The Digital Markets Act (DMA) sets out a series of do’s and don’ts, which firms will have to comply with for any ‘core platform service’ (CPS) where they are designated as a gatekeeper. The DMA aims to improve the contestability and fairness associated with the various CPS’s, as well as for adjacent/downstream services. This ambitious and wide-reaching form of ex-ante regulation is intended to complement the existing ex-post competition regime.

Gatekeepers are characterised as large platforms that serve as an important gateway for business users to reach end users and that enjoy an entrenched and durable position in their operations. In the majority of cases, gatekeepers will be defined based on a number of quantitative thresholds, measured in terms of revenues, market capitalisation and user base.

Core platform service describes the digital platform activities where the European Commission (EC) is particularly concerned about the nature of competition given the significant role of (potential) gatekeepers in these activities. Such services include ‘online intermediation services’, ‘online social networking services’, ‘operating systems’ and ‘online search engines’.

By 3 July 2023 at the latest, potential gatekeepers will have to notify their CPS to the commission if they meet the thresholds established in the DMA. The commission will then have 45 days to adopt the designation decision, following which gatekeepers will have six months to comply with the obligations in the Act, by 6 March 2024 at the latest.

In total, the DMA includes 10 different core platform services and 22 obligations that gatekeepers will have to adhere to (depending on their CPS). There is still significant room for interpretation about how the various obligations should be implemented, but it’s recognised that there won’t be a single solution for complying with each obligation, since:

- Obligations and the way they will need to be implemented have not been defined in detail in the DMA, with typically only a few paragraphs on each. (In contrast, in the telecoms sector there is more guidance (in the form of EC regulations/recommendations, or remedy specific consultations by regulators) on how each remedy should be applied, supported in a number of cases by an impact or ‘cost benefit’ analysis.)

  - A number of the obligations apply to all designated gatekeepers, irrespective of their business model and the service in question.
  - The objectives of contestability and fairness are not specified in detail in the DMA, although there are some high-level indications of how they should be interpreted. There is also limited precedent for the ‘contestability’ objective (compared to the ‘effective competition’ objective under the telecoms regulation regime)
  - Third parties, depending on their position, may not agree on how each obligation should be implemented.
  - The precedents from ex-post competition cases such as Google Android illustrate the challenges in designing and implementing appropriate obligations.1
  - There may be some trade-offs between trying to promote intra-platform and inter-platform competition
  - Other legal/technical considerations will need to be taken into account, such as data protection laws and the security of services, when deciding how best to implement the various obligations.

In the telecoms sector, regulators typically stipulate how firms have to comply with different obligations. In contrast, the onus will be on gatekeepers to decide how they are going to comply with the relevant obligations in the DMA. However, the EC may still need to assess whether the gatekeepers have complied as:

- Gatekeepers can ask the EC for guidance on whether their proposed solutions for implementing the obligations comply with the DMA.2
- The EC can decide to open its own

As the Digital Markets Act enters the implementation phase, GEORGE HOUPIS and TOM OVINGTON highlight the role of proportionality
Measures must be suitable to achieve the desired end i.e. the way in which the obligations are implemented must actually achieve the DMA’s objectives and avoid undermining them.

Measures must be necessary to achieve the desired end i.e. the way in which the obligations are implemented must be the least intrusive way of achieving the DMA’s objectives.

Measures must not impose a burden on the individual (our emphasis) that is excessive in relation to the objective sought to be achieved. This burden could relate to a wide range of actors, including the EU, national governments, regional or local authorities, economic operators and/or citizens.

It is possible that some ways of implementing specific obligations could impose significant implementation costs not only on the gatekeepers, but also on challenger firms and/or business users.

**THE ROLE OF PROPORTIONALITY**

In addition to being effective, the DMA makes it clear that the obligations should be implemented in a way that is proportionate.

The EC conducted an impact assessment of the draft DMA in December 2020, which considered the merits of different ways of designing the Act. However, the impact assessment did not go into detail about the ways in which the various obligations could be implemented. (Some of the obligations weren’t even included in the draft of the Act). Ensuring that the obligations are implemented proportionately where there are different options will almost definitely require additional analysis. The DMA indicates that proportionality is relevant for the obligations in Articles 6 and 7 – though debate around how the Article 5 obligations should be implemented should not be excluded, as these obligations are set out also at a reasonably high level.

Whilst the DMA does not itself include a definition of proportionality, it is defined under EU law more generally:

- Measures must be suitable to achieve the desired end i.e. the way in which the obligations are implemented must actually achieve the DMA’s objectives and avoid undermining them.
- Measures must be necessary to achieve the desired end i.e. the way in which the obligations are implemented must be the least intrusive way of achieving the DMA’s objectives.
- Measures must not impose a burden on the individual (our emphasis) that is excessive in relation to the objective sought to be achieved. This burden could relate to a wide range of actors, including the EU, national governments, regional or local authorities, economic operators and/or citizens.

It is possible that some ways of implementing specific obligations could impose significant implementation costs not only on the gatekeepers, but also on challenger firms and/or business users.

**THE DMA’S OBJECTIVES**

The assessment of whether obligations are implemented in line with the proportionality principles is related to the DMA’s objectives. While ‘contestability’ and ‘fairness’ are repeatedly referred to, they can be thought of as intermediary objectives (a means to an end). The text makes it clear that the ultimate objectives of the Act are to promote:

- Innovation
- High quality of digital products and services
- Fair and competitive prices
- Choice for end users.
The DMA highlights that these objectives should be achieved for the digital sector as a whole. This would be consistent with all providers of core platform and adjacent services being in a position to maintain or improve the quality of services that they offer, develop new services and expand through successful innovations, thereby expanding choice for end users and driving down prices.

This means that, depending on the nature of the CPS, gatekeeper and obligation in question, a balance may need to be struck by ensuring that all players have sufficient incentives to innovate in order to achieve the DMA’s objectives. This should be seen as the ‘equivalent’ in the implementation of the DMA of the application of the well-established best practice principle in telecoms regulation of undertaking impact assessments of different potential remedies/remedy options to address a market failure in order to promote competition, rather than ‘an efficiency defence’.

**CONTESTABILITY**

Due to network effects (when the benefits to users increase as the number of other users rises) and the role of data and scale, rivals to companies that have been able to gain a first mover advantage in some CPS’s have faced challenges in competing with them. For this reason contestability in the context of the Act could be achieved when barriers to entry are reduced or removed.

The Act also seeks to ensure that contestability is achieved in downstream services to the CPS. As a result, the achievement of the objective includes the prevention of leveraging between services, including tying and self-preferencing (discriminatory treatment of a gatekeepers’ own services).

The DMA also makes it clear that one of the ways to reduce or remove barriers is through providing non-gatekeepers with access to key inputs controlled by gatekeepers. This could have an impact on contestability for both the core platform and downstream services depending on the key inputs in question.

**FAIRNESS**

Fairness in the Act means addressing imbalances in bargaining power to ensure that non-gatekeepers can adequately capture the benefit from their innovations. There are likely to be two aspects to fairness:

**Pricing:** The jointly generated profits need to be split in such a way that the resulting division of economic surplus between gatekeepers and business users provides appropriate incentives to both.

**Unfair practices and conditions:** Gatekeepers should not impose ‘unfair’ terms and conditions on business users, for example restrictions on multi-homing by imposing most-favoured nation clauses. Achieving the first aspect is likely to be complex. The general principle should be that the division of the economic surplus should be commensurate to the risk taken and economic value added by different parties. It is possible that experience from transfer pricing may be helpful in this regard to set out the framework. But estimating the returns required in a ‘competitive’ market is challenging in practice because of the limitations in available benchmarks. The second aspect may be easier to address, especially where the terms and conditions clearly reduce the ability of business users to extract economic surplus. However, there are also likely to be instances where terms and conditions have a reasonable commercial rationale, in which case a balance may need to be struck.

```
The general principle should be that the division of the economic surplus should be commensurate to the risk taken and economic value added by different parties.
```

**ASSessing Proportionality**

Deciding whether an obligation has been implemented proportionately means considering whether:

- It supports the achievement of contestability and fairness, given the objective to ensure quality, choice and innovation in the provision of CPS.
- There is a less intrusive way of achieving the objectives.
- The burden on gatekeepers, non-gatekeepers, consumers or any other stakeholder is excessive.

Drawing on the guidelines for better policy-making and regulatory impact assessments by the EC, Ofcom and ComReg, we set out some steps to take when trying to find the most proportionate way of implementing an obligation:

- Identifying a range of different implementation options (unless it is not relevant to the CPS in question)
- Identifying the likely impact of the different implementation options on relevant stakeholders, including gatekeepers, challenger firms, business users and consumers
- Developing criteria that the options can be assessed against, linked to the ultimate objectives of the DMA
- Quantifying the costs and benefits of different options where appropriate and feasible (i.e. where data requirements allow)
- Considering the extent to which different implementation options are future-proof.

Whilst gatekeepers may have an advantage in their understanding of the different options and
their impact on a gatekeeper’s business, they also have an ‘incentive’ disadvantage since their analysis could be perceived as biased.

There is, however, significant precedent of evidence-based regulatory impact assessments from the telecoms sector, which has been used to consider the merits of different obligations such as for mobile number portability.

**OVERALL IMPACT OF THE OBLIGATIONS**

The DMA includes 22 different obligations. While not all may be relevant to each CPS, it will be important to consider the impact of the obligations as a package when assessing proportionality, taking into account any interactions between the obligations. (Such as obligations to offer access to inputs under ‘fair, reasonable and non-discriminatory’ conditions with other non-discriminatory obligations.)

**THE CONTESTABILITY OF CORE PLATFORM SERVICES**

The DMA includes 10 CPS’s, which are varied in nature. For example, the market for the provision of cloud services has three major providers, with market share changing over time (see Figure 1).

The EC’s own impact assessment stated that: ‘Amazon, Microsoft and Google have the largest shares of the IaaS and PaaS cloud market in the EU. For these companies, significant investments in physical computing infrastructure (e.g. data centres) are necessary for their core business. Therefore, these companies benefit from high returns to scale, which enables them to sustain their position in the overall cloud market. This business area appears contestable, but could consolidate in the coming years.’

The current level of contestability, and potentially the level of fairness, is likely to vary across different platform services – as well as other features that may affect the assessment of the impact of the DMA obligations (e.g. the degree of multi-homing). The current/forward-looking level of contestability for the CPS and the relative position of a gatekeeper may also need to be taken into account in the assessment of the proportionality of different ways of implementing obligations under the DMA.

**CONCLUSIONS**

Gatekeepers are currently in the process of deciding how they will comply with the various obligations under the Digital Markets Act. Given that these obligations have not been defined in detail, there is likely to be debate around how a number of the obligations should be implemented in practice. Relying on the use of the principle of proportionality could help gatekeepers, the EC and the other players that compete with or use gatekeepers’ platforms to ensure that the obligations are implemented in an effective way. Proportionality is mentioned in the DMA itself and defined more generally under EU law. Proportionality in the implementation of the DMA should be seen as the ‘equivalent’ of the application of the best practice principle of impact assessments in remedy design in telecoms regulation. Assessing the impact of different implementation options on a range of stakeholders lies at the heart of the concept of proportionality. When evaluating different options for implementing a specific obligation, it will be desirable to ensure that the chosen option achieves the ultimate objectives of the DMA – innovation, high quality of digital products and services, fair and competitive prices, and choice for end users – in the least intrusive way possible. There should also be some scope for taking into account the current/forward-looking level of contestability of the core platform service and assessing the impact of the obligations as a package.

**REFERENCES**

8. [Recital 32.](https://bit.ly/3mtPqp0)
11. [Recital 33.](https://bit.ly/3mtPqp0)
13. [Dr George Houpis](https://bit.ly/3mtPqp0) is a director in Frontier Economics’ communications practice. He has worked at KPMG and Citibank and taught at the London School of Economics.
14. [TOM OIVINGTON](https://bit.ly/3mtPqp0) is a manager in Frontier Economics’ communications practice. He has been advising on regulation and competition policy for over a decade.