

# *How the DMA obligations model fails to protect online markets' contestability and proposals for reform*

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# How the DMA Obligations Model Fails to Protect Online Markets Contestability and Proposals for Reform

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## ABSTRACT:

This Article makes a significant contribution to the debate on whether the model underpinning the much-heralded EU *Digital Market Act* can provide a comprehensive level of protection against online gatekeepers' abusive practices and achieve the DMA's proclaimed ambition to protect online markets contestability in the digital space. To illustrate model-failure, key Commission enforcement decisions in the years leading up to DMA enactment are examined to show less than optimal outcomes were achieved by the Commission's attempts to grapple with gatekeepers anti-competitive exclusionary practices, before the authors then proceed to demonstrate how the DMA's 'obligations list' model will also fail to counteract long-standing well-known anti-competitive conduct, allowing gatekeepers continue by default to engage in such conduct largely free from regulatory restraint. Identifying several important examples of DMA obligations-model gaps, the authors analysis calls into question the DMA's aspiration to protect online markets' contestability and proposes reforms for amending the model in order to adequately protect market contestability in the digital space. Absent such reforms, the current deficient DMA obligations model will pose neither a significant deterrent to anti-competitive gatekeepers, nor a 'silver bullet' to successfully protect online markets contestability.

## KEYWORDS:

Gatekeepers; DMA Obligations; Leveraging; Fining Power; Consumer Compensation; Exclusionary Conduct; Divestment; Market Contestability; Self-preferencing; Intermediation.

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## I. Introduction

Concern about whether Competition Law is fit to regulate the digital marketplace has been around for some years.<sup>1</sup> In recent times, these concerns have not abated. Huge platforms dominate the digital business landscape, what we now call *gatekeepers*<sup>2</sup>—major digital platforms so powerful that they can control access to the market across many countries. These powerful gatekeepers can set up rules which third-party vendors<sup>3</sup> wishing to use gatekeepers' platforms are subject, with such rules invariably conferring an unfair advantage on gatekeepers' commercial interests so they enjoy supernormal levels of profit. The gatekeepers have attained this position of 'superinfluence' against a background where antitrust regulators were largely asleep at the wheel for the last 20 years or so, allowing the gatekeepers generate supernormal profits, underpinned by a wide range of anti-competitive activities.<sup>4</sup>

It is recognised that competition regulators around the world have been behind the curve in focusing on gatekeepers practices. For many years there was little EU Commission enforcement activity, such that Commission focus did not, until very recently, begin to play a major role in seeking out, investigating and prohibiting what are obviously anti-competitive business practices by online gatekeepers.<sup>5</sup> Like the Commission, the competition enforcement community globally has taken a relatively long time to understand how extensive anti-competitive gatekeepers practices really are, and how they affect the contestability of online markets.<sup>6</sup> Consequently, major competition enforcement actors, such as the EU Commission, have only relatively lately come to play the role expected of them in support of protecting fair competition and access to the online markets by instigating more timely investigations into gatekeepers anti-competitive practices.

Legislative intervention has been similarly tardy.<sup>7</sup> The EU's *Digital Markets Act 2022* ("DMA") was finally enacted in 2022.<sup>8</sup> It proclaims that it seeks to protect the contestability of online markets, yet this article will demonstrate that although the DMA requires gatekeepers to do, or not to do, certain specific things<sup>9</sup>, this article contends that at its core it will fail to achieve its ambition to protect

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<sup>1</sup> Richard A. Posner, *Antitrust in the New Economy*, 68 *Antitrust L.J.* 925 (2001).

<sup>2</sup> 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 O.J. (L 265) 1, Art. 2(1) and (2) states: "(1) 'gatekeeper' means an undertaking providing core platform services, designated pursuant to Article 3; (2) 'core platform service' means any of the following: (a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communications services; (f) operating systems; (g) web browsers; (h) virtual assistants; (i) cloud computing services; (j) online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by an undertaking that provides any of the core platform services listed in points (a) to (i) [...]"

<sup>3</sup> Third-party vendors in this article means business users defined in the Digital Markets Act (DMA): see DMA, Art. 2(21).

<sup>4</sup> J.M. Newman, *Antitrust in Digital Markets*, 72 *Vanderbilt L. Rev.* 1497 (2019).

<sup>5</sup> In *Google Search (AdSense)*, the Commission only commenced investigation in 2016 of allegations that Google was abusing its dominant position in the online advertising market even though Google was dominant in two thirds of all EU Member States since 2006(!) and in most of the remaining third of Member States since either 2007 or 2008!: see Commission Decision in Case AT.40411, *Google Search (AdSense)*, 2020 O.J. (C 369) 04. While in the USA, there was little action at Federal level for many years, with individual States taking up the cudgel, often with mixed success. See Section A immediately below.

<sup>6</sup> US Assistant Attorney General Makan Delrahim has observed that: "It is incumbent upon antitrust enforcers not to be too myopic or formalistic when it comes to anticompetitive conduct in the digital age.": see Makan Delrahim, *Blind[ing] Me With Science: Antitrust, Data, and Digital Markets*, paper presented at the Harvard Law School & Competition Policy International Conference on "Challenges to Antitrust in a Changing Economy" (2019).

<sup>7</sup> A.C. Witt, *The Digital Markets Act: Regulating the Wild West*, 60 *Common Mkt. L. Rev.* 625 (2023), pointing out "[t]he DMA is the first comprehensive legal regime to regulate digital gatekeepers."

<sup>8</sup> EU Digital Markets Act came into full effect on 2 May 2023.

<sup>9</sup> For example, see details in Article 5, 6 & 8 of the DMA.

online markets contestability. This is because the DMA does not provide a comprehensive legal principle to prohibit a myriad of anti-competitive gatekeeper practices. This article will identify multiple examples of such gaps in the DMA, to reveal that the DMA does not provide a panacea to many commonly deployed gatekeeper-originating anti-competitive practices. The article will consider previous Commission investigations into gatekeeper anti-competitive practices which continue to fall outside the DMA's scope, yet clearly, they will continue to adversely affect online markets contestability. This will further highlight the DMA's limited capacity to effect positive change. The DMA's omission to prohibit such practices calls its effectiveness into question. Remedies provided by the DMA will also be shown to be inadequate and the authors will propose appropriate reforms to provide deterrent remedies later below.

### **A. Why Competition Enforcement was Slow to Tackle Anti-Competitive Practices in Online Marketplaces**

Online platforms represented a new type of business model<sup>10</sup> which conferred on them the ability to *anti-competitively compete* via new marketplace features *created by them, with global reach*, that do not exist in traditional market structures.<sup>11</sup> Whether it is by using their technology to leverage their dominance across markets<sup>12</sup>; or by creating closed essential digital ecosystems that set high barriers to entry<sup>13</sup>; or by using manipulation practices on dual-purpose platforms, to confer a preferential position on their own products or services using non-public data generated on their platforms by third party vendors and consumers using their platforms<sup>14</sup>—the gatekeeper business model allows the gatekeeper to rise to dominance across multiple areas of digital commerce rapidly in a way that can be very destructive of competition. Three actual examples will illustrate:

*First, leveraging*—there is no doubt that the major gatekeepers such as Google, Apple, Amazon, etc. possess not only massive market power, but also have achieved a powerful market position, allowing them to leverage their dominance into other markets.<sup>15</sup> A typical example would be that of Google, which has paid mobile phone manufacturers enormous sums in return for a commitment to pre-install Google Store and Google Chrome onto new android mobile phones.<sup>16</sup> This gives Google's search engine global reach to android mobile phone users around the world, and in the process simultaneously became the no.1 search engine on mobile phones, as well as allowing Google to generate multi-billion dollar profits in the global online advertising market by using its technology to

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<sup>10</sup> J.W. Veile, M.C. Schmidt & K.I. Voigt, *Toward a New Era of Cooperation: How Industrial Digital Platforms Transform Business Models in Industry 4.0*, 143 J. Bus. Res. 387, 393–94 (2022); K. Täuscher & S.M. Laudien, *Understanding Platform Business Models: A Mixed Methods Study of Marketplaces*, 36 Eur. Mgmt. J. 319, 324 (2018).

<sup>11</sup> OECD, *Handbook on Competition Policy in the Digital Age* 37–45 (2022); C. Cennamo, *Competing in Digital Markets: A Platform-Based Perspective*, 35 Acad. Mgmt. Persp. 265 (2021).

<sup>12</sup> e.g., Google leveraged its power in the search engine market to enhance its position in the online shopping market (*Google Shopping*, 2017): see A. Kornelakis & P. Hublart, *Digital Markets, Competition Regimes and Models of Capitalism: A Comparative Institutional Analysis of European and U.S. Responses to Google*, 26 Comp. & Change 334, 345 (2022).

<sup>13</sup> e.g., Apple App Store provided and controlled the only access for application developers to reach Apple device users: see S. Shao, *Antitrust in the Consumer Platform Economy: How Apple Has Abused its Mobile Platform Dominance*, 36 Berkeley Tech. L.J. 353, 368–69 (2021).

<sup>14</sup> e.g., Amazon's dual-purpose role allows it to prioritise its own products after analysing vendors and consumers data: see K. Martin, *Platforms, Privacy & the Honeypot Problem*, 37 Harv. J.L. & Tech. 1087, 1097–98 (2024).

<sup>15</sup> For example, Google leveraged its dominance in the global browser market via Chrome to the advertising market: see S. Munir, K. Kollnig, A. Shuba & Z. Shafiq, *Google's Chrome Antitrust Paradox*, 27 Vanderbilt J. Ent. & Tech. L. 419 (2024).

<sup>16</sup> Case T-604/18, *Google and Alphabet v. Commission* (Google Android), EU:T:2022:541 (Gen. Ct. Sept. 14, 2022): see further Section III.A below.

profile consumers purchasing preferences and interests.<sup>17</sup>

*Second, dual purpose conflict and consumer choice manipulation* practices driven by data misuse—Amazon presents a leading example of unfair competition arising from data-driven unfair competition practices<sup>18</sup> such as were seen when Amazon collected and analysed both consumers and third party vendors data in order to gain deep insight into vendor/consumer relationships in order to thereby list its own versions of products on top of consumers’ online search results lists and then offer Amazon own or ‘preferred’<sup>19</sup> products at cheaper prices or on preferential delivery terms.<sup>20</sup> This practice of using third party vendors and consumers *own non-public data to achieve competitive advantage in its own marketplace* allowed Amazon to confer on itself unfair competitive advantage against other competing vendors using the Amazon marketplace and also manipulate consumer purchasing choices in its own favour.

*Third, the closed ecosystem*—this sees gatekeepers occupying the position of a mandatory intermediary who must be engaged in by third party vendors if the latter wishes to reach consumers. Gatekeepers such as Apple have used proprietary technology to erect entry barriers around a closed ecosystem, which allows Apple to monopolise the app market for all Apple devices: in essence, any third party app developers, who want their apps to be available to consumers via Apple devices, must agree with Apple’s onerous agreement terms (e.g., high commission fees) and exclusively adopt Apple’s payment method (i.e., Apple Pay<sup>21</sup>) as the only payment method for in-app purchases.<sup>22</sup> Not agreeing to such terms meant that third party app developers hoping to offer their apps to Apple customers, possessed little or no bargaining power if they wished to be accepted into Apple’s closed

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<sup>17</sup> *id.*

<sup>18</sup> In *Amazon Buy Box* (2020) the EU Commission investigated the dual purpose role of Amazon (as both marketplace gatekeeper and market player) in order to determine whether holding both roles facilitated abuses of dominance via Amazon’s use of the “Buy Box”—without a formal decision condemning Amazon for abuse of dominance, the Commission instead opted to accept Amazon commitments to treat all sellers equally; to stop using non-public data; and allow consumers free choice as to delivery carriers. This outcome is very unsatisfactory because the Commission did not proceed to issue a formal Decision against Amazon, which undoubtedly was acting anti-competitively, plus in addition the AI which dictates how the Buy Box operates to determine which products are placed in the Buy Box (thereby giving them high visibility to the consumer) was not revealed or explained: see further Section II.A below.

<sup>19</sup> e.g., Amazon “preferred sellers” are those who paid Amazon to gain admission to the “Buy Box”: This shall be explored further below in Section II.A.

<sup>20</sup> The UK CMA investigated similar practices by Amazon in 2022, and closed investigation in late 2023, accepting commitments from Amazon not to disadvantage third-party sellers on its site by employing similar illegal practices: see CMA, *Investigation into Amazon’s Marketplace* (Feb. 12, 2024), <https://www.gov.uk/cma-cases/investigation-into-amazons-marketplace> (last visited Jan. 15, 2026). The US shares similar concerns, as highlighted by the US House Judiciary Committee’s 2020 Antitrust Subcommittee Report and the US House Judiciary Committee’s 2022 Report: see *Investigation of Competition in Digital Markets*, CP 117–8, 116th Cong. (2020).

<sup>21</sup> Instead of the Commission taking timely action against Apple and Google who were accused of using their payment apps to leverage their dominance, it was either the prior efforts of non-European legislators (e.g., Telecommunications Business Act, Act No. 18451 (S. Kor. Oct. 19, 2021) (amended 2024) or private antitrust actions (e.g., USA – *Cameron et al v. Apple Inc.*, Case No. 4:19-cv-03074-YGR, 2019 (N.D. Cal.)) challenging the online platforms use of *their payment apps* (Apple Pay & Google Pay) to leverage their dominance into ancillary markets that eventually spurred the Commission into action. Although the Commission started an investigation (i.e., Commission Decision in Case AT.40452, *Apple – Mobile Payments*, 2024 O.J. (C 1027)), Apple and Google dropped the requirement that the only way to pay on either platform was via their own payment app, the point (for present purposes) being that this outcome was not as a result of competition regulatory action, but rather was anticipating the way the wind was blowing following the South Korea legislation prohibiting such leveraging as well as the court action in the USA contesting the legality of such practices.

<sup>22</sup> Apple agreed to allow in-app purchases using different payment methods other than solely Apple Pay in order to avoid further fines: see ACM, *Apple Changes Unfair Conditions, Allows Alternative Payment Methods in Dating Apps* (June 11, 2022), <https://www.acm.nl/en/publications/acm-apple-changes-unfair-conditions-allows-alternative-payments-methods-dating-apps> (last visited Jan. 15, 2026).

ecosystem.<sup>23</sup>

The above are but a few examples of the complex unfair competition practices practised by online platforms, which both competition regulators and current competition laws are finding challenging to deal with. Against this background, the EU Commission was not only slow to realise the extent to which gatekeepers were deploying multiple layers of such anti-competitive strategies to restrict competition and innovation by rivals in the online marketplace<sup>24</sup>, but the outcome in some of these investigations involved only half-measures<sup>25</sup>; the Commission was also slow to realise the threat to consumer welfare<sup>26</sup>; and was slow to intervene when investigations highlighting issues of concern got underway. For example, the investigation into Google’s anti-competitive practices began in 2010 with *Google Search (Shopping)*<sup>27</sup>, but took 7 years to conclude. Another EU investigation into Google advertising practices (*Google AdSense 2016*) preventing rivals from placing their search adverts on websites) took 3 years to conclude. However, by the time the investigation started in 2016, it was already 10 years after Google had become dominant in the online advertising market in two thirds of all EU Member States (since 2006).<sup>28</sup> During this time, Google turnover increased from USD\$29.32 billion in 2010<sup>29</sup>; to USD\$89.98 billion in 2016<sup>30</sup>; and indeed grew further to USD\$279.8 billion by 2022<sup>31</sup> while also becoming the largest market share holder in the global online search and advertising markets, a position it continues to hold to this day!

This “slow-learning” about how extensive (and effective) gatekeepers anti-competitive practices actually are, also meant that the time the EU took to adopt the DMA was far too slothful as against the threat to online competition that was now obvious to all. Although anti-competitive concerns have been voiced for many years<sup>32</sup>, it was only in 2022 that the long-awaited DMA saw the light of day. Its objective is to “make the markets in the digital sector fairer and more contestable.”<sup>33</sup> However, the DMA was enacted too late—the horse had already bolted from the stable—because multiple major gatekeepers had already achieved *global dominance* status in their respective digital marketplaces as a result of being able to impose wide-ranging anti-competitive restrictions on vendors seeking to operate on their platforms. Gatekeepers had already achieved a position of super dominance rapidly, and not just on their respective platform marketplaces but also in ancillary markets<sup>34</sup>, allowing gatekeepers dominate the competition at several levels in a manner that traditional monopolies can

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<sup>23</sup> Shao, *supra* note 13, at 353-412.

<sup>24</sup> M. Cappai & G. Colangelo, *Taming Digital Gatekeepers: The “More Regulatory Approach” to Antitrust Law*, 41 *Comput. L. & Sec. Rev.* 105559 (2021).

<sup>25</sup> *Amazon Buy Box* saw Amazon using the “Buy Box” to push their own products to the detriment of the listings visibility of competing vendors products: yet when enforcement action was eventually taken the Commission (2020) was content to settle the case in 2022 rather than go to full Decision and prohibit certain Amazon practices that certainly looked discriminatory against competing vendors: see further discussion in Section II.A below.

<sup>26</sup> Commission Decision in Case AT.39740, *Google Search (Shopping)*, 2018 O.J. (C 9) 08.

<sup>27</sup> Commission Decision in Case AT.39740, *Google Search (Shopping)*, 2018 O.J. (C 9) 08.

<sup>28</sup> Commission Decision in Case AT.40411, *Google Search (AdSense)*, 2020 O.J. (C 369) 04.

<sup>29</sup> Google, *Annual Report*, at 29 (2010).

<sup>30</sup> T. Pangarkar, *Google Search Statistics – Market Share, Growth Rate, and Facts* (Market Scoop, 2023), <https://scoop.market.us/google-search-statistics/> (last visited Jan. 15, 2026).

<sup>31</sup> 80% of Google’s 2022 revenue was contributed by its advertising revenue: see *Alphabet Investor Relations*, at 4 (2022).

<sup>32</sup> Victim vendors formed “FairSearch.org” in 2010 to evidence Google’s abusive practices which meant that they rarely were listed on top of web search lists, in order to encourage the FTC and European Commission to investigate Google for alleged antitrust breaches: see FairSearch, *About Us* (FairSearch, 2023), <https://fairsearch.org/> (last visited Jan. 15, 2026). However, regulators did not appreciate the gravity of the situation at the time.

<sup>33</sup> European Commission, *The Digital Markets Act* (EC, 2022), [https://digital-markets-act.ec.europa.eu/index\\_en](https://digital-markets-act.ec.europa.eu/index_en) (last visited Jan. 15, 2026).

<sup>34</sup> e.g., in payment methods; app stores exclusivity; goods delivery services; search engine and advertising services; etc.

take decades to achieve.

To be fair to the Commission, other major competition enforcement actors were also tardy in introducing digital market-specific fair competition rules. For example, in the US, while there were some attempts at recent enforcement activity in the US, most action was initially led either by individual States' Attorneys General combining their efforts or by private litigators, with Department of Justice ("DOJ") enforcement at federal level<sup>35</sup> coming a poor second in terms of either frequency or intensity. On the legislative reform side, legislative response has been poor: while several Bills<sup>36</sup> were introduced to deal with digital market competition issues, to date none have been enacted into law. This is of serious concern because it has become clear (with the advent of EU legislation on digital markets and the threats to competition emergent in those regions) that certain types of gatekeeper-originating unfair competition practices also need to be legislatively prohibited in the United States at federal level, so that the burden of taking action is no longer primarily on the shoulders of State-level Attorneys General whose hand was forced in light of the absence of effective federal level regulation.

## **B. "Gatekeepers" and the Flexibility Offered by the Entrenched Position Test**

Art 3 of the DMA defines a gatekeeper as an online platform that is an important gateway between businesses and consumers in key areas in the digital marketplace which satisfies the following financial size criteria<sup>37</sup> and market criteria, namely: (a) the gatekeeper has a significant impact on the internal market; (b) the gatekeeper provides a core platform service<sup>38</sup> which is an important gateway for business users to reach end users; and (c) the gatekeeper enjoys an entrenched and durable position in its operations, or it is foreseeable that it will enjoy such a position in the near future. The Commission *initially* designated 6 undertakings as gatekeepers in 2023<sup>39</sup> (and one more in 2024<sup>40</sup>). Where an online platform does not meet the specified number of users criteria or financial criteria, it can still be designated as a gatekeeper if the Commission so concludes, having examined a number of specified factors specified in Art 3(8) DMA.<sup>41</sup> What is interesting about these criteria is that the Commission is

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<sup>35</sup> Two examples being the US DoJ challenge against Apple for allegedly charging excessive commission fees (2020), and the Federal Trade Commission ("FTC") and DoJ's combined challenge against Google for restricting competition in the online advertising market (2020): see U.S. Dep't of Justice, *Justice Department Sues Monopolist Google for Violating Antitrust Laws: Department Files Complaint Against Google to Restore Competition in Search and Search Advertising Markets*, Press Release No. 20-1124 (Oct. 20, 2020).

<sup>36</sup> e.g., American Innovation and Choice Online Act (AICOA), S. 2992, 117th Cong. (2022); Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2021, H.R. 3849, 117th Cong. (2021); Ending Platform Monopolies Act, H.R. 3825, 117th Cong. (2021).

<sup>37</sup> An undertaking shall be presumed to satisfy the respective requirements where it achieves an annual EU turnover of €7.5 billion or more in each of the last three financial years, or where its average market capitalisation or its equivalent fair market value amounted to at least €75 billion in the last financial year, and it provides the same core platform service in at least three Member States.

<sup>38</sup> DMA, Art. 2(2).

<sup>39</sup> i.e., Social Network (Microsoft, Meta/Facebook, ByteDance/TikTok); Advertising (Alphabet/Google, Amazon, Meta/Facebook); Intermediation (Alphabet/Google, Amazon, Apple, Meta/Facebook); Browser (Alphabet/Google, Apple); Search (Alphabet/Google); Video Sharing (Alphabet/Google); Operating System (Apple, Alphabet/Google, Microsoft); Number-Independent Interpersonal Communication Services (N-IICS) (Meta/Facebook): see European Commission, *Digital Markets Act: Commission Designates Six Gatekeepers*, Press Release IP/23/4328 (Sept. 9, 2023).

<sup>40</sup> In 2024, the Commission designated Booking as a gatekeeper for its online intermediation service Booking.com: European Commission, *Gatekeepers* (EC, 2024), [https://digital-markets-act.ec.europa.eu/gatekeepers\\_en](https://digital-markets-act.ec.europa.eu/gatekeepers_en) (last visited Jan. 15, 2026).

<sup>41</sup> The factors to be considered by the Commission include: (a) the size, including turnover and market capitalisation, operations and position of that undertaking; (b) the number of business users using the core platform service to reach end users and the number of end users; (c) network effects and data driven advantages; (d) any scale and scope effects from which the undertaking benefits; (e) business user or end user lock-in; (f) a conglomerate corporate structure or vertical integration of that undertaking; or (g) other structural business or service characteristics.

not taking a traditional *dominance* approach, i.e., requiring a minimum market share, but rather is examining a range of substantive factors that would indicate that the platform under examination is indeed a gatekeeper. Particularly interesting is the flexibility given to the Commission to designate a platform as a gatekeeper where it is foreseeable that it will enjoy “an entrenched position in the near future.” This gives the Commission more flexibility than does the more formalistic Art 102 TFEU dominance test, as abusive behaviour can only be condemned pursuant to Art 102 if an undertaking is first demonstrated to be dominant—whereas by contrast, under the DMA a digital platform can be designated as a ‘gatekeeper’ before it becomes “entrenched” i.e., before it becomes dominant. This feature can thereby bring aggressively growing platforms within the scope of the DMA’s anti-competitive prohibitions without needing proof of already-acquired dominance in the Art 102 sense. The Preamble to the DMA explains the position as follows and is worth reciting as it explains why the DMA is needed to deal with gatekeepers, notwithstanding Arts 101 and 102 TFEU:

“(5) [...] Although Articles 101 and 102 of the TFEU apply to the conduct of gatekeepers, the scope of those provisions is limited to certain instances of market power, for example dominance on specific markets and of anti-competitive behaviour, and enforcement occurs ex post and requires an extensive investigation of often very complex facts on a case by case basis. Moreover, existing Union law does not address, or does not address effectively, the challenges to the effective functioning of the internal market posed by the conduct of gatekeepers that are not necessarily dominant in competition-law terms.

(6) Gatekeepers have a significant impact on the internal market, providing gateways for a large number of business users to reach end users everywhere in the Union and on different markets. [...]

(11) Articles 101 and 102 TFEU and the corresponding national competition rules concerning anticompetitive multilateral and unilateral conduct as well as merger control have as their objective the protection of undistorted competition on the market. This Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market. This Regulation therefore aims to protect a different legal interest from that protected by those rules and it should apply without prejudice to their application.”<sup>42</sup>

Therefore, at first glance, it appears that the DMA provides EU antitrust enforcement agencies with better legal certainty when facing online gatekeepers abusive anti-competitive activities, as they will not need to demonstrate that traditional dominance criteria have been satisfied in order to assert jurisdiction. In practical terms therefore, it should follow that this should encourage gatekeepers to drop current restrictive practices, for example to cease prohibiting vendors on their platforms from offering their goods on other platforms (as per *Google*, 2016); or to cease from trying to direct consumers choice towards the gatekeeper’s own products or “preferred” products, thereby allowing online consumers more choice when using its platform (*Amazon*, 2023); and gatekeepers now shall have to permit consumers to choose a wider variety of payment and delivery methods, rather than

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<sup>42</sup> DMA, Preamble paras. 5, 6 & 11.

insist that consumers use the gatekeeper's own payment method exclusively.

So, on the surface, all seems positive. However, as the following sections of this article shall exhibit, serious gaps can now be identified in the DMA which challenge the notion that the DMA provides adequate protection for ensuring that markets where gatekeepers are present can remain contestable and fair.

### **C. The DMA Obligations Model: Prohibitions and Deterrence Weakness**

At first glance the DMA—Articles 5 and 6—appears to provide strong protection against certain gatekeeper practices which threaten market contestability.<sup>43</sup> It imposes obligations on gatekeepers not to do certain things. Article 5 *inter alia* prohibits a commonly used gatekeeper practice requiring consumers and third party vendors to exclusively use the gatekeeper's own payment app when making and receiving payments<sup>44</sup>; it furthermore prohibits gatekeepers from using end users' personal data for the purposes of providing online advertising services<sup>45</sup>; gatekeepers are also prohibited henceforth from combining users' personal data with personal data gleaned from other platforms maintained by the gatekeepers or gleaned via third party services, unless end users consent.<sup>46</sup> Furthermore, the gatekeeper must not restrict business users from offering the same products or services to end users through third-party online intermediation services, or through their own direct online sales channel at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper<sup>47</sup>, etc.. Several of these foregoing prohibitions reflect questionable gatekeeper practices investigated by the EU Commission in the last few years, which prevailed for many years prior to such investigation, and which will be discussed below.

Article 6 prohibits gatekeepers from engaging in practices such as making use, in competition with business users, of any data that is not publicly available that is generated or provided by those business users in the context of their use of the relevant gatekeeper services, including data generated or provided by the customers of those business users.<sup>48</sup> This would prohibit practices such as those used by, for example, Amazon, discussed above earlier. Also prohibited is the practice whereby the gatekeeper can be tempted to treat more favourably, in ranking and related indexing, services and products offered by the gatekeeper itself, than similar services or products of a third party.<sup>49</sup> The gatekeeper is also obliged to apply transparent, fair and non-discriminatory conditions to such rankings.<sup>50</sup>

While these Articles 5 and 6 obligations ('prohibitions') reflect Commission objection to certain practices which it was unhappy about in previous Amazon, Google Pay and Apple Pay investigations, the way they are designed (targeting certain named anti-competitive practices, rather than offering a general overarching anti-competition principle) illustrates how the DMA has missed the opportunity to provide for an overarching anti-competition principle that would prohibit *all* anti-competitive practices in digital markets, instead taking a narrower approach by only listing certain marking

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<sup>43</sup> A. Gaon & Y. Reinfeld, *Advancing Fair Digital Competition: A Closer Look at the DMA Framework*, 3 J.L. Mkt. & Innovation 358 (2024).

<sup>44</sup> DMA, Art. 5(7), prohibits Apple Pay and Google Pay to be the only method for in-app purchases.

<sup>45</sup> DMA, Art. 5(2)(a).

<sup>46</sup> DMA, Art. 5(2)(b).

<sup>47</sup> DMA, Art. 5(3).

<sup>48</sup> DMA, Art. 6(2).

<sup>49</sup> DMA, Art. 6(5).

<sup>50</sup> DMA, Art. 6(11).

provisions in the DMA to prohibit certain practices—a less comprehensive protection approach.<sup>51</sup> Consequently, as it currently stands, the DMA obligations model appears to contain serious gaps in protection because as the examination of recent cases below will demonstrate<sup>52</sup>, certain gatekeeper practices which threaten digital markets contestability—as seen in recent investigations—are not explicitly prohibited in the DMA’s Article 5 and 6 list of prohibited practices. This is *very surprising* considering all the attention that awaited the DMA’s adoption.

This major omission is compounded by the non-inclusion in the DMA of a general overarching principle condemning anti-competitive behaviour, such as Art 101 or 102 provides for cartels or holders of a dominant position. Digital markets need a new general anti-competition principle so that anti-competitive practices can be made illegal *long before* the potential gatekeeper achieves dominance or looks like achieving “an entrenched and durable position”, by which time market contestability has been eliminated or made very difficult. While DMA Article 3(8) does allow for a digital actor to be labelled as a gatekeeper even before they achieve the Article 3(2)’s gatekeeper definition thresholds of turnover, number of business users<sup>53</sup>, network effects<sup>54</sup> and customers lock-in<sup>55</sup>, etc., this does not solve this gap in protection problem because all that designation enables is for any *listed* Articles 5 and 6 practices engaged in by such an actor to be prohibited—but it *does not* extend to prohibit anti-competitive practices *not listed* in Articles 5 and 6.

The DMA model also possesses other key weaknesses in the following key areas, each of which shall be considered in turn in Section IV below: (a) fining powers conferred on the Commission are still confined largely to imposing a maximum 10% of annual worldwide turnover on offenders, which is not of sufficient deterrent effect given the *multi-hundred billion annual turnover* of the larger behemoth gatekeepers<sup>56</sup>; (b) no basis is provided for challenging high commission fees which result in consumers making significant overpayments when making digital purchases; and (c) no remedies for consumers adversely affected by online anti-competitive practices. Before that however, we shall consider advances brought about by the DMA.

## **II. Examples of how the DMA Improves Protection for Market Contestability**

In this section, we highlight instances where DMA prohibitions have clearly been inspired by the need to stop certain identified gatekeeper unfair competition practices. Then in the following Section III, we shall highlight instances where the DMA contains no prohibition provisions which would have prohibited the anti-competitive practices uncovered to show the gap in protection that still remains despite the adoption of the much-heralded DMA.

### **A. Bias—Gatekeepers with Dual Purpose Roles Harm Fair Competition**

A major problem to date in the digital competition world is the fact that gatekeepers own

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<sup>51</sup> Other authors have also pointed to other frailties in the DMA model, e.g., J. Davies, V. Meunier, G. Calanchi & A. Stenimachitis, *A Missed Opportunity: The European Union’s New Powers over Digital Platforms*, 67 Antitrust Bull. 504 (2022), pointing out another gap in DMA protection: “The EC missed the opportunity to introduce a market investigation tool. The rigid and static framework of the DMA seems like the wrong solution, given the economics of digital markets.”

<sup>52</sup> See below Section III.

<sup>53</sup> DMA, Art. 3(8)(b).

<sup>54</sup> DMA, Art. 3(8)(c).

<sup>55</sup> DMA, Art. 3(8)(3).

<sup>56</sup> For example, Amazon USD\$575 billion (see Amazon Investor Relations (2023)); Apple’s turnover was USD\$383 billion (see Apple Reports Fourth Quarter Results (2023)); Google USD\$305 billion (see Alphabet Investor Relations (2023)).

products/services are frequently competing with third party vendors' products/services who sell their goods on the gatekeeper's platform. This can lead to gatekeepers using a variety of methods to engage in bias<sup>57</sup> against third party vendors<sup>58</sup>, driven by gatekeepers dual purpose role in being both the provider of access to the online marketplace, while simultaneously offering their own or "preferred" products/services to customers *in competition with* the third party vendors' products/services on the gatekeeper's platform.<sup>59</sup> Amazon "Buy Box" (2023)<sup>60</sup> examined below will illustrate this phenomenon, where we shall see how a gatekeeper's privileged *dual purpose position vis à vis* non-power holding third party vendors required the third party vendors to accept *unfavourable discriminatory trading terms*.<sup>61</sup>

In 2019, the EU Commission commenced an investigation into Amazon's dual-purpose role in Amazon Marketplace<sup>62</sup> as both a *platform operator* for retail sales of other third-party vendors' products, as well as being a *retailer itself on its own platform*, in competition with those other third-party vendors' products. The Commission was investigating Amazon's alleged use of non-public data generated or provided by the vendors on its site when deciding about how to present those vendors' products in competition with its own products on its site.<sup>63</sup> Amazon's retail platform, with its large e-commerce market share<sup>64</sup>, occupied a dual purpose role which means that it can be tempted to distort competition.<sup>65</sup> In 2020, the Commission expanded its Amazon investigation to include conducting an in-depth investigation into the operation of the Amazon "Buy Box".<sup>66</sup> In the Buy Box, Amazon presents consumers with the most popular products on Amazon, by placing them in the Buy Box. What raised the Commission's concern was the fact that Amazon was using sensitive information, acquired by Amazon observing consumers' purchasing habits on Amazon, to drive consumers to the 'most popular' vendors products, which *often were either Amazon products* already promoted heavily by Amazon or third party vendors' products *who paid Amazon to be in the Buy Box*.<sup>67</sup> As well as manipulating

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<sup>57</sup> G. Massarotto, *What Is Algorithmic Bias and Why Antitrust Agencies Should Care?*, Competition Pol'y Int'l, 8 (2023).

<sup>58</sup> G.S. Warren, *Antitrust and the Systemic Bias against Small Business: Kodak, Strategic Conduct, and Leverage Theory*, 52 Case W. Res. L. Rev. 231, 233 (2001) cites three contexts in which bias can be exercised by large power players against non-power players: "(1) the presence of large power firms in most markets; (2) the exercise of countervailing power in commercial transactions between power firms; and (3) the power firms' strategic exercise of power against non-power players, raising their costs or forcing them to accept unfavourable, discriminatory terms."

<sup>59</sup> E.J. Janger & A.D. Twerski, *The Heavy Hand of Amazon: A Seller Not a Neutral Platform*, 14 Brook. J. Corp. Fin. & Com. L. 259, 260 (2019).

<sup>60</sup> Commission Decision in Cases AT.40462 (Amazon Marketplace, 2019) & AT.40703 (Amazon Buy Box, 2020), C(2022) 9442 final, 2023 O.J. (C 87) 05.

<sup>61</sup> Warren, *supra* note 58.

<sup>62</sup> Commission Decision in Cases AT.40462 (Amazon Marketplace, 2019) & AT.40703 (Amazon Buy Box, 2020), C(2022) 9442 final, 2023 O.J. (C 87) 05.

<sup>63</sup> Such practice would today be outlawed by Art. 5(2) of the recently adopted DMA which now prohibits the gatekeeper from using end users personal data or combining their personal data obtained from third-parties making use of the core platform service, or which is obtained for use in other services provided separately by the gatekeeper.

<sup>64</sup> A quarter of the e-commerce market in Europe: see J. Snoeck, *European E-Commerce Dominated by Marketplaces* (RetailDetail.eu, 2020), <https://www.retaildetail.eu/news/general/european-e-commerce-dominated-marketplaces/> (last visited Jan. 15, 2026).

<sup>65</sup> This risk was identified by the Commission which stated (in its Press Release announcing the acceptance of commitments by Amazon not to use such data when making decisions in competition with those independent vendors) that it is vital to "[...] ensure that dual role platforms with market power, such as Amazon, do not distort competition.": see Cases AT.40462 (Amazon Marketplace, 2019) & AT.40703 (Amazon Buy Box, 2020), C(2022) 9442 final, 2023 O.J. (C 87) 05; European Commission, *Antitrust Press Release: Commission Sends Statement of Objections to Amazon for the Use of Non-Public Independent Seller Data and Opens Second Investigation into Its E-Commerce Business Practices*, Press Release IP/20/2077 (2020); Amazon Commitments to the European Commission, Cases COMP/AT.40462 & COMP/AT.40703 (2022); R.J. Gilbert, *Separation: A Cure for Abuse of Platform Dominance?*, 54 Inf. Econ. & Pol'y 1 (2021).

<sup>66</sup> Cases AT.40462 (Amazon Marketplace, 2019) & AT.40703 (Amazon Buy Box, 2020), C(2022) 9442 final, 2023 O.J. (C 87) 05.

<sup>67</sup> Amazon charged vendors for (a) The Selling Plan; (b) Referral Fees; (c) Fulfillment Fees; and (d) Additional Selling expenses,

consumer choice<sup>68</sup>, this unfair competition practice would not only distort competitive conditions for ‘less popular’ vendors on Amazon, but also for vendors who are not prepared to pay Amazon in order to achieve elevated visibility in the Buy Box.

These practices should now be curtailed by the DMA Article 6(5)<sup>69</sup> which *inter alia* provides that the gatekeeper shall not treat more favourably products offered by the gatekeeper itself over similar services or products of a third party using its platform.<sup>70</sup> Furthermore, the same article obliges the gatekeeper to apply transparent, fair and non-discriminatory ranking conditions, and in doing so, the gatekeeper is now prohibited from using any data, that is not publicly available<sup>71</sup> when it competes with third party vendors using its platform, by making it is an illegal practice to use third party or customer-generated data to give preference to the gatekeeper’s own products/services or preferred products/services. This therefore presents an example of where the DMA will protect one particular aspect of online market contestability.

## **B. Leveraging Market Power from Core Services into Downstream Services**

The DMA is concerned that gatekeepers do not use their entrenched position to leverage their influence from one market to another level of the market. However, in legal prohibition terms, this objective is not expressed as an all-encompassing prohibition, instead being confined to payment methods and services; identification systems; and web browser engines. In this respect, Article 5(7) DMA<sup>72</sup> provides *inter alia* that gatekeepers (e.g., Apple, Google) shall not require end users or third-party vendors to use *a particular payment service* exclusively or technical services that support the provision of payment services, such as payment systems for in-app purchases (e.g., Apple Pay, Google Pay). In effect, Article 5(7) ends gatekeepers’ predilection for specifying the means by which gatekeepers, such as Apple, have long obliged those making in-app purchases to pay solely by means of Apple’s own payment app, Apple Pay, *to the exclusion of any other payment apps*.

This issue has arisen in the US in the ongoing litigation between Apple and Epic Games, which sued Apple in 2020<sup>73</sup> alleging abuse of dominance in the in-app payments market.<sup>74</sup> Requiring app users to process their Epic Games purchases exclusively through Apple Pay was abusive, argued Epic Games.<sup>75</sup> While the District Court<sup>76</sup> did not find favour with the Epic Games argument that Apple was dominant<sup>77</sup> the court nevertheless ordered Apple to allow other alternative payment methods to be added into the Epic Games app, to allow users to pay for in-app purchases by payment methods other than Apple Pay if they so wished. Both Epic and Apple appealed the decision on a variety of grounds before the US Ninth Circuit Court of Appeals<sup>78</sup> which, while it affirmed the District Court’s ruling on the

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such as High-Volume listing fees; Refund Administration Fees; etc.: see Amazon, *Grow Your Business, Cost-Effectively* (2023).

<sup>68</sup> R. Van Loo & N. Aggarwal, *Amazon’s Pricing Paradox*, 37 Harv. J.L. & Tech. 1, 15 (2023).

<sup>69</sup> DMA 2022, Art. 6(5).

<sup>70</sup> e.g., in terms of ranking and related indexing services for example.

<sup>71</sup> DMA 2022, Art. 6(2).

<sup>72</sup> DMA 2022, Art. 5(7).

<sup>73</sup> Epic Games, Inc. v. Apple Inc., No. 4:20-cv-05640-YGR (N.D. Cal. 2021).

<sup>74</sup> “Apple’s App Store is the only method to distribute software applications on iOS devices”: see *Investigation of Competition in Digital Markets*, *supra* note 20.

<sup>75</sup> Contrary to the Sherman Act, 15 U.S.C. §§ 1&2 (1890); T. Kojovic, *Epic v. Apple: An Antitrust Experiment*, 12 Union U. L. Rev. 634 (2021).

<sup>76</sup> i.e., United States District Court, Northern District of California.

<sup>77</sup> “Apple ‘is near the precipice of monopoly power,’ but is ‘saved by the fact that its [market] share [of 52-57%] is not higher’ [...]”: see Brief for the United States of America as Amicus Curiae in Support of Neither Party in Epic Games, Inc. v. Apple, Inc., No. 21-16506 (9th Cir. 2022).

<sup>78</sup> Apple appealed the decision to the US Ninth Circuit Court of Appeals. Epic cross-appealed because it believed the judge

dominance point<sup>79</sup>, nevertheless confirmed the District Court ruling that the App Store *and* the in-app payment processing system are two separate products which Apple had tied together. Consequently, as a result of this case and presumably foreseeing the adoption of Article 5(7) DMA in Europe, Apple dropped insistence on Apple Pay as the sole means of payment globally in 2021.

In Europe, interestingly some developments in this area at national level have also occurred in parallel to those at international regulatory level. For example, the Netherlands Authority for Consumers & Markets (“ACM”) in 2022 successfully forced Apple (pursuant to the *Dutch Competition Act 1997*) to drop its requirement that the sole method for in-app purchase payment must be confined to Apple Pay. Apple agreed in 2022 to allow in-app purchases using different payment methods other than solely Apple Pay in order to avoid further fines.<sup>80</sup>

From the two examples discussed above, *Amazon “Buy Box”* and *Apple Pay*, it can be concluded that pressure from antitrust regulators or courts have had some success in getting gatekeepers to cease practices, such as insisting that consumers pay using the gatekeeper’s own payment app (*Apple Pay*<sup>81</sup>) or from using consumers or third-party vendors’ non-public data to give the gatekeeper’s “own brand” / “preferred” products preferential visibility online (*Amazon “Buy Box”*). The DMA has legislated these prohibitions into law by way of Articles 5(7), 6(2) and (5).

However, as we shall see in the next Section of this article, there are multiple examples of where the DMA has not provided prohibitions that would protect market contestability and so the aspiration of the DMA to protect markets’ contestability is called into question. These omissions are curious because many of the cases about to be discussed were in the public domain and ongoing or close to final decision around the time the DMA was eventually adopted.

### III. Continuing Threats to Markets Contestability for Rivals and Third-Party Vendors in the DMA Era

In this Section we examine two intertwined themes, first, how recent outcomes in Commission antitrust investigations against gatekeepers illustrate how fair competition and consumer welfare<sup>82</sup>

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erred in law in finding that Apple had not breached US antitrust laws when it did not permit app developers to sell their apps (for use on Apple devices) other than through Apple’s App Store. Epic’s case was supported by the US DoJ, Microsoft, 35 State attorneys, and Counsel for the United States: see A. Goudswaard, *DOJ Criticises Apple, Facebook Rulings That Could Undercut Its Antitrust Strategy*, *The Nat’l L.J.* (Jan. 31, 2022); P. McGee, *Apple vs Epic Lawsuit Twist As DoJ and 35 US States Weigh In*, *Fin. Times* (Jan. 28, 2022).

<sup>79</sup> The Court held that “Epic failed to establish, as a factual matter, its proposed market definition and the existence of any substantially less restrictive alternative means for Apple to accomplish the procompetitive justifications supporting iOS’s walled-garden ecosystem”, and upheld that “[...] the district court found that Apple established non-pretextual, legally cognizable procompetitive rationales for its app-distribution and IAP restrictions. The District Court credited Apple’s rationale that its restrictions seek to enhance consumer appeal and differentiate Apple products by improving iOS security and privacy. It also partially accepted Apple’s rationale that the restrictions are a means of being compensated for third-party developers’ use of its intellectual property—crediting it generally but rejecting it “with respect to the [App Store’s] 30% commission rate specifically.”: see *Epic Games, Inc. v. Apple Inc.*, No. 4:20-cv-05640-YGR, paras. 20–21, 24–25 & 67 (9th Cir. 2023).

<sup>80</sup> ACM, *supra* note 22.

<sup>81</sup> *Cameron et al v. Apple* case, a US class-action lawsuit was brought by US small app developers based on violations of the *Sherman Act 1890*, claiming that Apple abused its market power to limit payment options in Apple App Store and charge app developers overly expensive commissions on in-app purchases. To settle with thousands of app developers, in 2021, Apple agreed to “[p]ermit all U.S. Developers to communicate with their customers via email and other communication services outside their app about purchasing methods other than in-app purchase, provided that the customer consents to the communication and has the right to opt out.”: see *Cameron et al v. Apple Inc.*, Case No. 4:19-cv-03074-YGR, paras. 4 & 107 (N.D. Cal. 2019); *Cameron et al. v. Apple Inc.*, Settlement Agreement and Release, ¶ 5.1.3.

<sup>82</sup> Reyna (Director of Legal and Economic Affairs at The European Consumer Organisation) demonstrates that in the digital era, “the ‘European Consumer Welfare Standard’ goes far beyond protecting consumers against price increases resulting

are not always adequately protected by the outcome of such investigations<sup>83</sup>; and second, to illustrate how the DMA has missed the opportunity to prohibit certain anti-competitive practices which arose in such investigations and thereby call into question its mission to protect online markets contestability.

To briefly address the ‘problem’ Competition Law has with gatekeepers, we shall consider below the outcome of three major pre-DMA era Commission investigations for the purpose of illustrating the challenge for the Commission when it seeks to (relying on the TFEU’s Competition Articles<sup>84</sup>) condemn gatekeepers from imposing excessive anti-competitive restrictions and exclusionary practices. In the three investigations considered below, the outcome was mixed at best: there was one Commission Article 102 ‘win’ (*Google Android*); one Commission 102 ‘loss’ (*Google Search (AdSense)*); and one ‘settlement without a formal prohibition Decision’ (*Amazon Marketplace and Amazon “Buy Box”*). This calls the effectiveness of the TFEU’s Competition Law provisions to deal with anti-competitive gatekeepers practices into question.

To compound matters, we shall also show how the DMA’s scope did not take the opportunity to cover such matters which arose in those three investigations. These three investigations will illustrate how the DMA does not “cure” the competition *lacunae* which those investigations revealed. These *lacunae* should have been anticipated for coverage by DMA prohibition, but have not been. Consequently, this calls the DMA regulatory model effectiveness into question. Unless gatekeepers anti-competitive practices can be effectively restrained, market contestability will continue to be adversely affected because, *first, third party online vendors* cannot on their own combat gatekeepers’ manipulation of how the vendors goods are presented to the consumer, and *second, online consumers* have no way of knowing whether online platforms are presenting them with ‘loaded offerings’ such as those presented by, for example, Google search results.

The DMA model’s limited coverage illustrates this problem. In brief, the DMA Articles 5 and 6 set out ‘obligations’ for gatekeepers which oblige them to do, or not do certain things.<sup>85</sup> However, the DMA does not contain an overarching principle that would empower the Commission to take action to protect market contestability in all situations, and so its reach is of limited efficacy. Being designated as a gatekeeper means that the designated undertaking must show the Commission how it is complying with the gatekeeper obligations as outlined in DMA Articles 5 and 6: but that regrettably leaves anti-competitive practices not specified as DMA ‘obligations’ to fall outside the DMA’s prohibition coverage. As a result, gatekeepers can remain free to continue to engage in such non-DMA-covered practices that limit the contestability of markets without fear of the DMA. Amazon Delivery

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from anti-competitive practices. It is also about ensuring the conditions for innovation in the form of product quality and choice to thrive in the benefit of the society as a whole” (see A. Reyna, *The Shaping of a European Consumer Welfare Standard for the Digital Age*, 10 J. Eur. Comp. L. & Prac. 1 (2019)). The OECD observes that “[t]he key elements of the consumer welfare standard [...] are the focus on consumers and how competition can serve their interests, such as through lower prices and higher quality, but also through higher levels of innovation over time” (see OECD, *The Consumer Welfare Standard—Advantages and Disadvantages Compared to Alternative Standards* (OECD Competition Policy Roundtable Background Note, DAF/COMP(2023) 4, at 11)).

<sup>83</sup> “European competition rules are established principally to protect competition, prevent distortions in the market and ensure fairness for market participants. The framework strives to ensure that governments and companies obey EU rules on fair competition, while providing sufficient space for innovation, unified internal market standards and the development of small businesses”: see M. Szczepeński, *EU Competition Policy: Key to a Fair Single Market*, at 1 (European Parliamentary Research Service, 2019).

<sup>84</sup> e.g., The Treaty on the Functioning of the European Union (TFEU), Art. 101 & 102.

<sup>85</sup> F. Bostoen, *Understanding the Digital Markets Act*, 68 Antitrust Bull. 263 (2023).

Services<sup>86</sup>, Google Advertising<sup>87</sup> and Apple's commission fee<sup>88</sup> will now be examined to illustrate this problem.

#### **A. Leveraging Dominance Downstream—Damaging Market Contestability by Bundling or Measures Designed to Stifle Rivals Ability to Contest the Market**

Gatekeepers can cause competition problems when they bundle unrelated products or services, without objective justification, in order to leverage their market power into other markets.<sup>89</sup> This is something which the DMA would have been expected to foresee, but it did not cater for it with *any prohibition*, which is a most curious omission given that the Amazon investigations (*Amazon Marketplace and Amazon "Buy Box"*) were well underway at the time of DMA's enactment. In *Amazon Marketplace*, Amazon insisted that consumers and third-party vendors selling their wares on Amazon's site used Amazon's delivery services, rather than leaving the third-party vendor free to choose a delivery service not owned or controlled by Amazon. Vendors were also charged by Amazon for Amazon warehousing and delivery services, and while that should not be objectionable in itself, they were fearful that if they used other independent delivery services they might not obtain a favourable listing for their products on Amazon, or perhaps be offered less favourable commercial terms.<sup>90</sup> Such anti-competitive practices excluded competing downstream or ancillary services from being chosen by the gatekeeper's third party vendors or their customers. Yet it is curious that the DMA contains no provision to condemn such an obviously anti-competitive practice, which pervaded the practices of the digital marketplace. There are several articles in the DMA<sup>91</sup> which, with just the addition of a few words, could have explicitly condemned such illegal practices, yet none are to be found.

Another markets-contestability limiting measure associated with gatekeepers' leveraging tactics is the way in which they tie use of two services together at different levels of their vertically integrated business models. For example, in 2018, Google was fined €4.34 billion<sup>92</sup> by the EU Commission for abusing its dominant position (over 90% market share) in the EU search engine market by requiring manufacturers of Android devices to pre-install the Google Search app and Google Chrome browser

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<sup>86</sup> In 2022, when it closed its investigation against Amazon and its use of Buy Box data, the EU Commission announced that Amazon would no longer require sellers of goods sold as Prime sellers to use Amazon's goods delivery services, henceforth leaving sellers free to choose competing delivery services to deliver their goods (sold to consumers on the Amazon platform). This would also relieve sellers from having to pay Amazon warehouse storage fees for holding their goods pending delivery by Amazon as well: see Cases AT.40462 (*Amazon Marketplace*, 2019) & AT.40703 (*Amazon Buy Box*, 2020), C(2022) 9442 final, 2023 O.J. (C 87) 05; European Commission, *Antitrust Press Release: Commission Accepts Commitments by Amazon Barring It from Using Marketplace Seller Data, and Ensuring Equal Access to Buy Box and Prime*, Press Release IP/22/7777 (2020).

<sup>87</sup> e.g., Commission Decision in Case AT.40411, *Google Search (AdSense)*, 2020 O.J. (C 369) 04.

<sup>88</sup> Apple, App Store Small Business Program (2022), <https://developer.apple.com/app-store/small-business-program/> (last visited Jan. 15, 2026).

<sup>89</sup> For example, Microsoft was found to abuse its dominant position in the operating system market (over 60%) by bundling its Windows Media Player with its operating system in order to expand its market power in the media player market. See Case T-201/04, *Microsoft Corp. v. Commission*, EU:T:2007:289, paras. 556 & 559; European Commission, *Shaping Competition Policy in the Era of Digitisation* (Sept. 27, 2018).

<sup>90</sup> In 2022 the EU Commission received commitments from Amazon that it would not apply discriminatory criteria to sellers depending on whether they used its delivery service or not.

<sup>91</sup> e.g., DMA, Arts. 5(7), 5(8); 6(6) & 12(5).

<sup>92</sup> Case T-604/18, *Google and Alphabet v. Commission* (Google Android), EU:T:2022:541 (Gen. Ct. Sept. 14, 2022); European Commission, *Antitrust Press Release: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine*, Press Release IP/18/4581 (2018). Google appealed the Commission decision to the EU General Court, which largely confirmed the Commission Decision (apart from slightly reducing the fine to €4.125 billion. Google subsequently appealed the General Court's ruling to the Court of Justice (see Case C-48/22 P, *Google and Alphabet v. Commission*, EU:C:2024:726).

as a condition for Google licensing them to carry the Google Play Store. In return, Google would share advertising revenue with device manufacturers, much of whose origin was owed to the pre-installation of the Google Chrome browser, because it allowed Google to gather massive insight into consumer behaviour and target advertising accordingly.<sup>93</sup> Yet again the DMA failed to provide any provisions that would prohibit such anti-competitive practices in the future by any other gatekeeper. This case presents a prime example of how gatekeepers seek to leverage dominance from their main market into downstream or ancillary markets by using the licensing of a core platform service (Google Play Store) to ‘skew’ android device manufacturers’ choice of web browser for pre-installation. This leveraging practice inevitably reduced the market shares of competing browsers.<sup>94</sup> This would be a classic situation that would require DMA intervention, by way of a provision to prohibit a gatekeeper or an undertaking well on its way to acquiring a DMA ‘entrenched and durable position’<sup>95</sup> from engaging in such illegal tactics. Yet there is an absence of any such obligation (i.e., prohibition) to be found in the DMA. If the whole point of the DMA is to protect market contestability, then surely such a provision would be absolutely necessary. Instead, in the absence of any such provision, action could only be taken against Google once it had become so powerful that it could be labelled as ‘dominant’, triggering the Article 102 TFEU jurisdiction. However, by such time, the damage done to competition would in fact be immense, because android device manufacturers had been paid significant sums to preload Google Chrome onto their android devices as the default browser, to the detriment of competing browsers, whose ability to grow their market share has been seriously stunted by Google’s anti-competitive practices.<sup>96</sup>

## **B. Use of Exclusionary Contracts—Impeding Market Contestability**

While some degree of competition restriction is reasonable in commercial affairs, such as those that ensure that a fair share of the resulting benefit is shared with consumers or offers other pro-competitive benefits such as improved distribution of goods or services, the following example shows a typical gatekeeper-driven exclusionary practice which does not appear to be prohibited by the DMA and which concerns the contestability of markets. Although the DMA prohibits gatekeepers from misusing personal data or from combining personal data obtained via the gatekeeper’s range of core platform services<sup>97</sup>, it does not contain any DMA ‘obligation’ prohibiting gatekeepers from using contractual terms<sup>98</sup> to extend dominance from one market to another to the detriment of its

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<sup>93</sup> C. Bergqvist & E. Faustinelli, *Leveraging Conducts in the Digital Economy: A Competition and Regulatory Perspective*, in RESEARCH HANDBOOK ON EU INTERNET LAW 94–118 (A. Savin & J. Trzaskowski eds., Edward Elgar Publ’g 2023).

<sup>94</sup> Since entering into the *mobile browser* market globally, Google Chrome’s market share increased from almost 0% (2012) to 30% in only 3 years, reaching a market share of 50% in 2017. By the end of 2024, it holds a market share of over 60% (data generated from *Mobile Browser Market Share Worldwide*, StatCounter (2024), <https://gs.statcounter.com/browser-market-share/mobile/europe/> (last visited Jan. 15, 2026)). “The Commission also takes the view that, in the present case, it would be unrealistic not to take into consideration Google’s dominance in general search, which magnifies the leverage that Google enjoys in concluding portfolio-based RSAs [Revenue Share Agreements] with OEMs [Original Equipment Manufacturers] and MNOs [Mobile Network Operators].”: see Case T-604/18, *Google and Alphabet v. Commission* (Google Android), EU:T:2022:541 (Gen. Ct. Sept. 14, 2022), para.4.

<sup>95</sup> DMA, Art. 3(1)(c) & 3(8).

<sup>96</sup> This was confirmed in the US in August 2024, when Judge Amit P. Mehta of the US District Court of Columbia held in *United States v. Google, LLC*, No. 20-cv-3010 (APM), Dkt. No. 1033 (D.D.C. 2024) held that Google’s exclusive agreements and payments to major original equipment manufacturers to install Google as the default search engine, conferred dominance on Google in online search and was exclusionary contrary to US antitrust law because it effected market foreclosure and reduced investment in innovation by rivals.

<sup>97</sup> DMA, Art. 5(2), (9), (10) & 6(8).

<sup>98</sup> First, Google allowed competing online advertising intermediation competitors for supply of services, such as from placing adverts on their websites (“Exclusivity Clause”). Second, Google required websites to reserve the most prominent space on

competitors ability to contest markets. This DMA lacuna is surprising because this problem was highlighted well before the enactment of the DMA in the *Google Search (AdSense)*<sup>99</sup> Commission Decision (2020). This provides an example *par excellence* of how a gatekeeper's long-standing anti-competitive behaviour stunted competitors' growth on an industry-wide basis and harmed consumers interests. Finding that Google abused its dominant position in the online search advertising intermediation market *since at least 2006*, the Commission found that Google's conduct stifled innovation; harmed competition; harmed consumers; and that Google's advertising intermediation rivals (e.g., Microsoft, Yahoo) were unable to grow and offer significant alternative online search advertising intermediation services to compete with Google.<sup>100</sup>

The Commission fined Google €1.49 billion for abusing its dominant position<sup>101</sup> in the EU online search advertising intermediation market, finding it had prevented competition on the merits *since at least 2006*. Its conduct had stifled innovation and harmed competition and consumers; and its advertising intermediation rivals were unable to grow and offer alternative online search advertising intermediation services to rival those of Google. As a result, website owners had limited options for monetising space on their websites and were forced to rely almost solely on Google. Google did not demonstrate that the Google imposed contracts created any efficiencies capable of justifying its practices.<sup>102</sup> Google's strategy succeeded in stopping its competitors from growing over a ten year period, which saw it *leveraging dominance from the online search market to the online advertising market*.<sup>103</sup> The fact there was little or no regulatory intervention *appears remarkable*<sup>104</sup> given it had such a high public profile and dominance over such a long period in multiple national markets in the EU.<sup>105</sup>

Notwithstanding that the General Court annulled the Commission's findings against Google<sup>106</sup>

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their websites for Google search ads ("Placement Clause"). Third, Google required websites categorised as "direct partners" to obtain prior authorisation from Google before changing their display of all online search adverts ("Prior Authorisation Clause"): see B. Zelger, *Competition Cases in the Digital Economy*, in RESTRICTIONS OF EU COMPETITION LAW IN THE DIGITAL AGE 153–196 (B. Zelger ed., Springer 2023).

<sup>99</sup> Commission Decision in Case AT.40411, *Google Search (AdSense)*, 2020 O.J. (C 369) 04 condemned Google efforts to prevent third party websites from selling advertising space for adverts created by competing online search advertising intermediation competitors by way of a series of contractual obligations, in return for which the third-party website would gain a high placing on Google search engine results.

<sup>100</sup> M. Case, *Google, Big Data, & Antitrust*, 46 Del. J. Corp. L. 189, 206–07 (2021).

<sup>101</sup> This was based in particular on Google's very high market shares, exceeding 85% for most of the period. The market is also characterised by high barriers to entry. These include very significant initial and ongoing investments required to develop and maintain general search technology, a search advertising platform, and a sufficiently large portfolio of both publishers and advertisers: see Commission Decision in Case AT.40411, *Google Search (AdSense)*, 2020 O.J. (C 369) 04.

<sup>102</sup> European Commission, *Antitrust Press Release: Commission Fines Google €1.49 Billion for Abusive Practices in Online Advertising*, Press Release IP/19/1770 (2019).

<sup>103</sup> H. Hovenkamp, *Antitrust and Platform Monopoly*, 130 Yale L.J. 1952, 1963–64 (2021).

<sup>104</sup> A. Dierx & F. Ilzkovitz, *EU Competition Policy: An Application of the Failing Forward Framework*, 28 J. Eur. Pub. Pol'y 1630 (2021).

<sup>105</sup> For example, Google changed third party websites terms and conditions to ensure that the most valuable space on their websites was reserved only for Google-associated adverts, rather than those of its other search engine competitors. While the Commission action is to be welcomed, one wonders why it took so long—10 years before concrete action was taken—particularly as the Commission Decision acknowledges that Google's actions were clearly seeking to exclude any competition *as early as 2009*, further aggravating Google's already abusive behaviour in a market where it held more than 85% market share, and where its strategy succeeded in stopping its competitors from growing, leveraging dominance from the search market to the online advertising market.

<sup>106</sup> Case T-334/19, *Google and Alphabet v Commission (Google AdSense for Search)*, EU:T:2024:634. The Court found that the Commission had not considered all relevant circumstances as to whether the contested clauses could have had such a capability. For example, the Court found that the Commission had not taken it upon itself to consider whether the duration of the contested clauses (such as the placement clause) was sufficient to constitute an abuse of dominance; or whether the placement or prior authorisation obligations were actually enforced in practice. In sum, while the Court largely agreed with

in 2024 (on the grounds that the Commission had not properly considered all relevant circumstances as to whether the contested clauses *could be capable of effecting market foreclosure*) the fact remains that such behaviour is not prohibited by the DMA. Use of exclusionary contracts has not been made the subject of a general scope DMA gatekeeper ‘obligation’ (i.e., prohibition) and so use of this method to stifle the contestability of markets remains outside the scope of the DMA. This only leaves Article 102 TFEU to deal with the illegal practice, which can only be triggered by an Article 102 TFEU dominance finding—and provided the Commission is prepared to intervene. Reliance on Article 102 cannot provide effective protection to protect market contestability—intervention will come too late: as this Google example shows, once the gatekeeper became dominant, its tactics for remaining dominant stifles rivals ability to grow and so removes rivals incentive to innovate and so endangers market contestability on a long term basis.

#### IV. Reform Recommendations to Improve DMA Efficacy

##### A. Reform of the DMA Obligations Approach

Several examples considered earlier above show how traditional competition enforcement efforts based on Article 102 TFEU yielded mixed results or were ineffective at reining in the anti-competitive behaviour of undertakings<sup>107</sup> who we now know to be gatekeepers since 2023 when the DMA gatekeeper designation regime came into force. While digital marketplace-specific legislation eventually saw the light of day in the EU in the form of the DMA<sup>108</sup>, the DMA proclaimed itself to not be an anti-competition measure but rather a measure to protect the contestability of markets. That in itself should have been a cause for concern: this article has shown above how the DMA’s model—of specifying ‘obligations’ for those designated as ‘gatekeepers’ to follow—contains several weaknesses in terms of its failure to provide legal provisions that would offer coverage sufficient to prohibit anti-competitive activities that threaten online markets contestability. Several of these anti-competitive practices, engaged in by gatekeepers such as Apple, Google and Amazon have been identified in the cases discussed above, to demonstrate how the DMA will only have limited impact on encouraging gatekeepers to avoid online markets contestability-threatening practices. While it is acknowledged that the DMA provides provisions<sup>109</sup> that (for example) that require gatekeepers: not to aggregate personal data from multiple sources; to treat third party vendors products fairly and transparently in terms of rankings and listings; to no longer impose their exclusive payment methods on customers or prevent third party vendors from offering their products via their own channels or other third party intermediation services—however—the DMA fails to provide a *general overarching principle* that gatekeepers must not engage in anti-competitive activities generally, which would (for example)

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the Commission finding that the contractual clauses appeared anti-competitive because they could have deterred contracted websites from dealing with Google competitors (i.e., they could have effected market foreclosure), nevertheless the Court found that this was not sufficient to ground a finding of abuse of dominance because the Commission had ignored consideration of factual matters which might have altered such conclusion.

<sup>107</sup> For example, see the only partially successful outcomes in *Amazon “Buy Box”* (2023) where there was no Commission prohibition decision, only merely a settlement based on offer of future behavioural commitments; Commission Decision in Case AT.40411, *Google Search (AdSense)* enforcement and fine did not inhibit Google from continuing its anti-competitive behaviour in other ways as per the new investigation opened against *Google Adtech* by the Commission in 2017 etc..

<sup>108</sup> As well as the EU *Digital Services Act 2022 which came into force in February 2024* which “[...] regulates online intermediaries and platforms such as marketplaces, social networks, content-sharing platforms, app stores, and online travel and accommodation platforms. Its main goal is to prevent illegal and harmful activities online and the spread of disinformation”: see Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 Oct. 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277) 1.

<sup>109</sup> DMA, Art. 5 & 6.

capture anti-competitive practices such as exclusionary behaviour; or leveraging power from one market to another downstream or ancillary market using unfair means; or setting high entry barriers to marketplaces they both control and also compete in; and so on.<sup>110</sup>

In light of such lacunae in the DMA, the only other recourse will be recourse to Article 102 TFEU, but the Commission has been either slow to invoke it, or has been reluctant to do so, principally for two reasons. First, because reliance on Article 102 is not an adequate basis for taking deterrent action against a *gatekeeper-in-the-making* because the Commission cannot invoke Art 102 jurisdiction until a gatekeeper becomes ‘dominant’ (as per Art 102) before it could intervene. By that time it would probably be too late to intervene effectively because the gatekeeper will have dominated market contestability across many jurisdictions and generated hyper profits in the meantime (as the statistics below will show). Second, the Commission has found attempting a convincing market definition can prove difficult when dealing with online markets.<sup>111</sup> While the DMA does make an attempt to deal with these Article 102 jurisdiction limitations by way of DMA Article 3(8)<sup>112</sup>, Article 3(8) can be of only limited use because the Commission can only impose DMA ‘obligations’ on the gatekeeper (or the *gatekeeper-in-the-making*)’s behaviour from among obligations explicitly listed in DMA Articles 5 and 6 (as was discussed immediately above), many anti-competitive practices do not appear on the DMA prohibited ‘obligations’ list. So, for example, the newly designated Article 3(8) gatekeeper will be aware that the DMA does not prohibit them from *all* anti-competitive practices.

Thus authors propose that this major flaw in the DMA model needs to be addressed without delay by way of the introduction of a *general anti-competition principle* applicable to both gatekeepers and gatekeepers-in-the-making—without it, gatekeepers will continue to compete unfairly as many of their anti-competitive practices will continue to fall outside DMA prohibition and so they will continue to compete unfairly with third party vendors and continue to threaten online markets contestability. This has already been seen by way of the ten years of Commission investigations analysed in Section III above from the pre-DMA era. That saw gatekeeper-like corporations (such as Google, Amazon, etc.) grow rapidly around the world in the 2010’s, supported by layers of largely unchallenged anti-competitive practices which allowed them to generate hyper profits and also stifle competition and innovation along the way. The authors propose adoption of a wide-ranging anti-competition prohibition to apply both to those who occupy a DMA Article 3(2) ‘entrenched and durable position’ and to those who are on their way to acquiring such a position (Article 3(8)). This prohibition would replace the DMA Articles 5 and 6 ‘obligations’ model, no longer confining prohibition to Articles 5 and 6 explicitly listed ‘obligations’. This change would go a long way towards helping the Commission acquire an adequate legal tool for restoring the contestability of online markets, without facing the Article 102 establishment of jurisdiction problem encountered by the Commission in pre-DMA era investigations (no jurisdiction to condemn unless dominance established first) while simultaneously fulfilling the DMA’s commitment to being a measure that protects online markets contestability (by condemning all gatekeeper-originating anti-competitive measures).

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<sup>110</sup> See Section III above.

<sup>111</sup> Case T-334/19, *Google and Alphabet v Commission (Google AdSense for Search)*, EU:T:2024:634.

<sup>112</sup> Which provides the Commission with power to confer gatekeeper designation even where the gatekeeper has not yet satisfied the Art. 3(2) gatekeeper thresholds: Art. 3(8) DMA provides the criteria for this assessment to be conducted, such as: whether the platform contains key elements such as lock-in effects; high switching costs; network effects and data driven advantages, particularly those associated with vertically integrated undertakings, which might enable that undertaking to cross subsidise, or combine data from different sources to leverage its position far beyond its competitors.

## B. Failure to Provide Adequate Fining Powers

Another major deficiency with the DMA which the analysis below bears out is that the Commission's DMA fining powers are not calibrated at a sufficiently high level so as to deter gatekeepers from continuing to indulge their anti-competitive instincts. Consequently, the combination of the DMA's anti-competition gaps combined with its fining levels being too low support the view that neither the Member States nor the Commission still fully grasp the appropriate scale of deterrence required to cause online gatekeepers to have a second think before they indulge in serious globe-wide anti-competitive activities.

To illustrate this problem in stark terms: if we consider fining powers: 7 corporations were designated as gatekeepers by the European Union in 2023, each with an individual annual turnover between USD\$120 and USD\$575 billion dollars per annum!<sup>113</sup> A fine of 10% of worldwide turnover is unlikely to be of sufficient deterrent effect compared to their massive annual turnovers. While the DMA does provide for higher fines to be levied where there are repeat infringements of similar practices within an 8-year period<sup>114</sup>, it is submitted that the DMA's deterrent effect is still insufficient, particularly as investigations can often take several years, followed by inevitable legal challenges in the courts, such that the 'evil day' of fine paying may be long after the board members and senior executives have departed the infringing party, so those who make and direct gatekeepers anti-competitive strategy have little to fear from the DMA's prohibitions.<sup>115</sup>

Furthermore, in order to achieve sufficient deterrence, explicit additional fines should be imposed on the turnover of each year during which infringement occurred, rather than calculate fines pursuant to Article 30 DMA which bases fine calculation as a percentage of the previous financial year's turnover, amplified by the illegal practice's "duration" and gravity.<sup>116</sup> In this regard, the authors propose that the fine level be increased by a *specified* additional percentage for each year of duration rather than an unspecified amount as is currently the case. Fines could be also boosted where it is found that third party vendors were forced to enter into anti-competitive agreements<sup>117</sup> that might restrict them for a future period from extracting themselves from the gatekeeper's illegal anti-competitive practices. Provision could also be made for the vendors' voice to be heard by the Commission and also the voice of consumers who, for example, would have suffered harm by suffering

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<sup>113</sup> Amazon USD\$575 billion (see *Amazon Investor Relations* (2023)); Apple's turnover was USD\$383 billion (see *Apple Reports Fourth Quarter Results* (2023)); Google USD\$305 billion (see *Alphabet Investor Relations* (2023)); Microsoft's turnover was USD\$178.63 billion (see *Microsoft Annual Report* (2023)); Meta's turnover was USD\$134.9 billion (see *Meta Reports Fourth Quarter and Full Year 2023 Results* (2023)); ByteDance's turnover was USD\$120 billion (see Z.P. Huang & M.J. Lee, *TikTok Owner ByteDance's Profit Jumps 60% in 2023 Amid Worries of US Ban*, *The Econ. Times* (Apr. 10, 2024)); Booking Holdings's turnover was USD\$150.6 billion (see *Booking Holdings FactSheet* (2023)).

<sup>114</sup> DMA, Art. 30(2). In addition, DMA, Art. 31(1) that provides periodic penalty payments can also be levied, not exceeding 5% of the gatekeepers' average daily worldwide turnover, where a gatekeeper refuses to comply with a Commission Decision.

<sup>115</sup> Additionally, as the profits of the gatekeepers continue to expand exponentially, gatekeepers shall in the intervening years have accumulated even more resources, and so can amortise the impact of a future-imposed fines and withstand the shock of a major fine imposed years hence. Because the potential for senior executives to make literally 10s or 100s of millions in executive compensation is so tempting, what is needed in order to achieve sufficient deterrent effect is for new laws to be enacted at global level, e.g., by China, US and EU respectively, with extra territorial effect, imposing civil liability on senior gatekeepers' management. Additional penalties could include claw-back of executive stock options earned during infringement periods, or the imposition of major fines on corporate executives leading infringing gatekeepers. Interestingly, by contrast, in China this has been legislated for whereby pursuant to Art. 56(1) of the *Anti-Monopoly Law 2022* undertakings' senior managers can be subject to a civil fines action in respect of their undertaking's anti-competitive activities by the State Antitrust Market Regulator (SAMR).

<sup>116</sup> DMA, Arts. 30(4) & 32(1).

<sup>117</sup> e.g., Case T-604/18, *Google and Alphabet v. Commission* (Google Android), EU:T:2022:541 (Gen. Ct. Sept. 14, 2022): see further Section III.A below.

from direct use of gatekeepers' own delivery services<sup>118</sup> or overcharging arising from being obliged to use particular gatekeeper-directed payment methods<sup>119</sup>, etc.

An extreme remedy would be to consider web-blocking as a remedy, whereby the Commission could be granted the power to order telecoms providers to block access to a gatekeeper (or part thereof) where it was found to be repetitively acting in grave breach of Competition Law. While such a remedy would undoubtedly injure the interests of vendors in the short term, it might provide sufficient shock therapy to the gatekeepers to get their house in order, and also encourage discommoded vendors and consumers to switch to other platforms.

Most importantly of all however, what is needed is a mind-shift from the Commission: it has a 10% fining power but has never come close to using it to the maximum extent. It needs to jump out of that conservative mindset when it comes to gatekeepers—they are creatures of a vastly different scale to undertakings being fined in traditional industries. A recent example to illustrate this need for a mindshift can be seen in the *Amazon* Article 102 TFEU investigation which concluded in 2022 with the EU accepting commitments from Amazon<sup>120</sup> as to its future behaviour. Surprisingly, no fines were imposed, nor was a formal prohibition finding made against Amazon despite the fact it had engaged in anti-competitive practices!<sup>121</sup> In concluding its investigation by accepting behavioural commitments in preference to additionally imposing multi-billion-euro fines arising from Amazon's use of non-publicly available consumers' purchasing habits data (which it gathered from third party vendors using its site) to boost Amazon's retail business, is highly unsatisfactory. By not imposing a large fine, the Commission missed an opportunity to impress on gatekeepers that serious consequences will follow where they act anti-competitively to damage fair competition of vendors using gatekeepers, in circumstances where gatekeepers use non-public data to advance their own economic position to the detriment of fair competition for others using the gatekeeper's platform.

Confirming that this mindshift has not yet taken place, the Commission imposed its first fines for breach of the DMA in an investigation into Apple and Meta practices in April 2025.<sup>122</sup> However, the scale of these fines is hardly earth shattering. While imposing fines of €200 million euros and €500 million euros (on Meta and Apple respectively)<sup>123</sup> for DMA non-compliance might definitely catch the

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<sup>118</sup> e.g., Cases AT.40462 (*Amazon Marketplace*, 2019) & AT.40703 (*Amazon Buy Box*, 2020), C(2022) 9442 final, 2023 O.J. (C 87) 05.

<sup>119</sup> e.g., *Apple Pay*.

<sup>120</sup> Cases AT.40462 (*Amazon Marketplace*, 2019) & AT.40703 (*Amazon Buy Box*, 2020), C(2022) 9442 final, 2023 O.J. (C 87) 05.

<sup>121</sup> Amazon committed to apply objectively verifiable, non-discriminatory conditions and criteria for the purposes of determining which vendor's offering, whether from Amazon or independent competing vendors, will be displayed as the featured offer in the Buy Box. Amazon also had to commit that it would not subject independent retailers listings to discriminatory treatment which would put them at a competitive disadvantage, such as whether a vendor was preferring to use alternative delivery services instead of Amazon's own fulfilment (i.e., delivery) services or not: see *Amazon Commitments to the European Commission*, *supra* note 65.

<sup>122</sup> Meta was fined for breach of DMA Article 5(2) which requires gatekeepers to obtain consent from users when they intend to combine or cross use users personal data across different core platform services; and Apple was fined for breach of DMA Article 5(4) for imposing technical and commercial restrictions on app developers to prevent them from steering consumers towards outside of App Store free-of-charge services, the converse effect of which was to effectively steer consumers towards the App Store and away from free-of-charge services available from the app developers outside the App Store. Apple and Meta have both lodged appeals in the General Court against the Commission Decision: see *European Commission, Antitrust Press Release: Commission Finds Apple and Meta in Breach of the Digital Markets Act*, Press Release IP/25/1085 (2025); *EU Commission, Antitrust Press Release: Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Markets Act*, Press Release IP/24/1689 (2024).

<sup>123</sup> *European Commission, Antitrust Press Release: Commission Finds Apple and Meta in Breach of the Digital Markets Act*, *supra* note 122.

attention of the board of a ‘normal’ major multinational, such fines appear wholly insignificant when compared to the 2024 turnover of USD\$164.5 billions and USD\$391 billions of Meta and Apple respectively in 2024.<sup>124</sup> Similarly, even where the Commission uses Articles 101/102 TFEU to impose fines, the mindshift has not taken place, as evidenced the most recently in where the Commission has fined Google 2.95 billion for abusing its dominance across the EEA territory<sup>125</sup>, applying the usual criteria of duration and gravity, it levied a fine which amounts to just around 1% of infringing gatekeeper’s annual turnover, which cannot be said to be a sufficient deterrent to a gatekeeper the size of behemoth Google.<sup>126</sup>

### C. Compensating Consumers—Rights without Remedies?

Currently, in the EU, where a gatekeeper is fined by competition regulators for abusive practices, consumers are not compensated for their loss. To seek compensation, they must instigate a separate antitrust lawsuit.<sup>127</sup> Any such consumer driven compensation action is likely to be met by a defendant gatekeeper with access to unlimited legal defence resources. The authors argue for the DMA to be revised to give consumers the right to compensation to be determined by the Commission following a Commission finding of gatekeeper breach.<sup>128</sup> This would avoid the need for consumers to litigate as a follow-on action and all of the difficulties and limitations that such action entails. This new remedy would definitely catch the attention of the gatekeepers as consumers in any case may number in the millions. It is proposed that this right to compensation be built into a revised DMA, rather than leaving consumers to have to take a separate antitrust lawsuit. The latter approach is of lesser deterrent effect for gatekeepers<sup>129</sup> because consumers are dispersed; they have information availability limitations; they do not have the sophisticated legal knowledge to pursue such actions and proving one’s loss in such actions will be very difficult because the consumer plaintiffs will not have easy (or perhaps no) access to the gatekeeper algorithms which underpinned the anti-competitive practices, to calculate their specific loss. While increasing consumers degree of awareness of their right to take follow-on actions to seek compensation (following the Commission finding a gatekeeper has committed competition law infringements) appears laudable, it is less preferable that a DMA sourced right to compensation which is not hamstrung by many obstacles such as those mentioned above that affect

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<sup>124</sup> Apple Reports Fourth Quarter Results (2024); Meta Reports Fourth Quarter and Full Year 2024 Results (2025). Also, on deterrence grounds, consideration could be given to imposing massive penalties on the senior executives of such mega-corporations, such as claw-back of deferred share options or repayment of significant salary sums for breach of trust. A typical gatekeeper CEO and their executive officers can typically earn significant seven or eight figure multi-million-dollar annual compensation packages: e.g., Alphabet CEO annual compensation package was \$8,802,824; Meta \$24,399,968; Booking \$46,720,734; Microsoft \$48,512,537; Apple \$63,209,845: see Highest-Paid CEOs (2025), <https://aflcio.org/paywatch/highest-paid-ceos> (last visited Jan. 15, 2026).

<sup>125</sup> Commission Decision in Case AT.40670, Google – Adtech and Data-Related Practices; European Commission, *Antitrust Press Release: Commission Fines Google €2.95 Billion Over Abusive Practices in Online Advertising Technology*, Press Release IP/25/1992 (2025). Google is active on both sides of the market (with its publisher ad server and its ad buying tools holding a dominant position at both ends) thereby leading Google to engage in self-preferential conduct.

<sup>126</sup> Google’s turnover is approximately USD\$350 billion in 2024: see Alphabet Revenue 2011-2025 (2025).

<sup>127</sup> To obtain compensation, consumers have to take follow-on action, i.e., either personally sue or participate in a class action either by way of an opt-in or opt-out action, depending on what form of action is available in their national jurisdiction.

<sup>128</sup> P.R. William & S. Howard, *Antitrust Enforcement, Regulation, and Digital Platforms*, 168 U. Pa. L. Rev. 1911, 1924 (2020). observes that “[...] when monopoly harms are not remediable ex post and where monopoly power is durable, the cost-benefit calculation shifts in the direction of regulatory intervention.”

<sup>129</sup> The problem is illustrated by the following example: in 3 cases concerning *Google in the period 2017-19*, the undertaking was fined over €8 billion by the Commission for abusing its dominant position yet there was no mechanism for obtaining compensation for affected businesses or consumers: Commission Decision in Case AT.40411, *Google Search (AdSense)*, 2020 O.J. (C 369) 04; Case T-604/18, *Google and Alphabet v. Commission* (Google Android), EU:T:2022:541 (Gen. Ct. Sept. 14, 2022); Commission Decision in Case AT.39740, *Google Search (Shopping)*, 2018 O.J. (C 9) 08.

the follow-on type action.

Legislative amendment would be required to allow the EU Commission order offending gatekeepers to pay compensation to similarly affected consumers in the EU. Alternatively or additionally, amendment of the DMA to give the power to award compensation to consumers against the gatekeeper could bring this about, and in turn increase the reputational deterrent effect for gatekeepers committing anti-competitive infringements, because a consumer compensation element in Commission competition infringement proceedings could lead to an increase in the overall EU deterrent effect of infringement sanction, as the consumer compensation element could be decided by the Commission in addition to a large fine. Such a remedy could increase the deterrent effect of anti-competitive infringement findings against gatekeepers in the EU. But at present this is not the case. For example, while the Commission fined Apple and Meta for breaching the DMA<sup>130</sup>, there is no mechanism in the Commission's armoury for enabling consumers to seek compensation even though undoubtedly there were adversely affected by the two gatekeepers behaviour. Availability of such a compensatory mechanism might cause platforms to sit up and take notice.

A variation of this approach can be seen in the USA in 2015 in the *E-Books* litigation which was instigated by the United States against Apple (*United States v. Apple Inc*<sup>131</sup>). A credit was given to the account of each e-book consumer who was overcharged (arising from an Apple-driven price-fixing operation). USA consumers received \$566 million in credit to their e-book accounts to compensate for the overcharge they had paid for e-books via the Apple App Store over a number of years. The same approach was followed in the recent US antitrust case, *State of Utah et al. v. Google LLC et al (2023)*<sup>132</sup>, in which Google settled the case pre-trial by agreeing to pay \$630 million compensation to consumers who were harmed by various Google's anti-competitive practices and \$70 million to the plaintiff States to cover case and settlement mediation costs. Eligible consumers did not need to submit a claim, instead, according to the Settlement agreed in the case, consumers would receive automatic payments through PayPal, or they could elect to receive a cheque or bank transfer.<sup>133</sup>

#### **D. Structural Divestment**

In EU Merger Control, asset divestment rather than commitments as to future behaviour are sometimes preferred as a remedy to satisfy the Commission that competition can be maintained in the post-merger period.<sup>134</sup> This remedy leads to divestment of key assets (whether factories, IP, etc.) and so the question arises now in the world of digital gatekeepers, where neither commitments nor fines are of sufficient deterrent to the massively wealthy gatekeepers, whether mandatory divestment could be the answer to restoring fair competition? Gatekeepers' turnover and profits can be so gigantic that normal levels of antitrust fines may not be adequate to deter gatekeepers from engaging in repeated anti-competitive activity, such as search bias.<sup>135</sup>

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<sup>130</sup> European Commission, *Antitrust Press Release: Commission Finds Apple and Meta in Breach of the Digital Markets Act*, *supra* note 122.

<sup>131</sup> *United States v. Apple Inc.*, 791 F.3d 290 (2d Cir. 2015) where the court held that arrangements between Apple and major publishers to fix e-book prices at higher than previous levels were anti-competitive and contrary to the *Sherman Act 1890*.

<sup>132</sup> *State of Utah v. Google LLC*, No. 3:21-cv-05227-JD (N.D. Cal. 2023).

<sup>133</sup> *State of Utah v. Google LLC*, No. 3:21-cv-05227-JD (N.D. Cal. 2023).

<sup>134</sup> Council Regulation (EC) No. 139/2004 of 20 Jan. 2004 on the Control of Concentrations Between Undertakings (EC Merger Regulation), 2004 O.J. (L 24) ¶ 8.

<sup>135</sup> D.A. Hyman & D.J. Franklyn, *Search Bias and the Limits of Antitrust: An Empirical Perspective on Remedies*, 55 *Jurimetrics J.* 339 (2015). The OECD has recently expressed the view that technology businesses should not use algorithms to engage in anti-competitive conduct and create bias, such as the present data-driven recommendation bias, search bias and pricing bias

*Google Shopping*<sup>136</sup> provides a case in point and will now be considered but first it is instructive to look at its forerunner, *Google Search*. In 2010 victim businesses formed “FairSearch.org” which was formed (to use its own words) “based on growing evidence that Google is abusing its search monopoly to thwart competition”.<sup>137</sup> FairSearch.org sought to encourage the FTC in the US and the European Commission to investigate Google for alleged antitrust breaches. In 2017, *Google Search* was fined €2.42 billion by the EU Commission for abusing its market dominance (over 90% market share) as a search engine, by conferring an illegal advantage on its own Google Shopping service. It did this by listing its “preferred” products at the top of search listings.<sup>138</sup> Google’s appeal against the Commission’s decision was not upheld by the EU General Court (2021)<sup>139</sup>, nor by the European Court of Justice (2024).<sup>140</sup> However, suffering a fine of this magnitude did not bring Google (a company with a multi-billion turnover<sup>141</sup>) to heel for long.

By 2021, the EU Commission opened another investigation (*Google – Adtech and Data-Related Practices*) into possible anti-competitive conduct by Google *vis a vis* its use of users’ data in the online advertising market<sup>142</sup> (this activity provides Google’s main source of revenue<sup>143</sup>). In its June 2023 Statement of Objections, the Commission made a preliminary finding to the effect that Google is in a dominant position, and that it has abused its dominant position in the online advertising exchange market where it is both an advertiser itself and because it also acts as the intermediary between advertisers wishing to place online adverts and publishers who can supply such services.<sup>144</sup> In the Commission’s view, Google had abused its dominant position in the EEA in the online advertising market at least since 2014, by committing a series of abuses of dominance such as informing Google’s own advertising exchange platform (AdX) in advance of what competing advertisers were prepared to provide online advertising services at, thereby placing AdX at a distinct competitive advantage over competitors.<sup>145</sup> In September 2025, the Commission fined Google €2.95 billion euros for abuse of dominance contrary to Article 102 TFEU, by distorting competition in the advertising technology industry by favouring its online display advertising technology services to the detriment of competing providers, advertisers and online publishers.<sup>146</sup> Google was ordered to cease such self-preferencing

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that are monitored and driven by algorithms: OECD, *Algorithmic Competition* (2023), DAF/COMP/WD(2023)17, at 8–9.

<sup>136</sup> Case T-612/17, *Google and Alphabet v. Commission (Google Shopping)*, EU:T:2021:763.

<sup>137</sup> FairSearch, *supra* note 32.

<sup>138</sup> In the 2017 *Google Search* case, Google was condemned for using consumer data gathered by the search engine to rank Google products at the top of the product search list, despite it arguing (on its website) that paid search results in the Shopping Unit attract more traffic and leads and that many businesses experienced significantly higher clickthrough rates (CTR) with Product Listing Ads compared to text ads shown in the same location for Google Shopping searches: see Commission decision in Case AT.39740, *Google Search (Shopping)*, 2018 O.J. (C 9) 08, para 493.

<sup>139</sup> Case T-612/17, *Google and Alphabet v. Commission (Google Shopping)*, EU:T:2021:763.

<sup>140</sup> Case C-48/22 P, *Google and Alphabet v. Commission*, EU:C:2024:726.

<sup>141</sup> Google’s turnover in 2017 was USD\$110.55 billion; USD\$136.36 billion in 2018; USD\$160.74 billion in 2019; USD\$181.69 billion in 2020; USD\$257.63 billion in 2021; USD\$279.8 billion in 2022; USD\$305 billion in 2023: source: Alphabet Investor Relations.

<sup>142</sup> Commission decision in Case AT.40670, *Google – Adtech and Data-Related Practices*; European Commission, *Antitrust Press Release: Commission Opens Investigation into Possible Anticompetitive Conduct by Google in the Online Advertising Technology Sector*, Press Release IP/21/3143 (2021).

<sup>143</sup> Google, *How Our Business Works* (2024), [https://about.google/intl/ALL\\_uk/how-our-business-works/](https://about.google/intl/ALL_uk/how-our-business-works/) (last visited Jan. 15, 2026).

<sup>144</sup> Google is dominant as (1) a dominant ad server, which places advertisements on Websites. (i.e., “DoubleClick for Publishers—DFP”); and (2) an ad management and marketing platform (i.e., “Google Ad Manager” and “Display & Video 360—DV360”): see European Commission, *Antitrust Press Release: Commission Sends Statement of Objections to Google Over Abusive Practices in Online Advertising Technology*, Press Release IP/23/3207 (2023).

<sup>145</sup> Commission decision in Case AT.40670, *Google – AdTech and Data-Related Practices*.

<sup>146</sup> EU Commission, *Antitrust Press Release: Commission fines Google €2.95 billion over abusive practices in online advertising technology*, *supra* note 125. Google is active on both sides of the market (with its publisher ad server and its ad buying tools

practices in the EEA territory and has been given 60 days to implement measures to end the inherent problems along the AdTech supply chain. The Commission shall consider whether such measures are adequate or not.

This inherent conflict of interest situation for Google in the advertising technology industry had led to EU Competition Commissioner Vestager remarking publicly at the time the Statement of Objections was issued that *only divestment* by Google of part of its services could address Commission competition concerns.<sup>147</sup> The Commissioner was implicitly recognising that *merely fining* Google for abuse of dominance would not, on its own, constitute a sufficient deterrent, given its massive worldwide turnover.<sup>148</sup> Vestager remarks that Google could be required to divest its sell-side tools—Google’s DoubleClick for Publishers (“DFP”) and AdX to end its conflicts of interest are significant—because were the case to occur *since the DMA came into effect*<sup>149</sup>, the Commission does not possess mandatory divestment powers under the DMA. An undertaking may of its own motion divest in order to avoid a fine or as part of a wider settlement to avoid a formal prohibition Decision, but it does not appear that under the DMA it cannot be ordered to divest. Now that a case such as this one has emerged, whereby divestment may be the only way to assure competition in the advertising technology digital space, the need for the DMA to be amended in order to confer a mandatory divestment power on the Commission has become evident, particularly as Google had offered to divest the AdX advertising marketplace only, but this was regarded as insufficient by the Commission during the course of the investigation.<sup>150</sup>

The US appears to be moving in a similar direction. First, the US DOJ and more than 30 US States, jointly filed a complaint in 2024 alleging that Google (Alphabet Inc) was dominant in the search engine market in the US and that its practices harmed advertisers (as well as consumers) by use of unfair restrictive and exclusionary practices.<sup>151</sup> This led to the DOJ seeking to make Google sell AdX and DFP.<sup>152</sup> In August 2024, Judge Amit P. Mehta of the US District Court of Columbia held in *United States, et al. v. Google* that Google’s exclusive agreements requiring major original equipment manufacturers to install Google as the default search engine, conferred dominance on Google in online search, and was exclusionary contrary to US antitrust law because it effected market foreclosure and reduced investment in innovation by rivals.<sup>153</sup> Following this Judgment, in November 2024, the US DOJ filed papers arguing that the court should order Google to divest itself of the Chrome browser in order to restore competition to the online search market. Google has filed counterclaims, so it is probable that this case will go all the way to the US Supreme Court via appeals which are expected to take several

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holding a dominant position at both ends) thereby leading Google to engage in self-preferential conduct.

<sup>147</sup> European Commission, *Remarks by Executive Vice-President Vestager on the Statement of Objections Sent to Google Over Practices in the Online Advertising Technology Industry*, Speech SPEECH/23/3288 (2023). Google responded to the Commission Statement of Objections in December 2025.

<sup>148</sup> In the past few years, approximately 80% of Google’s turnover comes from advertising. For example, Google’s advertising revenue was USD\$95.37 billion (2017); USD\$116.32 billion (2018); USD\$134.81 billion (2019); USD\$146.92 billion (2020); USD\$209.5 billion (2021); USD\$224.47 billion (2022); USD\$237.85 billion (2023): see Alphabet Investor Relations (2017-2023); M. Graham & J. Elias, *How Google’s \$150 Billion Advertising Business Works*, CNBC (May 18, 2021); F.Y. Chee & J. Godoy, *Exclusive: Google Offered to Sell Part of Ad Tech Business, Not Enough for EU Publishers*, Reuters (Sept. 18, 2024).

<sup>149</sup> It is arguable that behaviour such as Google engaged in, could be prohibited by DMA, Art 6(5).

<sup>150</sup> Chee & Godoy, *supra* note 148.

<sup>151</sup> K. Paul & Agencies, *More Than 30 US States Sue Google in Third Antitrust Action of the Autumn*, *The Guardian* (Dec. 17, 2020); in 2023, Google has agreed to pay a \$700 million settlement: see *State of Utah v. Google LLC*, No. 3:21-cv-05227-JD (N.D. Cal. 2023).

<sup>152</sup> Chee & Godoy, *supra* note 148.

<sup>153</sup> *United States v. Google, LLC*, No. 20-cv-3010 (APM), Dkt. No. 1033 (D.D.C. 2024).

years.<sup>154</sup>

The authors submit that, at last, the penny is dropping on both sides of the Atlantic among the antitrust regulatory community, namely there is a nascent emerging trend for antitrust regulators to consider divestment as the most effective remedy for restoring competition in digital markets, in circumstances where the market is dominated by a gatekeeper which maintains its dominance using exclusive agreements to unfair exclusionary effect. Therefore, there is a growing body of opinion that divestment may be necessary where other remedies are of insufficient deterrent effect. In order to accommodate such a remedy on a mandatory basis, the DMA will require amendment to provide for same.

## V. Conclusion

The DMA model needs serious revision and amendment in four key respects: (a) the ‘obligations’ list prohibition method needs to be abandoned and instead should be replaced by a general anti-competition principle for the digital space; (b) DMA fining ceilings need to be massively increased so that they constitute meaningful deterrence; (c) DMA amendment is required to provide for consumer compensation to be determined as part of Commission infringement decisions; and (d) the DMA requires amendment in order to equip the Commission with the most effective remedy of all, mandatory divestment power.

Antitrust regulators are facing an uphill struggle in the fight to protect the contestability of markets against gatekeepers’ abusive practices.<sup>155</sup> Several investigations to date have yielded mixed results in the fight to restore fair competition and have frequently fallen short in improving online third-party vendors prospects in the online marketplace. All of the examples set out (in Sections II and III above) of recent antitrust investigations into gatekeepers around the world reveal that the interests of third party vendors have been squeezed by: (a) gatekeepers occupying dual purpose roles<sup>156</sup>; (b) gatekeepers leveraging their dominance into ancillary markets<sup>157</sup>; (c) gatekeepers paying device manufacturers to pre-install their search engines or app stores on digital devices<sup>158</sup>; (d) gatekeepers using exclusionary agreements to restrict rivals access to business expansion opportunities<sup>159</sup>; (e) gatekeepers using third party vendors data gleaned from their use of core platform services<sup>160</sup>; and (f) gatekeepers’ high commission fees.<sup>161</sup> The consequences of such practices also raise concerns for online consumers because they have been suffering from price increases and other limitations arising from such practices, for example: Apple’s price-fixing increased e-books prices<sup>162</sup>; product choice limitation, such by way of unfair constituted product listings (by Amazon and Google)<sup>163</sup>; and restriction of online payment methods (by Google and Apple).<sup>164</sup>

Therefore, examples such as the forgoing, several of which fall outside the scope of the DMA’s

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<sup>154</sup> B Montgomery, ‘TechScape: Why the US wants to force Google to sell Chrome’ (The Guardian, 26 November 2024).

<sup>155</sup> Newman, *supra* note 4.

<sup>156</sup> e.g., *Amazon Buy Box* treated vendors unfairly: see details in Section II.A above.

<sup>157</sup> e.g., via payment systems such as Apple Pay and Google Pay: see details in Section II.B above.

<sup>158</sup> e.g., Google: see details in Section III.B above.

<sup>159</sup> e.g., Google restricted vendors from offering their services on competitors platforms: see details in Section III.B above.

<sup>160</sup> e.g., Amazon: see details in Section II.A above.

<sup>161</sup> e.g., app developers in general must pay Apple and Google high fees to access their platforms to reach consumers: see details in Section II.B above.

<sup>162</sup> See details in Section IV.C above.

<sup>163</sup> See details in Section II.A above.

<sup>164</sup> See details in Section II.B above.

Article 5 and 6 prohibitions, raise the question of whether gatekeepers' anti-competitive practices can be effectively combatted by the DMA's existing toolset at all. The negative response to this question means that the long-term economic development that we all expect will be brought about by online marketplace technological innovations, is not currently being adequately protected by existing competition enforcement tools. As long as massive dominant gatekeepers continue to impose onerous terms on online third-party vendors, who increasingly seek to use the online marketplace as their primary market for selling their goods, then the contestability of online markets will be increasingly threatened—and so the DMA model will have failed to achieve its core objective. The example of how Google was able to use a combination of exclusionary anti-competitive methods to prevent Microsoft from growing its online advertising intermediation business is a cautionary tale of what the future may hold.

Recent legislative reform by way of the DMA to allow the Commission designate large platforms as *gatekeepers* suffers from a lack of ambition. True, the changes introduced by the DMA can to a degree contribute to restricting gatekeepers choice of certain abusive practices, but this suffers from the fact it only applies to prohibit practices specifically listed in the DMA.<sup>165</sup> However, as this article has shown, there are several commonly used gatekeeper anti-competitive practices specifically aimed at reducing online markets contestability that receive no prohibitory mention in the DMA. These lacunae will leave the Commission's arsenal insufficiently equipped and it now faces an uphill battle when tackling gatekeepers anti-competitive practices not prescribed by the DMA. The absence of a general provision in the DMA prohibiting anti-competitive practices represents a major omission.

So far as deterrence and penalties are concerned for gatekeepers competition law violations: in order to achieve sufficient deterrence, it must be recognised that the current level of fines (e.g., up to 10% of worldwide turnover in the EU) are simply not adequate to deter gatekeepers from engaging in anti-competitive activities. As mega-billion dollar generating businesses, gatekeepers generate entirely gargantuan monopoly-like profits never seen on this scale previously.<sup>166</sup> They should be seen as *sui generis*, such that "normal" fine levels are simply not of sufficient deterrent effect to cause gatekeepers to change their business models and cease use of wide-ranging exclusionary and unfair competition practices which seem so fundamental to their rapid growth success. The impact of gatekeepers anti-competitive activities can be global in reach. They are not like other industries. They are actively engaged in a wide range of borderless anti-competitive activities on a global scale and can easily leverage their dominance into neighbouring, upstream or downstream markets. In this regard, it is worth noting that, apart from ByteDance (TikTok), all of the other 6 designated gatekeepers in the European Union have been the subject of multiple competition law investigations by the EU Commission, as well as in the United States where either individual States or federal authorities or private litigants have taken up the cudgels against them, yet each investigation or litigation continues to expose more and more extensive anti-competitive practices by gatekeepers on an ongoing basis.

In order for fines to have a significant deterrent effect, higher fine ceilings are required. This is justified because gatekeepers generate many multiples of a 'typical' fine in a single earning year, so the deterrent effect of say, the maximum 10% of worldwide turnover as a fine, is simply not a sufficient deterrent. This is amplified when one takes into account the fact that fines imposed will not ultimately

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<sup>165</sup> Such as prohibiting (a) restraints on vendors and consumers from choice of payment methods freely; or (b) restraints on vendors from offering their products or services to gatekeepers' competitors; or (c) practices that make use of vendors and consumers data without their consent; and so on.

<sup>166</sup> See details in Section IV.B above.

be payable until many years have elapsed while investigations and subsequent legal appeals take place, thereby further reducing the deterrent effect of even 10% turnover fines. Far larger fines are required in the case of gatekeepers.

Short of actually participating in direct or group litigation directly against anti-competitive gatekeepers, with all the risk and difficulties involved in such action, no dedicated compensation mechanisms have been provided by the DMA to compensate online third-party businesses or consumers who have been subject to gatekeepers unfair competition practices. Consumer compensation needs to be a feature of Commission infringement decisions when they make infringement findings.<sup>167</sup> *Apple e-books* presents a prime example of inconsistency in this regard, where US consumers received compensation but consumers in Europe received no such compensation. The DMA requires amendment in this regard, so that gatekeepers also have to directly compensate consumers when the Commission makes an infringement decision against a gatekeeper. Compensation presently is awardable only to the Commission on a fine basis: awarding compensation directly to millions of consumers as well in respect of an infringement will increase deterrent effect and avoid the limitations, risks and drawbacks of a consumer led follow-on action.

In conclusion, the contestability of online markets needs a significantly strengthened DMA to equip the Commission with the right tools to rein in gatekeepers anti-competitive tactics. This article has suggested 4 key structural improvements to the DMA model that are essential to achieve this outcome. Absent such reforms, gatekeepers will be emboldened to further dominate online marketplaces, leveraging their vast multi-billion dollar resources and conflicts of interests in their own marketplaces to stifle innovation and rivals, while they remain free to impose layer upon layer of anti-competitive trading terms on third party vendors using their marketplaces. If this trend is allowed to continue unchallenged by effective regulatory intervention, the promise of the internet will be diminished.

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<sup>167</sup> See details in Section IV.C. above.