

QUESTIONING THE DIGITAL MARKETS ACT'S LEGALITY

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Questioning the Digital Markets Act's Legality

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Abstract

This article questions the legal validity of the Digital Markets Act (“DMA”) in light of its enforcement practice. Adopted on the basis of Article 114 TFEU as an internal market harmonization measure, the DMA is administered by the Commission as a standing regime of unilateral conduct control that operates alongside, and in close normative proximity to, Article 102 TFEU. The resulting functional equivalence between the two instruments raises structural doubts as to the DMA’s compatibility with the constitutional framework of the Treaties.

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1. Introduction

Imagine a world where every decision spawns a parallel universe. Or watch *Everything Everywhere All at Once*.¹ In this movie, a single act fractures reality, and the protagonist drifts through countless versions of herself. She shows under different forms but remains identical in essence.

A similar dynamic now unfolds in European competition policy. On paper, the Digital Markets Act (“DMA”) and Article 102 TFEU belong to separate dimensions: one ex ante, regulatory, future-facing, and framed as an instrument of internal-market harmonization; the other ex post, adjudicative, grounded in precedent and in the traditional craft of competition policy.

The Commission’s Impact Assessment captured this ambition. Competition enforcement, it warned, “may be too late to tackle a competition problem.”² The DMA would fill these enforcement gaps without replacing competition law investigations. Complementarity became Brussels’ mantra. The genealogy runs back to the Cremer Report (2019), which diagnosed competition law’s limits in digital ecosystems

¹ Everything Everywhere All at Once (dir Daniel Kwan & Daniel Scheinert, 2022) IMDb, <https://www.imdb.com/title/tt6710474>.

² European Commission, Impact Assessment Report Accompanying 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), SWD(2020) 363 final, 15 December 2020, para 119., citing the European Court of Auditors, EU Competition Policy: Merger Control and Antitrust Proceedings (Special Report No 24/2020, 19 November 2020) para 59.

and prescribed a parallel *ex ante* framework to address structural bottlenecks.³ The message was clear. The DMA would *regulate* markets, not merely *police* conducts already caught by Article 102.

The Treaties appear to permit this dual-track system. The Court's case law on competence allocation suggested room for institutional creativity. In *Germany v Parliament and Council (Working Time Directive, C-84/94)*, the Court upheld measures adopted under the internal market provisions despite their social policy implications.⁴ It reasoned that internal market harmonization could legitimately pursue several objectives at the same time, including the protection of health and safety. The DMA's drafters surely intended to build on this precedent.

Two years into enforcement, the promise of complementarity with Article 102 TFEU rings hollow. The boundaries between the DMA and Article 102 have blurred to the point of confusion. The same firms are targeted and the same conduct (e.g., self-preferencing, anti-steering, data-leveraging) circulate between the two regimes. What was designed as complementarity risks functioning as duplication in practice.

Against this, we first assemble empirical evidence showing that DMA and Article 102 have become functionally interchangeable (2.). We then explore the legal consequences and assess whether the DMA lacks a legitimate basis in the Treaties (3.). The analysis is legal rather than normative. We take no position on whether the DMA embodies sound economic theory, reflects the right approach to platform governance, produces beneficial economic effects, or advances desirable policy goals. We address a constitutional question: does the DMA's enforcement practice align with its Treaty legal basis? We reach a conclusion and conclude by proposing a path forward (4.).

³ See J. Crémer, Y.-A. de Montjoye & H. Schweitzer, *Competition Policy for the Digital Era*, Final Report, European Commission, Directorate-General for Competition, April 2019. Three landmark reports, published nearly simultaneously in 2019, collectively laid the intellectual foundations for *ex ante* regulation of digital markets. In addition to the Crémer Report, see J. Furman, D. Coyle, A. Fletcher, D. McAuley & P. Marsden, *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (HM Treasury, March 2019), which led to the establishment of the Digital Markets Unit within the UK's Competition and Markets Authority; and Stigler Committee on Digital Platforms, *Final Report* (George J. Stigler Center for the Study of the Economy and the State, University of Chicago Booth School of Business, September 2019), which informed the US debate on platform regulation. While each report responded to jurisdiction-specific concerns, their convergence on the inadequacy of traditional antitrust tools to address digital market power shaped the global turn toward *ex ante* intervention.

⁴ Case C-84/94 *United Kingdom v Council* EU:C:1996:431.

2. DMA's functional overlap

The prevailing narrative presents the DMA and Article 102 TFEU as complementary. Our account challenges that view. Empirical evidence indicates a functional equivalence between the two regimes.⁵ Even if conceived as a complement, it now operates as a procedural substitute, different in tempo, not in kind.⁶

There is, in fact, a dual form of overlap. First, the DMA has been applied to behaviors that overlap significantly with those sanctioned under Article 102 TFEU (2.1.). Second, recent Article 102 cases in the digital sector take aim at conduct prohibited under the DMA (2.2.). This bidirectional overlap, reflected in enforcement practice as of February 2026, confirms a high degree of functional equivalence between Article 102 TFEU and the DMA.

2.1. DMA's non-compliance decisions

The Commission has issued two non-compliance decisions under the DMA so far, both in April 2025. These cases address conduct previously sanctioned under Article 102 TFEU.

2.1.1. Apple App Store

In April 2025, the European Commission fined Apple €500 million for infringing Article 5(4) DMA, which prohibits restrictions preventing business users from directing consumers to offers outside a gatekeeper's platform.⁷ The decision addressed Apple's anti-steering rules in the App Store. Developers were not allowed to inform users of alternative purchasing options, such as lower subscription prices on their own websites. According to the Commission, these restrictions limited user choice and undermined contractual freedom, core obligations introduced by the DMA's ex ante framework.

This finding is not unprecedented under competition rules. Just over a year earlier, on 4 March 2024, the Commission had fined Apple €1.84 billion under Article 102 TFEU for the same practice in the music-streaming sector.⁸ There, Apple was found to have imposed identical anti-steering clauses on Spotify, Deezer, and SoundCloud, thereby preventing them from informing iOS users about cheaper subscriptions available outside the App Store.⁹

Commissioner Margrethe Vestager explicitly acknowledged the overlap between DMA and Article 102 when announcing the 2024 decision: "In a couple of days, on 7 March 2024, Apple will have to comply

⁵ Jiri Kindl, 'Prospects for Concurrent Private Enforcement of the DMA and Article 102 TFEU' (2024) 12 *Journal of Antitrust Enforcement* 241 (anticipating significant overlap between the two regimes); also, Natalia Moreno Belloso and Nicolas Petit, 'The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove' (2023) 48 *European Law Review* 391-421 (showing that, even at the level of design, each of the DMA's obligations can be linked to competition law concepts); (underling that, even on paper, each of the DMA restrictions on gatekeepers can be linked to competition law); Belle Beems, 'The DMA in the Broader Regulatory Landscape of the EU: An Institutional Perspective' (2022) 19(1) *European Competition Journal* 1 (arguing the DMA should be considered a special branch of competition law for gatekeepers, rather than a standalone instrument).

⁶ Even before the DMA entered into force, some questioned its legal validity; see Alfonso Lamadrid de Pablo and Nieves Bayón Fernández, 'Why the Proposed DMA Might Be Illegal under Article 114 TFEU, and How to Fix It' (2021) 12(7) *Journal of European Competition Law & Practice* 576-589.

⁷ European Commission, 'Commission finds Apple and Meta in breach of the Digital Markets Act' (Press Release, 23 April 2025).

⁸ European Commission, *Apple - App Store Practices (music streaming)* (Decision) Case AT.40437, 4 March 2024.

⁹ European Commission, *Apple - App Store Practices (music streaming)* (Decision) Case AT.40437, 4 March 2024, paras 218-219.

with the full list of dos and don'ts under the DMA. Among others, Apple can no longer impose rules such as the anti-steering obligations, which were at the core of our investigation in this case.”¹⁰ The two decisions sanction the same conduct under two separate legal instruments and through identical theories of harm. Together, they amount to €2.34 billion in penalties. The Commission, in its Article 102 decision, made no reference to the DMA ruling.¹¹

The theory underpinning both decisions has deep roots in Article 102 jurisprudence. In *United Brands* (1978), the Court held that a dominant undertaking abuses its position where contractual restraints partition markets (such as resale prohibitions) because they “limit markets to the prejudice of consumers.”¹² Apple’s anti-steering rules, in the Commission’s reading, did exactly that. By withholding information about cheaper alternatives, they allegedly insulated Apple’s in-app payment system from the discipline of competition. The Commission’s 2024 Article 102 decision echoed this reasoning, finding that the restrictions deprived consumers of the “information necessary to make informed choices.”¹³ Apple’s prohibition on developers steering users to external offers follows the same exclusionary logic, that is, controlling information flow to maintain dominance. Apple’s €2.34 billion cumulative liability thus reflects not parallel enforcement of distinct regimes, but serial prosecution of the same category of violation under different statutory labels.

This conclusion is not altered by the formal distinctions between the two decisions. The Article 102 decision was confined to music-streaming applications, whereas the DMA non-compliance decision applied horizontally across the App Store, and the relevant temporal reference periods were not identical. Such differences are relevant for the application of *ne bis in idem* in its classical sense, but they are not dispositive here. The point is not that the Commission infringed Article 50 of the Charter, but that it relied on the same underlying theory of harm, directed at the same undertaking, to discipline the same form of conduct through two functionally interchangeable instruments. The issue is structural duplication in enforcement architecture, not double jeopardy in the narrow sense. From that perspective, the *Apple* cases illustrate how the DMA and Article 102 operate less as complementary regimes than as substitutes, differentiated primarily by procedure rather than by substance.

2.1.2. Meta “consent or pay”

In April 2025, the Commission imposed a €200 million fine on Meta for breaching Article 5(2) DMA.¹⁴ The decision concerned Meta’s introduction of a “consent or pay” model across Facebook and Instagram. Users were required either to consent to the combination of their personal data across Meta’s services or to pay for an ad-free subscription. The Commission concluded that this model did not offer

¹⁰ Margrethe Vestager, *Remarks on the adoption of an antitrust decision against Apple over abusive App Store rules for music streaming providers* (Speech, Brussels, 4 March 2024).

¹¹ There are also potential overlaps with national competition cases, on the subject, see Inge Graef, ‘Regulating Digital Platforms: Streamlining the Interaction between the Digital Markets Act and National Competition Regimes’ in *The Legal Consistency of Technology Regulation in Europe* (Hart Publishing 2024) 157-176.

¹² Case 27/76 *United Brands Company and United Brands Continental BV v Commission* EU:C:1978:22, para 5..

¹³ European Commission, *Apple – App Store Practices (music streaming)* (Decision) Case AT.40437, 4 March 2024, para 577.

¹⁴ European Commission, *Decision of 23 April 2025 in Case AT.40721 – Meta (Data Combination)* (not yet reported).

a genuine choice because the option to withhold consent was conditional upon payment, and no functionally equivalent free version was available.

The underlying legal theory is familiar to competition law. Article 102 TFEU has long recognized that conduct may be abusive where it exploits structural power to constrain choice under conditions of dependency. In *Tetra Pak II*, the Court confirmed that contractual arrangements may constitute abuse even where they are formally accepted, where the dominant undertaking's market position unduly binds customers and forecloses alternatives.¹⁵ The relevance of consent is thus limited where dependency flows from market structure rather than from voluntary choice. Meta's users were placed in a comparable position. Refusal to consent to data combination entailed either payment or exit from a social network characterized by strong network effects, which called into question whether consent was meaningfully free.

In *Microsoft (2004)*, the Commission held that the tying of Windows Media Player limited user autonomy and foreclosed alternatives.¹⁶ In *Google Shopping (2017)*, the preferential display of Google's own comparison service was condemned for distorting choice within search results by disadvantaging rivals.¹⁷ Even in *Intel (2017)*, the Court reaffirmed that practices presented as voluntary may be abusive where a dominant position renders refusal commercially unrealistic and gives rise to foreclosure effects.¹⁸ Meta's situation is analogous. Users who decline data combination must either pay or abandon a service with massive network effects, rendering the "choice" illusory. The instrument has changed, from antitrust to regulation, but the normative logic is the same: where structural power is used to constrain choice under conditions of dependency, EU competition law has consistently treated such conduct as suspect.

The DMA's Article 5(2) prohibition on combining personal data without consent thus restates what Article 102 already forbids: leveraging dominance to extract terms customers would refuse in competitive markets. The Meta decision shows this overlap empirically. The Meta decision illustrates the second strand of empirical convergence between the DMA and Article 102. The Commission invokes the vocabulary of competition law (choice, equal access...) while applying it through a regulatory mechanism designed for harmonization.¹⁹

¹⁵ Case C-333/94 P, *Tetra Pak v Commission*, ECLI:EU:C:1996:436.

¹⁶ European Commission, Decision of 24 March 2004 in Case AT.39530 – Microsoft.

¹⁷ European Commission, Decision of 27 June 2017 in Case AT.39740 – Google Shopping.

¹⁸ Case C-413/14 P, *Intel v Commission*, ECLI:EU:C:2017:632, paras 136-139.

¹⁹ Jörg Hoffmann, Liza Herrmann, Lukas Kestler, Gatekeeper's potential privilege—the need to limit DMA centralization, *Journal of Antitrust Enforcement*, Volume 12, Issue 1, March 2024, Pages 126-147 (discussing the limits of the DMA as a tool for harmonization as Article 1(6) provides Member States with the power to impose further national obligations on gatekeepers).

2.1.3. Ongoing DMA Investigations

The Commission's ongoing DMA investigations reveal the same pattern.²⁰ Gatekeepers' conduct that would traditionally fall under Article 102 scrutiny are now being examined under the DMA, sometimes simultaneously.

Apple's alternative distribution

The Commission has opened an investigation into Apple's contractual restrictions on alternative app distribution.²¹ The inquiry focuses on four elements: the contractual terms imposed on developers that offer or intend to offer alternative app stores, the Core Technology Fee applied to the first annual installs above a specified threshold, the multi-step installation process required for users to download alternative app stores, and the eligibility criteria for developers, including financial guarantees and minimum installation thresholds.

The foreclosure theory applied in this investigation has been refined through decades of Article 102 case law. In *Hilti* (1992), the Court held that a dominant firm abused its position by tying consumables to its own system and refusing to supply them separately in a manner that foreclosed rivals and impeded market entry.²² Apple's Core Technology Fee functions similarly. It imposes a financial penalty on developers who distribute apps outside Apple's ecosystem, effectively taxing competition.

On the more technical aspects of the case, *Microsoft* (2004) further established that dominant platform providers cannot use technical integration to foreclose rivals' access to complementary markets.²³ The Commission found that bundling Windows Media Player with Windows prevented competing media players from reaching users. Apple's multi-step installation process for alternative app stores creates analogous friction: users *can* access alternatives, but only by navigating deliberately cumbersome procedures designed to discourage departure from Apple's ecosystem. The DMA inquiry also mirrors *Google Android* (2018) in which the Commission concluded that Google's contractual and technical conditions preserved its control over app distribution and foreclosed rival app stores.²⁴ The legal reasoning is identical in that a dominant firm that designs contractual or technical barriers to restrict access to its ecosystem engages in exclusionary conduct.

The eligibility requirements (financial guarantees, minimum installation thresholds) recall *Intel's* exclusivity rebates, which the Court held were abusive because they created artificial barriers to switching.²⁵ Similarly, a developer facing Apple's requirements must choose between accepting Apple's App Store terms or assuming substantial financial risk and meet arbitrary thresholds to distribute independently. And *British Airways* (2007) to confirm that loyalty-inducing remuneration schemes

²⁰ We do not cover the market investigations on cloud computing services because it does not target any specific practice relevant to our analysis, see European Commission, 'Commission Launches Market Investigations on Cloud Computing Services under the Digital Markets Act' (Press Release, 18 November 2025).

²¹ European Commission, 'Opening of Proceedings, Case DMA.100001, Apple - Alternative App Distribution' (March 2024).

²² Case T-30/89, *Hilti AG v Commission* EU:T:1991:70, paras 106-119.

²³ Case T-201/04, *Microsoft Corp v Commission* EU:T:2007:289, paras 935-937.

²⁴ Commission Decision, Case AT.40099, *Google Android* (18 July 2018).

²⁵ Case C-413/14 P, *Intel Corp Inc v Commission* EU:C:2017:632, para 137.

may fall foul of Article 102 where, in light of an undertaking's structural market power, they operate as de facto exclusionary devices.²⁶ Even absent formal exclusivity or demonstrable foreclosure, such schemes may distort the competitive process by constraining intermediaries' effective freedom to allocate demand and by raising rivals' costs of access to the market. Apple's contractual terms operate identically according to the Commission as they make alternative distribution economically unviable for all but the largest developers.

The DMA investigation against Apple thus revisits conduct that Article 102 has long addressed. The only innovation is procedural: presumptive illegality in place of effects-based analysis. What differs is not substance, but the statutory vehicle. The DMA investigation reprises the same foreclosure theory that grounded the Article 102 cases, now enforced under the vocabulary of Articles 6(4) and 6(12) DMA. This reinforces the broader pattern of convergence between competition law and digital regulation.

Google Play Store and Search

The Commission opened its DMA investigation into Google in March 2024.²⁷ It concerns two practices. One focuses on whether Google restricts app developers from directing users toward better offers outside the Play Store. The anti-steering theory is similar to the approach used in the *Apple* cases. In the *Apple* precedent, the Commission found that Apple's steering terms restricted app developers from effectively promoting alternative subscription channels and prevented consumers from accessing information about alternative and cheaper offers.²⁸ This conduct was judged to breach Article 102(a) TFEU by imposing unfair trading conditions.

This logic has also appeared in other European cases. In France, the Paris Commercial Court fined Google for imposing imbalanced and restrictive contract terms on Play Store app developers.²⁹ This case anticipates similar reasoning on exploitative and exclusionary conduct. In parallel, the Dutch Authority for Consumers and Markets investigated Apple's App Store for restricting dating apps.³⁰ The agency focused on mandatory in-app purchase rules and prohibitions on steering. The concern was not framed primarily in terms of price levels, but in terms of how these conditions reconfigured the transactional interface between developers and users. That analysis was largely endorsed by the Rechtbank Rotterdam in its judgment of 16 June 2025, which confirmed that the anti-steering rule and related payment constraints curtailed developers' commercial autonomy and reshaped their customer relationship in a manner attributable to Apple's gatekeeper position.³¹ The ongoing Google investigation closely mirrors these precedents, scrutinizing whether similar developer restrictions in Google Play violate competition law and the DMA.

²⁶ Case C-95/04 P, *British Airways plc v Commission* EU:C:2007:166.

²⁷ European Commission, *Opening of Proceedings*, Case DMA.100002 - Google - Play Store and Search (March 2024).

²⁸ European Commission Decision, Case AT.40437 - Apple - App Store Practices (music streaming) (4 March 2024).

²⁹ Tribunal de commerce de Paris, 28 March 2022, 15e ch, no 2018017655.

³⁰ Authority for Consumers and Markets (ACM), *District Court of Rotterdam confirms ACM decision: Apple abused its dominant position for dating apps* (16 June 2025).

³¹ Rechtbank Rotterdam, *Apple Inc and Apple Distribution International Ltd v Autoriteit Consument & Markt*, ECLI:NL:RBROT:2025:6961, 16 June 2025 (upholding the ACM's finding that Apple's in-app payment obligation and anti-steering rules constituted abusive conditions under art 102 TFEU and art 24 Mw).

The second practice centers on whether Google accords an undue advantage to its own services, such as vertical search and comparison tools, over competing services in general search results. This form of *self-preferencing* is captured by Article 6(5) DMA, which prohibits gatekeepers from ranking their own services more favorably than those of rivals.³² Yet, it also constitutes an abuse under Article 102 TFEU. The Court of Justice confirmed in *Google Shopping* that systematically favoring one’s own services while demoting competitors amounts to a standalone abuse of dominance.³³ Similar reasoning underpinned the *Microsoft Windows Media Player* case,³⁴ where bundling the dominant operating system with Microsoft’s own media player was found to foreclose competing media services, and the *Amazon Marketplace / Buy Box* commitments,³⁵ in which the Commission raised concerns over Amazon’s preferential treatment of its own retail offers within its marketplace interface. Collectively, these precedents show that self-preferencing, whether through ranking, bundling, or design bias, falls squarely within the logic of Article 102 TFEU abuses that the DMA now codifies *ex ante*.

Google’s demotion of publishers’ content

The Commission’s decision to open proceedings against Google for the alleged demotion of media publishers’ content in search results follows a familiar enforcement pattern.³⁶ The investigation concerns Google’s “site reputation abuse policy,” which, according to the Commission, leads to the systematic demotion of publishers’ websites when they include content supplied by commercial partners. The conduct is assessed under Articles 6(5) and 6(12) DMA which prohibit self-preferencing and require gatekeepers to apply fair, reasonable, and non-discriminatory conditions to ranking and access on core platform services.

From a substantive standpoint, the theory of harm closely aligns with established Article 102 TFEU case law. The alleged practice consists in the use of control over ranking to disadvantage dependent business users and restrict their ability to monetize content and cooperate with third parties. This analytical structure mirrors the reasoning developed in *Google Shopping*, where the Court of Justice held that the manipulation of ranking by a dominant intermediary may amount to a standalone abuse.³⁷ Both cases target self-preferencing.³⁸

The Commission’s concern that Google’s policy may interfere with publishers’ freedom to conduct legitimate business recalls earlier abuse cases addressing discriminatory access conditions. In *British Airways*, the Court made clear that abuse may lie not in the formal architecture of contractual

³² 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 (Digital Markets Act), art 6(5).

³³ Case C-48/22 P *Google and Alphabet v Commission* (10 September 2024).

³⁴ European Commission, Decision of 24 March 2004 relating to a proceeding under Article 82 EC (Case COMP/C-3/37.792 Microsoft) [2007] OJ L 32/23.

³⁵ European Commission, Decision of 20 December 2022 making commitments binding pursuant to Article 9 of Regulation (EC) No 1/2003 (Cases AT.40462 Amazon Marketplace and AT.40703 Amazon Buy Box).

³⁶ European Commission, ‘Commission opens investigation into potential Digital Markets Act breach by Google in demoting media publishers’ content in search results’ Press Release IP/25/2675, 13 November 2025.

³⁷ Case C-48/22 P, *Google and Alphabet v Commission*, judgment of 10 September 2024.

³⁸ In *Google Shopping*, Google explicitly promoted its own service. Here, Google disqualifies certain publishers’ content on the basis of a quality rule (a rule defining which types of content are considered legitimate for ranking). This is not direct self-preferencing, but rather self-preferencing through the imposition of discriminatory conditions of access to ranking.

obligations, but in the way a dominant firm recalibrates economic incentives so as to make alternative commercial strategies commercially irrational.³⁹ Even absent express exclusivity, conduct that nudges dependent partners toward a single viable course of action may fall within Article 102 where dominance converts choice into abstraction. The Commission adopts a comparable lens in its assessment of the alleged demotions. By conditioning visibility and ranking on compliance with specific monetisation parameters, a dominant intermediary may narrow the set of economically sustainable options available to publishers, thereby shaping market outcomes through incentive design rather than overt prohibition.

The discrimination theory is reinforced by *Post Danmark I* (2012), where the Court held that a dominant undertaking may infringe Article 102(c) TFEU by applying dissimilar conditions to equivalent transactions without objective justification, where such conduct is capable of producing actual or likely exclusionary effects.⁴⁰ The Commission’s concern that this policy “directly impact[s] a common and legitimate way for publishers to monetise their websites” echoes the *Post Danmark* principle that a dominant firm may not, through discriminatory conditions, distort economic incentives in a manner that restricts the commercially viable options available to dependent trading partners.

The FRAND access requirement under Article 6(12) DMA also codifies and generalizes an Article 102 logic articulated in *Slovak Telekom* and complemented by the Grand Chamber in *Google Shopping*.⁴¹ Where a dominant undertaking grants access to a platform or interface but subjects that access to discriminatory conditions capable of foreclosing competition, EU competition law may require transparent and non-discriminatory access without satisfying the *Bronner* indispensability threshold.

According to the Commission’s own findings in *Google Shopping*, Google commands over 90% market share in general internet search in most European markets.⁴² Publishers lacking visibility in Google Search lose access to the overwhelming majority of potential readers. Google’s unilateral imposition of demotion penalties for certain monetization strategies mirrors the logic identified in *Google Shopping*, namely that a dominant intermediary may not leverage control over ranking and visibility to impose discriminatory conditions that restrict the commercially viable options of downstream users.

Google Android interoperability and search data sharing

The Commission’s specification proceedings concerning Google’s interoperability and search data sharing obligations further illustrate the continuity between DMA enforcement and established Article 102 TFEU doctrine.⁴³ Although framed as regulatory dialogue under Articles 6(7) and 6(11) DMA, the underlying theories of harm closely track classic abuse of dominance case law.

³⁹ Case C-95/04 P, *British Airways v Commission*, EU:C:2007:166.

⁴⁰ Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172 (Grand Chamber, 27 March 2012).

⁴¹ Case C-165/19 P, *Slovak Telekom a.s. v European Commission*, EU:C:2021:239 (Third Chamber, 25 March 2021).

⁴² Case C-48/22 P, *Google and Alphabet v Commission*, EU:C:2024:726 (Grand Chamber, 10 September 2024).

⁴³ European Commission, *Opening of Specification Proceedings, Google Android Interoperability and Search Data Sharing* (January 2026).

The first set of proceedings concerns Google’s obligation under Article 6(7) DMA to provide third-party developers with free and effective interoperability with hardware and software features controlled by the Android operating system, including features leveraged by Google’s own AI services such as Gemini. Substantively, this inquiry revisits long-standing Article 102 jurisprudence on discriminatory access to essential platform functionalities and technical foreclosure.

In its *Microsoft* decision (2024), the Commission found that the company’s refusal to supply interoperability information risked eliminating effective competition in the work group server operating systems market, insofar as access to the withheld interoperability input was indispensable for rivals to compete.⁴⁴ The decision further established that a dominant undertaking may not leverage control over technical interfaces or system functionalities so as to reserve downstream innovation to its own services. While the *Microsoft* case concerned the refusal to supply interoperability information as such, the underlying principle extends to situations in which a dominant platform differentially grants access to interoperability-relevant functionalities or interfaces that condition rivals’ ability to compete in adjacent markets. Google’s differentiated access to Android features used by its AI services raises analogous concerns: by granting its own AI tools privileged access to operating system functionalities while limiting third-party access, a dominant platform may distort competition in neighboring AI and digital assistant markets.

This reasoning was reaffirmed in *Slovak Telekom* (2021), where access is granted but made subject to unfair conditions, *Bronner* does not apply; the conduct is assessed under ordinary Article 102 standards, including whether it is capable of producing at least potentially exclusionary effects.⁴⁵ What matters is whether access conditions place competitors at a structural disadvantage relative to the dominant firm’s own downstream operations. The Commission’s focus on “equally effective access” mirrors this standard. Interoperability that exists in form but not in substance may still amount to exclusionary conduct where it deprives rivals of the ability to compete on the merits.

Article 6(7) DMA thus codifies a familiar Article 102 logic. The novelty lies not in the prohibition itself, but in the shift from an *ex post* assessment of foreclosure effects to an *ex ante* obligation requiring functional equivalence between internal and external access to platform-controlled features.

The second set of proceedings concerns Google’s obligation under Article 6(11) DMA to grant third-party online search engine providers access to anonymized ranking, query, click, and view data on FRAND terms. From a competition law perspective, this obligation echoes established doctrines on discriminatory access to data and inputs controlled by dominant intermediaries.

In *Google Shopping*, the Court confirmed that control over a critical intermediation function (such as ranking or visibility) may not be leveraged to distort downstream competition.⁴⁶ Although that case concerned self-preferencing rather than data access, the underlying logic is the same. Where a dominant

⁴⁴ Commission Decision, Case COMP/C-3/37.792, *Microsoft* (24 May 2004) [2007] OJ L 32/23.

⁴⁵ Case C-165/19 P, *Slovak Telekom a.s. v European Commission*, EU:C:2021:239 (Third Chamber, 25 March 2021).

⁴⁶ Case C-48/22 P, *Google and Alphabet v Commission*, Judgment of the Court (Grand Chamber), 10 September 2024, ECLI:EU:C:2024:726.

firm controls an input that conditions competitive viability, differential treatment of downstream users may amount to abuse.

Post Danmark I further clarifies that Article 102 does not prohibit differential treatment as such, but that conduct by a dominant undertaking becomes abusive where, in its economic and legal context, it is capable of producing exclusionary effects on competitors and lacks objective justification.⁴⁷ That logic has been applied specifically to discriminatory access and pricing conditions under Article 102(c) TFEU, where the Court has required an assessment of whether dissimilar conditions applied to equivalent transactions place trading partners at a competitive disadvantage.⁴⁸ Limiting access to search data, or granting it under conditions that deprive competitors of its practical utility, may similarly distort competitive conditions by depriving rival search engines of the informational inputs necessary to improve relevance, scale, and user experience.

The FRAND framing under Article 6(11) DMA generalizes this reasoning. As the Court recognized in *Slovak Telekom* and reaffirmed by the Grand Chamber in *Google Shopping*, where a dominant undertaking grants access to a platform or interface but subjects that access to discriminatory conditions, the conduct is not assessed under the *Bronner* indispensability framework but under ordinary Article 102 standards, including whether it is capable of producing at least potentially exclusionary effects.⁴⁹ What matters is whether the dominant firm's conduct distorts the competitive process by raising rivals' costs or narrowing the set of economically viable alternatives. Access that is formally granted but practically insufficient may still foreclose competition. Conditioning access to search data on restrictive eligibility requirements, or excluding emerging AI-based search alternatives, risks replicating the same exclusionary effects identified in prior Article 102 cases addressing discriminatory access to essential interfaces.

Taken together, these specification proceedings do not introduce a new theory of harm. They operationalize, through regulatory dialogue, a body of Article 102 jurisprudence addressing technical foreclosure.

2.2. Recent Article 102 digital cases

The convergence between the DMA and Article 102 works in reverse as well. All recent Article 102 decisions in the digital sphere concern conduct that falls squarely within the prohibitions of the DMA. Had these cases been brought after 2024, they could have been framed as DMA cases. Of course, Article 102 remains broader in scope. It applies beyond designated gatekeepers and outside the list of core platform services defined in the Regulation. Yet in practice, when it comes to digital markets, the overlap is near-total with enforcement targeting the same firms and the same practices.

⁴⁷ Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172 (Grand Chamber, 27 March 2012).

⁴⁸ Case C-525/16, *MEO - Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência*, EU:C:2018:270, paras 27-31.

⁴⁹ Case C-7/97, *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG* ECLI:EU:C:1998:569.

2.2.1. Apple Music Streaming/App Store

On 4 March 2024, the Commission fined Apple €1.84 billion for abuse of dominance in music streaming services under Article 102 TFEU.⁵⁰ The infringement concerned anti-steering rules applied to app developers such as Spotify, Deezer, and others. These rules prevented developers from informing iOS users about alternative subscription options available outside the App Store, including lower-priced offers. The Commission concluded that such restrictions limited consumer choice and constrained effective price competition between Apple and rival streaming services.

The same conduct was later sanctioned under the Digital Markets Act. In April 2025, Apple was fined again, this time under Article 5(4) DMA, for maintaining anti-steering practices that violated the gatekeeper obligations introduced by the regulation.⁵¹

The *Apple Music Streaming* case captures, perhaps better than any other case, the phenomenon of parallel enforcement. The same conduct and the same theory of harm were pursued under two separate instruments: one grounded in Article 102 TFEU, the other in Article 5(4) DMA. The legal vocabulary changed, but the normative substance remained constant. This continuity exemplifies the empirical convergence between competition law and the DMA that we seek to document and explain.

2.2.2. Google Shopping

In September 2024, the Court of Justice upheld the Commission's €2.42 billion fine on Google for abuse of dominance in comparison shopping services.⁵² The Court confirmed that Google systematically favored its own comparison tool in general search results while demoting those of competing services. By endorsing the Commission's analysis, the Court gave self-preferencing the status of an autonomous form of abuse under Article 102 TFEU.⁵³ The judgment crystallized a line of reasoning that treats differential treatment within a platform's ranking system as exclusionary when it alters the competitive process.

The overlap with the Digital Markets Act is explicit. Article 6(5) DMA prohibits gatekeepers from ranking their own products or services more favorably than those of third parties.⁵⁴ The rule captures the exact conduct condemned in *Google Shopping*. In fact, that DMA provision results from the EC's experience in the *Google Shopping* case.⁵⁵ The Shopping judgment therefore functions as a doctrinal bridge between competition law and digital regulation. It marks the point where a practice once tested through detailed market analysis is now addressed through categorical rulemaking.

⁵⁰ European Commission, 'Commission fines Apple over €1.8 billion over abusive App Store rules for music streaming providers', Press Release, 4 March 2024.

⁵¹ European Commission, 'Commission finds Apple and Meta in breach of the Digital Markets Act', Press Release, 23 April 2025.

⁵² Case C-48/22 P, *Google and Alphabet v Commission*, Judgment of the Court (Grand Chamber), 10 September 2024, ECLI:EU:C:2024:726.

⁵³ Case C-48/22 P, *Google and Alphabet v Commission*, Judgment of the Court (Grand Chamber), 10 September 2024, ECLI:EU:C:2024:726, para 219, 232, 237-240.

⁵⁴ Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act) art 6(5).

⁵⁵ Giuseppe Colangelo and Alba Ribera Martinez, 'The Metrics of the DMA's Success' (2025) 16(3) *European Journal of Risk Regulation* 1017-1037.

2.2.3. Google AdTech

On 4 September 2025, the Commission imposed a fine of €2.95 billion on Google for abuse of dominance in the ad-tech intermediation chain.⁵⁶ The decision found that Google leveraged its control over both sides of the digital advertising market. By operating simultaneously the publisher ad server, the main ad-buying tools, and the ad exchange AdX, Google had a position from which it could shape the rules of intermediation to its own advantage. In practice, AdX benefited from informational and routing privileges, i.e., access to rivals' bid data and preferential demand flows from Google's buying tools. These design choices did not eliminate rivals outright, but they re-ordered competitive incentives in a way that made alternative exchanges structurally less attractive to publishers and advertisers. The infringement thus lies in the self-preferential organization of the intermediation architecture itself, which entrenched AdX's centrality and weakened the contestability of the ad-tech ecosystem.

The conduct described in the decision could have been lifted directly from the Digital Markets Act. Article 6(5) DMA forbids a gatekeeper from treating its own products or services more favorably than those of third parties. That rule captures the preferential routing of ad demand through AdX. The relevance of Article 6(2) is more structural but no less revealing. That provision restricts a gatekeeper's ability to exploit non-public business-user data generated within its core platform services for its own advantage.⁵⁷ The Commission's findings that AdX benefited from advance access to competitors' bid information illustrate precisely this concern, not the replication of a downstream product, but the use of informational asymmetries to tilt the competitive conditions of intermediation itself. In this sense, the case exemplifies how data-driven self-preferencing and conflicts of interest converge within vertically integrated platform architectures.

The AdTech case illustrates once more how conduct once examined as abuse of dominance under Article 102 has been recast in the prescriptive language of the DMA. The difference lies not in the economic theory but in the institutional form. What antitrust once addressed through evidence, counterfactuals, and remedies now appears as a codified prohibition backed by administrative penalties. The result is a regime in which competition law and regulation converge not (only) by legislative design but through enforcement practice. This produces two formally distinct regimes that, in practice, discipline the same conduct through different legal techniques.

2.2.4. Meta Facebook Marketplace

In November 2024, the Commission fined Meta €797.7 million for two practices abusing its dominance under Article 102 TFEU.⁵⁸ The first concerned tying. Facebook Marketplace was automatically integrated into the Facebook platform, which exposed users to the classified ads service without a

⁵⁶ European Commission, 'Commission fines Google €2.95 billion over abusive practices in online advertising technology' (Press Release, 4 September 2025).

⁵⁷ Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act) art 6(2).

⁵⁸ European Commission, *Decision of 14 November 2024 in Case AT.40684 – Meta (Facebook Marketplace)*.

genuine element of choice. The second related to data exploitation. Meta used advertising data generated by competing classified ads providers to reinforce its own Marketplace operations.⁵⁹⁰

The factual pattern invites comparison with the Digital Markets Act. Meta's automatic integration of Marketplace into Facebook illustrates the type of structural self-preferencing that Article 6(5) DMA seeks to prevent, insofar as the gatekeeper used interface design and default exposure to confer a distribution advantage on its own service that rivals could not replicate. At the same time, the Commission's findings on Meta's use of non-public advertising data generated by competing classified-ads providers directly anticipate Article 6(2) DMA, which prohibits gatekeepers from exploiting business-user data obtained through their core platform services to strengthen their own competing offerings. The case thus exemplifies how dominance in a core social network can be leveraged through both preferential visibility and informational asymmetries to entrench adjacent services.

This case crystallizes the logic of convergence between the DMA and Article 102. The conduct sanctioned under Article 102 finds its textual counterpart in the DMA. The procedural pathway changes, but the normative content remains constant. Integration, data asymmetry, and preferential treatment are treated as systemic distortions of competition. Meta's case shows that the line between competition enforcement and digital regulation has thinned.

2.2.5. Android Auto

The Court of Justice further reinforces the convergence between Article 102 TFEU and the Digital Markets Act in *Alphabet and Google v. AGCM (Android Auto)*, decided in February 2025.⁶⁰

The dispute concerned Google's refusal to ensure interoperability between Android Auto and a third-party application providing electric vehicle charging services. The Court declined to approach the conduct as a classical refusal to supply. Instead, it reframed the issue as one of access conditions within a platform that was designed to host third-party applications. This move is significant. Once a platform is conceived as an interface open to complementors, restrictions on interoperability are no longer exceptional events triggering heightened thresholds. They become governance choices subject to ordinary competition scrutiny.

In that setting, the indispensability criterion traditionally associated with *Bronner* recedes.⁶¹ The Court accepts that a refusal of access may fall within Article 102 even where access is not strictly indispensable but materially affects the usability or commercial attractiveness of a third-party service. What matters is not whether exclusion is inevitable, but whether the dominant firm's conduct shapes the parameters of competition on and around the platform. The concern is structural rather than existential. It mirrors the DMA's logic. Competition law intervenes to prevent the dominant undertaking from unilaterally defining the rules of participation in an ecosystem it controls.

⁵⁹ European Commission, *Decision of 14 November 2024 in Case AT.40684 – Meta (Facebook Marketplace)*, section 7.3.

⁶⁰ Case C-233/23, *Alphabet Inc, Google LLC and Google Italy Srl v Autorità Garante della Concorrenza e del Mercato (AGCM)* (Judgment of the Court (Grand Chamber), 25 February 2025), ECLI:EU:C:2025:110.

⁶¹ Case C-7/97, *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co* ECLI:EU:C:1998:569.

The judgment also confirms that the absence of demonstrable exclusion does not immunize such conduct. The continued presence of competitors does not preclude a finding that access restrictions are liable to distort competitive conditions, particularly in markets shaped by indirect network effects, scale economies, and path dependence. At the same time, the Court insists on a case-by-case assessment. It leaves room for dominant firms to demonstrate, on the basis of the economic and factual context, that the contested practice was not capable of producing exclusionary effects. The analytical framework thus operates through structured presumptions rather than exhaustive effects proof. It signals a recalibration of Article 102 enforcement away from full-blown effects analysis and toward administrable inferences of harm, an evolution that resonates with the logic underpinning the DMA.

Most notably, the Court acknowledges that Article 102 may require a dominant undertaking to take positive steps to facilitate interoperability, including the development of technical solutions that do not yet exist. This obligation is tempered by considerations of feasibility, security, and proportionality, and may justify a reasonable implementation period as well as financial compensation. Nonetheless, the underlying premise is clear. Where platform openness is part of the business model, competition law may legitimately intervene in the design and evolution of the platform's architecture.

From a systemic perspective, *Android Auto* confirms that Article 102 has become a vehicle for regulating platform governance. The Court's principles on access, platform control and interoperability closely anticipate the obligations later codified in the DMA. The distinction between the two regimes lies less in substance than in institutional form. What the DMA expresses through general, *ex ante* prohibitions attached to gatekeeper status, Article 102 now achieves through adjudication. The case thus reinforces the view that the DMA does not introduce a radically new logic of intervention but rather consolidates and stabilizes trends already present in competition law enforcement.

2.2.6. Microsoft Teams

On 12 September 2025, the European Commission brought its Article 102 investigation into Microsoft's integration of Teams within Microsoft 365 and Office 365 to a close.⁶² Rather than adopting an infringement decision, the Commission accepted commitments pursuant to Article 9 of Regulation 1/2003. Microsoft undertook to decouple Teams from its productivity suites, to introduce a clear price distinction between bundled and stand-alone offerings, and to improve interoperability and data portability for competing communication services. The commitments, binding for seven years (ten years in the case of interoperability) were considered sufficient to dispel concerns relating to tying and foreclosure.

The factual and legal matrix of this case recalls several precedents. *In Microsoft (WMP)*, the General Court upheld the finding that the tying of Windows Media Player to Windows constituted an abuse of dominance.⁶³ *In Google Android (T-604/18)*, the Court confirmed that pre-installation and default-setting practices linking the Play Store to Google Search and Chrome restricted competition on adjacent

⁶² European Commission, *Commission accepts commitments offered by Microsoft to address competition concerns related to Teams* (Press Release, 12 September 2025).

⁶³ Case T-201/04, *Microsoft Corp v Commission*, EU:T:2007:289.

markets.⁶⁴ Earlier cases such as *Hilti* (T-30/89)⁶⁵ and *Tetra Pak II* (C-333/94 P)⁶⁶ already established that the use of market power in a primary market to influence a neighboring one can amount to abusive leveraging. The *Teams* commitments thus fit squarely within a line of cases in which competition law intervenes not because foreclosure has already materialized, but because the architectural coupling of a dominant product with a complementary service alters competitive trajectories and constrains rivals' ability to contest adjacent markets

The procedural posture is, however, distinctive. Unlike the traditional infringement route, the Commission obtained a change in product design and pricing without declaring an infringement. The decision exemplifies how Article 102, through Article 9 commitments, can produce effects typically associated with regulatory instruments. This capacity to secure forward-looking market adjustments outside a formal sanction process is central to understanding the functional convergence between competition enforcement and the DMA.

The DMA is often portrayed as introducing a qualitatively new mode of engagement between the Commission and large digital platforms. Because it operates *ex ante*, the argument runs, the DMA generates a structured dialogue on compliance, which involves exchanges on technical implementation, periodic reporting, and decisions on specification under Article 8 DMA. This dialogue allegedly contrasts with the case-by-case nature of Article 102 TFEU, where firms adjust conduct privately, without institutional endorsement. On that view, the DMA's value lies not only in its preventive scope but also in the formal confirmation it provides to undertakings that their practices meet legal requirements.

This distinction is overstated. Article 102 already contains a mechanism that formalizes compliance, i.e., the Article 9 procedure. When the Commission accepts commitments, it transforms a proposed course of conduct into a legally binding and enforceable framework. The *Microsoft Teams* decision illustrates this process. Microsoft's commitments were discussed and ultimately accepted by the Commission, which in doing so conferred institutional validity on the firm's compliance design. From a legal standpoint, this produces a "stamp of approval" comparable to what the DMA's administrative dialogue is presumed to offer.

Nor does the DMA, in practice, deliver routine certificates of conformity. The instrument imposes general obligations on gatekeepers, not individualized authorizations. The Commission may clarify these obligations or find non-compliance, but silence does not amount to validation. Many adjustments undertaken by gatekeepers under the DMA occur without any explicit acknowledgment from the Commission.

Finally, the distinction between *ex ante* and *ex post* processes should not obscure the shared outcome of both regimes. Each can precipitate forward-looking changes in market design. What differs is the institutional architecture that triggers those changes. The DMA does it through codified obligations

⁶⁴ Case T-604/18, *Google and Alphabet v Commission* (Google Android), EU:T:2022:541.

⁶⁵ Case T-30/89, *Hilti AG v Commission*, EU:T:1991:70.

⁶⁶ Case C-333/94 P, *Tetra Pak International SA v Commission*, EU:C:1996:436.

attached to gatekeeper status, Article 102 through investigations culminating in commitments or remedies. In substantive terms, both mechanisms enable the Commission to steer corporate conduct before harm is characterized. The DMA thus extends a modality that already exists in competition law rather than replacing it. In this sense, *the Teams* case recalls further continuity between the two regimes.

3. DMA's vertical failure

The functional overlap between the Digital Markets Act and Article 102 TFEU gives rise to a vertical legality problem. The DMA operates on the same axis as EU competition law, targets the same conduct, and pursues closely related public interests. This overlap is not constitutionally neutral.

The analysis proceeds in three steps. First, the overlap raises a *primary* question of legal basis: whether the DMA, despite its formal reliance on Article 114 TFEU, in fact constitutes a special branch of competition law that could not lawfully be adopted on that basis (3.1.). Second, even if that legal-basis objection were set aside, the coexistence of two instruments capable of addressing the same conduct triggers an autonomous problem of proportionality under Article 52(1) of the Charter, insofar as it creates a structurally duplicative enforcement architecture (3.2.). Third, in the alternative, the DMA must be evaluated against the substantive logic of the Treaties themselves, namely whether a regulatory framework that substitutes the Treaty concept of undistorted competition with the notions of fairness and contestability remains consistent with the EU's economic constitution (3.3.). Each step addresses a distinct level of legality. The first concerns competence. The second concerns institutional proportionality. The third concerns substantive fidelity to the Treaties. They each expose a vertical inconsistency between the DMA and EU primary law.

3.1. DMA's legal basis

The most immediate difficulty raised by the DMA's functional overlap with Article 102 TFEU concerns its legal basis. The objection is neither marginal nor technical. It rests on a structural mismatch between the Regulation's formal classification as an internal-market harmonization measure and its substantive operation as an *ex ante* competition regime. In constitutional terms, the question is whether the Regulation's *real object* corresponds to the competence invoked. If it does not, the resulting defect goes to the validity of the legal basis.

3.1.1. The ECJ's approach

The legal basis of a Union act must be anchored in a Treaty provision conferring the requisite competence.⁶⁷ A misidentification of that legal basis constitutes a ground for annulment and reflects a breach of the Treaties.⁶⁸ The decisive issue is whether the chosen legal basis reflects the act's *true object*, as revealed by its objectives and content.

⁶⁷ The grounds for annulment of a legislative act are settled. They include lack of competence, breach of essential procedural requirements, infringement of the Treaties or of rules governing their application, and misuse of powers.

⁶⁸ This ground of annulment is designed to police compliance with higher-ranking norms. It captures violations of the Treaties, general principles of EU law, the Charter of Fundamental Rights, and superior norms of secondary legislation.

The Court's case law distinguishes between an act's object and its objective. The object refers to what the measure regulates in practice, whereas the objective denotes the end pursued by the legislature. The former is assessed in light of the latter. A legal-basis error is characterized as 'simple' where the act is adopted on a Treaty provision that does not correspond to its objective and content. It is 'complex' where the legislature relies on a single legal basis despite pursuing two inseparable primary objectives.⁶⁹ This case law yields a structured approach to legal-basis review. The Court identifies the act's operative objective by determining the principal aim actually pursued, examines the measure's concrete content to verify correspondence with the chosen legal basis, and assesses whether the scope of the invoked Treaty provision matches the objective thus identified.

The *Tobacco Advertising* case provides the classic example. The Court annulled Directive 98/43/EC on the ground that its true object was not the harmonization of the internal market but the protection of public health. The Court identified a twofold defect: an overstepping of the chosen legal basis and a breach of the principle of conferral of competences.⁷⁰ The reasoning is instructive. The Court did not contest the legitimacy of regulating tobacco advertising as such, but insisted that the legal basis reflect the measure's predominant purpose. Because the directive primarily pursued a public-health objective, recourse to internal-market harmonization could not be justified, notwithstanding its harmonizing effects.⁷¹

The *OSPAR* judgment supplies another illustration.⁷² The case concerned the annulment of a Council decision authorizing Portugal to ratify an amendment to the OSPAR Convention permitting the monitoring of discharges from warships. Although the amendment related both to environmental protection and to the conservation of marine biological resources, the Court held that its predominant objective fell within the Common Fisheries Policy. Article 192(1) TFEU was therefore inapplicable, since the environmental dimension of the measure was merely incidental. The substance of the act lay in fisheries policy, an area of exclusive Union competence. The judgment confirms that legal-basis review turns on the identification of the act's center of gravity, not on the presence of ancillary effects nor on the formal characterization adopted by the legislature. This reasoning echoes *Vodafone*, where the Court held that the legal basis must correspond to the measure's true "centre of gravity" as revealed by its content and objective, rather than by the formal characterization adopted by the legislature.⁷³

More recently, the action for annulment of Directive (EU) 2022/2041 on adequate minimum wages further illustrates the importance of identifying a measure's real object. Advocate General Emiliou considered that the directive's substance concerned remuneration rather than working conditions.⁷⁴ Although framed in terms of working conditions, the directive intervened directly in wage-setting mechanisms by requiring Member States to ensure adequate minimum wages. Recourse to a general

⁶⁹ In such circumstances, the act must rest on both relevant legal bases. An exception applies where one objective is predominant and the other merely incidental, in which case only the legal basis corresponding to the primary objective is required.

⁷⁰ Case C-376/98 *Federal Republic of Germany v European Parliament and Council* ECLI:EU:C:2000:544.

⁷¹ The real object revealed by its underlying rationale (the protection of public health) that may justify annulment.

⁷² Joined Cases C-132/14 to C-136/14 *European Parliament and European Commission v Council of the European Union* EU:C:2015:813.

⁷³ *Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* (Case C-58/08) EU:C:2010:321, paras 32-37.

⁷⁴ TFEU Art. 175.

Treaty legal basis was therefore inappropriate,⁷⁵ since remuneration falls outside the scope of Union competence.

Across these cases, the constant is the same. In *Tobacco Advertising*, the confusion lay between internal-market harmonization and public health protection. In *OSPAR*, it concerned environmental policy and the Common Fisheries Policy. In the minimum-wage litigation, it arose between working conditions and remuneration. In each instance, the decisive factor is the divergence between the act's legal object, which anchors Union competence, and its real object as revealed by its content. That divergence is sufficient to cast doubt on the validity of the chosen legal basis.

3.1.2. Application to the DMA

The legality of the DMA ultimately turns on the identification of its true object. The question is whether the Regulation genuinely pursues internal-market harmonization or whether that objective conceals a different regulatory purpose. Under EU constitutional law, a legal basis is sustainable only where the measure's substance and operation correspond to the objective it purports to pursue.

The formal justification: Article 114 TFEU

Formally, the DMA relies on Article 114 TFEU, which empowers the Union to adopt harmonization measures intended to prevent fragmentation and ensure the proper functioning of the internal market.⁷⁶ This choice was explicitly justified in the Commission's 2020 Explanatory Memorandum, which identified the proliferation of divergent national platform rules as the primary threat warranting EU intervention.⁷⁷ The appropriateness of that legal basis therefore hinges on whether harmonization genuinely constitutes the Regulation's center of gravity.

First difficulty: the DMA's object

A functional examination of the DMA casts doubts on the claim that harmonization constitutes the Regulation's center of gravity. Rather than aligning national rules, the DMA establishes a far-reaching framework applicable to designated gatekeepers. Under the banner of internal-market harmonization, it restructures competitive relations in digital markets through *ex ante* behavioral and structural obligations. The DMA operates less as an instrument for the harmonization of national legal regimes than as a direct mechanism for reshaping market conduct. It targets conduct already amenable to competition-law scrutiny and introduces no substantive redefinition of anticompetitive behavior. Its principal innovation lies in procedural acceleration and enforcement efficiency.

The frequently invoked argument of complementarity between competition and the internal market does not resolve this difficulty. Competition can contribute to market integration, but this observation

⁷⁵ The legislature's attempt to rely on Article 153(1)(b) TFEU (working conditions) in order to circumvent the exclusion laid down in Article 153(5) on matters of remuneration.

⁷⁶ The legal object declared by the legislature in this case refers to the proper functioning of the internal market which is invoked to justify the choice of Article 114 TFEU as the DMA's legal basis.

⁷⁷ European Commission, 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) 842 final, point 2.

does not suffice to characterize the DMA as a harmonization measure within the meaning of Article 114 TFEU. Acknowledging overlap between the two fields does not eliminate the need to identify the Regulation's predominant object. As its practical application shows (*see above 2.*), the DMA operates as a special branch of competition law.⁷⁸ It is designed to correct perceived enforcement deficits of Article 102 TFEU in relation to systemic platforms, in particular the duration, cost, and remedial constraints of abuse-of-dominance proceedings.⁷⁹ This is the classic function of a *lex specialis*: to supplement a general regime in order to address enforcement gaps. That functional reality sits uneasily with the choice of an internal-market legal basis. This divergence calls into question the compatibility of the DMA with its chosen Treaty legal basis. Where a matter falls within a specific legal basis of the Treaties, the legislature may not rely on a more general legal basis to act. Under settled case law, where several legal bases are conceivable, the more specific or predominant basis must prevail over the more general one. As the Court of Justice has made clear in *C-338/01*, the proper legal basis for an EU measure is determined by reference to its "main or predominant purpose or component"⁸⁰. If one component is merely incidental to another, the act must rest on the basis corresponding to the predominant component⁸¹. Specifically, reliance on Article 114 "is not justified where the measure to be adopted has only the incidental effect of harmonizing market conditions."⁸² Since the DMA's center of gravity lies not in the harmonization of national laws but in the regulation of market power through a specialized enforcement framework, this divergence between proclaimed objective and operative substance is sufficient to cast doubt on the appropriateness of its chosen legal basis.

In this light, the DMA resembles a mask that no longer quite fits the face beneath it. Its internal-market justification frames how the Regulation seeks to be seen, but its operative substance reveals a different regulatory ambition: the *ex ante* disciplining of economic power. Once the center of gravity shifts from harmonization to market control, Article 114 TFEU ceases to describe the act's true legal identity. The tension is not semantic but constitutional. EU law requires the legal basis to follow regulatory reality, not regulatory presentation.

Second difficulty: the DMA's preventive nature

⁷⁸ Jacques Crémer, 'Why you should think of the DMA as competition law' (2025) *Concurrences* No 11-2025, Art No 129339. *See also*, Pierre Larouche and Alexandre de Stree, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021) 12(7) *Journal of European Competition Law & Practice* 542 (explaining that the distance between EU competition law and the DMA is much smaller than the Commission claims).

⁷⁹ *See* Olivier Guersent, 'Le droit de la concurrence est très efficace, mais trop lent dans le contexte du digital' (*Décideurs Juridiques*, 16 December 2024) (explaining that the DMA was created to address the slowness and inefficiency of competition law).

⁸⁰ Case C-338/01 *Commission v Council* ECLI:EU:C:2004:253, para 55.

⁸¹ *Ibid.* Also, *CeWe Color AG & Co OHG v OHIM* (Joined Cases T-178/03 and T-179/03) ECLI:EU:T:2005:303, para 42; *European Parliament v Council of the European Union* (Case C-155/07) ECLI:EU:C:2008:605, para 35; *Commission v European Parliament and Council* (Case C-411/06) ECLI:EU:C:2009:518, para 46; *Commission v Council of the European Union* (Case C-137/12) EU:C:2013:675 (Grand Chamber), para 71.

⁸² Case C-155/91 *Commission v Council* ECLI:EU:C:1993:98, para 19; Case C-70/88 *European Parliament v Council of the European Communities* ECLI:EU:C:1990:217, para 17.

Unlike the Digital Services Act or the reform of product-liability rules, both grounded in demonstrable risks of fragmentation,⁸³ the DMA did not respond to existing or even clearly foreseeable divergences in national regulation. Rather than harmonizing pre-existing rules, it created an autonomous regulatory regime *ex nihilo*. At best, the DMA may be described as a form of preventive uniformization. This differs conceptually and legally from harmonization within the meaning of Article 114 TFEU.⁸⁴ Evidentiary standards set out in the Court’s case law establish that future obstacles to the internal market need not be fully realized, but they must remain plausible and probable. In fact, the Court’s scrutiny of Article 114 TFEU measures imposes two substantive requirements.

First, the risk of fragmentation must be reasonably foreseeable and not purely hypothetical. The Court consistently frames this threshold in terms of likelihood, the emergence of divergent national rules must be plausible, not speculative.⁸⁵ Absent such a requirement, the powers of the Union “would be practically unlimited.”⁸⁶ Accordingly, the risk of fragmentation is established where divergent national measures already exist in some Member States, or where other Member States have demonstrated a genuine likelihood of legislating in a manner that would lead to a heterogeneous development of national laws⁸⁷. On the one hand, one might argue that the adoption of §19a GWB in Germany could constitute evidence of emerging regulatory divergence, thereby satisfying the Court’s requirement that future obstacles to the internal market be plausible rather than purely hypothetical. Whether the action of a single Member State is sufficient to meet that threshold is itself doubtful. The Court has consistently required indications of a genuine risk of fragmentation, not merely the unilateral initiative of one national legislature⁸⁸. A solitary national intervention, particularly one adopted in anticipation of, or parallel to, EU action, does not necessarily demonstrate an “appreciable” or “likely” distortion of competition across the internal market as a whole. On the other hand, it could be also objected that outside the German law adoption, other Member States were at the same time preparing comparable initiatives aimed at controlling large digital platforms⁸⁹. In our view, national initiatives before the DMA tended to address digital platforms but not as a coherent set of obligations focused on gatekeeping behavior. While digital platforms were subject to various national rules in different policy areas, there

⁸³ Jean-Sébastien Borghetti, ‘Taking EU Product Liability Law Seriously: How Can the Product Liability Directive Effectively Contribute to Consumer Protection?’ (2023) 136(1) French Journal of Legal Policy 136. See also Godefroy de Boisguillé, ‘La responsabilité du fait des produits défectueux appliquée à l’intelligence artificielle : le choix de la raison’ (2025) 66 Archives de philosophie du droit 329.

⁸⁴ Case C-380/03 Germany v Parliament and Council ECLI:EU:C:2006:772.

⁸⁵ Case C-58/08 Vodafone and Others v Secretary of State for Business, Enterprise and Regulatory Reform ECLI:EU:C:2010:321 para 33; Case C-380/03 Germany v Parliament and Council (Tobacco Advertising II) ECLI:EU:C:2006:772 para 38; Case C-547/14 Philip Morris Brands EU:C:2016:325, para 59; Case C-301/06 Ireland v Parliament and Council ECLI:EU:C:2009:68 para 64; Case C-217/04, United Kingdom v Parliament and Council, ECLI:EU:C:2006:279 paras 60–64.

⁸⁶ Case C-376/98 Germany v Parliament and Council ECLI:EU:C:2000:544 para 107.

⁸⁷ Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others v Secretary of State for Health* ECLI:EU:C:2005:449 para 29.

⁸⁸ See Case C-210/03 *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health* ECLI:EU:C:2004:802 para 37. The Court underlines that the risk of fragmentation was plausible because, at the time the directive was adopted, two Member States had already prohibited the marketing of the product concerned and a third had adopted legislation, not yet in force, pursuing the same objective. Factually, this meant that two Member States had already legislated, one had adopted a law not yet in force, and three Member States were therefore engaged in a trajectory of regulatory divergence.

⁸⁹ For instance, in Greece, the Hellenic Competition Commission launched a sector inquiry into digital ecosystems and proposed the creation of a new national legislative instrument to address ‘systemic abuse of dominance. In Belgium, it amended its rules on abuse of economic dependence in 2020. Although formally cross-sectoral, this reform was designed with online digital platforms in mind, thereby creating another potentially divergent regime alongside the German one.

were no widespread national “gatekeeper control regimes” comparable to the DMA. The DMA itself was the first EU-wide codification of that concept. The notion that many Member States had already adopted similar gatekeeper measures before it is not supported by the available evidence.

In any event, even if the German example and national initiatives were accepted as sufficient to establish a plausible risk of divergence, it would still fail to satisfy the second requirement identified by the Court.

Second, indeed, the Court must verify whether the measure whose validity is contested “genuinely [has] as its object the improvement of the conditions for the establishment and functioning of the internal market.”⁹⁰ This requirement, like the first, calls for evidence rather than assertion. From that perspective, the DMA does not pursue, nor is it structured to pursue, an anti-fragmentation objective. Specifically, Articles 5 and 6 do not harmonize national market conditions; they codify, in abstract and ex ante form, patterns of conduct previously addressed through competition-law enforcement, in particular under Article 102 TFEU, as shown above. Nor does the DMA establish mechanisms aimed at coordinating or pre-empting national regulatory initiatives. In practice, moreover, the Regulation is applied as an instrument of competition control. It targets perceived enforcement shortcomings of Article 102 TFEU rather than eliminating obstacles to trade or discrepancies in national rules. There lies the DMA center of gravity. Taken together, the DMA’s content and enforcement confirm that it does not genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market within the meaning of Article 114 TFEU.

Third difficulty: the DMA’s fragmentation in practice

A third difficulty concerns the DMA’s practical effect on the internal market. Article 114 TFEU requires that a measure’s effects reduce regulatory divergence, not just that it be framed in harmonizing terms.⁹¹ Where an EU instrument generates parallel or overlapping national interventions, the harmonization claim fails. The DMA’s lived reality reveals exactly this pattern.

Member States are layering national proceedings, sometimes on adjacent legal bases, on top of the very same compliance architecture that gatekeepers deploy for some provisions of the DMA. Italy is illustrative. The recent decision of the Italian Competition Authority against Google illustrates how Member States may indirectly apply the DMA through domestic consumer protection law. The AGCM opened a consumer-law case against Google’s DMA consent prompt and closed it with commitments governing how the prompt must be designed and presented. These commitments regulate wording, disclosures, and the sequencing of user choice⁹². The Italian authority formally coordinated its actions with the Commission’s DMA services.⁹³ In practice, however, it exercised powers functionally equivalent to those conferred by the DMA, without being subject to the institutional constraints that accompany their exercise. This approach bypassed the Commission’s exclusive enforcement

⁹⁰ Case C-376/98 Germany v Parliament and Council ECLI:EU:C:2000:544 para 84.

⁹¹ Case C-376/98 Germany v Parliament and Council ECLI:EU:C:2000:544 para 2.

⁹² i.e., how choice must be staged and repeated, including changes to wording, links, service lists, and “cool-off” mechanics.

⁹³ Autorità Garante della Concorrenza e del Mercato (AGCM), Google, Case PS12714.

competence under the Regulation. The commitments were adopted in November 2025. The European Commission did not react.

Germany provides the mirror image. Section 19a of the German Act Against Restraints of Competition was used in 2023 to push essentially the same cross-service data governance logic.⁹⁴ The agency explicitly positioned the case as “similar” to the DMA and, crucially, expanded it beyond the DMA’s designated core platform services to cover “more than 25 other services.” It is true that Section 19a predates the DMA, having been introduced in 2021. But this is precisely the point. What matters is that the DMA has neither displaced nor absorbed this national regime. Instead, it has come to coexist with it. The result is not harmonization but scope-splitting. EU rules for CPS, national “extensions” for non-CPS, and interface/consent design constraints that can vary by authority. Compliance becomes jurisdictional. The gatekeeper no longer implements “the” DMA solution; it implements an Italian version, a German version, and whatever comes next, precisely the kind of fragmentation the DMA claims to cure.

The Bundeskartellamt’s recent prohibition of Amazon’s price control mechanisms confirms this dynamic.⁹⁵ Acting under Section 19a GWB and coordinated with the Commission, the authority objected to Amazon’s use of algorithmic visibility tools and Buy Box allocation to influence third-party pricing.⁹⁶ The concern was not price levels as such, but the structural capacity of a vertically integrated platform to steer competitive conditions within its ecosystem. The intervention mirrors the DMA’s governance logic, yet proceeds on a distinct national legal basis. Rather than replacing national experimentation, the DMA now operates alongside it. The architecture is layered, not unified.

In short, the DMA does not harmonize market regulation; it simply reframes it. The result of Articles 1(5) and 1(6) DMA, which preserve wide space for national intervention, is a regime that standardizes designation and obligation lists at EU level and allows Member States to influence the substance of compliance through parallel instruments. From an internal-market perspective, this is not harmonization in the classical sense but organized pluralism. Divergence is not a deviation from the system. It is built into it.

Article 114 TFEU as constitutional mismatch

Taken together, these elements cast doubt on whether recourse to Article 114 TFEU respects the allocation of competences established by the Treaties. This invites a closer examination of the legislature’s choice of legal basis, given that the DMA’s content and application point toward a different constitutional anchor.

One explanation for the choice of Article 114 TFEU lies in the constraints attached to the more obvious alternative, Article 103 TFEU. That provision is designed to organize the ex post enforcement of

⁹⁴ Bundeskartellamt, Google - Cross-service data processing (Case B7-70/21), decision of 5 October 2023 (commitments under s 19a(2) GWB).

⁹⁵ Bundeskartellamt, ‘Bundeskartellamt prohibits Amazon from applying so-called price control mechanisms and orders the disgorgement of 59 million euros in economic benefits’ (Press Release, 5 February 2026).

⁹⁶ Bundeskartellamt, Press Release, 5 February 2026 (noting close coordination with the European Commission and the Bundesnetzagentur).

Articles 101 and 102 TFEU and requires implementing measures to give effect to the principles laid down therein.⁹⁷ It is therefore not an appropriate legal basis for the establishment of a structural ex ante regulatory framework such as the DMA.

Reliance on Article 114 TFEU enabled the legislature to avoid those constraints, dispensing with case-by-case assessment, effects-based analysis, strict alignment with Treaty competition principles.⁹⁸ In substance, the DMA establishes an ex ante competition regime for which the Treaties provide no express basis. If Article 103 TFEU is indeed incapable of supporting an ex ante regulatory framework of this kind, this does not justify recourse to Article 114. It instead confirms that the Treaties provide no express competence for the creation of a parallel ex ante competition regime. Where no suitable legal basis exists, the Union may not rely on a general harmonization provision to fill the gap. Constitutional silence is not a license for regulatory substitution.

Institutional considerations further clarify this choice. Article 103 TFEU is subject to a special legislative procedure⁹⁹ in which the European Parliament enjoys only a consultative role.¹⁰⁰ By contrast, Article 114 triggers the ordinary legislative procedure and fully involves the Parliament as co-legislator. The Court of Justice has consistently held that the choice of legal basis must respect the institutional balance laid down in the Treaties and has shown particular vigilance in safeguarding the Parliament's prerogatives¹⁰¹. The resulting reduction in the Parliament's legislative role would have required particularly careful justification in light of the Court's case-law on institutional balance.¹⁰² Reliance on Article 114 therefore not only broadened the substantive scope of EU action but also insulated the DMA against such an institutional challenge.

In addition, one could argue that reliance on Article 114 does not formally alter the standard of judicial review. It does, however, profoundly affect its intensity. Article 114 performs a double institutional function. First, it safeguards the role of the European Parliament as co-legislator by triggering the ordinary legislative procedure. Second, it situates the Digital Markets Act squarely within the

⁹⁷ TFEU, Art. 103(1).

⁹⁸ Konstantina Bania, 'Fitting the Digital Markets Act in the Existing Legal Framework: The Myth of the "Without Prejudice" Clause' (2023) 19(1) *European Competition Journal* 116 (arguing that the DMA offers "a shortcut" where "there is no apparent reason as to why the Commission would prefer the long (and painful) path of competition law enforcement to address the same conduct").

⁹⁹ See EUR-Lex, Special legislative procedure: "The special legislative procedure means that the Council is the only legislator, instead of being co-legislator on equal footing (codecision) with the European Parliament on a legislative proposal made by the European Commission (ordinary legislative procedure, used for the majority of EU legislation). Article 289(2) of the Treaty on the Functioning of the European Union (TFEU) provides that, for certain cases defined in specific treaty articles, the Council is the only legislator and the Parliament is required to either: consent to the Commission's proposal; be consulted on it". Article 103 TFEU provides for a special legislative procedure under which the Council adopts the relevant measures after merely consulting the European Parliament, which is therefore excluded from co-decision."

¹⁰⁰ TFEU, Art. 103(1): The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.

¹⁰¹ Case C-70/88, *European Parliament v Council of the European Communities* EU:C:1990:217. In this case, the Court recognized the European Parliament's right to bring an action for annulment in order to preserve the institutional balance (summary §2). See also §22 and §23: "Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur. The Court, which under the Treaties has the task of ensuring that in the interpretation and application of the Treaties the law is observed, must therefore be able to maintain the institutional balance and, consequently, review the observance of the Parliament's prerogatives when called upon to do so by the Parliament, by means of a legal remedy which is suited to the purpose which the Parliament seeks to achieve".

¹⁰² *Ibid*; capacity of the European Parliament to bring an action for annulment to safeguard its prerogatives (Case C-70/88).

constitutional framework of internal-market harmonization. In that context, the Court has consistently accorded the EU legislature a wide margin of discretion. Judicial review does not extend to assessing whether the regulatory model chosen is optimal, but only whether the legislature could reasonably consider the measure appropriate to address obstacles to the internal market. This significantly narrows the scope for successful challenges by confining substantive review to three core inquiries, i.e., the risk of internal-market fragmentation, the absence of manifest error, and compliance with the principle of proportionality.

Last, aside from Article 103 TFEU, one might theoretically consider Article 352 TFEU. In practice, however, this avenue is largely foreclosed.¹⁰³ Protocol No 27 states that, where necessary to ensure that competition is not distorted, the Union must act under the Treaties, including on the basis of Article 352 TFEU. That legal basis is, however, both legally and politically more constraining. From a legal perspective, Article 352 TFEU is subject to strict cumulative conditions which could, in principle, have been met had the Union sought to establish an *ex ante* regime for digital gatekeepers, but only at the cost of explicitly acknowledging the absence of a specific Treaty competence for such a policy.¹⁰⁴ Recourse to Article 352 would also have required unanimity in the Council and only consultation of the Parliament.¹⁰⁵ From a political stance, it would have forced the Union to acknowledge that the DMA constitutes a new form of economic governance for which the Treaties provide no specific legal basis, thereby reframing the DMA as a constitutional innovation rather than an internal-market harmonization measure. Article 352 is therefore not a realistic alternative. Its relevance here is diagnostic rather than prescriptive. It confirms that the Treaty framework offers no readily available legal basis for an *ex ante* competition regime of the kind introduced by the DMA, which in turn explains, without justifying, the legislature's resort to Article 114 TFEU

This institutional configuration sheds light on the growing recourse to Article 114 TFEU to ground regulatory instruments whose link to market integration is attenuated and whose objectives extend beyond classical harmonization.¹⁰⁶ Applied to the DMA, the resulting divergence between formal legal basis and functional operation casts doubt on the suitability of Article 114 TFEU and, ultimately, on the DMA's constitutional validity.

¹⁰³ Art. 352 TFEU, part seven: general and final provision, Official Journal 115, 09/05/2008 P. 0196 - 0196, para 1: "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament". - See on this question: Alfonso Lamadrid de Pablo, Nieves Bayón Fernández, "Why the Proposed DMA Might Be Illegal under Article 114 TFEU, and How to Fix It", *Journal of European Competition Law & Practice*, Volume 12, Issue 7, September 2021, Pages 576-589.

¹⁰⁴ Art. 352 TFEU, EUR Lex: "Article 352 TFEU may only be used as a legal basis when: the action envisaged is necessary to attain an EU objective, in the context of the policies defined by the treaties (except for the common foreign and security policy); the action by the EU has been proved to be necessary; no provision in the treaty provides for action to attain the objective; the envisaged action does not extend the EU's powers beyond those provided for by the treaties".

¹⁰⁵ By contrast, Article 103 TFEU also provides for a special legislative procedure, but requires only a qualified majority in the Council rather than unanimity.

¹⁰⁶ Bruno de Witte, 'Internal Market Legislation as European Public Policy' (2025) 80 *Revista de Derecho Comunitario Europeo* 11.

Now, a challenge of the DMA's legal basis is compounded by procedural constraints on judicial review. An action for annulment under Article 263 TFEU must be brought within two months of the publication of the contested act, a period that has now elapsed for the DMA.¹⁰⁷ The Court held in *TWD Textilwerke Deggendorf* that a party which clearly and effectively had standing to bring a direct annulment action against an individual Union act may not, once that time limit has expired, contest the validity of that act indirectly before a national court.¹⁰⁸ That foreclosure rule is narrowly confined to situations in which access to Article 263 TFEU was unequivocal, effective, and not subject to structural uncertainty. The *TWD* foreclosure rule rests on a crucial standard: the manifest certainty of the admissibility of direct recourse under Article 263 TFEU¹⁰⁹. Although gatekeepers are directly bound by the DMA, it is far from clear that they are individually concerned within the meaning of *Plaumann*.¹¹⁰ Gatekeepers form an open and abstract regulatory category defined by objective thresholds and subject to administrative designation.

In those circumstances, any reassessment of the DMA's legal basis would most plausibly arise incidentally, through a reference for a preliminary ruling under Article 267 TFEU, in the context of national litigation concerning the application or enforcement of DMA obligations.¹¹¹ This procedural configuration does not neutralize the legal-basis objection, but it alters the institutional pathway through which it may be examined.

3.2. Proportionality

The preceding analysis suggests that the Digital Markets Act rests on a legal basis whose scope does not correspond to its functional operation. While this mismatch raises concerns in its own right, it also has further constitutional implications. If the DMA performs the role of an *ex ante* competition regime that could only have been grounded, if at all, in Article 103 TFEU, its coexistence with the existing competition framework cannot be regarded as merely formal. Rather, it gives rise to a structural overlap of regulatory powers that must itself comply with the requirements of Article 52(1) of the Charter on proportionality. In fact, the Court's recent case law increasingly treats proportionality as a systemic constraint on the exercise and allocation of regulatory powers. The following section therefore assesses whether the parallel application of Article 102 TFEU and the DMA satisfies the requirements of foreseeability, complementarity, and necessity identified by the Court, or whether it results in a structurally disproportionate duplication of enforcement powers.

¹⁰⁷ Article 263 TFEU.

¹⁰⁸ *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland* (C-188/92) EU:C:1994:90.

¹⁰⁹ It has to say the manifest certainty that the applicant satisfied the *Plaumann* criteria of being directly and individually concerned, and thus had an unequivocal right to bring a direct action for annulment under Article 263 TFEU.

¹¹⁰ ECJ 15 July 1963, *Plaumann*, n°25/62. In this case, the Court held that, for non-privileged applicants, individual concern requires that the applicant be affected by the contested measure “by reason of certain attributes which are peculiar to them or by reason of circumstances which differentiate them from all other persons” (part. IV, Grounds of judgment) That condition is not satisfied for gatekeepers under the DMA. They are defined by objective economic thresholds and form an open regulatory category whose members are legally interchangeable and subject to administrative designation. They are therefore affected not because of attributes peculiar to them, but because they fall within an abstract class of undertakings meeting predefined criteria.

¹¹¹ Article 267 TFEU.

3.2.1. The ECJ's approach

The principle of *ne bis in idem*, enshrined in Article 50 of the Charter, has long prevented the duplication of proceedings or penalties for the same facts (*idem factum*) against the same undertaking (*bis*). Recent case law, however, has reshaped this prohibition into a qualified principle governed by proportionality. In *bpost* (C-117/20)¹¹² and *Nordzucker* (C-151/20),¹¹³ the Court of Justice departed from a rigid exclusionary model toward one governed by proportionality. Parallel procedures, such as a competition investigation and a sector-specific enforcement action, may now coexist, provided that the duplication satisfies the limits set out in Article 52(1) of the Charter. The decisive test is no longer formal identity but proportional justification.¹¹⁴

The first condition concerns predictability and procedural coherence. In *bpost*, the Court held that duplication can only be justified where “*there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the different authorities*”.¹¹⁵ Both proceedings must be conducted within a proximate timeframe and with sufficient coordination, ensuring that prior sanctions are duly considered in the second decision. *Volkswagen* (C-27/22) later confirmed that proportionality also requires a close temporal and procedural link between actions.¹¹⁶

The second condition requires that the objectives pursued are distinct and complementary. In *bpost*, the Court justified the coexistence of sectoral and competition enforcement because the postal regulator pursued market liberalization while the competition authority safeguarded undistorted competition.¹¹⁷ *Nordzucker* drove the point home. Where two authorities act under Article 101 TFEU to protect the same public interest, the duplication no longer serves complementary goals but duplicates the same general interest of ensuring undistorted competition.¹¹⁸ The possibility of double proceedings thus depends on a plurality of aims that justify differentiated enforcement responses.

Finally, the Court requires that duplication impose no excessive cumulative burden. As *bpost* explains, any duplication must remain “*strictly necessary*” and ensure that the overall penalties are commensurate with the gravity of the conduct.¹¹⁹ The total burden on the undertaking must not exceed what is needed to secure the legitimate objectives pursued. The *bpost* and *Nordzucker* framework establishes a

¹¹² Case C-117/20 *bpost* (Grand Chamber, 22 March 2022) EU:C:2022:202.

¹¹³ Case C-151/20 *Bundeswettbewerbshörde v Nordzucker and Others* (Grand Chamber, 22 March 2022) EU:C:2022:203.

¹¹⁴ Van Cleynenbreugel P. *BPost and Nordzucker: Searching for the Essence of Ne Bis in Idem in European Union Law*: ECJ 22 March 2022, Case C-117/20, *BPost v Autorité belge de la concurrence* Case C-151/20, *Bundeswettbewerbshörde v Nordzucker AG e.a. European Constitutional Law Review*. 2022;18(2):357-374; Benoit Zelger, “The principle of *ne bis in idem* in EU competition law: the beginning of a new era after the ECJ’s decisions in *bpost* and *Nordzucker*?” (2023) 60 *Common Market Law Review* 239 (contending that *bpost* and *Nordzucker* establish a uniform twofold test making the *ne bis in idem* prohibition more likely to apply, with any exceptions requiring justification through proportionality analysis).

¹¹⁵ Case C-117/20 *bpost* (Grand Chamber, 22 March 2022) EU:C:2022:202, para 51.

¹¹⁶ Case C-27/22 *Volkswagen Group Italia and Volkswagen* EU:C:2023:663.

¹¹⁷ Case C-117/20 *bpost* (Grand Chamber, 22 March 2022) EU:C:2022:202.

¹¹⁸ Case C-151/20 *Bundeswettbewerbshörde v Nordzucker and Others* (Grand Chamber, 22 March 2022) EU:C:2022:203.

¹¹⁹ Case C-117/20 *bpost* (Grand Chamber, 22 March 2022) EU:C:2022:202, para 51.

coordination standard rather than a blanket prohibition. Proportionality, in this sense, disciplines the institutional relationship between overlapping competences as much as it limits the penalties imposed.

The objection that regulatory duplication between ex ante and ex post instruments is nothing new deserves examination. The *European Electronic Communications Code* imposes on operators with significant market power obligations that closely resemble Article 102 TFEU, i.e., non-discrimination, access, transparency.¹²⁰ The Directive was itself adopted under Article 114 TFEU. The coexistence of telecoms regulation and competition law has been tested in three landmark cases, each of which ultimately reinforces the structural concerns raised by the DMA.

In *Deutsche Telekom*, the Court held that EU competition rules “supplement, by an ex post review, the legislative framework adopted by the Union legislature for ex ante regulation of the telecommunications markets.”¹²¹ Crucially, the ex ante framework was administered by a national regulatory authority, whereas Article 102 TFEU was enforced by the Commission. Under the DMA, the Commission operates on both sides. It is at once the ex ante regulator and the competition agency. The coordination and foreseeability that the Court implicitly relied upon in *Deutsche Telekom* are absent from the DMA’s enforcement architecture.

In *Telefónica*, the Court accepted the cumulative application of telecoms regulation and Article 102 because the two regimes were functionally differentiated. Sector-specific regulation organized market structure ex ante; Article 102 operated ex post to safeguard undistorted competition. That distinctness satisfied the *Nordzucker* complementarity test. The DMA does not fit within that template. The DMA targets largely the same categories of conduct as Article 102 and does so for materially convergent reasons.¹²² The formal distinction between “undistorted competition” and ‘fairness and contestability’ is rhetorically neat, but operationally thin. In practice, the DMA does not structure markets in a way that is functionally autonomous from Article 102; it intervenes in normative proximity to it.

In *Slovak Telekom*, the Court confirmed that where an operator is subject to a regulatory obligation to grant access, the strict *Bronner* indispensability condition does not apply when assessing abusive conduct relating to access under Article 102.¹²³ That ruling represents the furthest point of convergence between ex ante regulation and ex post competition law within the existing constitutional framework, but it preserved case-by-case assessment and effects analysis. The DMA goes further. Articles 5 and 6 impose *per se* prohibitions detached from any finding of market effect. If *Slovak Telekom* marks the outermost boundary of the Court’s tolerance for regulatory influence on competition standards, the DMA crosses it.

A further structural difference weakens the analogy often drawn between telecoms regulation and the DMA. The DMA expressly provides that it applies without prejudice to Articles 101 and 102 TFEU and

¹²⁰ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) [2018] OJ L 321/36, in particular Chapter IV (Articles 68–73) on access obligations for operators with significant market power.

¹²¹ Case C-280/08 P, *Deutsche Telekom AG v Commission* (Second Chamber, 14 October 2010) EU:C:2010:603, para 92.

¹²² Case C-295/12 P, *Telefónica SA and Telefónica de España SAU v Commission* (Fifth Chamber, 10 July 2014) EU:C:2014:2062.

¹²³ Case C-165/19 P, *Slovak Telekom a.s. v Commission* (Third Chamber, 25 March 2021) EU:C:2021:239, paras 59–60.

to national competition rules.¹²⁴ By contrast, Directive (EU) 2018/1972 establishing the European Electronic Communications Code contains no general clause declaring that its regime operates without prejudice to EU competition law.¹²⁵ The telecoms framework was conceived as a sector-specific substitute for competition law in markets considered insufficiently competitive. The DMA, in contrast, formally proclaims coexistence with antitrust but imposes obligations that closely resemble those mobilized under Article 102 TFEU. This asymmetry has consequences for the *ne bis in idem* analysis. One framework assumes a degree of substitution; the other denies it while operating in normative proximity to the same field. That distinction bears directly on the proportionality and complementarity requirements articulated in *bpost* and *Nordzucker*.

A final distinction is constitutional in nature. The *Electronic Communications Code* explicitly “aims to progressively reduce *ex ante* sector-specific rules as competition in the markets develops and, ultimately, to ensure that electronic communications are governed only by competition law.”¹²⁶ It is designed to render itself obsolete. The DMA contains no equivalent mechanism. It establishes permanent obligations with no provision for deregulation as competitive conditions evolve. A transitional regime is more easily justified under Article 52(1) of the Charter than a standing parallel enforcement architecture with no built-in sunset.

The telecoms precedents rest on pillars the DMA does not replicate. Far from weakening the proportionality objection, the comparison reinforces it. The EU legal order has already developed a constitutional framework for managing the coexistence of sectoral regulation and competition law. The DMA departs from it in every material respect.

With the telecoms precedent addressed, the analysis now shifts the inquiry upstream. The concern here is not limited to situations where two proceedings are actually opened against the same conduct, but extends to the structural condition that enables such duplication to occur. Even in the absence of concurrent enforcement, the coexistence of two instruments, Article 102 TFEU and the DMA, capable of addressing the same practices and pursuing the same public interest raises a proportionality issue in its own right. Under Article 52(1) of the Charter and the logic of *Digital Rights Ireland* (C-293/12), proportionality constrains not only enforcement outcomes but also the legislative architecture of EU measures.¹²⁷ In *Digital Rights Ireland*, the Court annulled the Data Retention Directive because the regime as a whole exceeded what was necessary to achieve its legitimate objective.¹²⁸ Applied here, the principle implies that the Union may not create redundant enforcement powers when one is sufficient to achieve the stated aim. A dual regime that allows the Commission to select between two functionally

¹²⁴ 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 (Digital Markets Act) [2022] OJ L 265/1, art 1(6)

¹²⁵ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) [2018] OJ L 321/36, recital 29.

¹²⁶ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) [2018] OJ L 321/36, recital 29. It shows that EU law already provides a model for temporary and competition-oriented sectoral intervention, a model the DMA does not follow.

¹²⁷ Takis Tridimas, *The General Principles of EU Law* (3rd edn, Oxford University Press 2023) 229–26 (on the application of proportionality as a structural constraint).

¹²⁸ Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland and Others* (Grand Chamber, 8 April 2014) EU:C:2014:238.

equivalent tools, one regulatory, one antitrust, fails the necessity and foreseeability requirements of Article 52(1). It introduces legal uncertainty, enlarges institutional discretion beyond what is required for effective enforcement, and therefore amounts to a structural disproportion.

The same reasoning follows from *Tobacco Advertising I* (C-376/98), where the Court annulled a directive adopted under Article 114 TFEU because its true objective, public-health protection, lay outside the internal-market competence invoked.¹²⁹ The Union legislature, the Court held, cannot rely on a general harmonization power to pursue ends already covered by a more specific Treaty provision. Applied *mutatis mutandis* to the DMA, when conduct within the reach of Article 102 TFEU is re-regulated through a new instrument based on Article 114, the overlap exceeds what is necessary to achieve the internal-market objective and becomes constitutionally disproportionate.

Taken together, *bpost*, *Nordzucker*, *Digital Rights Ireland*, and *Tobacco Advertising I* show that proportionality operates as a systemic safeguard. It limits not only the accumulation of proceedings but also the Union’s design of overlapping regimes that replicate existing competences. The proportionality inquiry thus extends beyond concurrent enforcement to the very architecture of institutional authority, a question to which the following sections now turn.

3.2.2. Application to the DMA

The proportionality inquiry developed in *bpost* and *Nordzucker* was designed to assess whether parallel proceedings already underway respect the boundaries of Article 52(1) of the Charter. Yet its underlying logic applies equally upstream, to the legislative configuration that allows such duplication to occur. Even in the absence of concurrent enforcement, the coexistence of Article 102 TFEU and the DMA, each capable of addressing identical conduct and pursuing the same public interest, raises a proportionality concern of constitutional magnitude. The structure itself, not just its application, must satisfy the conditions of foreseeability, complementarity, and necessity. On all three counts, the dual regime falls short.

Foreseeability

Under *bpost*, duplication of proceedings is permissible only where clear and predictable rules define when overlap may occur, where authorities coordinate their actions within a proximate timeframe, and where any cumulative sanction remains proportionate. The first requirement, clarity and foreseeability, is absent here.

Both Article 102 TFEU and the DMA are founded on distinct legal bases, yet the decisive question is whether their coexistence was foreseeable to those subject to them. The DMA’s Recitals proclaim that it “complements” competition law but “does not preclude” its application, a formulation that signals coexistence without allocation.¹³⁰ Nowhere does the Regulation specify whether the same

¹²⁹ Case C-376/98 Germany v Parliament and Council ECLI:EU:C:2000:544.

¹³⁰ 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 (Digital Markets Act) [2022] OJ L 265/1, recital 9.

conduct may fall under both frameworks, nor how conflicts will be resolved. The DMA simply acknowledges the continued applicability of Article 102 but does not clarify how the two interact.¹³¹

The result is legal opacity. A gatekeeper can anticipate that self-preferencing will be prohibited under the DMA, but not whether the same conduct might attract an additional fine under Article 102. The *Apple* anti-steering sequence illustrates the defect. Apple was fined €1.84 billion under Article 102 in 2024, then €500 million under the DMA in 2025, for behavior the Commission itself described as lying “at the core” of the earlier case.¹³² A dual system that allows such duplication without statutory guidance fails the foreseeability and coordination conditions articulated in *bpost*¹³³ and *Volkswagen*.¹³⁴

Complementarity

The second condition, developed in *bpost*¹³⁵ and reaffirmed in *Nordzucker*,¹³⁶ allows duplication only if the parallel regimes pursue distinct but complementary legitimate aims. In *bpost*, the duplication was justified because the postal regulator sought market liberalization, while the competition authority protected rivalry, two separate interests. By contrast, *Nordzucker* held that when two competition authorities apply Article 101 TFEU to ensure undistorted competition, the duplication serves *the same* public interest and thus cannot be justified.

The DMA and Article 102 do not meet this complementarity test. Formally, the EU legislature distinguishes between “undistorted competition” on the one hand and “fairness and contestability” on the other¹³⁷. Substantively, the two frameworks target identical conduct for identical reasons. *Meta Marketplace* treated the integration of Marketplace within Facebook as tying under Article 102;¹³⁸ Article 5(8) DMA prohibits precisely the same practice.¹³⁹ *Google Shopping* condemned self-preferencing under Article 102; Article 6(5) DMA now codifies the same rule *ex ante*. The aims are not complementary but overlapping.¹⁴⁰

The convergence is not confined to objectives. It extends to remedies. Critics might argue that the DMA’s detailed technical mandates distinguish it from traditional antitrust enforcement. Yet this

¹³¹ 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 (Digital Markets Act) [2022] OJ L 265/1, recital 10.

¹³² European Commission, ‘Remarks by Executive Vice-President Vestager on the Adoption of an Antitrust Decision against Apple over Abusive App Store Rules for Music Streaming Providers’ (speech, Brussels, 4 March 2024).

¹³³ Case C-117/20 *bpost* EU:C:2022:202, para 51.

¹³⁴ Case C-27/22 *Volkswagen Group Italia and Volkswagen* (First Chamber, 14 September 2023) EU:C:2023:663, para 95.

¹³⁵ Case C-117/20 *bpost* EU:C:2022:202, paras 49-50.

¹³⁶ Case C-151/20 *Bundeswettbewerbshörde v Nordzucker and Others* (Grand Chamber, 22 March 2022) EU:C:2022:203, paras 52-57.

¹³⁷ DMA, para 11: “Articles 101 and 102 TFEU and the corresponding national competition rules (...) 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.”

¹³⁸ European Commission, ‘Commission Fines Meta €797.72 Million over Abusive Practices Benefitting Facebook Marketplace’ (press release, Brussels, 14 November 2024), para 137.

¹³⁹ DMA, Art. 5(8).

¹⁴⁰ European Commission, *Google Search (Shopping)* (Case AT.39740), Decision of 27 June 2017, para 341; DMA, Art. 6(5).

distinction collapses under scrutiny. Article 102 has long supported remedies of equal granularity.¹⁴¹ In *Microsoft (T-201/04)*, the Commission ordered disclosure of “technical documentation” for server interoperability and installed a monitoring trustee to oversee compliance,¹⁴² an architecture of supervision indistinguishable from the DMA’s Article 8 specification mechanism. Recent cases confirm the continuity. In *Apple NFC/Apple Pay (2024)*, the Commission required third-party access to “tap-and-go” technology under strict conditions on timing and non-discrimination;¹⁴³ in *Renfe Mobility Data (2024)*¹⁴⁴ and *Google/AGCM (2025)*,¹⁴⁵ it imposed data-access and interoperability obligations with precise development timelines. The level of remedial detail is not a legal novelty; it is a matter of prosecutorial preference.

Seen in this light, the DMA’s granularity exposes rather than resolves the overlap. Detailed ex ante mandates on ranking algorithms, data portability, or app-store design do not demonstrate distinct aims; they show the Commission achieving through regulation what it could otherwise achieve through adjudication, only faster and with lighter proof burdens. This is not complementarity. It is duplication under a different label.

Necessity

Necessity requires limiting duplication to what is strictly needed. Even before enforcement begins, the dual DMA/Article 102 framework imposes cumulative burdens. Gatekeepers maintain parallel compliance programs, submit to duplicate monitoring, and face uncertainty over which regime governs what conduct.

Bpost requires ex ante clarity. Undertakings must be able to foresee which acts or omissions are liable to be the subject of cumulative prosecutions.¹⁴⁶ Articles 1(5) and 1(6) DMA provide no such foreseeability. They preserve parallel competence without organizing it.

Enforcement confirms the problem. Apple and Meta faced Article 102 remedies followed by DMA compliance orders on the same conduct, with no indication that one satisfied the other. This layering multiplies costs without demonstrable gain. *Bpost* requires that prior sanctions be credited when imposing subsequent penalties, so that the charges resulting for the persons concerned from such cumulation are limited to the strict minimum.¹⁴⁷ The DMA contains no such mechanism. The Commission does not discount DMA fines for prior Article 102 sanctions.

¹⁴¹ Article 7 of Regulation 1/2003 grants the Commission power to impose “behavioural or structural remedies” to terminate abuses, with no textual limitation on specificity. The case law confirms. Remedies must be “appropriate” and “necessary,” which can require detailed technical mandates when effective competition demands it, see Case C-295/12 P *Telefónica and Telefónica de España v Commission* (Fifth Chamber, 10 July 2014) EU:C:2014:2062.

¹⁴² Case T-201/04 *Microsoft v Commission* ECLI:EU:T:2007:289 para 137.

¹⁴³ European Commission, *Apple - Mobile Payments* (Case AT.40452), Decision of 11 July 2024 (C(2024) 4761).

¹⁴⁴ European Commission, *Online Rail Ticket Distribution in Spain* (Case AT.40735), Decision of 17 January 2024 (C(2024)).

¹⁴⁵ Case C-233/23 *Alphabet and Others v Autorità Garante della Concorrenza e del Mercato* (Grand Chamber, 25 February 2025) EU:C:2025:110.

¹⁴⁶ Case C-117/20 *bpost* (Grand Chamber, 22 March 2022) EU:C:2022:202, para 51.

¹⁴⁷ Case C-117/20 *bpost* (Grand Chamber, 22 March 2022) EU:C:2022:202, para 51.

The contrast with prior practice is instructive. In *Telekomunikacja Polska*, the Commission deducted from its Article 102 fine the amount previously imposed by the Polish telecommunications regulator for the same conduct, a modest sum, but one that acknowledged the principle that cumulative sanctions must account for prior penalties.¹⁴⁸ The DMA contains no equivalent mechanism, nor has the Commission indicated any intention to credit Article 102 sanctions when calculating DMA fines

The disproportionality lies in legislative design itself. *Bpost* permits cumulation only where accompanied by rules ensuring coordination that is sufficiently close in terms of substance, time and the persons involved.¹⁴⁹ Articles 1(5) and 1(6) DMA contain no coordination rules. They simply state that the DMA is “without prejudice” to Article 102 TFEU, a formulaic saving clause that creates legal uncertainty rather than resolving it. Article 52(1) demands proportionate means, not merely legitimate aims. The DMA fails this test.

3.3. Alignment with the Treaties

The preceding sections suggest that the DMA is exposed, first, to serious doubts concerning its legal basis and, second, to an autonomous proportionality concern arising from structural duplication. Even assuming these objections away, and accepting the DMA as complementary to competition law, a residual question remains as to its compatibility with the substantive logic of the Treaties. By departing from the Treaty notion of undistorted competition and embracing a regulatory vocabulary centered on fairness and contestability, the DMA reshapes the economic settlement embedded in primary law. This final section turns to that residual, but decisive, inquiry.¹⁵⁰

The Treaties have long treated competition as a structuring element of European integration. Former Article 3 EC explicitly referred to a system of *free* and *undistorted* competition.¹⁵¹ That formulation was abandoned with the Lisbon reform. It was replaced by Protocol No. 27, which provides that the internal market “includes a system ensuring that competition is not distorted.”¹⁵² The omission of the term “free” may reflect a political compromise reached during constitutional negotiations¹⁵³. But in any case, the concept of “undistorted competition,” even without the qualifier “free,” cannot be equated with the notion of “contestable and fair markets.”

Fairness organizes differential treatment to achieve a preferred outcome. It rests on a logic of correction, or positive discrimination. Stronger actors are constrained more heavily so that weaker or dependent actors may compete on less asymmetric terms. Fairness entails a redistribution of

¹⁴⁸ Case COMP/39.525, *Telekomunikacja Polska* (Commission Decision of 22 June 2011), para 920.

¹⁴⁹ Case C-117/20 *bpost* (Grand Chamber, 22 March 2022) EU:C:2022:202, para 51 & 53.

¹⁵⁰ Pablo Ibáñez Colomo, ‘The Draft Digital Markets Act: A Legal and Institutional Analysis’ (2021) 12 *Journal of European Competition Law & Practice* 561, 566 (noting that the DMA pursues objectives of fairness and contestability that “display a different, expansive, vision” compared to Article 102).

¹⁵¹ Protocol (No 27) on the Internal Market and Competition, annexed to the Treaty on European Union [2008] OJ C 115/309.

¹⁵² Protocol (No 27) on the Internal Market and Competition, annexed to the Treaty on European Union [2008] OJ C 115/309.

¹⁵³ Even though the adjective “free” was removed from the Treaty formula “free and undistorted competition”, the concept of economic freedom remains structurally embedded in EU law through the internal market itself, which is constitutionally defined as a system of four fundamental freedoms: the free movement of goods, persons, services and capital. Competition law operates within, and in support of, that framework of economic freedoms.

competitive opportunities through regulatory differentiation. While this approach may be analytically attractive, it does not follow a constitutional objective of the EU internal market.

One could likely argue that undistorted competition (Protocol No. 27) cannot exist if a handful of actors control market access. ‘Fairness’ would be the *sine qua non* condition for the economic freedom of smaller enterprises to truly exist. This argument is unconvincing. Reducing “undistorted competition” to a mere synonym for “fairness and contestability” is a legal fallacy for at least three reasons.

First, they do not have the same legal meaning. Undistorted competition is a strictly defined legal notion anchored in Articles 101 and 102 TFEU, State aid rules, and Protocol No. 27. It refers to markets free from cartels, abuses of dominance, unlawful subsidies, or discriminatory regulatory barriers. It is a ‘negative’ concept. It delineates prohibited interferences with competition rather than prescribing desirable market outcomes. By contrast, the notions of “contestable and fair markets” belong to a different normative register. They do not derive from Treaty-based competition rules, nor have they been given a stable judicial meaning. Instead, they emerge from policy discourse, i.e., Commission communications, “level playing field” documents, and, most recently, the DMA itself. They reflect broader regulatory aspirations such as openness, transparency, equitable access, and balanced competitive conditions. Unlike undistorted competition, these notions are positively programmatic rather than juridically delimitative.

Second, the relationship is asymmetric.¹⁵⁴ A market that is undistorted in the legal sense need not be fair in a socio-economic sense. And a fair market may pursue objectives beyond EU competition law’s scope. Undistorted competition is a Treaty-anchored legal requirement. “Contestable and fair markets” articulates a political aspiration toward economic justice. Undistorted competition focuses on process, assuming markets operate competitively when firms face no artificial barriers and consumers exercise unconstrained choice. “Fair” competition imports distributional judgments about proper market structure.¹⁵⁵

Third, the two concepts may even conflict. A concentrated market characterized by high barriers to entry may remain undistorted where concentration is efficiency-driven, yet fail to be contestable if entry requires prohibitive investment, and fail to be fair if market power translates into persistent supracompetitive prices. Conversely, regulatory measures designed to promote fairness or contestability may themselves introduce distortions by constraining competitive dynamics, insulating less efficient firms, or overriding outcomes that would otherwise emerge from rivalry on the merits. The DMA’s reorientation from undistorted competition toward fairness and contestability thus reflects not a technical adjustment, but a substantive policy choice.

AG Poiares Maduro captured this distinction in his *British Airways* opinion. He explained that Article 102 “is not designed to ensure that competitors who are less efficient than the dominant company are

¹⁵⁴ Giuseppe Colangelo and Alba Ribera Martínez, ‘The Metrics of the DMA’s Success’ (2025) *European Journal of Risk Regulation* 1.

¹⁵⁵ On contestability, see William J Baumol, ‘Contestable Markets: An Uprising in the Theory of Industry Structure’ (1982) 72 *American Economic Review* 1.

shielded from competition,” but rather to prevent dominant firms from “distorting competition by other means than competing on the merits.”¹⁵⁶ The DMA’s fairness and contestability objectives extend beyond this constraint. Articles 5 and 6 prohibit conduct even when efficient and competitive on merits, if it fails contestability or fairness tests.

This is not hypothetical. Article 6(12) DMA requires gatekeepers to provide business users access to performance data generated through their platform use. This obligation serves contestability. It helps business users reduce dependence on the gatekeeper. But Article 102 has no equivalent doctrine. In *Bronner*, the Court held that dominant firms need not share facilities except in extraordinary circumstances where the facility is indispensable and refusal eliminates all competition.¹⁵⁷

Admittedly, the *Bronner* framework does not exhaust the case law. The Court has clarified that its strict indispensability conditions are not a universal threshold for intervention under Article 102. In *Google Shopping*, the Court declined to characterize self-preferencing as a classic refusal to supply, and therefore did not require a showing of indispensability.¹⁵⁸ More recently, in *Android Auto*, the Court further nuanced the analysis by distinguishing between infrastructures developed for the dominant firm’s own needs and platforms designed to host third-party applications. It allowed interoperability obligations to arise without full *Bronner* conditions in the latter case.

These judgments nonetheless preserve a case-by-case assessment grounded in abuse, objective justification, proportionality, and effects on competition. The DMA proceeds differently. It establishes ex ante access and data-sharing obligations without requiring any finding of abuse, indispensability, or foreclosure, and without engaging in the structured balancing that characterizes Article 102 enforcement. Even when measured against the most expansive strands of the Court’s post-*Bronner* case law, the DMA thus operates upstream of competition law rather than alongside it.

Similarly, Article 6(3) DMA prohibits pre-installation of gatekeeper apps that disadvantage competitors and mandates uninstallation rights.¹⁵⁹ This pursues fairness. Users should choose which apps to use. But Article 102 permits pre-installation when it serves efficiency. In *Microsoft* and *Google Android*, the Commission and the Courts treated pre-installation and tying as abusive only where they produced foreclosure effects and could not be justified by efficiencies.¹⁶⁰ More broadly, the Court has consistently held, notably in *Intel* and *Post Danmark*, that Article 102 requires an effects-based assessment and does not protect competitors from competitive disadvantage as such. By imposing a *per se* prohibition detached from foreclosure analysis, Article 6(3) DMA abandons the effects-based framework that structures Article 102 enforcement in favor of structural fairness.

¹⁵⁶ Opinion of AG Poirares Maduro in Case C-95/04 P *British Airways v Commission* EU:C:2006:344, paras 53-54 and 59.

¹⁵⁷ Case C-7/97 *Oscar Bronner v Mediaprint ECLI:EU:C:1998:569* paras 41-46.

¹⁵⁸ Case C-48/22 P, *Google and Alphabet v Commission*, EU:C:2024:726 (Grand Chamber, 10 September 2024).

¹⁵⁹ Regulation (EU) 2022/1925 (Digital Markets Act), art 6(3).

¹⁶⁰ Case T-201/04 *Microsoft v Commission* ECLI:EU:T:2007:289 paras 1038-45 and 1054-89.

In short, Protocol No. 27 embodies a process-oriented constitutional choice.¹⁶¹ It entrusts competitive dynamics, not regulatory design, with the task of disciplining market power. The DMA inverts that logic. Rather than safeguarding competitive processes, it prescribes business conduct in order to engineer preferred outcomes such as contestability and fairness. That may well be a coherent policy choice. But it is not the choice embedded in the Treaties. The Member States consented to a system of undistorted competition, not to a regime of administratively designed market outcomes grounded in alternative regulatory objectives.

4. The path forward

The evidence assembled in this article casts serious doubt on the DMA's constitutional legitimacy. The DMA and Article 102 have become functionally interchangeable in practice. They target the same firms for the same conduct. The Commission's parallel enforcement confirms what the legal basis seeks to obscure. The DMA operates as a second competition code, not as a harmonization instrument.

The Commission is caught in a form of functional duplication, whereby the DMA replicates the regulatory logic of Article 102 while operating outside the Treaty framework governing competition law. What follows explores how this tension might be managed, or resolved, within the existing constitutional architecture of the Union.

4.1. Possible methods of legislative revision

The optimal response would be a fundamental revision transforming the DMA into a genuine harmonization instrument. From an institutional and legislative perspective, three techniques are available to revise a regulation such as the DMA.¹⁶²

First, the legislature may adopt a modifying regulation. This method consists in amending specific provisions of a regulation while leaving its overall structure intact. This approach is procedurally light but ill-suited to situations where the underlying logic of the instrument is in question. But the main drawback of amending regulations is that they force legal practitioners to read two instruments at the same time, i.e., the original act and the amending act, in order to determine the law in force until a formal codification or recast is adopted.

Second, the Union may proceed by way of a recast. The existing regulation is formally repealed and replaced. The new act preserves continuity while allowing for a comprehensive restructuring of its content. This technique is designed for situations in which an instrument must be substantially re-aligned with its legal basis or original purpose.

¹⁶¹ David J Gerber, 'Constitutionalizing the Economy: German Neo-Liberalism, Competition Law, and the "New Europe"' (1994) 42 *American Journal of Comparative Law* 25.

¹⁶² The possibility to amend or recast Regulation (EU) 2022/1925 (the DMA) derives from the Union legislature's material competence under Article 114 TFEU, which authorises the adoption and modification of harmonization measures for the internal market, combined with Article 288 TFEU, under which a regulation is binding in its entirety and can only be altered or repealed by an act of the same legal nature (principle of *actus contrarius*). That competence is exercised through the ordinary legislative procedure laid down in Article 294 TFEU, to which Article 114 expressly refers. See also, Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts OJ C 77, 28.3.2002, pp. 1-3.

Third, the legislature could opt for outright repeal followed by the adoption of an entirely new regulation (nuclear option). This method offers the greatest degree of legal and regulatory flexibility since it frees the legislature from the constraints of the existing instrument. However, it also entails significant political and legal disruption including uncertainty as to the continuity of rights and obligations.

Fourth, admittedly, the DMA provides for a degree of flexibility through delegated acts which allow the Commission to update the obligations of Articles 5, 6, and 7 to keep pace with market changes.¹⁶³ However, this mechanism is legally confined to non-essential elements pursuant to Article 290 TFEU. It cannot be used to modify the essential content, structure or objectives of the DMA. Any attempt to remove or neutralize provisions that operate in substance as competition-law rules would affect the very core of the DMA and its constitutional positioning under Article 114 TFEU. Such a reform would therefore fall outside the scope of delegation. It would require a full legislative intervention by the EU legislature.

4.2. The most relevant legislative option

The analysis in Section 3 concludes that the DMA's current content and enforcement practice do not correspond to its declared legal basis under Article 114 TFEU. It does not follow, however, that the DMA must be abandoned. Article 114 could legitimately support a regulation addressed to digital gatekeepers, provided that its content is realigned with the harmonization objective that Article 114 requires. A recast emerges as the option most consistent with constitutional and institutional constraints.¹⁶⁴ It would maintain the DMA's anchoring in Article 114 TFEU while removing provisions that operate in substance as competition law. This approach would restore coherence between the DMA's legal basis and its regulatory content within the internal market. This would require eliminating rules currently used to address conduct comparable to Article 102 enforcement and refocusing the instrument on its internal market function, namely the prevention of divergent national regulation of platform activity. Although such changes could formally be adopted through an amending regulation, they would in substance amount to a recast, as they would alter the DMA's regulatory logic and require a comprehensive reassessment of its normative framework. Proceeding by way of a recast would address the existing functional duplication and re-establish the DMA's legitimacy as a measure grounded in Article 114 TFEU.

This is no easy path. The revised DMA would set a uniform procedural and substantive floor for national digital-platform rules. It would leave the control of unilateral conduct to competition law. Such a re-anchoring would eliminate the overlap with Article 102 TFEU and restore coherence between form and

¹⁶³ Notably under Article 12 (3) of the DMA. For more, see Thibault Schrepel, *Adaptive Regulation* (ALTI Working Paper, November 2025) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5416454.

¹⁶⁴ It ensures legal certainty by providing a single and consolidated text. In contrast, amending regulations produce a layered and opaque body of law in which the legally binding rules are scattered across multiple acts, undermining legal certainty and accessibility. Recast procedure prevents normative fragmentation. Furthermore, in contrast to a full "repeal and replace" approach, a recast benefits from the 2001 Interinstitutional Agreement. This framework, through the "graying-out" rule, preserves the regulation's original architecture and the hard-won political compromises already in place. It allows for the integration of substantial innovations while effectively shielding the core pillars of the DMA from wholesale renegotiation and lobbying pressures.

function. Article 114 would serve its intended purpose (i.e., harmonization) not covert competition enforcement.¹⁶⁵

This legislative recalibration is institutionally feasible but politically demanding. Under Article 294 TFEU, the Commission would have to exercise its right of initiative by proposing a recast of the DMA explicitly redefining the DMA's objectives.¹⁶⁶ The Parliament and Council would then co-legislate under qualified majority voting. Substantively, this path would narrow the DMA's scope to cross-border divergences in national platform regulation and remove direct obligations on individual firms targeting conduct also covered by Article 102. The effect would be to constitutionalize the DMA as a pre-emptive instrument of market integration. This would preserve the efficiency gains of a single EU framework while addressing incoherences that currently arise from the Regulation's legal basis.

4.3. In the absence of legislative revision: disciplined enforcement

A more realistic path forward in the absence of legislative revision would be disciplined enforcement. The Commission would confine the application of the DMA to forms of conduct that fall outside the material scope of Article 102 TFEU. As regards Member States, disciplined enforcement would take the form of action against national measures that fragment the internal market in breach of the DMA. Although the Regulation itself provides no direct enforcement mechanism against Member States, the Commission could rely on infringement proceedings under Article 258 TFEU, using Article 1(5) DMA as the relevant normative benchmark.

In operational terms, disciplined enforcement would require two institutional commitments. First, as regards gatekeepers, the Commission would adopt internal enforcement guidelines establishing a presumption of deference to Article 102 TFEU wherever the conduct at issue falls within its material scope. DMA proceedings would be reserved for obligations that have no functional equivalent under competition law. Second, as regards Member States, the Commission would systematically monitor national proceedings that encroach upon DMA-harmonized obligations. Article 258 TFEU proceedings, coupled with the coordination mechanism under Article 1(7) DMA, would provide the institutional means to address such encroachments.

One might object that self-restraint sits uneasily with the *Meroni* doctrine.¹⁶⁷ The objection is misplaced. *Meroni* prohibits the delegation of unconstrained discretionary powers. Disciplined enforcement is not delegation; it is prosecutorial priority-setting, a prerogative the Commission exercises daily under Regulation 1/2003 and has formalized in its 2014 Article 102 Guidance. The proposed discipline would make explicit what is already implicit. And legal certainty would be enhanced, not diminished. Undertakings would know which instrument governs which conduct, something the current regime does not allow.

¹⁶⁵ Annegret Engel, 'Licence to Regulate: Article 114 TFEU as Choice of Legal Basis in the Digital Single Market' in Annegret Engel, Xavier Groussot and Gunnar Thor Petursson (eds), *New Directions in Digitalisation: Perspectives from EU Competition Law and the Charter of Fundamental Rights* (Springer 2024) (exploring the very distinct roles these two articles play in regulating digital markets).

¹⁶⁶ Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 115/47, art 294.

¹⁶⁷ Case 9/56, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority* (Court, 13 June 1958) EU:C:1958:7.

Such a solution would not weaken the Union’s digital ambitions. It would strengthen them. By transforming the DMA into a true internal-market instrument designed to pre-empt regulatory fragmentation rather than replicate competition enforcement, the Union would restore constitutional coherence and advance one of its central political projects: completing the single market. As the Draghi report underlines, Europe’s competitiveness depends on removing internal barriers to scale and innovation.¹⁶⁸ A re-anchored DMA could serve precisely that function and turn a constitutional liability into a catalyst for integration.

5. Conclusion

The DMA is said to complement Article 102 TFEU. Labels aside, current practice shows that the DMA and Article 102 often chase the same conduct against the same actors. The regulatory multiverse collapses into one universe: enforcement, by any name, of competition law. This duplication leads the Commission to enforce competition law under the vocabulary of internal-market harmonization. The danger is not just the expansion of administrative power but the erosion of the Treaty-based allocation of competences. Until the Union restores coherence between objective and instrument, the DMA will remain a regulatory hybrid built on sand. The Commission can save it, but only by recalibrating its content and/or enforcement practice. The path is not easy. Failing that, judicial review is likely to be the ultimate arbiter. Until one of these paths is taken, serious doubts will continue to surround the DMA’s conformity with the Treaties.

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¹⁶⁸ Part A of the Draghi Report highlights that slower productivity growth and weaker innovation performance relative to peers threatens Europe’s economic prospects, and that fragmented internal regulatory and market conditions undermine the Single Market’s capacity to deliver scale and growth, Mario Draghi, *The Future of European Competitiveness: Part A - A Competitiveness Strategy for Europe* (Publications Office of the European Union 2025) 11.

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