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Sean-Paul Brankin
sean-paul.brankin@bristows.com
Of Counsel
Bristows, Brussels

Pat Treacy
pat.treacy@bristows.com
Senior Counsel
Bristows, London and Brussels

INSTITUT de droit de la concurrence

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Sean-Paul Brankin*
sean-paul.brankin@bristows.com
Of Counsel
Bristows, Brussels

Pat Treacy
pat.treacy@bristows.com
Senior Counsel
Bristows, London and Brussels

I. Introduction

1. On 25 March 2022, the European Commission (EC) and European Parliament reached provisional agreement on the text of The Digital Market Act (DMA).[1] According to the agreed text, the DMA is a "*targeted set of legal obligations* (. . .) *to ensure contestable and fair digital markets featuring the presence of gatekeepers*."[2] Large digital platforms providing certain categories of services may be designated as "gatekeepers" by the EC. Once designated, gatekeepers are subject to *ex ante* rules designed to "*limit* [their] *market power*."[3] This structure has been described as "*conceptually straightforward*."[4]

2. Any straightforwardness is, however, largely illusory. It may fairly be said that the DMA is extraordinary in its ambition and complexity. It has no close precedents in terms of scope or structure. As a result, accurate predictions—positive or negative—as to its precise operation and/or impact are difficult.

3. Some observations can nonetheless be made with a high degree of certainty. First, for reasons discussed further below, the EC will face very substantial challenges when enforcing the DMA. Many of these are inherent in the design of the legislation. Second, for similar reasons, gatekeepers will require timely and meaningful regulatory guidance from the EC in order to comply with the new rules. It is likely that they will struggle to obtain such guidance.

4. To explain why this is the case, it is useful first to outline both the structure of the DMA and the reasons for its adoption.

II. Why we have the DMA

5. The main reason is the perceived failure of existing law—and in particular competition law—to control the power of digital platforms. According to the European Parliament's rapporteur on the DMA, Andreas Schwab, "*it is clear that competition rules alone cannot address all the problems we are facing with tech giants and their ability to set the rules by engaging in unfair business practices. The Digital Market Act will rule out these practices*."[5]

6. The Impact Assessment Support Study[6] (ISS) issued by the EC goes into further detail. It discusses ten case studies, involving seven key "issues" relating to gatekeeper platforms, and the status of competition law enforcement in relation to those case studies.[7] That information may be summarised as follows:

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* Bristows has clients whose activities may potentially be affected by the DMA once adopted. However, the views expressed in this article are entirely the authors' own. It was not written at the behest of or in the interest of any client or clients of Bristows and no clients were consulted in relation to its contents.

1 References to the DMA in this article are to the 11 May 2022 version of the draft text of the Regulation available at https://www.consilium.europa.eu/media/56086/st08722-xx22.pdf.

2 DMA, *supra*, recital 8.

3 European Parliament, press release, 24 March 2022, Deal on Digital Markets Act: EU rules to ensure fair competition and more choice for users, https://www.europarl.europa.eu/news/en/press-room/20220315IPR25504/deal-on-digital-markets-act-ensuring-fair-competition-and-more-choice-for-users.

4 C. Wall and E. Lostri, The European Union's Digital Markets Act: A Primer, CSIS, 8 February 2022, https://www.csis.org/analysis/european-unions-digital-markets-act-primer.

5 Similarly, Cédric O, the Minister representing the French Presidency of the European Council, said: "*The European Union has had to impose record fines over the past 10 years for certain harmful business practices by very large digital players. The DMA will directly ban these practices and create a fairer and more competitive economic space for new players and European businesses*." *See* European Parliament, press release, 23 November 2021, Digital Markets Act: ending unfair practices of big online platforms, https://www.europarl.europa.eu/news/nl/press-room/20211118IPR17636/digital-markets-act-ending-unfair-practices-of-big-online-platforms and European Council, press release, 25 March 2022, Digital Markets Act (DMA): agreement between the Council and the European Parliament https://www.consilium.europa.eu/en/press/press-releases/2022/03/25/council-and-european-parliament-reach-agreement-on-the-digital-markets-act.

6 Digital Markets Act: Impact Assessment support study, Annexes, VIGIE number: 2020/630, December 2020, https://www.cullen-international.com/dam/jcr:b2f68dd5-1633-458a-b7aa-33e100f404bc/KK0620191ENN.pdf.

7 ISS, Table 7, at pp. 28–29, and Annex 4, at pp. 209–382, setting out, respectively, "*identified issues in relation to gatekeeper platforms*" and "*Case Studies*."

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Table 1

Issue	Case Study(ies)	EU Case Law Status
Tying and bundling	Amazon Prime and Video	None[I]
	Google ad ecosystem	Ongoing appeal[II]
	Microsoft 365 and cloud services	Ongoing investigation[III]
Data access	Apple App Store	Ongoing investigations[IV]
Self-preferencing	Amazon Marketplace	Ongoing investigation/appeal[V]
Device neutrality	Google Android/Apple iOS	Ongoing appeal[VI]
	Apple Wallet/Pay	Ongoing investigation[VII]
	Digital ID (Facebook and Google)	None[VIII]
Leveraging	None cited[IX]	
Interoperability/API	Microsoft (Slack complaint)	Ongoing investigation[X]
Switching barriers	Airbnb/eBay	None[XI]

7. What immediately springs out is that none of the case studies has been finally legally assessed. Some of the issues have not even been subject to formal investigation at EU level. This is not because they cannot be dealt with under existing competition law rules: the ISS recognises that many could be and, in fact, are already subject to investigation under Article 102 of the Treaty on the Functioning of the European Union (TFEU).[8]

8. More pertinent is that pursuing cases under Article 102—in particular in respect of novel products and services characterised by high levels of investment and innovation—means addressing complex economic issues. Most if not all of the relevant behaviours are, at least potentially, pro-competitive. For example, at the outset of the Case Study section in Annex 4, the ISS summarises the prevailing economic consensus on tying and bundling as follows: "*Overall, the economic literature suggests that the systematic regulation of tying is not always justified on efficiency and welfare grounds. Tying can often be justified on efficiency grounds and expands the range of products to users and the profit of the platform*."[9]

9. However, those potential justifications have not been fully examined in context of most of the Annex 4 case studies.

10. Despite this, EU legislators have exhausted their patience. The ISS identifies "*several disadvantages*" with continuing to pursue cases under Article 102. In summary, these are:

- dominance and abuse is hard;
- cases take years if not decades to proceed through to final appeal; and
- remedies are perceived to have been ineffective—at least in relation to Google.[10]

11. Long-term observers of developments in EU competition law will note the irony that this new approach is diametrically opposed to the shift towards effects-based enforcement that has driven the reform of Article 102 enforcement since the late 1990s/early 2000s.[11] That said, few would enthusiastically defend the pace of EU competition law enforcement in this area,[12] and the political and social context surrounding the activities of certain digital platforms perhaps explains why a quicker and potentially more effective route to controlling gatekeeper behaviour has been sought.[13]

I ISS, Annex 4, p. 211 *et seq*.

II *Google Android*; ISS, Annex 4, p. 229 *et seq*.

III ISS, Annex 4, p. 243 *et seq*.

IV Ibid., p. 268 *et seq*.

V Ibid., p. 288 *et seq*.

VI Ibid., p. 314 *et seq*., citing *Google Android* remedies (at p. 317).

VII Ibid., p. 328 *et seq*.

VIII Ibid., p. 342 *et seq*., citing ongoing appeal against the Bundeskartellamt's *Facebook* infringement decision (decision of 6 February 2019 in case B6-22/16) before the Düsseldorf Higher Regional Court.

IX No specific case study in relation to leveraging is set out at Annex 4 of the ISS, although there are references to leveraging allegations in the *Microsoft* (Slack complaint) case study at p. 356 *et seq*. Table 7 at p. 28 of the ISS states that there are "*Few cases*" but includes references to non-EU case law and investigations.

X ISS, Annex 4, p. 356 *et seq*.

XI Ibid., Table 7, p. 28 ("*No (directly relevant) cases*") and Annex 4, p. 370 *et seq*.

8 Ibid., p. 42.

9 Ibid., p. 210.

10 Ibid., p. 42.

11 See, e.g., DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, December 2005, https://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf

12 For example, the ongoing Amazon Marketplace investigation apparently began in 2015 (ISS, p. 296), while the proceedings leading to the 2017 *Google Search (shopping)* decision were formally opened in 2010 (*see* https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740).

13 *See*, e.g. European Parliament, press release, 10 October 2019, EU to take action against fake news and foreign electoral interference, https://www.europarl.europa.eu/news/en/press-room/20191007IPR63550/eu-to-take-action-against-fake-news-and-foreign-electoral-interference.

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III. How the DMA works

12. In outline, the structure of the DMA may be divided into three sections: the process by which gatekeepers are designated (1.); the obligations imposed on gatekeepers (2.); and enforcement powers (3.).

1. Designation

13. For the EC to designate a provider of digital services as a gatekeeper, that undertaking must provide one of the ten categories of "core platform services" (CPS) listed in Article 2(2) DMA.[14] That list includes:

– online intermediation services;

– search engines;

– social networks;

– messaging services ("number-independent interpersonal communication services");

– operating systems; and

– cloud computing.[15]

14. The list is diverse. Moreover, some of the individual definitions are broad—covering a range of business models. For example, "online intermediation services" covers both online marketplaces for physical goods or services (Amazon or Booking.com) and app stores (Apple).[16]

15. An undertaking that provides any of the ten CPS may be designated a "gatekeeper" if it either satisfies certain size thresholds set out in Article 3(2) DMA or, following a market investigation, is otherwise deemed to act as an important gateway between business and end users with an entrenched, durable position and a significant impact on the internal market.[17] To meet the Article 3(2) criteria, an undertaking must have:

– an EU turnover of at least EUR 7.5 billion or a market capitalisation of at least EUR 75 billion; and

– at least 45 million active monthly end users and 10,000 active annual business users.

14 Article 19 DMA creates a mechanism by which the EC may add new CPS to the list following a market investigation.

15 The full list is (i) online intermediation—e.g. digital marketplaces and app stores—(ii) search engines, (iii) social networks, (iv) video-sharing platforms, (v) number-independent interpersonal communication services—i.e. messaging services such as WhatsApp—(vi) operating systems, (vii) web browsers, (viii) virtual assistants, (ix) cloud computing, and (x) advertising services.

16 *See*, e.g. Explanatory Memorandum to the DMA, COM(2020) 842 final, 15 December 2020, at p. 2 ("*online intermediation services (incl. for example marketplaces, app stores and online intermediation services in other sectors like mobility, transport or energy)*"), https://ec.europa.eu/info/sites/default/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf.

17 DMA, Articles 3(4), 3(8) and 17.

2. Obligations

16. The DMA imposes two categories of obligation on designated gatekeepers: (i) nine obligations set out in Article 5 that are considered not to require further specification; and (ii) a further thirteen "specifiable" obligations set out in Article 6.[18]

17. The nine obligations under Article 5 include:

– "ring-fencing" of platform data (no cross-use of personal data from the platform and no use of external sources of such data on the platform);

– allowing business users freedom in relation to promotions, marketing and the use of third-party sales channels; and

– allowing end users to use third-party services to access the gatekeeper's platform.[19]

18. The thirteen specifiable obligations under Article 6 include:

– no "self-preferencing" in relation to the use of business user data;

– use of transparent, fair, and non-discriminatory ranking criteria; and

– enabling the uninstalling of non-essential software applications.[20]

19. The EC may "specify"—either at its own initiative or at the request of a gatekeeper—the measures to be taken by a gatekeeper to implement obligations under Article 6.[21] However, both Article 5 and Article 6 obligations are immediately binding on gatekeepers following designation.[22]

20. Moreover, the initial obligation to interpret and understand both Articles 5 and 6 obligations falls on gatekeepers rather than the EC. Article 8(1) provides that gatekeepers shall "*ensure and be able to demonstrate compliance*" with all Articles 5 and 6 obligations. Further, Article 11(1) requires gatekeepers to submit a report setting out the measures it has implemented to ensure compliance within six months of their designation.[23]

18 Further specific obligations related to interoperability to be imposed only on designated gatekeepers providing number-independent interpersonal communication services are set out under Article 7.

19 DMA, Articles 5(2), 5(4) and 5(5).

20 DMA, Articles 6(2), 6(5) and 6(3).

21 DMA, Articles 8(2), 8(3) and 20.

22 Both Articles 5 and 6 provide—in identical terms—that "*Gatekeepers shall comply with this Article in respect of each of its core platform services* (. . .)" *See also* Article 8(1) DMA. This may not have been the original intention: ISS, p. 52 proposes a distinction between "*(i) prohibitions and/or obligations which can be specified to a high degree, thereby enabling them to be self-executing; and (ii) prohibitions and/or obligations which would require further elaboration by a regulatory body*," implying that Article 5 obligations were intended to be "*self-executing*," while Article 6(1) obligations were not. However, the Explanatory Memorandum to the DMA, at p. 9, refers to "*directly applicable obligations, including certain obligations where a regulatory dialogue may facilitate their effective implementation*."

23 Gatekeepers are also obliged to establish a compliance function, independent of operational activities, with a compliance head reporting to the management board, Article 28 DMA.

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Such measures must be "*effective in achieving the objectives of* [the DMA]."[24]

21. The requirement to implement compliance measures is, again, not conditional on the EC having specified the Article 6 obligations. Indeed, in order to obtain guidance on its Article 6 obligations through specification the gatekeeper must "*provide a reasoned submission to explain the measures that it intends to implement or has implemented.*"[25] In contrast, there is:

– no obligation on the EC to specify the measures to be taken in relation to Article 6; and

– no mechanism of any kind for the EC to offer guidance as to the compliance measures to be taken in relation to Article 5.[26]

3. Enforcement powers

22. The EC's powers to investigate potential infringements of the DMA are modelled on its existing investigatory powers in relation to EU competition law.[27] Accordingly, the EC may issue requests for information (RFIs), carry out on-site inspections (so-called dawn raids), and conduct market investigations.[28]

23. In addition, gatekeepers have certain reporting obligations, including providing the EC with:

– a report setting out the measures they have implemented to ensure compliance with their obligations under the DMA within six months of their designation;

– an independently audited description of any consumer profiling techniques applied in relation to their CPS within six months of their designation; and

– advance notice of any acquisitions (or other concentrations) they intend to enter into in relation to services in the digital sector.[29]

24. The DMA's remedies provisions are similarly modelled on EU competition law. The EC's key powers are to order gatekeepers to cease and desist from any infringement, and to impose fines of up to 10% of worldwide turnover (or 20% in case of recidivism).[30] In cases of systematic non-compliance, the EC may, in addition, impose structural remedies, or prohibit a gatekeeper from engaging in concentrations in the digital sector during a limited time period.[31]

IV. Challenges

25. As is clear from the above, the DMA has been adopted to resolve what are, to a large extent, competition policy concerns that are believed (but not generally finally determined) to exist.[32] It has mixed policy objectives that cover fair competition, protection of consumers from unfair practices, and the creation of contestable markets.[33] Inevitably, this complex matrix will create challenges for enforcement and compliance. Some of these are explored below.

1. Broad and uncertain obligations

26. The non-specifiable obligations included in Article 5 are supposed to be defined "*sufficiently clearly that* [they can] *be applied without further interpretation.*"[34] The first such obligation, in Article 5(2), provides that gatekeepers "*shall not: (a) process, for the purpose of providing online advertising services, personal data of end users using services of third-parties that make use of core platform services of the gatekeeper;* (. . .) *(c) cross-use personal data from the relevant core platform service in other services provided separately by the gatekeeper, including other core platform services, and vice-versa; and (d) sign in end users to other services of the gatekeeper in order to combine personal data* (. . .)."[35]

27. This is not the full provision. However, even at a glance, the complexity of this section is enough to suggest that significant further interpretation will be required. Obvious questions include: (i) may data that has initially been processed for other purposes subsequently be used for the provision of advertising services; and (ii) does cross-use of personal data cover all forms of use—direct or indirect—in non-CPS services.

28. For Article 6 obligations, the potential need for further interpretation—or at least specification—is express and

24 DMA, Article 8(1)

25 DMA, Article 8(3).

26 Article 8(3) DMA provides expressly that the EC "*shall have discretion in deciding whether to engage*" in the process of giving guidance and refers only to guidance in relation to Article 6 (and 7) obligations (not those under Article 5).

27 *See*, in particular, Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1, Articles 18 to 20.

28 DMA, Articles 21, 23 and 17 to 19. *See also* Article 24 (interim measures), Article 25 (commitments) and Article 26 (appointment of monitors).

29 Ibid., Articles 11(1), 15(1) and 14(1).

30 Ibid., Article 30.

31 Ibid., Articles 18(1) and 18(2).

32 For most (but not all) of the specified practices, competition investigations have been opened, but are not yet finally concluded—some have not yet reached even the preliminary stage of a statement of objections.

33 See, e.g., DMA, Recitals 4 to 7, 35 and 72.

34 ISS, p. 59. "*However, there are other problematic practices, for which it is not possible to define a prohibition or obligation in the legislation sufficiently clearly that it could be applied without further interpretation. Self-preferencing (in a broad sense) is one such case, while access to data or interoperability, also require a further interpretation and/or operational step in order to render them effective. Thus, the use of a pure blacklist approach based on self-executing prohibitions would either result in a limited list of prohibitions (and thus fail to tackle some of the serious problems raised by gatekeeper platforms) or if broadened, could result in measures which are difficult to interpret and create legal uncertainty, creating considerable pressure on the enforcement and appeals process to define the scope of the obligations. This would entirely negate the time benefits that should arise from a self-executing measure.*"

35 DMA, Article 5(2).

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the issues raised are perhaps even more complex. For example, Article 6(5) requires that gatekeepers "*shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party* [and] *shall apply transparent, fair and non-discriminatory conditions to such ranking and related indexing and crawling.*"

29. It must be questionable whether it is even possible to comply meaningfully with such obligations. For example, if ranking criteria are the result of machine learning, no one may understand—or therefore be able to explain—the precise mechanisms being applied. Providing transparency may therefore be effectively impossible.

30. As set out above, the initial obligation to understand and implement these obligations falls on gatekeepers themselves. The EC may—but not must—specify the measures to take in relation to Article 6 obligations, while gatekeepers must submit reasoned proposals for compliance measures in order to obtain guidance.[36] In relation to Article 5 obligations, there is no formal mechanism by which gatekeepers may even seek guidance. Nor is "*compliance by design*" (enthusiastically promoted by some within the EC) a solution here.[37] Compliance cannot be designed in without clarity as to the obligations to be respected.

31. In practice, it seems inevitable that the EC will need to engage in an iterative process of ongoing dialogue with gatekeepers. That will be challenging for both parties, not least the EC, which will inevitably start from a low base in terms of technical understanding (given the number of CPS and the variety of gatekeepers likely to fall within its remit) in circumstances where it is likely to have to store and process vast quantities of data, which will doubtless continue to grow while a practice is being considered.[38]

32. The technical debate will be complicated by a legal one. As demonstrated by the language of Article 6(5) quoted above—with its partial adoption of the FRAND (fair, reasonable and non-discriminatory) concept—the DMA obligations are likely to be difficult to divorce from cases and concepts under Article 102. It seems inevitable that gatekeepers, their advisors, the EC, and ultimately the EU courts, will rely on that case law in seeking to interpret the scope and content of those obligations. The history of Article 102 enforcement suggests that this is unlikely to offer simple solutions and will, in fact, complicate the position.

36 Ibid., Article 7(2a).

37 Algorithms and competition, Speech by Commissioner Margrethe Vestager at Bundeskartellamt 18th Conference on Competition, Berlin, 16 March 2017, https://ec.europa.eu/newsroom/comp/items/55994/en.

38 In the context of the *Google Search (shopping)* investigation, the EC has stated that it analysed 5.2 terabytes of data from Google in relation to search results, *see* Eur. Comm., press release IP/17/1784 of 27 June 2017, Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service, https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784.

2. Multiple objectives

33. Gatekeepers are obliged to ensure that the compliance measures they implement are "*effective in achieving the objectives of* [the DMA]".[39] It is clear from both the recitals to the DMA and the ISS that these objectives are not limited to the standard economic policy objective of increasing efficiency and consumer welfare through effective competition.[40] Repeated reference is made to public policy concerns such as fairness, avoidance of unfair or deceptive commercial practices, privacy, and data protection, as well as the more traditional competition policy objective of contestability.[41]

34. Unfortunately for gatekeepers—and everyone else seeking to interpret the DMA—these objectives are not necessarily fully aligned. They may indeed conflict.

35. Take for example Google's Privacy Sandbox initiative, which is currently being investigated by the EC,[42] and is subject to commitments to the CMA.[43] Google describes it as an "*effort to develop new technology that will improve people's privacy across the Web and apps on Android. The proposed solutions will limit tracking of individuals and provide safer alternatives to existing technology on these platforms while keeping them open and accessible to everyone*."[44]

While this may enhance privacy and data protection by restricting third parties' access to data about user identity and behaviour, it may also increase entry barriers, reducing market contestability, and/or cause advertising spending to become even more concentrated on Google's ecosystem at the expense of competitors.[45]

36. Under the DMA framework, gatekeepers are required to take the initiative in relation to the complex judgments involved in when balancing such conflicting objectives. There are, however, no simple or obvious answers. The responsibility for resolving matters will ultimately fall on the EC and the EU courts. It will not be possible or practical to do so exclusively through litigation (although that will be necessary in some cases). Gatekeepers and the EC will inevitably need to find mechanisms for resolving these issues through dialogue, outside the formal framework of the DMA.

39 DMA, Article 8(1).

40 Indeed, it is notable that the only reference to efficiencies in the recitals to the DMA is in recital 23, which specifies that any "*justification on economic grounds seeking to demonstrate efficiencies deriving from a specific type of behaviour*" is not relevant in the context of the designation of a provider of CPS as a gatekeeper.

41 *See*, e.g. DMA, Recitals 4 to 7, 35 and 72.

42 Eur. Comm., press release IP/21/3143 of 22 June 2021, Antitrust: Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3143.

43 https://www.gov.uk/cma-cases/investigation-into-googles-privacy-sandbox-browser-changes.

44 https://privacysandbox.com/intl/en_us.

45 CMA, press release, 8 January 2021, CMA to investigate Google's 'Privacy Sandbox' browser changes, https://www.gov.uk/government/news/cma-to-investigate-google-s-privacy-sandbox-browser-changes.

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3. Diversity of regulated activities

37. As is clear from the CPS definition discussed above, the DMA is intended to cover a very wide range of digital services—from search, through app stores and operating systems, to cloud computing. As a consequence, the EC will be expected to regulate an extraordinarily broad range of businesses under the DMA. The EC's Impact Assessment (IA) assumes that fifteen to twenty gatekeepers will be designated.[46] Apple, Booking.com, Amazon, Uber, Google, Facebook, Airbnb, eBay and Microsoft, among others, have been mentioned as potential candidates.[47] The Parliament has added WhatsApp, Facebook Messenger, and iMessage to the list, through the inclusion of number-independent interpersonal communication services within the DMA's scope.[48]

38. Whatever the precise number, the EC's regulatory responsibilities in terms of the number of entities supervised will far exceed those of the standard economic regulator. The responsibilities of most sectoral regulators are focussed on one, or perhaps a small number of, former government-owned monopolists in one or more related industries.

39. For regulators such as Ofgem or Ofcom in the UK—respectively responsible for various entities in the (i) energy and (ii) telecommunications and broadcast media sectors—there is a reasonably close link between the activities of the regulated entities in the sector for which they are responsible. In contrast, under the DMA, the EC must regulate industries with technologies and business models as diverse as Google's advertiser-funded search services, Apple's commission-funded App Store, Microsoft's licence fee-funded operating system, and Amazon with Its combination of funding from online sales, services provided to third-party sellers, cloud services, advertising services, subscriptions, and physical stores.[49] This diversity is expressly recognised in the ISS.[50] The combination of the large number and diverse nature of regulated entities and activities renders the regulatory task facing the EC unprecedented in scope and scale. Among others, it will be extremely difficult for the EC to develop the level of technical, industry-specific knowledge and understanding on which most economic regulators rely to carry out their tasks effectively.

4. Limited resources

40. Experience suggests that effective *ex ante* regulation is an expensive and staff-intensive activity. The UK, by way of example, has various sector-focussed regulators and a relatively long history of economic regulation of (actual or quasi) monopolists moving towards more contestable markets. The budget and staffing figures for Ofgem, Ofcom and Ofwat are set out in the table below. Each of these is a regulator charged with the supervision of only one or two closely related sectors, and in a single jurisdiction.

Table 2

UK Regulator	Sector	Budget	Staff (FTE)
Ofgem[51]	Energy	GBP 120 million	1,187
Ofcom[52]	Media and telecoms	GBP 135 million	992
Ofwat[53]	Water	GBP 32 million	238

41. According to the ISS, the EC's projected costs and staffing for the DMA are EUR 8.2 million and less than 50 full-time equivalents (FTEs).[54] Other sources suggest costs of between EUR 10 and 17 million and up to 80 FTEs.[55] In other words, the EC is likely to find itself regulating the Union-wide activities of up to twenty global digital platforms with at most a third of the staff and half of the budget of one of the smallest UK industry regulators (Ofwat), and less than a tenth of the staff and around a tenth of the budget of the larger UK regulators (Ofgem and Ofcom).

46 Impact Assessment, Part 1/2, SWD(2020) 363 final, 15 December 2020, para. 353 ("*it is assumed that Option 2 would cover up to a maximum of between 15 gatekeepers (sub-option 1-A) and 20 gatekeepers (sub-option 1-B)*"), available at https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=72185. The decision to raise the Article 3(2) size thresholds from the EUR 6.5/EUR 65 billion proposed in the ISS to EUR 7.5/EUR 75 billion in the agreed text may limit the number of designated gatekeepers, but the EC's power to designate gatekeepers below these thresholds inevitably renders that uncertain.

47 ISS, pp. 9–10. A longer list of nineteen companies is considered at ISS, pp. 124–125.

48 European Parliament press release, 24 March 2022, *supra*, footnote 3.

49 M. Yuen, Amazon

annual revenue breakdown by segment in 2022, Insider Intelligence, 11 February 2022, https://www.insiderintelligence.com/insights/amazon-revenue.

50 *See*, e.g. ISS, p. 174: "*Apple and Amazon are companies whose core business substantially differs from each other. While Amazon has a large e-commerce platform and provides logistics services around the globe, Apple provides mobile consumer electronics with its own integrated operating system and connected services*"; and similarly ISS, pp. 122 123:"[A]*t its heart Apple is a mobile devices company that worked its way towards other layers of the value chain*. (. . .) *Google's core business is deeply rooted in online search and in contrast to Apple the largest share of Google's revenues stem from advertisements*."

51 https://www.ofgem.gov.uk/publications/ofgem-annual-report-and-accounts-2020-21.

52 https://www.ofcom.org.uk/__data/assets/pdf_file/0025/221686/annual-report-2020-21.pdf.

53 https://www.ofwat.gov.uk/wp-content/uploads/2021/07/Ofwat-Annual-report-and-accounts-2020-2021.pdf.

54 ISS, pp. 61 and 67 ("*The total estimated cost of option 2 is around €11.6m, of which an estimated €8.2m would be associated with the activities of the European Commission (including co-ordination of the network)*" and "[b]*ased on* (. . .) *an assumption based on the regulation of 10 platforms, we estimate that* (. . .) *just under 50 FTE might be required within the Commission to handle option 2*").

55 IA, *supra* footnote 49, para. 353 ("*The administrative costs for the EU Commission are estimated at EUR 16.7 million per year*"). The Explanatory Memorandum to the DMA, at pp. 11–12, refers to the redeployment of 80 FTEs and total financial resources for the period 2021–2027 of EUR 81 million.

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5. Enforcement powers

42. In a traditional *ex ante* regulatory context, regulated entities—particularly those considered to have market power—are subject to extensive reporting obligations. Until 2021, BT, the former UK telecommunications incumbent regulated by Ofcom, was subject to nine detailed regulatory financial reporting requirements in relation to wholesale fixed telecoms markets. [56]

43. Compared to this, the reporting obligations imposed on gatekeepers under the DMA are minimal. They must submit two one-off reports within six months of designation, but thereafter need only submit information relating to planned mergers and acquisitions. If the EC is compelled to obtain the information it requires to monitor compliance with the DMA through RFIs and dawn raids, the process will be slow, and painful for all concerned.

V. Conclusions

44. Once the DMA enters into force, both the regulator and the regulated will face substantial challenges. In its regulatory role, the EC will have to grapple with responsibilities of extraordinary scope, legal provisions of doubtful clarity, and this in the context of uncertain goals and constrained resources. Gatekeepers will, for their part, face many of the same difficulties. Indeed, the task assigned to gatekeepers is arguably more challenging, since the DMA places on them the initial burden of interpreting and implementing its requirements.

45. Without timely and meaningful regulatory guidance from the EC, gatekeepers will struggle to comply with the new rules. If gridlock is to be avoided, the EC and gatekeepers will need to develop mechanisms outside the formal framework of the DMA for meeting these challenges through dialogue. The EC has a good record of developing alternative approaches where black letter procedures prove ineffective, although these approaches are not always fast-moving.[57] We can, therefore, expect solutions to emerge, but the process may not be rapid. ■

56 Ofcom, Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26, Volume 6: BT Regulatory Financial Reporting, 18 March 2021, https://www.ofcom.org.uk/__data/assets/pdf_file/0018/216090/wftmr-statement-volume-6-bt-rfr.pdf.

57 *See* the EC's development of pre-notification discussions in the context of EU merger control and its flexible approach to the implementation of the cartel settlements procedure (in relation to the latter, cf. Sean-Paul Brankin, All settled: Where are the European Commission's settlement proposals post consultation? Competition Law Journal, 7, 170–181 (2008)).

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