

The Digital Markets Act's *Per Se* Prohibitions Increase Legal Risks for Non-Gatekeeper Platforms¹

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Executive Summary

1. The proposed Digital Markets Act (“DMA”) aims at regulating “*digital gatekeepers*”, defined as digital platforms that provide “*core platform services*” and meet certain quantitative or qualitative thresholds. The DMA sets out a list of 18 obligations and prohibitions, which gatekeepers are required to follow independently of market circumstances and without the possibility to put forth any justification. In its present form, the DMA creates the presumption that the practices it targets are harmful under all circumstances (*i.e., per se*). This presumption is likely to increase legal risks also for non-gatekeepers.
2. The DMA shares similar objectives with competition law. Therefore, it cannot be excluded that competition authorities and judges rely on the DMA when assessing the abusive nature of certain commercial behaviors. In Germany, regulations are already being used as benchmarks in abuse of dominance decisions. EU or other European enforcers and judges may follow suit. In this scenario, the DMA would act as a rulebook for good behavior under Article 102 TFEU and national abuse of dominance provisions. This risk of spillover to non-gatekeepers is reinforced by the propensity of competition authorities to define increasingly narrow markets, particularly in the digital space.
3. Similar spillover effects are likely in respect of abuse of economic dependence provisions, which do not even require a finding of dominance. These provisions also display a striking resemblance with the DMA in both nature and objective since they aim at preserving fairness in seemingly unbalanced economic relationships.
4. The risk of the behavioral rules of the DMA being applied under Article 102 TFEU, national abuse of dominance provisions, or national abuse of economic dependence provisions exists independently of the DMA’s quantitative thresholds, and would not be reduced by changes to these thresholds.
5. The trickle-down effects of the DMA to other legal instruments are likely to be accelerated by private litigation. Plaintiffs might take action against non-gatekeepers relying upon national abuse of economic dependence or dominance provisions and the presumptions created by the DMA. At the same time, the mere threat of private enforcement will incentivize potential defendants to pre-emptively comply with the DMA or settle when confronted with claims.
6. Given that the behaviors prohibited by the DMA can be pro-competitive and economically beneficial in various circumstances, the DMA’s *per se* approach, and the increased legal risks could cause a chilling effect on these behaviors across the digital economy.

¹ Prepared by King & Spalding LLP for the Computer & Communications Industry Association (“CCIA”).

7. As a result, the DMA's *per se* prohibitions significantly increase the legal risks for non-gatekeepers. The DMA would benefit from amendments that would clarify that behaviors it prohibits are not harmful *per se*, and that they shall not be viewed as anti-competitive or unfair in all circumstances.

1. Introduction

In the context of the on-going debate on how to best enforce competition law in fast-paced digital markets, the European Union (“EU”) decided to move towards establishing an entirely new regulatory framework, the DMA,² designed to curb the market power of “Big Tech” platforms. The DMA's objective is to ensure that markets are contestable and fair. The proposed Regulation shares similar objectives with competition law.

The DMA takes an *ex-ante* approach. It designates a category of companies, defined as gatekeepers, that need to comply with certain obligations and prohibitions. These obligations and prohibitions apply without the need to show any harm whatsoever, and without the possibility of justifying the commercial behavior by way of an efficiency defense or an objective justification. This contrasts with the usual *ex post* approach taken in competition law, where intervention only occurs after enforcers demonstrate that the conduct in question is likely to cause harm in its specific market context and after they have assessed and counter-balanced possible efficiencies.

As with any piece of legislation, it is difficult to predict the ultimate effects that the DMA will have, notably on other non-targeted companies, such as smaller digital platforms. While DMA advocates maintain that its impact will be limited to the operations of a handful of “Big Tech” companies, the DMA rules will likely spillover also to non-gatekeepers.³

- First, the legal scope of the DMA is not limited to gatekeepers. It also applies to a category of “emerging gatekeepers” which are also subject to a subset of obligations and prohibitions.⁴
- Second, the thresholds established by the DMA are not set in stone. The European Commission (the “**Commission**”) has the power to amend them “regularly”⁵ by delegated act.⁶ Once adopted, it will be fairly easy for the Commission to expand the

² References to the Digital Markets Act relate to the draft of the Digital Markets Act adopted by the Commission on 15 December 2020, the Council on 25 November 2021 and the European Parliament on 15 December 2021. These drafts are referred altogether as “**the DMA**”, unless stated otherwise.

³ The DMA will also impact business users and consumers indirectly, through mandated changes to the core platform services regulated.

⁴ Articles 15(4) and 3(6) of the DMA. In the Commission's draft, only the obligations listed at Article 5(b) (prohibition on wide parity clauses), Article 6(1) points (e) (prohibition to tie operating system with other software applications), (f) (obligation to ensure access and interoperability to operating system), (h) (portability of data generated through the activity) and (i) (free access to business data) are applicable to emerging gatekeepers. On the contrary, in the European Parliament's draft, all the obligations and prohibitions listed at Articles 5 and 6 are applicable to emerging gatekeepers.

⁵ Recital 22, Articles 3(5) and 37 of the DMA.

⁶ Neither the Council nor the European Parliament have any formal right to propose amendments to a delegated act. In addition, Article 37(5)-(6) of the DMA only foresee limited *ex post* democratic control on delegated acts: the European Parliament and the Council will merely be notified once the delegated act is adopted, and

DMA's scope of application, catching also undertakings that were not identified as gatekeepers under the initial thresholds. Since the design of compliance programs does not happen overnight, compliance-minded undertakings are encouraged to pre-emptively comply with the DMA.

- Third, various other countries have modeled their laws after those of the EU. This is often referred to as the “*Brussels effect*”, according to which the EU has the unique ability among nations today to promulgate regulations that shape the global business environment.⁷ For instance, many countries have or are in the process of modeling their data privacy laws on the EU's GDPR.⁸ They could take a similar approach and model new rules for platform conduct on the DMA, without necessarily adopting the same gatekeeper thresholds.⁹ This is already the case in some jurisdictions.¹⁰ As such, these new rules could ultimately impact EU-based digital companies operating abroad. In a similar fashion, foreign rules akin to the DMA could potentially also catch (or spillover to) non-digital industries where business users are dependent on particularly large companies that control ecosystems.¹¹
- Fourth, because the DMA shares common values and objectives with other EU and national provisions (*i.e.*, Article 102 TFEU, its national equivalents and national provisions on the abuse of economic dependence), the DMA will most likely have spillover effects to the interpretation and enforcement of those provisions. The DMA creates *per se* prohibitions for gatekeepers. It builds upon the premise that the commercial behaviors it targets generate anticompetitive harm independently of the circumstances in which they take place. This is likely to contribute to the creation of a legal presumption that the commercial practices targeted by the DMA are harmful *per se*, not only for gatekeepers, but also possibly for a larger pool of digital players who

subsequently only have a short two-month period to prevent its entry into force (by majority and qualified majority respectively).

⁷ See A. Bradford, *The Brussels Effect: How the European Union Rules the World*, Oxford University Press, 2020.

⁸ See, for instance, D. Simmons, *17 Countries with GDPR-like Data Privacy Laws*, 13 January 2022, <https://insights.comforte.com/countries-with-gdpr-like-data-privacy-laws>. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/41/EC (General Data Protection Regulation) (“**GDPR**”).

⁹ See, for instance, Mlex, 16 December 2020, *Japanese competition regulator to examine EU's draft laws as reference for its own big tech regulations, official says*, available at: <https://content.mlex.com/#/content/1250671>; Mlex, 28 April 2021, *EU, UK approaches on digital platform antitrust enforcement not far apart, CMA official says*, available at: <https://content.mlex.com/#/content/1288818>; Mlex, 29 November 2021, *Enforcement in digital markets discussed by G7 antitrust watchdogs*, available at: <https://content.mlex.com/#/content/1340545>; Mlex, 7 December 2021, *UK may want private actions under new gatekeeper regime to keep up with EU, judge says*, available at: <https://content.mlex.com/#/content/1342690>.

¹⁰ See, for instance, Mlex, 27 October 2021, *Digital platforms face new regulations in Thailand under decree approved by cabinet (*update)*, available at: <https://content.mlex.com/#/content/1332364>. The Thailand decree includes a definition of “*Digital Platform Services*” that is so arbitrarily broad “*that the entire Internet and digital economy might fall under the scope*”, said the Asia Internet Coalition (see here: <https://aicasia.org/wp-content/uploads/2021/10/Asia-Internet-Coalition-AIC-Submission-on-Draft-Royal-Decree-regarding-Supervision-of-Digital-Platform-Services-to-MDES.pdf>).

¹¹ For instance, a reasoning similar to the DMA could support intervention with regards to automobile ecosystems, obliging car makers to open up their interfaces to potentially unsafe third-party applications.

can still be found liable under Article 102 TFEU, its national equivalents and national provisions on the abuse of economic dependence.

This paper will analyze this fourth category of spillover effects.

2. The language used in the DMA creates the presumption that the commercial practices it targets are harmful *per se*

The Commission justifies the obligations and prohibitions of the DMA by the fact that the 18 commercial behaviors they target “*are particularly unfair or harmful*”.¹² The text of the DMA creates a presumption that these commercial behaviors are harmful *per se*, and condemns them as unlawful without any possibility of defense.

The DMA relies heavily on the notion of fairness.¹³ By consistently referring to the commercial behaviors it targets as “*unfair*”, the DMA undoubtedly creates a presumption of moral wrongdoing for any undertaking which would engage in such behavior. In the Impact Assessment, the Commission even refers to the “*egregious nature of the unfair practices*” the DMA aims to regulate.¹⁴ This creates the premise that such practices are, by their very *nature*, harmful and objectionable independently of the circumstances in which they take place.

Yet, the scope of what is unfair is not clearly defined by the DMA. In particular, the DMA seems to confuse unfairness with anti-competitiveness. In its preamble, the DMA notes that one of the shortcomings of competition law in “*ensuring fair economic outcomes*” is that its “*scope is limited to certain instances of market power (e.g. dominance on specific markets)*.”¹⁵ Yet, the Commission refers to past and current antitrust investigations to justify the DMA’s obligations and prohibitions and often refers to the “*particularly negative direct impact*”¹⁶ or “*harmful effects of the unfair behaviors*”¹⁷ it targets.

Despite what is claimed by the Commission, the behaviors prohibited by the DMA have not proven to be harmful under all circumstances. In fact, many of these behaviors are capable of clear pro-competitive effects.¹⁸ For instance, “*self-preferencing*” has been recognized by the Commission’s own experts as “*not abusive per se, but should be subject to an effects test*”.¹⁹ In this respect, the Crémer Report specifically recognizes that “*where the limitation of choice is inherent in the nature of the service offered, it cannot be qualified as a platform’s deliberate*

¹² Explanatory memorandum attached to the draft DMA adopted by the European Commission on 15 December 2020 (“**Explanatory Memorandum**”), page 6.

¹³ See, for instance, recital 33 of the DMA: “*The obligations laid down in this Regulation are limited to what is necessary and justified to address the unfairness of the identified practices by gatekeepers [...]*”; Article 1(1) of the DMA adopted by the European Parliament on 15 December 2021: “*The purpose of this Regulation is to contribute to the proper functioning of the internal market by laying down harmonized rules ensuring contestable and fair markets for all businesses [...]*.” The Commission’s DMA reads: “*This Regulation lays down harmonized rules ensuring contestable and fair markets in the digital sector across the Union where gatekeepers are present*”.

¹⁴ Impact Assessment, page 50.

¹⁵ Recital 5 of the DMA.

¹⁶ Recital 33 of the DMA.

¹⁷ Explanatory Memorandum, pages 6, 8, 21, 28.

¹⁸ Oxera report commissioned by the CCIA, *How platforms create value for their users: implications for the Digital Markets Act*, 12 May 2021, available at: <https://www.oxera.com/wp-content/uploads/2021/05/How-platforms-create-value.pdf>

¹⁹ Commission, *Competition policy for the digital era* (“**Crémer Report**”), page 66, <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

choice to restrict competition and may furthermore be justified by an efficiency rationale".²⁰ In spite of the foregoing, the Commission decided to prohibit “*self-preferencing*” as a *per se* violation under Article 6(d) of the DMA, without the possibility of any justification.

The language used in the DMA blurs the lines between unfairness and anti-competitiveness. This is not innocuous. The presumptions introduced by the DMA will likely influence how the 18 commercial practices it targets are assessed under abuse of dominance and abuse of economic dependence provisions. Such influence will impact non-gatekeepers, independently of the DMA’s quantitative thresholds.

3. The DMA’s effects will likely spillover to dominant non-gatekeepers through abuse of dominance provisions

The scope of abuse of dominance provisions is not limited to gatekeepers. They can and are often enforced against smaller digital platforms too. There are several ways in which the DMA can have spillover effects to the enforcement of Article 102 TFEU and other national abuse of dominance provisions.

a) The DMA targets the behavior of non-dominant undertakings

First, the DMA targets behaviors that are implemented by dominant and non-dominant undertakings alike.

The DMA notes that “*gatekeepers [...] are not necessarily dominant in competition-law terms.*”²¹ If the commercial practices targeted by the DMA are deemed of “*egregious nature*”, “*unfair*” and “*harmful*”²² for non-dominant gatekeepers, *a fortiori* the Commission and national competition authorities will deem them harmful, unfair and of egregious nature if implemented by a dominant undertaking. In view of the presumptions introduced by the DMA as detailed above, there is a genuine risk that the Commission will consider the commercial practices targeted by the DMA to be restrictive of competition by nature and rely on a presumption of harm to prohibit them absent any valid justification under Article 102 TFEU.²³

The Commission drew the list of obligations and prohibitions of the DMA based on its previous antitrust enforcement experience.²⁴ Therefore, it is in turn very likely that the Commission and national competition authorities will consider the DMA when enforcing Article 102 TFEU. This would not be unsuited considering that both Article 102(a) TFEU²⁵ and the DMA refer to the notion of fairness and aim at regulating business terms between trading partners. As such,

²⁰ Cr mer Report, page 64. See also *Streetmap.EU Ltd v Google Inc. & Ors* [2016] EWHC 253 (Ch) (12 February 2016), paras. 171, 176, 177, where the Court found that Google’s self-preferencing of its Maps OneBox in its general search results was objectively justified.

²¹ Recital 5 of the DMA.

²² See, e.g., Explanatory Memorandum, page 6 and Impact Assessment, page 50.

²³ For instance, during the webinar “*The Digital Markets Act in Europe: Precaution or Innovation?*”, Michael Koenig (the Commission’s Adviser for the Digital Markets Act) on 25 May 2021 said “*I don’t think that we should say, that if other companies have achieved their entrenched positions with certain practices that ‘we should not stop these practices, but we should allow others to deploy these harmful practices to come to the same level’, that’s definitely not the approach that we would take from our side.*” (at min 36:50), available at: <https://itif.org/events/2021/05/25/digital-markets-act-europe-precaution-or-innovation>.

²⁴ Explanatory Memorandum, page 2; Recital 33 of the DMA; Footnote 133 of the Impact Assessment.

²⁵ Article 102(a) TFEU prohibits “*unfair trading conditions*” imposed by dominant undertakings.

one could see how easily and neatly the DMA’s presumptions could trickle down to Article 102 TFEU, a provision applicable to non-gatekeepers.

b) Regulations as codes of conduct

Second, regulations sometimes act as rulebooks of what is good behavior on the market. As such, the DMA has the potential to become a benchmark for assessing the behavior of non-gatekeepers under EU and national abuse of dominance provisions.

In Germany, regulations are already relied on as benchmarks to assess abuse under dominance provisions. In its landmark *Facebook* decision,²⁶ the German competition authority relied on the GDPR and the German abuse of dominance provision²⁷ to police the data collection and processing practices of Facebook on the German market. In doing so, it referred to the GDPR as a “*suitable standard for measuring the appropriateness of the data processing terms of a dominant supplier*”²⁸ and even as a “*standard for examining exploitative abuse*”.²⁹

The German competition authority followed the same legal reasoning in its *Amazon* decision of July 2019: “*Exploitative abuse exists if the business terms no longer reflect a balance of interests, which is examined by weighing interests considering GWB assessments and other potentially applicable legal provisions from areas other than antitrust law.*”³⁰ In August 2021, the Hanover Regional Court relied on the same case law and the P2B Regulation³¹ to rule that Amazon had abused its dominance.³²

These three cases show that, under German law, regulations can act as benchmarks to assess the abusive nature of terms and conditions from a competition law perspective. This legal reasoning has not yet been applied at EU level. However, the on-going dispute between the Düsseldorf Court and the Federal Court of Justice regarding the legality of the legal reasoning in *Facebook* pushed the Düsseldorf Court to ask a preliminary ruling from the European Court of Justice (“**ECJ**”). Consequently, the ECJ will soon have to rule on whether the GDPR (and potentially other regulations) can act as a benchmark to assess abuses of dominance under Article 102 TFEU.³³

If the ECJ were to allow competition authorities to use regulations as benchmarks for abuse, the Commission and national competition authorities may well rely on the DMA against dominant non-gatekeepers. As previously noted, if a practice is considered “*harmful*”, “*unfair*”

²⁶ Decision of 6 February 2019 of the German competition authority, *Facebook Inc., Facebook Ireland Ltd., Facebook Deutschland GmbH*, case B6-22/16 (“**Facebook decision**”).

²⁷ Section 19(1) GWB.

²⁸ *Facebook* decision, paragraph 526.

²⁹ Press release of 7 February 2019 of the German competition authority, *Bundeskartellamt prohibits Facebook from combining user data from different sources*, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.

³⁰ Case summary of 17 July 2019, case B2-88/18, page 7.

³¹ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (“**P2B Regulation**”).

³² Hanover Regional Court, Az. 25 O 221/21. Amazon has appealed this decision to the German Federal Court of Justice.

³³ Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Germany) lodged on 22 April 2021 – *Facebook and Others*, case C-252/21.

and of “*egregious nature*” when implemented by a non-dominant gatekeeper, competition authorities will *a fortiori* deem the practice harmful when implemented by dominant platforms. In this scenario, the DMA could be used as evidence of anticompetitive object or effect of non-gatekeepers’ contractual provisions.

The idea of relying on a regulation to determine what is good behavior on the market has already made its way to EU jurisprudence. In *Google Shopping*,³⁴ the General Court relied on the Open Internet Regulation³⁵ to justify the existence of an equal treatment obligation imposed on Google. It did not matter that the Open Internet Regulation was not applicable to Google as it is not an Internet Service Provider. Rationalizing the parallel by Google’s dominance on the downstream market, the General Court even noted that it was “*of no relevance [...] whether or not [this] legislation calls, in general terms, for such non-discriminatory access to online search results*”.

In these circumstances, it seems realistic that the DMA would be used to justify the creation of new obligations or prohibitions under Article 102 TFEU. In this scenario, the Court would note that it is “*of no relevance [...] whether or not [the DMA] calls, in general terms, for such*” obligation or prohibition since dominance puts digital companies in a position akin to that of gatekeepers.

c) The impact of the DMA on private enforcement

Third, due to the principle of direct effect of regulations,³⁶ the DMA will be directly applicable in all Member States. If passed in its present form, the DMA will not only be enforced by the Commission, but also by national courts. Private enforcement of the DMA’s 18 conduct prohibitions carries a genuine risk for smaller digital platforms.

Complainants may seek to indirectly enforce the DMA by relying on abuse of dominance and other related provisions, arguing that conducts prohibited by the DMA should also be prohibited for dominant platforms. Non-gatekeepers may become concerned when confronted with such claims, incentivizing them to settle or to pre-emptively comply with the DMA and deterring them from implementing otherwise potentially pro-competitive conduct.

The influence of private claims on the risk of spillover across legal instruments and jurisdictions is illustrated by the class action filed against Facebook in the UK in January 2022. In this class action, complainants allege that Facebook abused its dominance in the social networks market by imposing “*unfair*” terms and conditions on its users, while “*illegally exploiting*” their personal data. The claimants allege that the “*unfair deal was only possible due to Facebook’s market dominance*”.³⁷ The language, object and legal reasoning of the claim

³⁴ Judgement of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, EU:T:2021:763 (“*Google Shopping decision*”).

³⁵ Regulation No 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (“**Open Internet Regulation**”).

³⁶ Article 288 TFEU.

³⁷ See, e.g., Global Competition Review, 14 January 2022, *UK class action claim seeks £2.3 billion from Facebook*, available at: <https://globalcompetitionreview.com/collective-actions/uk-class-action-claim-seeks->

display a striking resemblance with the German *Facebook* decision and the language used in the DMA.

In sum, there are several avenues that enforcers and complainants can take to enforce the DMA's 18 conduct rules against non-gatekeepers through dominance provisions. Such enforcement is facilitated by increasingly narrow market definitions.

d) Narrow market definitions

Fourth, the likelihood of a DMA spillover to non-gatekeepers is heightened by the Commission's propensity to define increasingly narrow markets where digital markets are concerned. For instance, in *Google Shopping*, the Commission excluded merchant platforms such as Amazon Marketplace and eBay Marketplaces from the relevant market despite the fact that these platforms fulfil the same demand for product search as the Google Shopping service.³⁸ By the same token, the Commission's market definition in *Google Android* faced similar issues for considering that Android and iOS belonged to two different product markets.³⁹ The Commission's propensity to define very narrow markets is more recently illustrated by the ongoing *App Store (music streaming)* investigation, where the Commission preliminarily defined a market for "*the distribution of music streaming apps through [Apple's] App Store*".⁴⁰

Complainants will continue to argue for increasingly narrow market definitions, also in the case of non-gatekeepers. Under these circumstances, the scenario under which a non-gatekeeper would be found dominant on a narrowly defined market is not purely theoretical.⁴¹ With narrower market definitions these smaller platforms are more likely to be caught by allegations of abuse, which may in turn be interpreted in light of the DMA's conduct rules. The risk of spillover of the presumptions introduced by the DMA to dominance provisions is therefore an incentive for non-gatekeepers to comply with the DMA despite not meeting the gatekeeper thresholds.

ps23-billion-facebook?utm_source=UK%2Bclass%2Baction%2Bclaim%2Bseeks%2B%25C2%25A32.3%2Bbillion%2Bfrom%2BFacebook&utm_medium=email&utm_campaign=GCR%2BAlerts; See also Euractiv, 14 January 2022, *Facebook faces £2.3bn class-action in the UK for data "exploitation"*, available at: <https://www.euractiv.com/section/digital/news/facebook-faces-2-3bn-class-action-in-the-uk-for-data-exploitation/>.

³⁸ Commission decision of 27 June 2017, case AT.39740 – *Google Search (Shopping)*, recital 246. The Commission's market definition was nonetheless confirmed by the General Court in the *Google Shopping* decision.

³⁹ Commission decision of 18 July 2018, case AT.40099 – *Google Android*.

⁴⁰ Commission, press release of 30 April 2021, *Antitrust: Commission sends Statement of Objections to Apple on App Store rules for music streaming providers*, IP/21/2061.

⁴¹ Commission press release of 18 June 2021, *Antitrust: Commission sends Statement of Objections to Insurance Ireland for restricting access to a data sharing platform*, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3081. In this case, the Commission is investigating whether Insurance Link, a data-sharing platform detailing auto insurance claims, may have abused its dominance by denying or delaying access to its data sharing system, putting certain insurers at a competitive disadvantage.

4. The DMA's spillover effects to non-dominant, non-gatekeeping platforms through abuse of economic dependence provisions

Provisions on abuse of economic dependence apply where an undertaking is in a position of relative bargaining strength vis-à-vis its commercial partners, notably its suppliers or customers. It also arguably applies to relationships between business users of digital platforms.⁴² Provisions on abuse of economic dependence do not require the finding of dominance. They rest on the notion of fairness of economic relationships.

Various Member States prohibit abuses of economic dependence.⁴³ These Member States might interpret their national provisions on economic dependence as prohibiting conduct that is codified as *per se* harmful and unfair under the DMA. There are several factors that will facilitate spillover effects from the DMA to abuse of economic dependence provisions, and therefore to non-dominant, non-gatekeeping platforms.

On the one hand, the DMA and the provisions on abuse of economic dependence share the objective of preserving fairness in unbalanced economic relationships.⁴⁴ On the other hand, abuse of economic dependence do not usually provide for exhaustive lists of what can constitute an abuse. The notion of abuse is therefore subject to interpretation. Some of these regimes are also fairly recent. Therefore, it cannot be excluded that complainants, enforcers and judges will draw inspiration from the DMA for their claims, investigations, and cases. In fact, the DMA foresees that national enforcers may want to consult the Commission on the DMA when enforcing their national dominance and economic dependence rules. This possibility was formalized by the European Parliament in the new Article 31(d)(5) which states that “*national competition authorities as well as other competent authorities of the Member States enforcing [abuse and economic dependence rules] may consult the Commission on any matter relating to the application of this Regulation.*”⁴⁵

Independently of their willingness to refer to, or draw inspiration from, the DMA, national enforcers and judges are bound by the principles of direct effect of regulations and primacy of EU law when enforcing their national provisions. This could make it difficult for them to interpret or enforce national provisions on platform conduct in a manner inconsistent with the conduct rules of the DMA, even when applied to non-gatekeepers.

⁴² Certain national abuse of economic dependence provisions (e.g., Belgium, Germany, Austria) explicitly provide for this scenario.

⁴³ Belgium, Bulgaria, Cyprus, France, Germany, Italy, and Portugal. Jurisdictions like Germany and Austria have amended their competition rules to enforce dominance provisions below dominance thresholds specifically for digital markets. These provisions do not prohibit abuse of economic dependence as such, but they have very similar objectives.

⁴⁴ In its recitals, the DMA states that “*Core platform services [...] feature a number of characteristics that can be exploited by their providers. [...] All these characteristics combined with unfair conduct by providers of these services can have the effect of [...] impacting the fairness of the commercial relationship between providers of such services and their business users and end users [...]*” (Recital 2 of the DMA); The Impact Assessment also states that “*many businesses are increasingly dependent on these gatekeepers, which in many cases leads to gross imbalances in bargaining power and, consequently, unfair practices resulting in conditions for business users that would not be achievable under normal circumstances (‘unfair business conditions for business users’)*” (Impact Assessment, paragraph 28).

⁴⁵ Article 31(d)(5) of the European Parliament’s draft DMA; see also Article 1(6) of the DMA in footnote 48.

5. Conclusion

There is a genuine risk that the DMA will have spillover effects to non-gatekeepers. The language used by the DMA creates a general presumption, beyond the scope of the DMA, that the commercial behaviors it targets are harmful *per se*, independently of the circumstances and the market players that adopt them. This language matters, and the presumption it creates will likely be relied on by EU and national enforcers when applying abuse of dominance and abuse of economic dependence provisions. This risk of spillover is enhanced by the rise of private damage claims.

As such, the DMA will likely influence the European (and global) operations of dominant and non-dominant digital platforms alike. Independently of whether digital players meet the gatekeeper thresholds, they will view the commercial behaviors targeted by the DMA as carrying a risk of regulatory intervention or private litigation and will be dissuaded from engaging in them. This can constitute a net economic loss for end users, as these practices have been proven to generate pro-competitive effects in certain circumstances.

Amendments to the DMA's quantitative thresholds or creating an SME safe harbor will not eliminate the spillover risks identified in this paper.⁴⁶ Only amendments clarifying that the behaviors prohibited by Articles 5 and 6 are not harmful in all circumstances, and that they should not be viewed as anti-competitive or unfair *per se*, will shield non-gatekeepers from the spillover effects detailed in this paper.⁴⁷ The risk of private enforcement of the DMA's conduct rules against non-gatekeepers could also be lessened by amendments that would strictly reserve the enforcement of the DMA's conduct rules to the Commission. Such clarifying amendments would be most impactful in Article 1, paragraphs 6 and 7,⁴⁸ which already touch upon these topics but are insufficient to prevent unwanted spillover effects.

⁴⁶ Amendments adopted by the European Parliament on 15 December 2021 on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (COM(2020)0842 – C9-0419/2020 – 2020/0374(COD), available at: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0499_EN.html.

⁴⁷ For example, the DMA could be amended to allow designated gatekeepers the opportunity to rebut the presumption of harm through the specification process of DMA Article 7.

⁴⁸ European Parliament's draft DMA, Article 1(6): "*This Regulation is without prejudice to the application of Article 101 and 102. It is also without prejudice to the application of: national rules prohibiting anticompetitive agreements, decisions by associations of undertakings, concerted practices and abuses of dominant positions; national competition rules prohibiting other forms of unilateral conduct insofar as these rules are applied to undertakings other than gatekeepers [...]*"; Article 1(7): "*National authorities shall not take decisions which would run counter to a decision adopted by the Commission under this Regulation. The Commission and Member States shall work in close cooperation and coordination in their enforcement actions on the basis of the principles established in Article 31d.*" See also Article 31(d) of the European Parliament's draft DMA.