

The Commission's strategy to regulate Big Tech

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The Commission employs a stick-and-carrot approach, demonstrating its commitment to enforcing regulations while engaging in dialogue. It should balance maintaining regulatory intervention's credibility while fostering constructive dialogue through an incentive framework.

1 Introduction

When it comes to regulating Big Tech, the Commission assumes a central role as the main regulator. It possesses a range of regulatory instruments to act preemptively before a practice occurs via merger control laws and digital competition regulations like the EU Digital Markets Act (DMA) and post-event after a practice occurs via existing antitrust laws. Over the past two decades, the Commission has extensively used these tools to shape the behaviour of prominent players such as Alphabet, Apple, Amazon, Meta, and Microsoft in Europe¹.

The DMA represents a significant addition to the Commission's regulatory arsenal. It provides an expedited means to address harmful practices implemented by designated Big Tech acting as gatekeepers due to their unavoidable position. Employing a stick-and-carrot approach, the Commission aims to incentivise gatekeepers to voluntarily comply with European rules. This strategy sends a clear signal to gatekeepers and stakeholders alike that the Commission possesses both the capability and willingness to intervene formally when necessary while also emphasising its commitment to constructive dialogue to resolve contentious issues without resorting to formal measures.

However, both aspects of this approach have inherent limitations. The stick approach necessitates striking the right balance to ensure the credibility of regulatory intervention, while the carrot approach requires the establishment of an incentive framework conducive to fostering constructive dialogues among the Commission, gatekeepers, and stakeholders. Finding the balance between the stick and the carrot is crucial to effectively regulate Big Tech and promote competitive and fair digital markets in Europe.

¹ You can find all cases against Alphabet, Apple, Amazon, Meta, and Microsoft on the Commission's website. <https://competition-cases.ec.europa.eu/search>

2 The Stick-and-Carrot Approach

The Commission uses its enforcement power as a stick to police gatekeepers when they misbehave. Traditional antitrust laws work hand in hand with the DMA, allowing both tools to address the same alleged harmful practices by the same firm².

An example highlighting this synergy is the *Apple Music Streaming* case. On 3 March 2024, the Commission considered that Apple abused its dominant position by prohibiting music streaming services like Spotify from informing and directing users, via their iPhone applications, to alternative offerings on their websites, thus enforcing an anti-steering rule³. The Commission levied a hefty €1.84 billion fine on Apple and mandated the removal of the alleged anticompetitive clause regarding music streaming services. Notably, the fine structure included a punitive component of €1.8 billion, a first in EU competition law, aiming to ensure deterrence. This punitive fine sends a clear signal to Apple to adhere to European rules, acting as a warning for compliance, including under the DMA.

Four days later, 7 March 2024 marked the compliance day for the DMA. Gatekeepers, including Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft, were required to comply with the DMA and submit both confidential and public versions of their compliance reports detailing their measures⁴.

Following this compliance day, the Commission employed a stick-and-carrot approach. Initially, it sought dialogue with gatekeepers to resolve potential compliance issues informally. The *Apple Epic Games* saga illustrates swift and informal intervention. When Apple prevented Epic Games from using DMA provisions to create an alternative app store on the iPhone, the Commission intervened⁵. Subsequently, Apple quickly lifted the ban after Epic Games

² C-117/20 *Bpost*, ECLI:EU:C:2022:202, 22 March 2022.

³ European Commission, Commission Fines Apple Over €1.8 Billion over Abusive App Store Rules for Music Streaming Providers, 4 March 2024 (accessed 28 March 2024). Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1161

⁴ European Commission, Designated Gatekeepers Must Now Comply with All Obligations Under the Digital Markets Act, 7 March 2024 (accessed 28 March 2024). Available at: https://digital-markets-act.ec.europa.eu/designated-gatekeepers-must-now-comply-all-obligations-under-digital-markets-act-2024-03-07_en

⁵ Epic Games, Update: Apple Reinstates Epic Developer Account After Public Backlash for Retaliation, 6 March 2024 (accessed 28 March 2024). Available at: <https://www.epicgames.com/site/en-US/news/apple-terminated-epic-s-developer-account>

committed to adhere to Apple's terms, showcasing the Commission's use of dialogue as a tool to incentivise compliance⁶.

Furthermore, the Commission emphasised dialogue with Apple regarding its compliance plan, leading to adjustments aligning with DMA provisions concerning alternative distribution from the web⁷. DMA workshops organised by the Commission further facilitated constructive dialogue between gatekeepers and stakeholders, aiming to enhance compliance measures⁸.

However, to enforce DMA compliance effectively, the Commission must demonstrate its ability to wield the stick. Thus, on 25 March 2024, the Commission initiated formal investigations into DMA non-compliance against Alphabet, Apple, and Meta, and took investigatory steps against Amazon and Apple⁹. Particularly significant are the investigations against Apple, one of which focuses on the DMA provision prohibiting anti-steering rules for all developers. This investigation complements the previous prohibition decision in the *Apple Music* case. If Apple is found non-compliant, the Commission could potentially levy fines for both DMA non-compliance and breach of an antitrust order, demonstrating its capacity to enforce compliance using both DMA and antitrust laws until Apple complies.

3 The Messages

The stick-and-carrot approach underscores the Commission's readiness to act swiftly while remaining open to resolving issues through constructive dialogue with gatekeepers and stakeholders. The Commission's message to gatekeepers is unequivocal: they can either choose to resist or engage in dialogue.

⁶ Emma Roth, Epic Games Just Got Unbanned by Apple — Again, *The Verge*, 8 March 2024 (accessed 28 March 2024). Available at: <https://www.theverge.com/2024/3/8/24094543/epic-games-ios-developer-license-apple-dma>

⁷ Apple, Apple Announces Changes to iOS, Safari, and the App Store in the European Union, 25 January 2024 (accessed 28 March 2024). Available at: <https://www.apple.com/newsroom/2024/01/apple-announces-changes-to-ios-safari-and-the-app-store-in-the-european-union/>

⁸ European Commission, DMA stakeholders workshops (accessed 29 March 2024). Available at: https://digital-markets-act.ec.europa.eu/events/workshops_en

⁹ European Commission, Commission Opens Non-Compliance Investigations Against Alphabet, Apple and Meta Under the Digital Markets Act, 25 March 2024 (accessed 29 March 2024). Available at: https://digital-markets-act.ec.europa.eu/commission-opens-non-compliance-investigations-against-alphabet-apple-and-meta-under-digital-markets-2024-03-25_en

The Commission also sends an explicit message to stakeholders who are eager to use all available legal mechanisms to ensure the effectiveness of the DMA, including resorting to private enforcement through lawsuits before national judges. This private enforcement mechanism complements the Commission's public enforcement efforts.

However, the Commission has concerns about private enforcement. National courts can request the Commission to intervene in the proceedings, potentially diverting the Commission's limited human resources away from public enforcement. Furthermore, inconsistent interpretations of DMA provisions by national judges may lead to a fragmented landscape of DMA rulings, contradicting the DMA's objective of harmonising the digital single market.

To address these concerns, the Commission must swiftly reassure stakeholders of its commitment to DMA enforcement and dissuade them from resorting to private enforcement. The expedited initiation of formal DMA investigations not only signals the Commission's readiness to intervene but also preempts national judges from delivering inconsistent decisions. Should national courts review a DMA provision, they cannot issue a decision contradicting a Commission-adopted decision or one conflicting with a Commission-contemplated decision in an ongoing proceeding. This clear message to stakeholders conveys the Commission's assurance that it will fulfil its mandate effectively.

4 The Limits

While the stick-and-carrot approach is effective, it does have its limitations. The stick approach requires the Commission to strike the right level of intervention to maintain credibility. It should only wield the stick when serious concerns arise regarding a gatekeeper's non-compliance with the DMA and when there is a strong likelihood of winning the case before the European Court of Justice. Additionally, the Commission should be cautious not to accept unreasonable requests for intervention from stakeholders seeking rent. Otherwise, the Commission will lose its credibility if it loses cases and satisfy rent-seekers.

Conversely, the carrot approach necessitates the establishment of an incentive framework that fosters constructive dialogues among the Commission, gatekeepers, and stakeholders¹⁰. This framework should signal that compliance is an iterative process, with measures improving

¹⁰ For an in-depth discussion about a model for a participative approach, see Christophe Carugati, A Model for a Participative Approach to Digital Competition Regulation, *Bruegel*, 27 February 2023.

based on feedback received. The feedback provided must be constructive and aligned with DMA requirements. For instance, stakeholders should not make unreasonable demands, such as requiring Google to remove Google Chrome from its browser choice screen to bolster the market share of competing browser engines. The DMA only mandates Google to offer a browser choice screen displaying a list of browser engines, enabling users to freely select their preferred browser. The DMA does not require that the screen leads to an increase in the market share of competitors. External experts should play a crucial role in impartially assessing compliance solutions and facilitating consensus among involved parties. Furthermore, the Commission should offer guidance on certain DMA provisions, like the one related to fair, reasonable, and non-discriminatory general access conditions, to clarify interpretation. Such guidance would provide a clear framework for understanding the DMA requirements.

Ultimately, the carrot approach may yield more effective and expedient compliance measures than the stick, as it incentivises constructive engagement and continual improvement.

About

Digital Competition

Digital Competition ([digital-competition.com](https://www.digital-competition.com)) is a research and advisory firm. Our mission is to advance open digital and competition policies for better innovation. We inform our members and clients on emerging and global digital and competition issues through impartial, forward-looking analyses, shaping policies that foster innovation for all. This analysis did not receive any funding.

This paper is part of our DMA Dialogue Hub (<https://www.digital-competition.com/dmadiialoguehub>). The Hub is dedicated to a participatory approach of the DMA, ensuring compliance solutions that benefit everyone. We act as an expert-driven, trusted intermediary, fostering constructive dialogue between stakeholders and the Commission. Our annual membership fee from various stakeholders safeguards impartiality. Finally, we help navigate policy challenges, including with other European and non-European digital competition laws.

To enhance this dialogue, we are launching the DMA Dialogue Series, delving into compliance solutions and seeking consensus with stakeholders. We encourage them to share publicly available research and relevant documentation on compliance solutions. We also offer consultations, training sessions, and conferences on DMA. Contact us to join the Hub as a member and/or for consultation/press inquiries.

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