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A Reorientation of the European Commission's Discretion in the Digital Markets Act: Solutions From Digital Constitutionalism

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Key message

The discretion afforded to the European Commission ('EC') is of central importance with regard to the implementation and enforcement of the Digital Markets Act ('DMA'). If viewed as arbitrariness, particularly in view of a normative framework that arguably permits such a perspective, the European Commission's decisions may potentially jeopardise the rule of law and the fundamental rights of those affected by them.

This piece puts forth the proposition that essential checks and balances must be established to guarantee that the discretion granted to the EC is not merely a means of ensuring effectiveness. Conversely, it is postulated that it can also be employed to enhance fundamental rights within the confines of the DMA's inflexible structure.

The types and role of discretion in the Digital Markets Act

The DMA acknowledges the European Commission's various forms of discretion, which it exercises as the sole enforcer (for an overview of the different types of discretion, see, among others, Oliveira and Dias, 2022 and Gonçalves, 2019).

Firstly, there is the *discretion to act* which allows the relevant authorities to take action or refrain from doing so in response to a specific behaviour or request. An illustration of this is the discretion afforded to the European Commission to engage (or not to engage) in a process to determine the efficacy of the measures implemented by the gatekeeper to ensure compliance with Articles 6 and 7 (see Article 8(3) DMA). An additional illustration can be found in Article 27(2) of the DMA, which grants National Competition Authorities ('NCAs') and the Commission full discretion to follow up on (or refrain from responding to) information received from third parties (including business users, competitors, or end users of a gatekeeper's core platform services).

Secondly, there is the *discretion of choice*, which allows the freedom to choose between two or more courses of action that are provided for in the legislation. In the context of the DMA, an illustrative example can be found in the relationship between the specification procedure set forth

in Article 8 and the non-compliance procedure outlined in Article 29 of the DMA. Indeed, on the basis of the compliance reports submitted by the gatekeepers (see Article 11 DMA), the Commission has the discretion to either initiate a procedure to specify what is expected from the gatekeeper for effective compliance, thus favouring a cooperative and dialogical enforcement, or, alternatively, to proceed directly to a finding of non-compliance under Article 29 of the DMA. In this second scenario, the Commission is afforded a further degree of discretion in selecting an appropriate course of action. The Commission may elect to terminate the procedure without adopting a decision of non-compliance (see Article 29(7) DMA). An alternative course of action would be for the Commission to adopt a decision of non-compliance. Such an action would require the gatekeeper to cease the infringement in question and to desist from further similar actions within an appropriate deadline. Moreover, the gatekeeper would be required to present an account on how it intends to comply with the decision (see Article 29(5) DMA). Ultimately, the Commission may impose a fine on the non-compliant gatekeeper (see Article 30 DMA). In each of the aforementioned scenarios, the Commission exercises its discretion in the context of punitive enforcement. This approach appears to be consistent with the stance taken by the European Commission in relation to the initial compliance reports submitted by the gatekeepers (for a detailed analysis, Ribera Martínez, 2024).

Thirdly, *creative discretion* or the *discretion to create* provides the administration with the freedom to design concrete solutions within the applicable legal limits. In this instance, the law is thus limited to predicting and fixing a result, for which the administration is free to define the appropriate process or measures to achieve it. Although it may still be identified as a form of *discretion of choice*, it differs from the *discretion to opt* in that the options available to the administration are not predetermined or specified in legal provisions. Instead, they are the result of the administration's *design*. To illustrate this *creative discretion*, one might cite the interim measures which the EC is permitted to implement with the objective of preventing serious and irreparable damage for business users or end users of gatekeepers until the conclusion of an investigation. Article 24 of the DMA empowers the European Commission to exercise this competence in cases where it has *prima facie* established that gatekeepers have not complied with their obligations. However, a margin of creativity is permitted with regard to the design and choice of specific interim measures, as these are not defined nor specified in the DMA.

In contrast, *technical discretion* is employed primarily for the purpose of designing solutions that require a high level of specialised technical and professional knowledge and expertise. In this context, the reality to be regulated entails the formulation of technical judgements regarding the existence, value, or probability of a given situation. Although the complexity of the DMA authorises this type of discretion to be mobilised across the board, it is considered that it will mainly take place not in relation to the questions of 'if' or 'when' – often defined in the DMA in strict legal terms – but rather in relation to the 'how', i.e. the content or substance of the Commission's actions and decisions. Examples of this type of discretion can be found in the context of market investigations. It is noteworthy that companies may be designated as gatekeepers when the quantitative thresholds set out in Article 3(2) of the DMA are not met (see Article 3(8) DMA). Indeed, while the legislator defines the final objectives of the analysis and sets out elements that the Commission should consider for this purpose, the designation of a particular company as a gatekeeper requires the application of technical, scientific, and specialised knowledge. The same is true of market investigations conducted for the purpose of introducing new services, practices, and obligations within the scope of the DMA (see Articles 12 and 19 DMA). In this regard, the Commission is acknowledged for its particular *sapiential*, particularly in light of its experience in relation to digital markets under Articles 101 and 102 of the TFEU.

The potential of discretion to guarantee the safeguarding of fundamental rights

One potential solution to the shortcomings of the DMA, or at the very least, to compensate for some of the blank interferences on the gatekeepers' subjective position, would be to ensure that the different moments of discretion afforded to the EC are used and exercised in a way that optimises the fundamental rights in question.

The DMA is mindful of the significance of exercising discretion within defined limits and the importance of upholding fundamental rights in a manner that guarantees both the efficacy of the procedures and the optimisation of fundamental rights. In addition to references in the recitals, Article 34(1) of the DMA, entitled 'Right to be heard and access to the file', sets out the obligation for the Commission to provide the undertaking concerned with the opportunity to be heard before the adoption of a decision pursuant to Articles 8, 9(1), 10(1), 17, 18, 24, 25, 29 and 30 and Article 31(2) of the DMA. Furthermore, in accordance with the case law of the General Court, even decisions adopted under other Articles (for example, the decision in which the Commission designates an undertaking as a gatekeeper by rejecting its arguments seeking to call into question the presumptions laid down in Article 3(2) DMA) must respect the fundamental rights and observe the principles recognised by the Charter of Fundamental Rights of the European Union ('CFR'). This is precisely what results from Article 34(4) of the DMA, which makes reference to "any proceedings", as well as from Recital 109 of the DMA. The mention by the Court was not essential, in any case, as it is inherent to the idea of fundamental rights.

Indeed, as the General Court emphasises in Bytedance v Commission, "according to the case-law, the rights of the defence are fundamental rights forming an integral part of the general principles of law whose observance the Courts of the European Union ensure. That general principle of EU law is enshrined, in the context of the right to good administration, in Article 41(2)(a) and (b) of the Charter and applies where the authorities are minded to adopt a measure which will adversely affect an individual […] Accordingly, observance of the right to be heard is required even where the applicable legislation does not expressly provide for such a procedural requirement […] in accordance with Article 41 of the Charter, every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union, which includes, inter alia, the right of every person to be heard, before any individual measure which would affect him or her adversely is taken. According to the case-law, that right guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his or her interests adversely" (see para 340ff).

In conclusion, it can be stated that discretion is not synonymous with either a monopoly in decision-making or arbitrariness. Discretion, in whatever form it may take or whichever actor it may be exercised by, is subject to external limits (such as the public interest or interests determined by the legislator and entrusted to the Commission) and internal limits. These include, first and foremost, fundamental rights, which, in the European Union ('EU') area, are not even limited to those enshrined in the CFR (see Article 6 Treaty on European Union ('TEU').

It is our contention that the potential of administrative discretion can be harnessed to ensure the practical realisation and optimisation of the fundamental rights and interests at stake. Indeed, it seems that the European Commission has made use of its discretion in its first designation

decisions, freeing itself from the apparent rigidity in the DMA (for further insights, see Ribera Martínez, 2024). It is thus proposed that the Commission's discretion to act and choose, as well as its creative and technical discretion, can address the flaws of the DMA in terms of rigidity and participation.

To illustrate, in the event that compliance reports submitted by gatekeepers are deemed inadequate in light of the DMA's objectives, rather than automatically initiating non-compliance proceedings, the Commission could and should engage in specification (at least with respect to some of the obligations set forth in the DMA). In all cases, the EC is obliged to select the outcome that most respects and fulfils the positive duties that arise from fundamental rights. Following the entry into force and applicability of the DMA, the Commission appeared to pursue this course of action with regard to the right to be heard. Indeed, as is evident from the General Court ruling in Bytedance v Commission, "prior to the adoption of the contested decision, the applicant was heard on several occasions. Indeed, first of all, before the notification itself, four meetings, at the very least, were held between the applicant and the Commission […] Next, after the notification was submitted on 3 July 2023, the Commission sent the applicant its preliminary views on 26 July 2023 and gave it the opportunity to state its position, which the applicant did by letter of 2 August 2023. Lastly, on 17 August 2023, another meeting between the applicant and the Commission took place." (see para 345).

The EU Courts' subsidiary role

It is acknowledged that the Commission may exercise its discretion in a manner that differs from the aforementioned interpretation. Furthermore, a fair balance may require the Commission to proceed with a solution, measure or decision that the gatekeeper deems to impair its rights disproportionately. However, this does not negate the legitimacy of, nor detract from the imperative for, judicial oversight of discretionary adjacent binding zones.

It could be argued that, in a scenario where the Commission is afforded discretion, its decision-making process cannot be subject to judicial control. In such cases, the determining factors would be merit, convenience and/or expediency, and these are not susceptible to judicial review. Otherwise, the separation of powers, which is also a dimension of the rule of law and democracy – as values on which the Union is founded (see Article 2 TEU) – would be at stake.

Such an interpretation carries the risk of undermining the fundamental principles of the rule of law, namely the control of power and its subordination to the law. In conclusion, it can be stated that all forms of authority are ultimately subject to the law. Regardless of the degree of openness in the rule that translates into discretion, all power is ultimately limited. And all power is constrained by fundamental rights, serving both as a shield and a sword. Thus, it is reasonable to assume that *if the legislature and the executive branch exercise Force and Will, the judiciary will be expected to exercise judgement* (see Loper Bright Enterprises v. Raimondo).

Even if companies were not recognised as entitled to fundamental rights (which is not the position we are taking), procedural fundamental rights are considered to afford protection to any individual who is a party or is directly affected by administrative or other proceedings. Indeed, in addition to their role as traditional cornerstones of individual subjective positions, fundamental rights also serve as objective procedural standards and precipitates of constitutional values, common to both

domestic and EU jurisdictions (for an overview, see, among others, Ribeiro). When viewed in their objective dimension or even as principles, fundamental rights impose positive obligations on both to the legislature and the executive branch, independent of the subjects (for further insight into the particular importance of fundamental rights and access to information in the context of DMA enforcement, see Helminger and Hornkohl, 2024).

In order to ensure the effective protection of the law, the Court of Justice requires a fair trial that is independent of the executive branch (see, among others, Netherlands and Van der Wal/Commission). While this does not preclude the possibility of the enforcer's views influencing the judiciary's decision, it is essential that the courts maintain substantive independence, in the sense that executive decisions are not perceived as binding on the judiciary. It is only through this approach that those seeking justice and the general public can be assured of the continued confidence in the judicial system.

In addition to ensuring compliance with the relevant legislation (i.e., the control of all relevant questions of law), judicial review may extend to considerations such as the factual assumptions on which a Commission decision is based and the purpose that was actually pursued. Indeed, while the Commission is permitted a significant degree of discretion in making determinations of fact, these must be substantiated by evidence. In essence, it is the responsibility of the courts to delineate the scope of discretion granted to the authority by a specific statute. Moreover, the judiciary is empowered to ascertain the impartiality and proportionality of the actions undertaken by the European Commission. Finally, with specific reference to fundamental rights, it is important to note that, in accordance with Article 52 of the CFR, any restriction on the exercise of the rights and freedoms recognised therein must be provided for by law, respect the essential content of those rights and freedoms, and comply with the principle of proportionality. This principle requires that any limitation on the rights and freedoms of individuals must be both appropriate and strictly necessary and proportionate in the strict sense. The principle and guarantee of judicial control also apply here. It is not policymaking; rather, it is fundamental rights adjudication.

It is our contention that this is the manner in which the European Commission's discretion in the DMA must be perceived.

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