC (2023)* case, which has seen significant evolution recently, involves allegations that Google maintained its monopoly in the search engine market through anti-competitive deals with companies like Apple. This case, which draws comparisons to the historic Microsoft antitrust trial, saw a crucial update when the court reaffirmed Google's monopolistic behaviour under the *Sherman Act of 1890*. Additionally, in July 2024, the European Commission issued preliminary findings against Meta's "pay or consent" model under the DMA, arguing that it fails to provide users with a less intrusive, yet equivalent, service option. Furthermore, the U.S. Department of Justice has recently filed an antitrust lawsuit against Apple, accusing the company of leveraging its locked-down iPhone ecosystem to suppress competition, including blocking "super" apps, mobile cloud streaming services, and cross-platform messaging apps. This marks the third time the DOJ has sued Apple for antitrust violations in the past 14 years. See Office of Public Affairs – (United States of America and Others v Apple Inc, Complaint, No. 2:24-cv-04055 (D NJ, 11 June 2024).

[4] EM Fox and D Gerard, *EU Competition Law: Cases, Texts and Context* (2nd edn, Edward Elgar Publishing 2023).

increasingly shaping the understanding and application of competition law.[5] Examining the intricacies of competition law's limitations is crucial considering these challenges. A detailed exploration of specific cases and examples reveals the shortcomings of existing regulatory approaches. These failures underscore the urgency of reassessing and adapting legal mechanisms to effectively address the complex challenges at the intersection of technology and market dominance.

Moreover, the EU's commitment to addressing damages to digital competition complements the normative idea of the Unions' policy, *Technical Normative Power* (TNP), which places citizen protection at the core.[6] Effectively, challenging technology giants requires supervision by the EU's regulatory authority, establishing a normative framework within the tech giants' environment and thereby diffusing its standards globally. This framework extends to organisations and companies dependent on their interfaces, benefiting consumers with more transparent information, competitive prices, and expanded options. From the perspective of EU institutions, regulating these aspects also ensures the protection of other fundamental rights, such as privacy and data protection, offering a comprehensive approach to address the complexities arising from the intersection of technology and market dominance.[7]

Our paper explores *the extent to which the current Digital Markets Act (DMA) framework is equipped to address the growing complexity and rapid evolution of digital markets*. While the regulation attempts to capture gatekeepers through quantitative thresholds, there is concern that powerful players may evade legal scrutiny by exploiting its weakness. We argue that the DMA lacks precise definitions of key terms such as 'more favourably' and 'rivals,' creating significant ambiguity in its implementation. This absence of clarity risks leading to inconsistent enforcement, potentially undermining both competition and innovation in digital markets.[8] Furthermore, we wish to address an even bigger question: *Does the interventionist approach of the DMA risk creating an overly rigid regulatory environment that disproportionately burdens smaller businesses and new market entrants?* In light of these concerns, one must consider whether the DMA might end up hindering the competition it seeks to protect.

[5] H Schmidt, *Competition Law, Innovation and Antitrust: An Analysis of Tying and Technological Integration* (2nd edn, Edward Elgar 2023).

[6] The integration of normative principles and regulatory power, often encapsulated as TNP, is palpably evident in the DMA, manifesting through key provisions that underscore the normative underpinnings guiding the regulatory framework. A notable instance is discerned in Recital 80, which establishes the normative imperative that gatekeepers must adhere to the obligations delineated in the regulation concerning each core platform service specified in the relevant designation decision. This foundational principle emphasises compliance within the conglomerate position of gatekeepers, introducing a normative thread that recognises the interconnectedness of their services and the need for a comprehensive approach. A further demonstration of TNP within the DMA is evident in Recital 105, which highlights the Commission's commitment to evaluating the DMA's impact on contestability and fairness in the online platform economy reflects a normative dedication to maintaining a high level of protection and respect for common rights and values.

[7] See the *Digital Markets Act* (DMA) and the "sister" regulation of the *Digital Services Act* (DSA).

[8] C Carugati, *How to Implement the Self-Preferencing Ban in the European Union's Digital Markets Act'* (Bruegel 2022) Policy Contribution 22/2022 <https://www.bruegel.org> accessed 25 October 2024.

The paper's methodology is based on a comprehensive legal and economic analysis of the DMA framework, focusing on the role and responsibilities of digital gatekeepers. We employ a doctrinal research approach to examine the DMA, the Treaty on the Functioning of the European Union (TFEU), and prominent cases. We further illustrate the practical enforcement of the DMA, such as actions taken against major technology firms. This comprehensive approach demonstrates the DMA's influence on major tech companies like Google and Meta. The analysis also considers comparative approaches, drawing on competition law's limitations and examining the intersection of market power and technology in the digital economy. The methodology extends beyond legal doctrine by assessing the economic implications of the DMA, particularly its impact on competition, innovation, and consumer protection in digital markets.

We begin by introducing the governing gatekeepers, providing a foundational understanding of their role and the need for oversight in digital markets. We then delve into the primary goals of the DMA, examining its regulatory framework and objectives. Finally, we offer an in-depth analysis of enforcement measures supported by relevant case studies to illustrate the practical application.

## 2 The DMA's Objective and Foundations: Regulating Digital Gatekeepers

The DMA, effective since May 2, 2023, marks an important milestone in the European Union's regulatory framework, targeting digital entities referred to as "gatekeepers."[9] These gatekeepers provide core platform services, including online intermediation, search engines, and social networks. The DMA was introduced to prevent gatekeepers from exploiting their power to the detriment of competition, consumers, and innovation.

The DMA complements existing EU competition law, particularly the prohibitions outlined in Articles 101 and 102 of the TFEU.[10] While Articles 101 and 102 aim to prevent anti-competitive agreements and the abuse of dominant market power, the DMA's emphasis on "fairness" and "contestability" distinguishes it from merely focusing on undistorted competition within the internal market.[11] The regulation mandates that gatekeepers adhere to obligations designed to curb practices that harm competition and consumer choice. These obligations include prohibiting combining personal data from different services without user consent, restricting unfair practices in advertising, and preventing gatekeepers from favouring their products over competitors. By enforcing these rules, the DMA aims to create a more transparent and competitive digital space, benefiting both businesses and consumers.

[9] Regulation (EU) 2022/1925 of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act) [2022] OJ L265/1, Article 2(1).
[10] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.
[11] J Van den Boom, 'What Does the Digital Markets Act Harmonize? – Exploring Interactions between the DMA and National Competition Laws' (2022) 19 European Competition Journal 57.

Gatekeepers under the DMA are identified based on strict qualitative and quantitative criteria, including their annual turnover within the European Economic Area (EEA) and the company's presence as a core service in at least three member states. Gatekeepers are companies that serve as essential gateways for businesses to reach consumers, often wielding significant economic power. They are assessed based on their market presence and user base, with thresholds of at least 45 million active end users and 10,000 active business users within the EU. Gatekeepers must also demonstrate that they hold an entrenched position in the market for three consecutive years, underscoring their long-term dominance. Companies under this category face regulatory scrutiny designed to prevent them from exploiting their gatekeeper role to stifle competition or innovation.[12]

The obligations imposed on gatekeepers focus on preventing unfair practices that hinder market contestability. For instance, gatekeepers are not permitted to incorporate personal data obtained from their subsidiaries, limit business users' dealings with end users, use the personal data of customers who use third-party services operating over their platforms, or bundle or prefer proprietary goods and services sold by the gatekeeper in a manner that stifles third-party competition.[13]

In terms of scope, the DMA targets a wide range of digital services, including online search engines, social media networks, video-sharing platforms, messaging services, cloud computing, and online advertising services. These platforms are vital to the EU's internal market, and their regulation is crucial for safeguarding competition and innovation. The regulation's extraterritorial reach ensures that companies providing these services, even if based outside the EU, must comply with its rules if they serve EU users. This reflects the EU's commitment to extending its regulatory influence globally, akin to the impact of the General Data Protection Regulation (GDPR).

The regulatory measures under the DMA are not limited to preventing anti-competitive behaviour but also seek to safeguard broader consumer rights, such as privacy and data protection. By establishing clear rules for digital gatekeepers, the DMA ensures that consumers benefit from greater transparency and choice while business users are protected from unfair practices. This aligns with the EU's broader objective of fostering a digital environment that upholds fundamental values like fairness, innovation, and the protection of individual rights.

A key milestone in the enforcement of the DMA was reached on July 3, 2023, when major tech companies, including Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft, and Samsung, were required to notify the European Commission of their alignment with the DMA's criteria for gatekeepers. The European Commission, following a 45-working-day

[12] Regulation (EU) 2022/1925 of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act) [2022] OJ L265/1, Article 3.
[13] Council Regulation (EU) 2022/1925 Of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1. <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en> accessed 24 August 2024.

evaluation period, officially designated six gatekeepers—Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft—on September 6, 2023.[14] These companies, providing 22 core platform services, were given six months to comply with the DMA's requirements, signalling the beginning of a new era of compliance and regulation in the digital economy.[15]

By extending its regulatory purview beyond the EU's borders, the DMA solidifies the EU's role as a global standard-setter in digital governance. This extraterritoriality mirrors the precedent set by the GDPR, where the EU successfully exported its data protection norms to companies worldwide. The DMA's global reach reflects the EU's commitment to fostering a competitive digital market that is both fair and open, regardless of the geographical location of service providers.

The DMA's objective is clear: to regulate digital gatekeepers and prevent them from exploiting their dominant market positions to the detriment of competition and consumers. While the DMA outlines strict obligations for these gatekeepers, such as prohibiting the combination of personal data from different services without consent and ensuring interoperability, the regulation raises essential questions.

A critical concern is whether these regulatory mechanisms can prevent gatekeepers from manipulating their dominant positions. Although the DMA forbids gatekeepers from restricting business users' access to end users, whether these rules will be sufficient to prevent similar manipulations in practice remains to be seen.

Moreover, the DMA' 's centralisation of enforcement powers at the EU level may risk privileging gatekeepers by limiting the role of national authorities. With national laws aimed at ensuring contestability and fairness being potentially inapplicable to gatekeepers, gatekeepers could exploit this centralisation to avoid stricter national regulations. This raise concerns that' the DMA might unintentionally facilitate gatekeepers' dominance instead of enhancing fair competition, creating enforcement delays and complicating timely regulatory action.[16]

## 3 Regulation Structure Oversight

Compared to other EU digital legislations, the DMA is a succinct regulation comprising fifty-four articles distributed across five chapters. *Chapter I* addresses fundamental aspects of the DMA's applicability, while Chapter II is dedicated to the designation of gatekeepers, and Chapter III outlines the obligations imposed on gatekeepers. The scope

[14] 'Commission Designates Six Gatekeepers under the Digital Markets Act' (*Digital Markets Act (DMA)*, 6 September 2023) <https://digital-markets-act.ec.europa.eu/commission-designates-six-gatekeepers-under-digital-markets-act-2023-09-06_en> accessed 24 August 2024.

[15] 'Potential Gatekeepers Notified the Commission and Provided Relevant Information' (*Digital Markets Act (DMA)*, 4 July 2023) <https://digital-markets-act.ec.europa.eu/potential-gatekeepers-notified-commission-and-provided-relevant-information-2023-07-04_en> accessed 24 August 2024.

[16] J Hoffmann, L Herrmann, and Lukas Kestler, 'Gatekeeper's Potential Privilege—the Need to Limit DMA Centralization' (2024) 12(1) Journal of Antitrust Enforcement 126, 147.

of the regulation extends to core platform services provided or offered by gatekeepers to business users or end users within the Union, regardless of the gatekeepers' location or the applicable law.[17] The regulation explicitly states that it does not prejudice the application of Articles 101 and 102 of the TFEU and allows for applying national competition rules in certain contexts.

Under the DMA, an undertaking qualifies as a gatekeeper if it satisfies specific criteria, with presumptions based on financial and operational indicators. These criteria include demonstrating a significant impact on the internal market,[18] providing a core platform service crucial for business users to reach end users,[19] and holding an entrenched or durable position or having the foreseeable potential for such a position soon. This highlights the DMA's unorthodox approach, which is designated for Big Tech.

Gatekeepers meeting the specific criteria must notify the Commission within two months and provide relevant information. The Commission holds the authority to designate gatekeepers within 45 working days, considering the information provided by the undertaking.[20] Additionally, the Commission may designate an undertaking as a gatekeeper even if it does not meet the quantitative thresholds, considering factors such as size, operations, network effects, and other structural characteristics. The Commission continuously publishes and updates a list of gatekeepers and their relevant core platform services, promoting transparency in compliance. These reviews do not suspend gatekeepers' obligations, ensuring continuous evaluation and adherence to the DMA's provisions.[21]

Articles 5 to 7 underscore the obligations to ensure fair competition, non-discrimination, and user choice in the digital sector, emphasizing a unique TNP impact on tech companies. For example, Article 5 delineates specific obligations for gatekeepers concerning their core platform services. These obligations include restrictions on processing personal data for online advertising without user consent, limitations on combining personal data from different services and ensuring user consent for signing in to other services. The gatekeeper is also prohibited from preventing business users from offering diverse products or services through third-party online intermediation services,[22]

[17] Excluded from the DMA's realm are the enchanting number-independent interpersonal communication services, guided by the regulatory prowess of the European Electronic Communications Code (EECC) under Directive (EU) 2018/1972. This purposeful exclusion orchestrates regulatory efficiency, avoiding duplicative oversight and allowing these services to gracefully dance under the EECC's watchful guidance, see Article 1(3) of the DMA.

[18] According to Article 3(2)(a), an undertaking is presumed to be a gatekeeper if it has an annual Union turnover equal to or exceeding EUR 7.5 billion in each of the last three financial years, or an average market capitalization or equivalent fair market value of at least EUR 75 billion in the last financial year, and concurrently provides the same core platform service in at least three Member States.

[19] For core platform services, Article 3(2)(b) presumes an undertaking as a gatekeeper if it provides service with a minimum of 45 million monthly active end users in the last financial year, established or located in the Union, and has at least 10,000 yearly active business users in the Union. The identification and calculation of these figures should adhere to the methodology and indicators outlined in the Annex.

[20] Digital Markets Act, art 3(4).

[21] Digital Markets Act, art 4.

[22] Digital Markets Act, art 5(3).

and business users must be allowed to communicate freely with end users acquired through the gatekeeper's platform.[23] Additionally, Article 5 addresses issues related to end-user access to content and services,[24] non-restriction of reporting non-compliance with the law to public authorities,[25] and non-mandatory use of identification, web browsers, and payment services.[26] The gatekeeper must also provide advertisers and publishers with information on advertising metrics.[27]

Article 6 outlines obligations that may be further specified under Article 8. This includes the prohibition of gatekeepers using non-publicly available data from business users for competition and requirements related to the uninstallation of software applications and changing default settings.[28] The gatekeeper is also mandated not to treat its services preferentially in ranking and indexing (e.g., Google Search Ranking Systems)[29] and not to restrict end-users' ability to switch between different applications and services (e.g., App Store).[30] Article 7 focuses on the interoperability of number-independent interpersonal communications services. Gatekeepers providing such services must make basic functionalities interoperable upon request.[31]

Article 8 introduces provisions for gatekeepers to comply with the obligations outlined in Articles 5, 6, and 7. The gatekeeper is required to ensure and demonstrate compliance through effective measures aligned with the objectives of the DMA and relevant laws, including data protection, cyber security, consumer protection, and product safety. The Commission is empowered to open proceedings, adopt implementing acts, and specify measures for compliance. Gatekeepers can request the Commission's engagement to assess the effectiveness of their compliance measures, providing a reasoned submission for consideration. The Commission's powers include communicating preliminary findings, specifying measures, and reopening proceedings based on material changes, incomplete information, or ineffective measures.

In addition, within six months of designation pursuant to Article 3, the gatekeeper must submit a detailed and transparent report to the Commission describing the measures taken to comply with the obligations in Articles 5, 6, and 7. This report should be updated at a minimum annually. Gatekeepers must publish and provide the Commission with a non-confidential report summary within the same timeframe. The Commission, in turn, will link to the non-confidential summary on its website. This reporting mechanism ensures transparency and accountability in the gatekeeper's adherence to regulatory obligations.[32]

[23] Digital Markets Act, art 5(4).
[24] Digital Markets Act, art 5(5).
[25] Digital Markets Act, art 5(6).
[26] Digital Markets Act, art 5(7) and (8).
[27] Digital Markets Act, art 5(9).
[28] Digital Markets Act, art 6(3) and (4).
[29] Digital Markets Act, art 6(5).
[30] Digital Markets Act, art 6(6).
[31] Digital Markets Act, art 7(1).
[32] Digital Markets Act, art 11.

Like other digital regulations, the DMA strategically employs a meticulously crafted enforcement system to establish comprehensive standards. This system is purposefully designed to substantiate the faithful implementation of the law's objectives, thereby upholding core values and principles integral to the functioning of the common market. The intricacies of this enforcement mechanism are particularly concentrated and elucidated within *Chapter V* of the Regulation, affirming its central role in fortifying the regulatory framework and promoting the desired EU norms. Consequently, the Commission is vested with the authority to requisition essential information from undertakings crucial for fulfilling its duties under the regulation.[33] This also includes imposing fines under Articles 30 and 31.[34] The foundational competencies of the CJEU, as outlined in Article 45, come to the forefront by invoking its oversight authority in conjunction with Article 261 TFEU.[35] Concurrently, Article 47 empowers the Commission to issue guidelines, adding another layer to the regulatory landscape. These guidelines, designed to address various facets of the regulation, play a pivotal role in enhancing the effective implementation and enforcement of the DMA. Serving as interpretative tools, they contribute to a nuanced understanding and application of the regulatory framework.[36] Furthermore, Article 48 introduces a dimension of standardisation, allowing the Commission, under circumstances deemed appropriate and necessary to delegate standards development to European standardisation bodies.[37]

This comprehensive initiative reflects the EU's commitment to upholding fundamental values in the evolving digital landscape. The DMA safeguards the rights of EU citizens, addresses gatekeepers and competition concerns, and ensures a fair, transparent digital ecosystem. The efficacy of the DMA as a foundational element in the EU's digital regulatory framework and its global influence can be further assessed by examining the best practices in Commission enforcement and the rulings of the CJEU while positioning the EU as a global leader in digital regulation. The practical application of the DMA by the

[33] Digital Markets Act, art 21. Article 22 grants the Commission the power to conduct interviews and gather statements from natural or legal persons who consent to be interviewed. The Commission also possesses the authority to conduct inspections, outlining the scope of powers, including entering premises, examining records, and requesting explanations. Article 24 responds to urgent scenarios, granting the Commission authority to enact interim measures to avert serious harm to businesses or end users of gatekeepers.

[34] In the event of a non-compliance decision, the Commission is authorised to impose fines on gatekeepers, capped at 10% of their total worldwide turnover in the preceding financial year. The Commission also grants a power to impose penalties, not exceeding 1% of the total worldwide turnover, on undertakings and associations of undertakings for various infractions. The fines take into consideration the gravity, duration, recurrence, and any delays caused to the proceedings. This penalty is applicable when gatekeepers intentionally or negligently violate obligations outlined in Articles 5, 6, and 7, as well as measures specified in decisions pursuant to Article 8(2), remedies in Article 18(1), interim measures in Article 24, and commitments legally binding under Article 25. Notably, the escalation of fines to a maximum of 20% is sanctioned when a gatekeeper repeats a similar infringement within eight years.

[35] Digital Markets Act, art 45. Under this provision, the CJEU is endowed with expansive jurisdiction, granting it the power to meticulously examine Commission decisions that impose fines or periodic penalty payments. Within this overarching scope, the Court holds the authority to either annul, reduce, or augment the fines or periodic penalty payments levied by the Commission.

[36] Digital Markets Act, art 47.

[37] Digital Markets Act, art 48.

Commission, including its enforcement decisions and the subsequent impact on digital market players, will provide valuable insights into the effectiveness of the regulatory measures. By scrutinizing these enforcement actions and judicial interpretations, it becomes possible to gauge the DMA's success in achieving its intended goals, ensuring fair competition, and maintaining the fundamental values of EU citizens.

The centralised enforcement model that the DMA adopts raises concerns about the European Commission' 's capacity to handle the scale of compliance monitoring and enforcement required to regulate such vast digital ecosystems effectively. Although the DMA seeks to position the Commission as a central regulator, we question whether it is feasible for the Commission to simultaneously manage the regulatory responsibilities of multiple gatekeepers while also dealing with broader antitrust enforcement issues.

Enforcement challenges are compounded by the risk that gatekeepers, backed by vast legal and financial resources, will exploit ambiguities in the DMA to delay compliance or dilute the impact of enforcement actions. The DMA stipulates hefty fines for non-compliance, but does the Commission possess the investigative and enforcement capacity to implement such penalties consistently and effectively across different member states? The centralised enforcement model may lead to inefficiencies, as national competition authorities are sidelined in the process, potentially causing gaps in enforcement, especially in more localised market contexts.

Furthermore, the regulation' 's success depends on the Commission' 's ability to update its enforcement strategy in response to the rapid evolution of technology and business models. A potential limitation of the DMA is its prescriptive nature—by setting rigid rules for gatekeepers, it may struggle to adapt to new technologies or platforms that fall outside its initial scope. Thus, critics might argue that the DMA lacks the flexibility necessary to remain relevant in an industry of constant innovation.

## 4 Commission Oversight: A Pragmatic Analysis of Enforcement Measures

The EU Competition Policy ensures a fair marketplace by enforcing rules that promote innovation and protect consumers. The European Commission monitors competition, addressing abuses of dominant positions and anti-competitive agreements, such as cartels. It also scrutinises mergers and state aid to ensure they benefit consumers without distorting competition. The policy covers key sectors like energy, finance, and technology. To enhance transparency, the Commission provides a platform for the public to access updates on competition cases, particularly under the DMA, reflecting its commitment to openness and accessibility for all stakeholders.

The European Commission, under the DMA, has centralised more essential competencies to ensure the proper implementation. European regulators actively pursue investigations into major tech companies, raising concerns over antitrust issues and market dominance. Microsoft's decision to unbundle Teams from Office to avoid potential

antitrust fines is part of the EU's broader scrutiny.[38] Microsoft, having faced 2.2 billion euros in EU antitrust fines in the past decade, was at risk of further penalties, with a 2020 complaint by Slack triggering the investigation. This scrutiny focuses on Microsoft's market position in productivity software, specifically in the European communication and collaboration products market.[39]

On May 2, 2022, the European Commission issued a Statement of Objections to Apple, asserting that Apple abused its dominant position in the mobile wallet market on iOS devices. The Commission argued that Apple's limitation of access to NFC technology restricts competition and innovation. Specifically, Apple's decision to favour its own Apple Pay solutions by restricting third-party access to NFC input raises concerns of potential anti-competitive behaviour. The Commission contended that Apple's dominant position hampers competition, violating Article 102 of the TFEU.[40]

On June 14, 2023, the European Commission issued a Statement of Objections to Google, alleging that the company violated EU antitrust rules in the advertising industry. The Commission argues that Google has abused its dominance in European markets for publisher ad servers and programmatic ad-buying tools by favouring its ad exchange, AdX, since 2014. This conduct allegedly distorted competition, harming advertisers and publishers, and may require Google to divest part of its services to address these concerns. If confirmed, these actions would breach Article 102 of the TFEU.[41] This recent antitrust action against Google builds on previous regulatory interventions. In 2017, the Commission fined Google €2.42 billion for abusing its dominance as a search engine by giving illegal advantages to its comparison-shopping service. Google strategically promoted its service and demoted rivals in search results, stifling competition. The fine considered the duration and gravity of the infringement. It was based on the value of Google's revenue from its comparison-shopping service in the relevant European Economic Area countries. The decision required Google to cease its illegal conduct within 90 days or face penalty payments. This case underscores the Commission's commitment to addressing anti-competitive practices by tech giants, setting a precedent for subsequent investigations

[38] P Sawers, 'Microsoft Unbundles Teams from Microsoft Office in Europe to Appease Regulators' (*TechCrunch*, 1 September 2023) <https://techcrunch.com/2023/08/31/microsoft-office-teams-europe-unbundle> accessed 24 August 2024.

[39] S Kar-Gupta and C Chee, 'Microsoft in EU Antitrust Crosshairs over Teams, Office Tie-Up' (*Reuters*, 27 July 2023) <https://www.reuters.com/technology/eu-antitrust-regulators-investigate-microsoft-over-teams-office-tying-2023-07-27> accessed 24 August 2024.

[40] 'Antitrust: Commission Sends Statement of Objections to Apple over Practices Regarding Apple Pay' (*European Commission*, 2 May 2022) <https://ec.europa.eu/commission/presscorner/detail/en/IP222764> accessed 24 August 2024. The Statement of Objections focuses on NFC access for in-store payments, excluding online restrictions or alleged refusals of access to Apple Pay for specific rival products.

[41] 'Antitrust: Commission Sends Statement of Objections to Google over Abusive Practices in Online Advertising Technology' (*European Commission*, 14 June 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip233207> accessed 24 August 2024.

into Google's conduct, including those related to the Android operating system and Ad Sense.[42]

In July 2024, the Commission sent preliminary findings to Meta regarding its "Pay or Consent" advertising model, highlighting potential DMA violations. This model, introduced in November 2023, forces EU Facebook and Instagram users to either pay for an ad-free experience or continue using the platforms with personalised ads based on their consent to data processing. The Commission's preliminary view suggests that Meta's approach may be non-compliant with Article 5(2) of the DMA, which requires gatekeepers to provide users with a clear alternative to consent. This service is less reliant on personal data but is otherwise equivalent in functionality. Meta's binary choice, however, fails to offer such an alternative, essentially coercing users into accepting data-intensive services if they wish to avoid payment.

In its preliminary findings, the Commission pointed out that Meta's current model does not allow users to freely exercise their right to opt out of data combinations while still accessing a comparable service, infringing upon their autonomy and privacy rights. This development illustrates how the DMA, alongside other regulatory frameworks (GDPR and DSA), is shaping the operational strategies of digital giants.

These examples highlight how the Commission employs its regulatory tools to monitor gatekeepers and other tech players within the EU market to ensure a fair, transparent and competitive environment. It also proves the Commission's resilience and motivation in engaging big-tech corporations.

Undoubtedly, the CJEU plays a crucial role in shaping the EU's normative regulatory power on the global stage. However, as the EU's enforcement model becomes more centralised, it may raise concerns about the broader implications of such a concentrated regulatory approach.

As we have argued in earlier sections of this paper, this model could potentially create enforcement delays, allowing gatekeepers to exploit legal ambiguities and placing smaller, less-resourced national authorities at a disadvantage.

Furthermore, while the CJEU has demonstrated its ability to impose significant penalties, the long-term impact of such fines on market structures remains debatable. Are they truly a deterrent, or do they simply become a "cost of doing business" for tech giants? These considerations call for a critical reassessment of whether the current centralised model, although effective in creating legal certainty and uniformity, is sufficiently adaptable to digital markets' dynamic and rapidly evolving nature. Without more flexibility and local engagement, there is a risk that the regulatory framework may struggle to keep pace with technological advancements and evolving market dynamics.

[42] 'Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service' (*European Commission*, 27 June 2017) <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784> accessed 24 August 2024.

## 5 Deciphering Competition: CJEU Rulings on EU Competition Cases

The CJEU has also been instrumental in reinforcing the EU's normative power in competition law concerning digital markets. In *Google and Alphabet v. Commission*, it was determined that Google took advantage of its market dominance by illegally favouring its comparison-shopping service to its competitors.[43] Although the decision set a significant legal precedent, it raises critical questions about its broader impact. Can even a substantial fine truly challenge the entrenched dominance of companies like Google, or is it merely a temporary setback, leaving their underlying market power intact? We argue that fines alone fail to address the structural issues of monopolistic power in digital markets, where companies often treat penalties as a cost of doing business rather than a genuine deterrent.

This case stems from the European Commission's June 27, 2017 decision, which found that Google abused its dominant position in the general online search market across 13 EEA countries by favouring its shopping comparison service over competitors.[44] For this violation, Google was fined an astronomical €2.4 billion. Google and Alphabet filed a lawsuit against the Commission's decision with the General Court (GC).

The GC rejected Google's claims, highlighting the anti-competitive nature of its practices. It ruled that Google abused its monopoly by favouring its shopping comparison service, distorting competition. The decision was based on three factors: the significant traffic generated by Google's search engine, users' focus on top search results, and Google's dominant, irreplaceable market position. While valid, these points emphasise regulators' difficulty in dismantling tech giants' entrenched advantages. Penalizing behaviour alone may not change the market dynamics that sustain their dominance.

The GC further noted that Google's self-preferencing behaviour would not occur without its dominant market power. It also emphasised the EU's requirement for equal treatment by Internet access providers and Google's deliberate actions to undermine competition. As a result, the Digital Markets Act (DMA) now incorporates principles to ensure a more competitive and secure market for European consumers.[45]

On September 14, 2022, the GC published another seminal ruling against Google in the Google Android case.[46] The GC confirmed the Commission's decision to restrict Android device manufacturers and mobile network operators to prevent the dominance of Google's search and related applications. The Commission had taken Google to task for hindering the development of rival mobile operating systems, applications, and services in the EEA. On July 18, 2018, the Commission fined Google for abusing its dominant position by

[43] Case T-612/17 *Google and Alphabet v Commission (Google Alphabet)* [2005] ECRII.
[44] Search results for products generated by the Google search engine were presented as more prominent and eye-catching when derived from the company's proprietary shopping comparison application relative to the results generated by competing services.
[45] Case C-48/22 P *Google and Alphabet v Commission (Google Shopping)*, pending before the Court of Justice of the European Union.
[46] Case T-604/18 *Google and Alphabet v Commission* (*Google Android*) [2022] ECLI.

imposing anti-competitive contractual restrictions on mobile device manufacturers and network operators. The Commission found that Google required mobile device manufacturers to pre-install Google Search and its Chrome browser and obtain a license from Google to use its Play Store application store. In addition, the Commission found that mobile device manufacturers could only obtain the operating licenses if they had undertaken not to sell devices running alternative Android operating system versions, contravening Google's services bundling. Finally, the Commission found that Google granted a portion of its revenues from advertising to device manufacturers in exchange for their commitment not to pre-install competing general search engines.

According to the Commission, these restrictions aimed to protect and enhance Google's dominant position in mobile operating systems. The Commission noted that, as of July 2018, Google's Android operating system was installed on approximately 80% of smart mobile devices in Europe. It concluded that the common objective of and interconnection between the restrictive practices in question led the Commission to classify them as a single and continuous infringement of Article 102 of the TFEU. The Commission imposed a fine of €4.3 billion on Google.

Google and Alphabet appealed the European Union's decision, which was rejected by the GC in most, if not all, relevant aspects. The GC confirmed all the findings of the Commission's decision regarding the anti-competitive effects in one of the most critical rulings in competition law, a ruling of precedential value with widespread lateral implications for other companies. It accepted the Commission's claims, according to which Google imposed illegal restrictions on manufacturers of Android mobile devices and mobile network operators to consolidate its dominant position.

The GC's findings carry implications in terms of their added value for other ongoing cases. One such case involves Google's activity in online advertising. In June 2023, the Commission filed charges against Google for its anti-competitive activity in "ad tech", a field in which Google dominates in the EEA. The Commission claims that Google has been abusing its dominant position by favouring its own ad exchange, AdX, in ad selection auctions and the way its Google Ads place bids on ad exchanges. So, Google is perpetuating its dominant position and shutting competitors out of the market. The *Google Android* case will also probably influence future enforcement actions and shape related legislation. In its ruling, the GC reiterated the importance of identifying the relevant market, determining its scope, and analysing its structure to assess market dominance and anti-competitive behaviour:

> *In that regard, it must be pointed out that the purpose of determining the relevant market and the dominant position held on that market by the undertaking concerned is not only to define the fact and extent of internal competitive constraints specific to that market, but also to verify that there are no external*

*competitive constraints from products, services or territories other than those which form part of the relevant market under consideration.*[47]

In Google's biggest legal defeat to date, the GC's ruling to reject Google's appeal compelled Google to discontinue some of its anti-competitive practices. The principles tested in these cases have since become the foundations of the DMA designed to render the European digital market more competitive for businesses and a better-protected space for consumers.

In another case, on September 27, 2023, the GC affirmed the Commission's decision, validating Valve's infringement on cross-border sales restrictions and five video game publishers operating on the "Steam" gaming platform. This legal development shed light on the intricate relationship between intellectual property (IP) rights and competition law concerning the cross-border provision of copyright-protected content within the EU.[48] As the operator of Steam, Valve permitted publishers to geo-block Steam keys, restricting users in specific countries from activating games purchased elsewhere. The Commission identified anti-competitive practices, leading to Valve's five Article 101 TFEU infringements. The GC upheld this decision, revealing that Valve and the publishers had engaged in anti-competitive agreements between 2010 and 2015, aiming to limit cross-border sales.[49]

Valve contended that it provided technical geo-blocking services, arguing that it did not fall under Article 101 TFEU. However, the GC disagreed, affirming that such conduct was within the Article's scope, even in vertical relationships with competition restrictions. The GC dismissed Valve's attempt to annul the Commission's decision, asserting that the Commission sufficiently demonstrated agreements or concerted practices between Valve and each publisher, intending to restrict parallel imports through geo-blocking.[50]

The Court emphasised the necessity of a "concurrence of wills" for anti-competitive agreements, noting Valve's active promotion of geo-blocked keys to restrict imports, demonstrating acquiescence in the restrictive agreements. The GC rejected Valve's claim that IP rights justified competition restrictions, asserting that IP rights could not be exploited to eliminate parallel imports, as the primary goal of the agreements was competition restriction.[51]

Notably, the GC clarified that geo-blocking was not aimed at protecting copyright but rather at eliminating parallel imports and safeguarding substantial royalty amounts collected by publishers or profit margins earned by Valve. The judgment delved into the intersection of EU competition law and copyright, emphasizing that copyright protection did not grant right holders the right to demand the highest possible remuneration or foster

[47] ibid para 191.
[48] Case T-172/21 *Valve Corporation v European Commission* [2023] ECLI.
[49] ibid para 6-11.
[50] ibid para 94.
[51] ibid para 192.

artificial price differences among national markets, as it hindered the completion of the internal market.

Valve's arguments challenging the categorisation of the conduct as harmful to competition and a restriction by object were dismissed by the GC. The Court underscored that Valve failed to undermine the overall assessment of the collusive conduct, emphasizing that the alleged pro-competitive effects of geo-blocking did not cast doubt on its harmful impact on competition.

This ruling addressed the intricate interplay between competition law and IP rights, deviating from established case law. It challenged the assumption of IP rights as insurmountable barriers, signalling a broader trend of reduced deference to intellectual property within competition policy.

Another example is the case of *ByteDance v. Commission*, 2023. ByteDance, the holding company of TikTok, was classified as a gatekeeper under the DMA. They challenged this classification, contending that they did not fulfil the required criteria and sought to overturn it while requesting temporary measures to suspend obligations outlined in Articles 5, 6, and 15. ByteDance argued that revealing confidential information as mandated by the regulation would negatively impact its competitive edge and that limitations on data usage would stifle innovation. They claimed such disclosures would give competitors unfair advantages and erode user trust.

In contrast, the Commission maintained that these claims were speculative and asserted that adequate legal safeguards were in place. The Court determined that ByteDance's evidence did not demonstrate significant and irreparable harm, stating that any financial damages could be remedied through compensation. It concluded that ByteDance failed to show the urgency for interim measures since the alleged harms were either speculative or insufficiently supported. As a result, their request for interim measures was rejected.[52]

## 6 Summary

This paper explored the anticipated developments and the critical importance of digital competition within the Digital Single Market (DSM) framework. The DMA seeks to harmonise rules and regulations across the EU, fostering a cohesive and unified approach to digital competition. This harmonisation is crucial to prevent fragmented regulatory landscapes that could impede the functioning of a unified digital market. The centrality of digital competition under the DSM prism is emphasised by the recognition that digital markets transcend national borders. By promoting fair competition, the DMA aims to stimulate innovation, encourage new market entrants, and provide consumers with greater choices. Viewed within the framework of the DSM, digital competition catalyses

[52] Case T-1077/23 *Bytedance Ltd v European Commission* [2024] ECLI.

economic growth, job creation, and the establishment of a dynamic, resilient digital economy.

Furthermore, the DMA is a pivotal tool in strengthening the EU's TNP. This strategic approach emphasises safeguarding fundamental rights while preserving the integrity of the single market regulatory regime. By setting forth regulations to ensure fair competition and prevent anti-competitive practices among digital gatekeepers, the DMA aligns with broader TNP objectives: upholding fundamental rights, fostering digital sovereignty, and maintaining a cohesive regulatory framework within the Digital Single Market. In this way, the DMA addresses both economic considerations and reinforces the EU's normative influence, shaping a digital landscape that prioritises fairness, innovation, and the protection of individual rights.

However, as this paper critically highlight, while the DMA represents an ambitious attempt by the EU to regulate Big Tech and foster fair competition in digital markets, significant challenges remain. The centralised enforcement model raises concerns about the Commission's capacity to manage compliance effectively, particularly given the scope and scale of Big Tech. Moreover, the rigid rules set forth by the DMA may, ironically, stifle the very innovation it seeks to promote, especially when faced with the complexities of rapidly evolving digital ecosystems.

Additionally, while the DMA aims to extend the EU's regulatory influence globally, its extraterritorial reach may lead to unintended consequences. The tangible risk is that services and innovation could be relocated to jurisdictions with less stringent regulatory frameworks, undermining the Act's objectives. The balance between regulation and market dynamism is delicate, and whether the DMA can strike this balance effectively remains to be seen.

Ultimately, the DMA's success hinges on the Commission's ability to enforce compliance and to remain flexible enough to adapt the regulations in response to the digital market's rapid evolution. Future research and scholarship will play a crucial role in continuing to assess the DMA's impact on both market competition and innovation, providing a critical lens through which to evaluate the effectiveness of Europe's regulatory framework in the ever-changing digital age.