



June 25, 2024

Rekabet Kurumu  
Üniversiteler, 1597. Cd. No:9  
06800 Çankaya/Ankara  
Türkiye

Dear Rekabet Kurumu:

On behalf of Chamber of Progress – a tech industry association supporting public policies to build a more inclusive society where all people benefit from technological leaps – I appreciate the opportunity to share our perspective on competition policy. We understand that, while the official comment period for your consultation is closed, you are still considering language, and we wanted to provide our perspective as well.

As a transatlantic organization, we have seen firsthand the shortcomings of the Digital Markets Act (DMA) in Europe. We strongly urge you to reject European-style regulation in Turkey and instead embrace policies that will promote innovation, ensure vibrant competition, and benefit consumers.

The Turkish technology ecosystem is thriving. To ensure that public policy continues to nurture more innovative Turkish startups, policymakers should remember that competition policy must prioritize protecting consumers - not competitors.

One-size-fits-all rules like the DMA are both over-inclusive and under-inclusive, and carry unintended negative consequences for users and businesses that rely on these platforms. As recent history in Europe illustrates, this is not a theoretical concern. Customers have already been harmed. I am including several recent articles documenting this trend and more fundamental problems with the approach of the European Commission.

I would be delighted to discuss our views with your team in greater length if given the opportunity.

Sincerely,

*Kayvan Hazemi-Jebelli*

Kayvan Hazemi-Jebelli  
Senior Director, Europe  
Chamber of Progress

Enclosed:

Annex 1: "Europe's Digital Market Act Fails Consumers", 4 March 2024

Annex 2: "The Digital Markets Act's 'Statler & Waldorf' Problem", 7 March 2024

Annex 3: "DMA: Setting the Goalposts", 13 February 2024

Annex 4: "The DMA's Missing Presumption of Innocence", 5 March 2024

Annex 5: "Confronting the DMA's Shaky Suppositions", 16 April 2024

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# Europe's Digital Market Act Fails Consumers

The EU's "Gatekeeper" tech law is here. Here's how it's making services worse for European consumers.



Adam Kovacevich · Follow

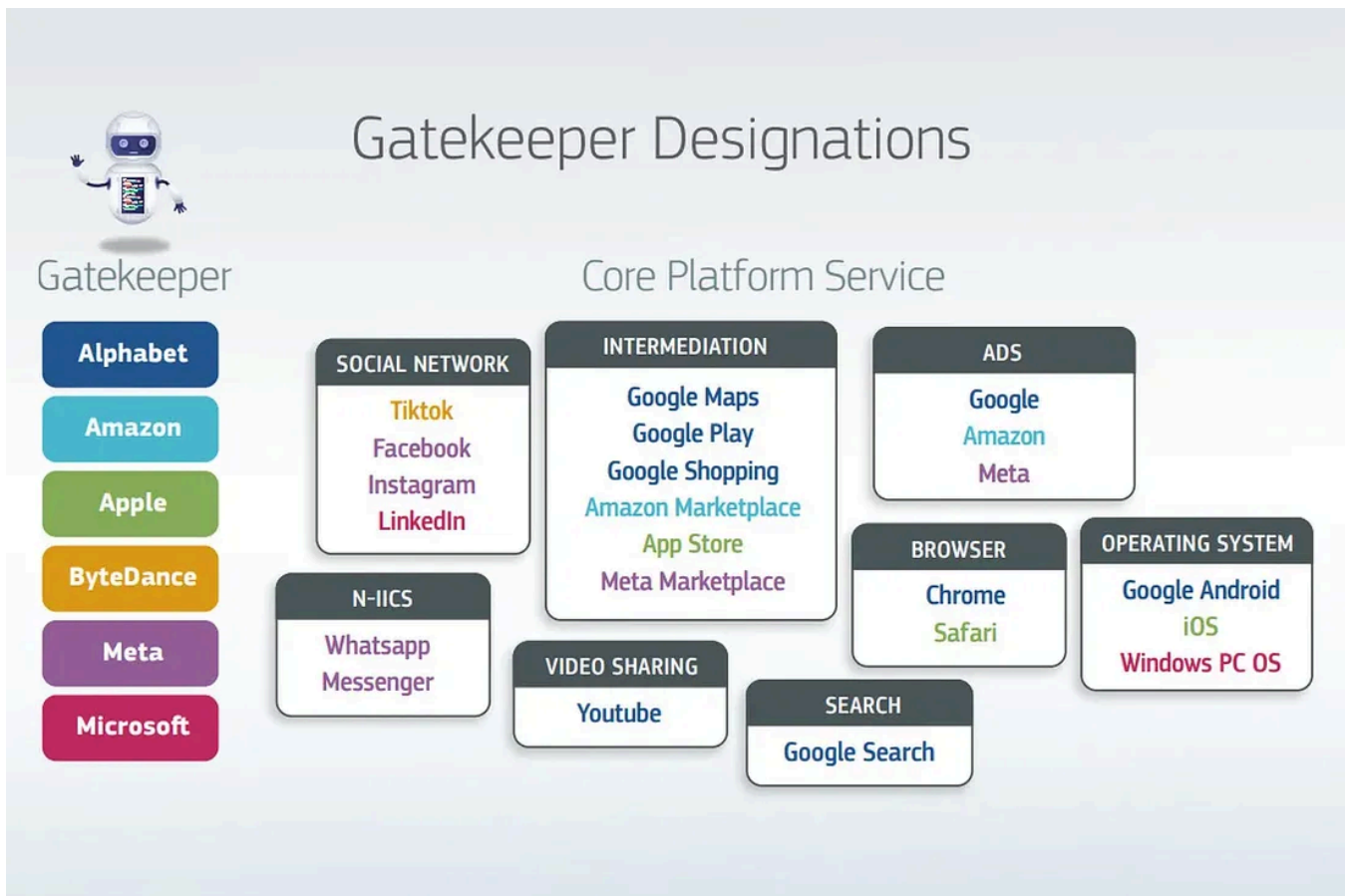
Published in Chamber of Progress

7 min read · Mar 4, 2024

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Europe's Digital Markets Act regulates these services

Global tech policymaking is about to have a “Sliding Doors” moment, with new European regulations making tech services markedly worse, while millions of American consumers continue enjoying the status quo.

Two years ago, the U.S. Congress rejected two bills — the American Innovation Choice Online Act and the Open App Markets Act — that would have blocked Big Tech companies from offering vertically integrated services (like Amazon Prime, Google Maps in search results, and the iOS App Store).

But at the same time, Europe went in the opposite direction, adopting their own bill with the same mandate, the Digital Markets Act (DMA).

The Digital Markets Act designates six “gatekeeper” tech companies — five American and one Chinese — and 22 “core platforms” from those companies. These services must turn off any vertical integration with other company services, and must enable interoperability from competing services (see graphic above).

Now that the DMA’s implementation deadline of March 7 is here, we are able to see the law’s impacts more clearly. In short, it’s not a pretty picture.

*The Digital Markets Act degrades the quality of Big Tech products used by millions of Europeans — removing useful features, reducing security, unleashing spam and hate, undermining parental controls, and making services harder to use.*

Here are some notable examples:

### **1. Mandatory app “sideloading” on iOS — despite EU governments’ private wishes**

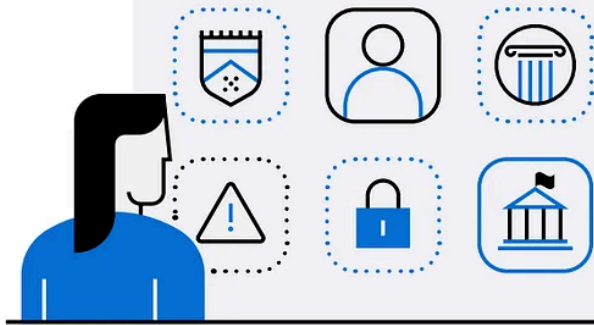
The DMA is forcing Apple to allow “sideloading” of apps onto iPhones without going through App Store review. Apple has highlighted repeatedly that this mandate will threaten the security and privacy of iPhone users, by giving malicious actors more pathways into users’ phones.

The EU largely brushed off Apple’s concerns during debate on the DMA. But a new white paper from Apple reveals that:

*Government agencies, both in the European Union and outside of it [...] have reached out to us about these new changes, seeking assurances that they will have the ability to prevent government employees from sideloading apps onto government-purchased iPhones.*

*Several have told us that they plan to block sideloading on every device they manage. One EU government agency informed us that it had neither the funding nor the personnel to review and approve apps for its devices, and so planned to continue to rely on Apple and the App Store because it trusts us to comprehensively vet apps.*





### Concerns from Governments and Users

We expect that many will welcome these protections, because we know that there are real concerns about the changes Apple is making to its platform. Since we announced DMA-related changes to iOS, Safari, and the App Store in the EU on January 25, 2024, we have heard concerns from governments—including government agencies of EU member states—and users about the risks of allowing alternative app stores and alternative payment processors on iOS, and asking how and if we plan to put safeguards in place against those risks.

**Government agencies**, both in the European Union and outside of it, have been quick to recognize the risks created by these new distribution options and the need for protective measures. These agencies—especially those serving essential functions such as defense,

banking, and emergency services—have reached out to us about these new changes, seeking assurances that they will have the ability to prevent government employees from sideloading apps onto government-purchased iPhones.

Several have told us that they plan to block sideloading on every device they manage. One EU government agency informed us that it had neither the funding nor the personnel to review and approve apps for its devices, and so planned to continue to rely on Apple and the App Store because it trusts us to comprehensively vet apps.

These agencies have all recognized that sideloading—downloading apps from outside the App Store—could compromise security and put government data and devices at risk.

And **users** have sent Tim Cook numerous emails expressing their fears that these changes will make their experience on iPhone less safe. These customers have told us that what they love and value about Apple and its products is our commitment to protecting their privacy and security, and that they fear the risks the new changes may bring to their own devices—and those of their families.

On top of this, individual European consumers have emailed Apple CEO Tim Cook raising concerns about the security impacts of the DMA's sideloading mandate:

European governments recognize that the DMA's sideloading mandate is a threat to national security – but they're leaving European consumers to fend for themselves.

To: **Tim Cook**  
From: **Apple User**  
Subject: **Sideloading**  
Date: **January 16, 2024**

**Can you even guarantee security to people who don't want sideloading on their devices?**

Surely lot of people prefer getting normal applications as usual. A way to unaccept side-loading and having « normal Apple applications » on installation would be a nice way.

To: **Tim Cook**

From: **EU Apple User**

Subject: **Concerns and Suggestions Regarding EU's Sideloading Mandate**

Date: **January 26, 2024**

I am writing to express my concerns about the recent requirement imposed by the European Union (EU) for Apple to allow sideloading on iOS devices. **I understand that this decision has been made in the interest of promoting competition and consumer choice, but I believe it raises important privacy and security considerations.**

... The App Store has been a trusted source for iOS applications, providing a level of confidence and security that is crucial in today's digital age. Personally, I have always felt safe knowing that the apps I download from the App Store undergo strict vetting processes to protect my device and personal information.

However, with the introduction of sideloading, there is a potential risk of users unknowingly installing malicious or unverified applications from external sources, compromising the overall security of iOS devices. This shift could expose users to various cybersecurity threats, and I am



concerned about the potential consequences of sideloading on iOS.

## 2. Undermining content moderation to create a free-for-all

In the wake of the January 6th insurrection, Apple removed the right-wing app Parler from its App Store, given the app's role in helping plan the attack. Several years before that, Apple removed the Infowars app after its founder Alex Jones called the Sandy Hook gun massacre a “hoax.”

Policymakers routinely call on Apple and Google to remove apps from their app stores. In fact, the EU's Digital Services Act requires timely attention to content moderation flags.

And yet, the DMA chucks app store content moderation overboard, by allowing access for any alternative app store — regardless of whether they have any content moderation at all.

As Apple notes, the DMA will create a free-for-all for hate, hoax, and adult apps, newly free to evade Apple's previous app store content policies:

**Each alternative app marketplace will develop its own market standards for content, business models, and more—and some content and business models that Apple has always protected users from will become available on iPhone.** This is what the DMA intended: marketplaces will be able to offer apps that Apple would not have allowed on the App Store. For instance, none of Apple's new user protections will evaluate whether apps contain adult content, whether gambling or cryptocurrency exchange apps have the required licenses, or whether apps with user-generated content have content moderation policies. We will not consider whether apps are encouraging the reckless use of weapons or whether they are seeking to profiteer from national and global crises like epidemics. Each app marketplace will have to decide whether it will allow those kinds of content and businesses on their marketplaces, and how much to invest in enforcing their rules to ensure apps that violate them stay off their platforms.

So it won't matter that Apple kicked Parler and Infowars off its app store, because **those apps can now just use a DMA-mandated alternative app store to guarantee**

installation on iPhones.

### **3. Evading parental purchase controls**

Apple's "Ask To Buy" feature allows parents to decide which apps their kids download from the App Store. Before the DMA, all iPhone apps were required to be purchased through the App Store, ensuring that teens or kids couldn't evade the "Ask to Buy" feature (and their parent's supervision) by sideloading an app.



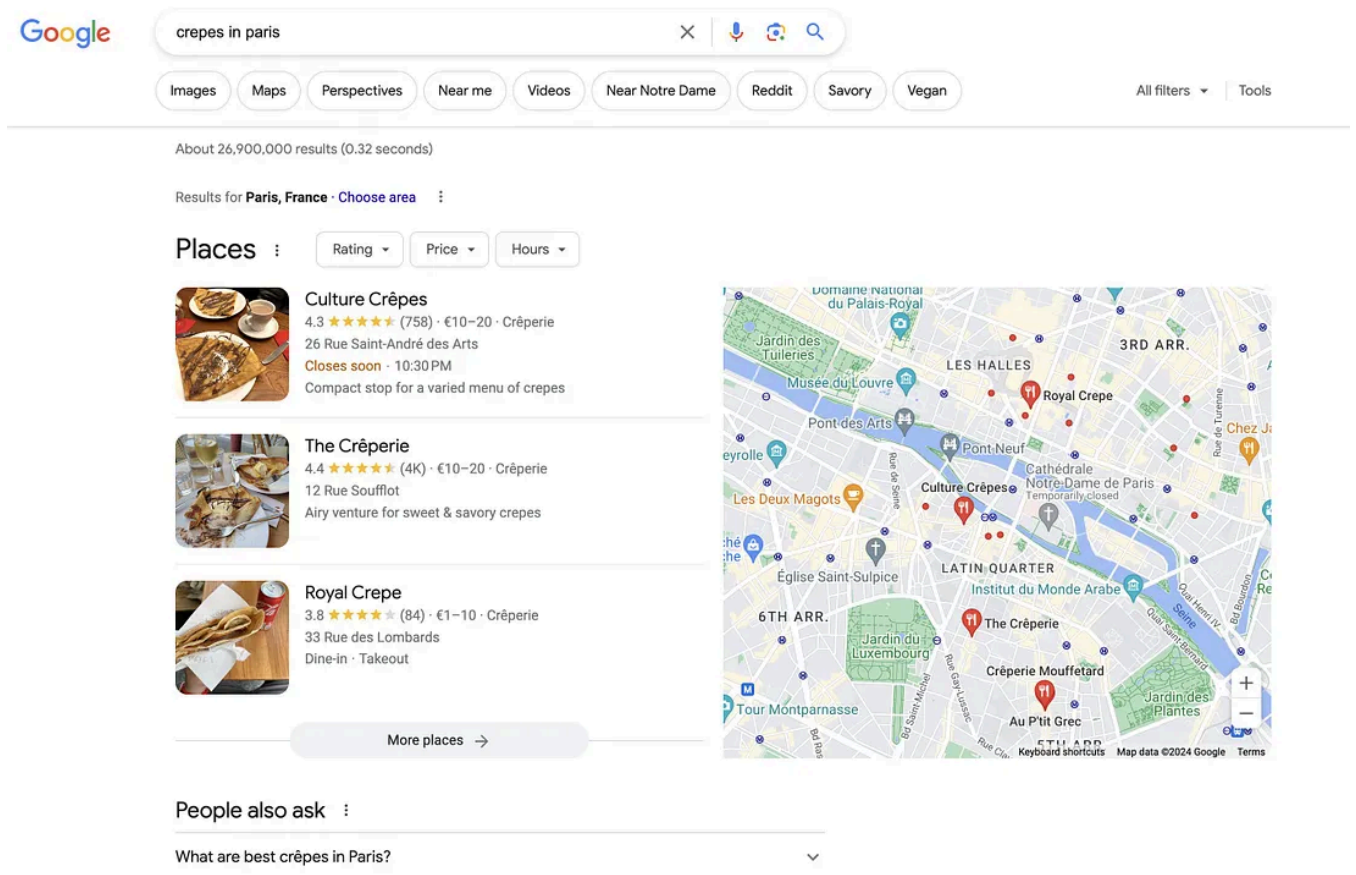
But as Apple notes in its [white paper](#), the DMA is forcing Apple to allow alternative app stores onto iOS — and those stores won't necessarily include parental controls like Ask To Buy. This will leave parents with [fewer controls](#) and assurances than they had before.

**To support the changes we've announced to comply with the DMA, we are also introducing the ability for developers in the App Store to use alternative payment options to complete transactions for digital goods and services within their apps in the EU.** This opens up new options for developers, but it also means users of those apps will not have the same protections and benefits they have come to rely on through Apple's private and secure commerce system, including In-App Purchase (IAP)—such as easy subscription cancellation, a centralized purchase history page, parental controls like Ask to Buy, or protections from predatory tactics like those that aim to trick users into paying a different amount for a digital good than advertised. The burden will fall on users to figure out for themselves, on an app-by-app basis, what benefits and protections might be available to them—and who they should contact for help when transactions go wrong, as AppleCare agents will have limited (if any) ability to assist them.

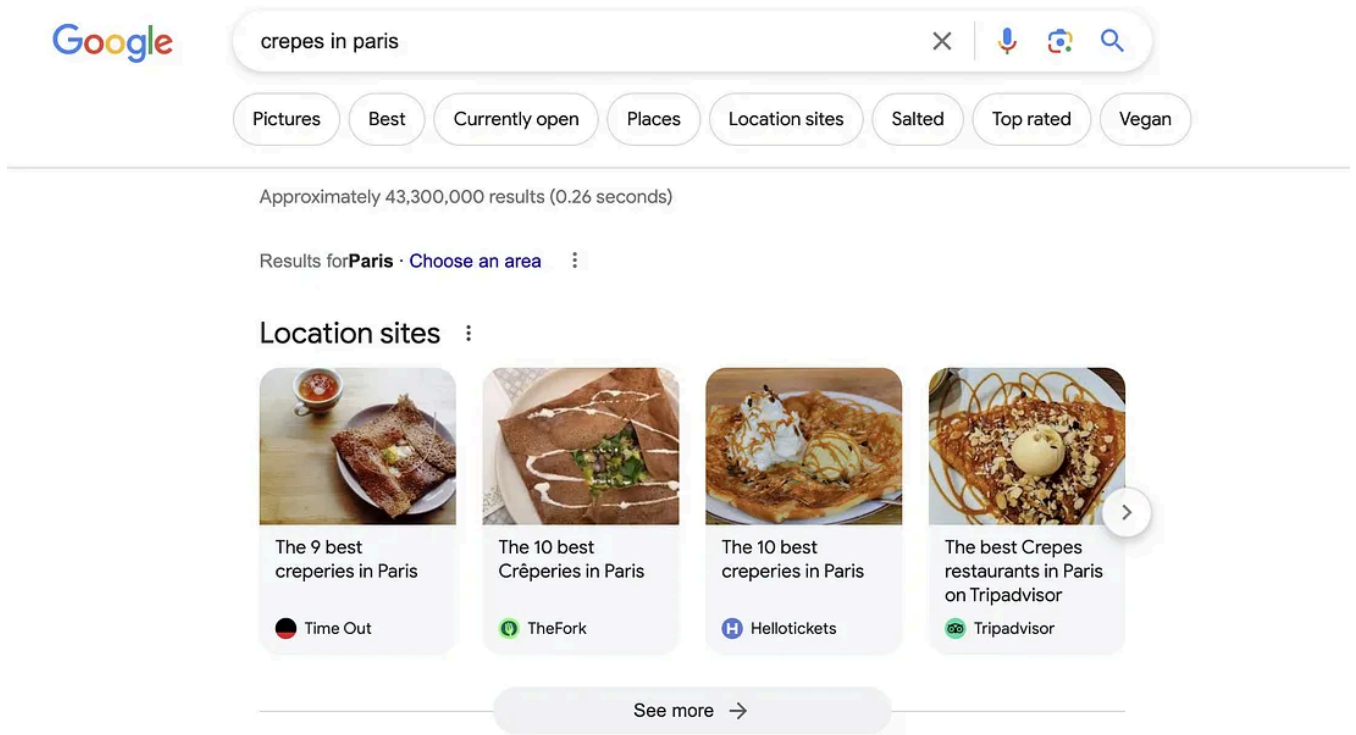
### 5. Google can't show Google Maps in search results

Because of complaints from competitors like Yelp and TripAdvisor, the DMA prohibits Google from “favoring” its own map results in Google search — even when those results are clearly useful for consumers.

Before the DMA, a search for “crepes in Paris” would show both local results plotted on a Google Map, and a “Maps” tab at the top of the results page:



After the DMA, Google's results no longer include the "Maps" tab — and must instead prominently feature results from TripAdvisor and Yelp (the companies that lobbied for the DMA):



Not surprisingly, European consumers are annoyed and unhappy:

*(i)* This question has been marked as a duplicate. [View](#)

Pop Gapon Original Poster

Feb 14, 2024

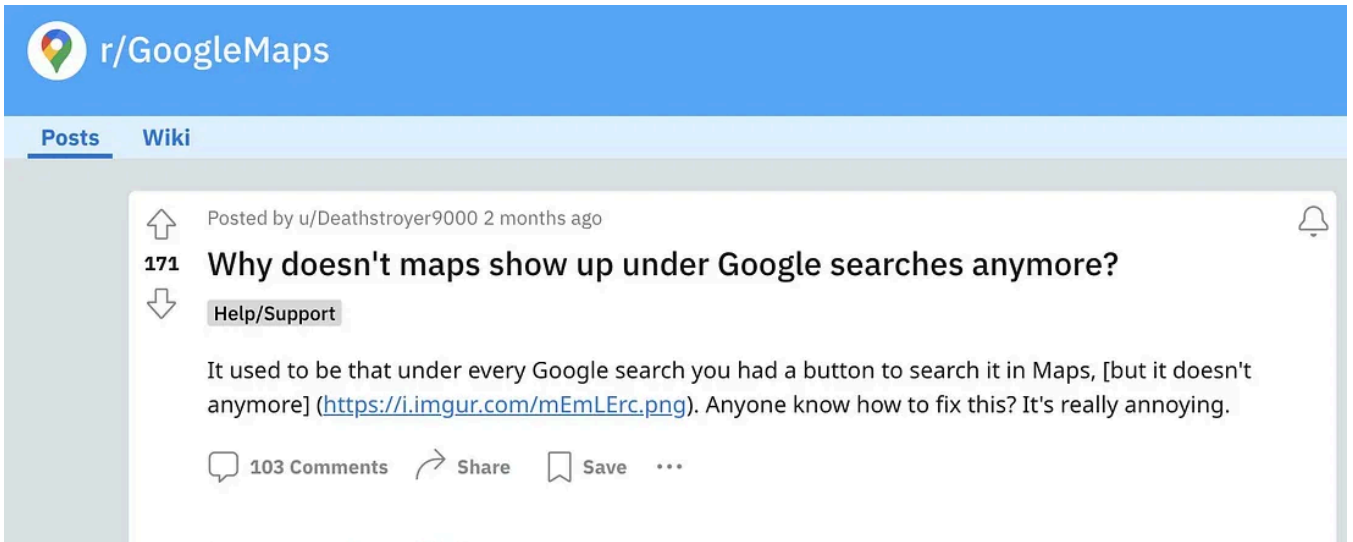
## Maps filter missing

Sometimes when I try to filter the results of my query I cant find the "maps" filter among others - there are standart buttons of "images", "videos", "news" etc, but no "maps". In some cases this filter appears, but not always. How can I fix this?

Details  
[General Search Feedback](#), [Web](#)

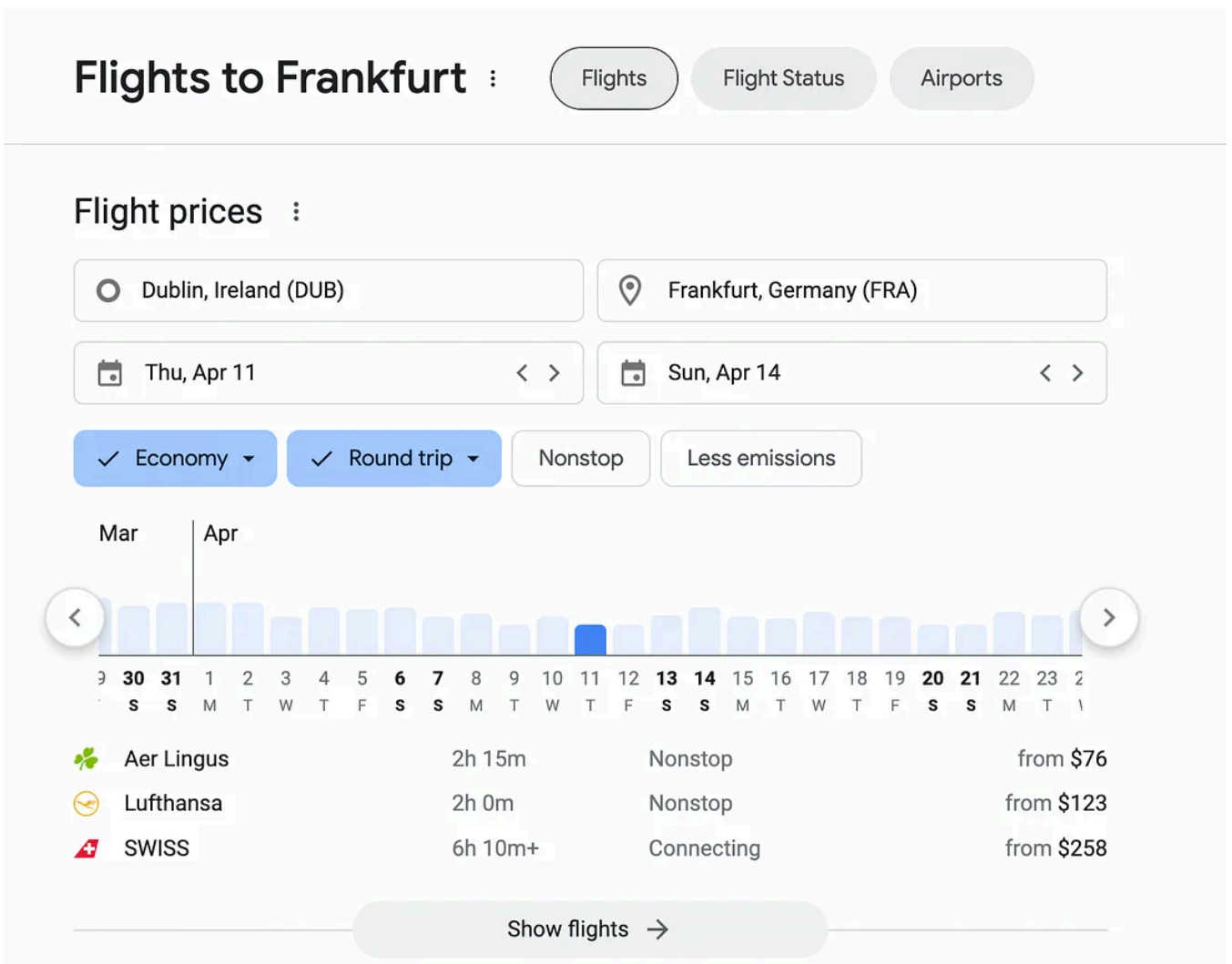
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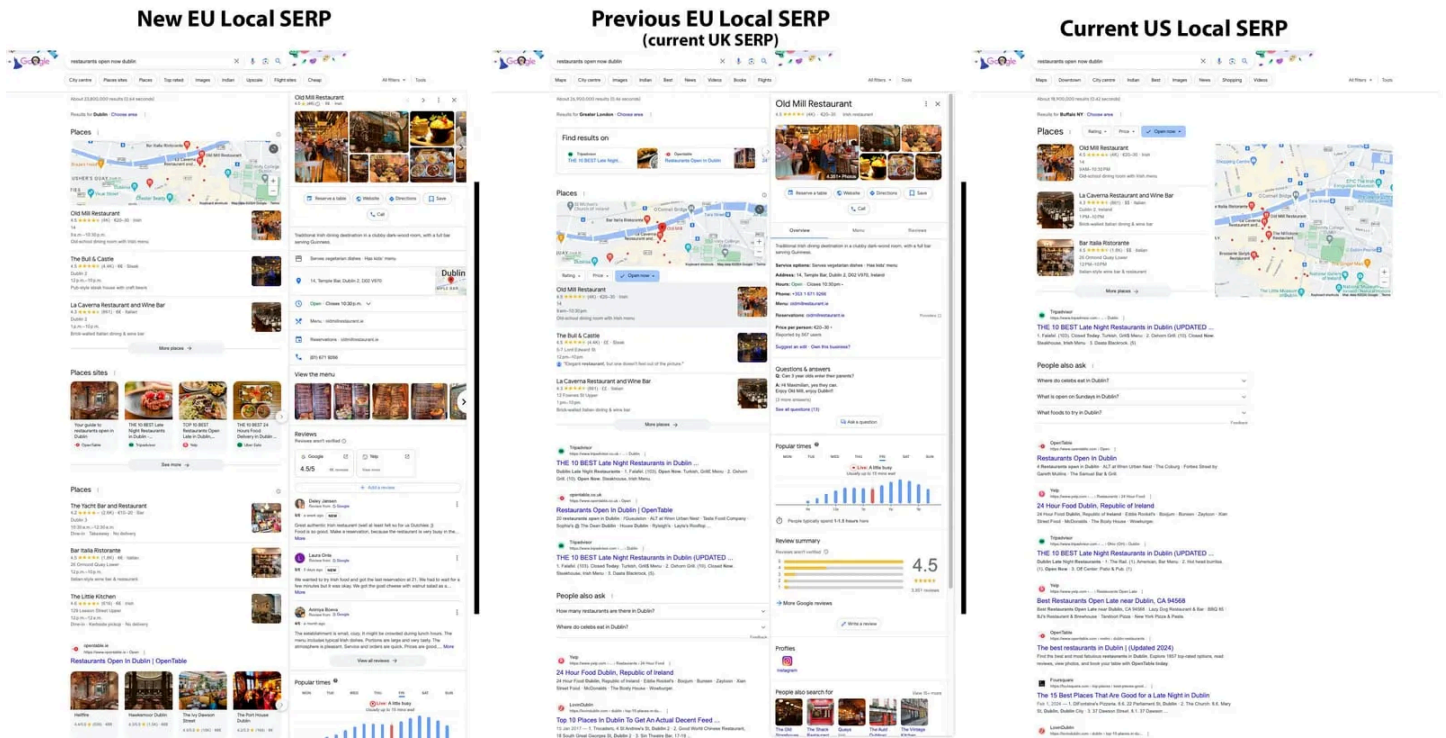
### 5. No more Google Flight search

When you Google “flights from Dublin to Frankfurt,” Google provides an easy flight search box for you. But because rivals like Booking.com complained to the EU that this was unfair, Google announced in January that it is removing this convenience.



### 6. More cluttered Google search results

Google’s search results for local businesses — like “pizza in Rome” — are getting more crowded, thanks to the DMA. Because Google is required to provide “fair” links to competing sites like Yelp and TripAdvisor, the new search results are more crowded and less user-friendly than before (post-DMA results at left; pre-DMA results in middle):



Post-DMA search results at left; pre-DMA results in the middle

### 7. Repeats the mistake of Europe’s cookie pop-ups

If you like the endless annoying “cookie pop-ups” required by Europe’s ePrivacy Directive, you’re going to love the permissions and pop-ups that the DMA has in store.

Right now, users of Instagram, Facebook, Facebook Messenger, and Facebook Marketplace see those services interoperate smoothly with each other. But the DMA requires that Meta bombard users with pop-ups, verifying that they prefer continued integration over fully separate services.

Similarly, the DMA is forcing Google to get users’ opt-in permission to continue offering integrated services:

## About DMA and your linked services

The [Digital Markets Act \(DMA\)](#) is an EU law that takes effect on 6 March 2024. As a result of the DMA, in the EU, Google offers you the choice to keep certain Google services linked. Those Google services include:

- Search
- YouTube
- Ad services
- Google Play
- Chrome
- Google Shopping
- Google Maps

Turning off these integrations will provide users with less useful recommendations and less relevant results — but the DMA is forcing users to see this pop-up anyway:

If services aren't linked, some features that involve sharing data across Google services will be limited or unavailable. For example:

- When Search, YouTube and Chrome are not linked services, your recommendations in Search, like 'What to watch' and your Discover feed will be less personalised.
- When Search and Maps are not linked services, reservations made on Search won't appear in Google Maps.

These integrations may not be beneficial to Google or Meta's competitors, but they absolutely make the services more useful for European consumers. Forcing consumers to jump through a new hoop for very little benefit is repeating the mistake of Europe's cookie law.

As of this writing, we don't yet know the full details of each company's DMA implementation plans. I'll update this post with more examples as we learn more.

But so far, it's clear that **the DMA is making Big Tech services less useful, less secure, less family-friendly, and less useful**. Europeans' experience on Big Tech services is about to get worse compared to the experience of Americans and other non-Europeans.

What is Europe's goal in worsening the experience for consumers? **To help a small set of companies who have noisily lobbied for the DMA for years** — including Spotify, Booking.com, Yelp, and Epic Games. But in my next post, I'll delve into how these companies will never, ever be satisfied with Big Tech's DMA compliance plans.

*Chamber of Progress (progresschamber.org) is a center-left tech industry association promoting technology's progressive future. We work to ensure that all Americans benefit from technological leaps, and that the tech industry operates responsibly and fairly.*

*Our work is supported by our corporate partners, but our partners do not sit on our board of directors and do not have a vote on or veto over our positions. We do not speak for individual partner companies and remain true to our stated principles even when our partners disagree.*

Digital Markets Act

Google

Apple



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## Written by Adam Kovacevich

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CEO and Founder, Chamber of Progress. Democratic tech industry policy executive. Formerly Google, Lime, Capitol Hill, Dem campaigns.

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# The Digital Markets Act's "Statler & Waldorf" Problem

DMA enforcement begins today. The middlemen companies who lobbied for the law will never be satisfied.



Adam Kovacevich · Follow

Published in Chamber of Progress

10 min read · Mar 7, 2024

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Remember Statler and Waldorf? They were the grumpy old Muppets who were always complaining from their balcony, never satisfied with the performances on stage.



The European Commission enforcing the EU's new Digital Markets Act (beginning today) is about to learn that the complainant companies who lobbied for the law — Yelp, Spotify, Epic Games, Booking.com and others — will, like Statler and Waldorf, never be satisfied with its implementation.

I wrote previously about the ways that Europe's Digital Markets Act degrades products for European consumers. Now that we're moving into the DMA's enforcement stage, in this post I'll discuss why the **"Statler & Waldorf" companies won't ever be happy unless they can fully redesign platforms' products or businesses**.

## **Who Wanted the Digital Markets Act?**

It wasn't consumers or European citizens who clamored for the Digital Markets Act — it was mostly **"middleman" services** that hoped to get better placement on iPhones and Android devices, in app stores, or in Google search results. Content aggregators like Yelp, Tripadvisor, and Booking.com. Big app makers like Spotify, Epic Games, and Match.com. Rival search engines like Ecosia, Yandex, and DuckDuckGo.

The companies largely achieved their results: a law that bans big tech services from vertically integrating their services — even if those integrations help consumers.

EU bureaucrats are remarkably open about the DMA's aim: not to help consumers, but to help **"pawns"** (Epic, Spotify, Yelp) turn into **"kings"**:

Now that the DMA is entering its enforcement period, the European Commission is responsible for enforcing it. **In a normal law enforcement or regulatory environment**, the EC would assess each company's compliance based on the letter of the law itself.

But that's not what the EC is going to do.

Instead, they are going to judge DMA compliance by **putting their thumb in the wind**, inviting these same complainants to share their opinions on Big Tech platforms' compliance plans. They're even organizing "workshops" where complainants can come and, well, complain:

## DMA stakeholders workshops

The Commission is organising a number of technical workshops with interested stakeholders to receive their views on specific issues and questions that may arise in relation to the specific implementing measures by gatekeepers that are to ensure effective compliance with the DMA.

### [Microsoft DMA compliance workshop](#)

26 March 2024

### [ByteDance DMA compliance workshop](#)

22 March 2024

### [Alphabet DMA compliance workshop](#)

21 March 2024

### [Amazon DMA compliance workshop](#)

20 March 2024

### [Meta DMA compliance workshop](#)

19 March 2024

### [Apple DMA compliance workshop](#)

18 March 2024

Past EU competition cases show that this approach is a mistake, and won't result in consistent enforcement but a series of ever-moving goalposts. But the EC likely won't realize this for years.

## What Complainants Want: Equal Outcomes, Not just Equal Opportunity

Kay Jebelli of Truth on the Market recently wrote:

*Competition law protects the process of competition, not “fair” outcomes for rivals (as the latter increases the risk of regulatory capture, which some have dubbed “swampetition”).*

*This distinction **between a fair process and fair outcomes** is even more important under the DMA. Commission officials have stated that the DMA is about creating the opportunity for platforms’ business users and rivals to take advantage of the DMA’s access provisions. But the coming months will test whether they stick to their guns.*

*If the goal is to have a fair process — rather than particular outcomes — then **successful enforcement (and compliance)** does not require that rivals actually take advantage of the opportunities offered by the DMA, nor that users choose to switch to their services.*

Put differently, the Digital Markets Act directs Big Tech companies to redesign their products to give their rivals more **opportunity** — in the form of alternative app stores, guaranteed links and visibility in search results, and mandatory de-linking of integrated services.

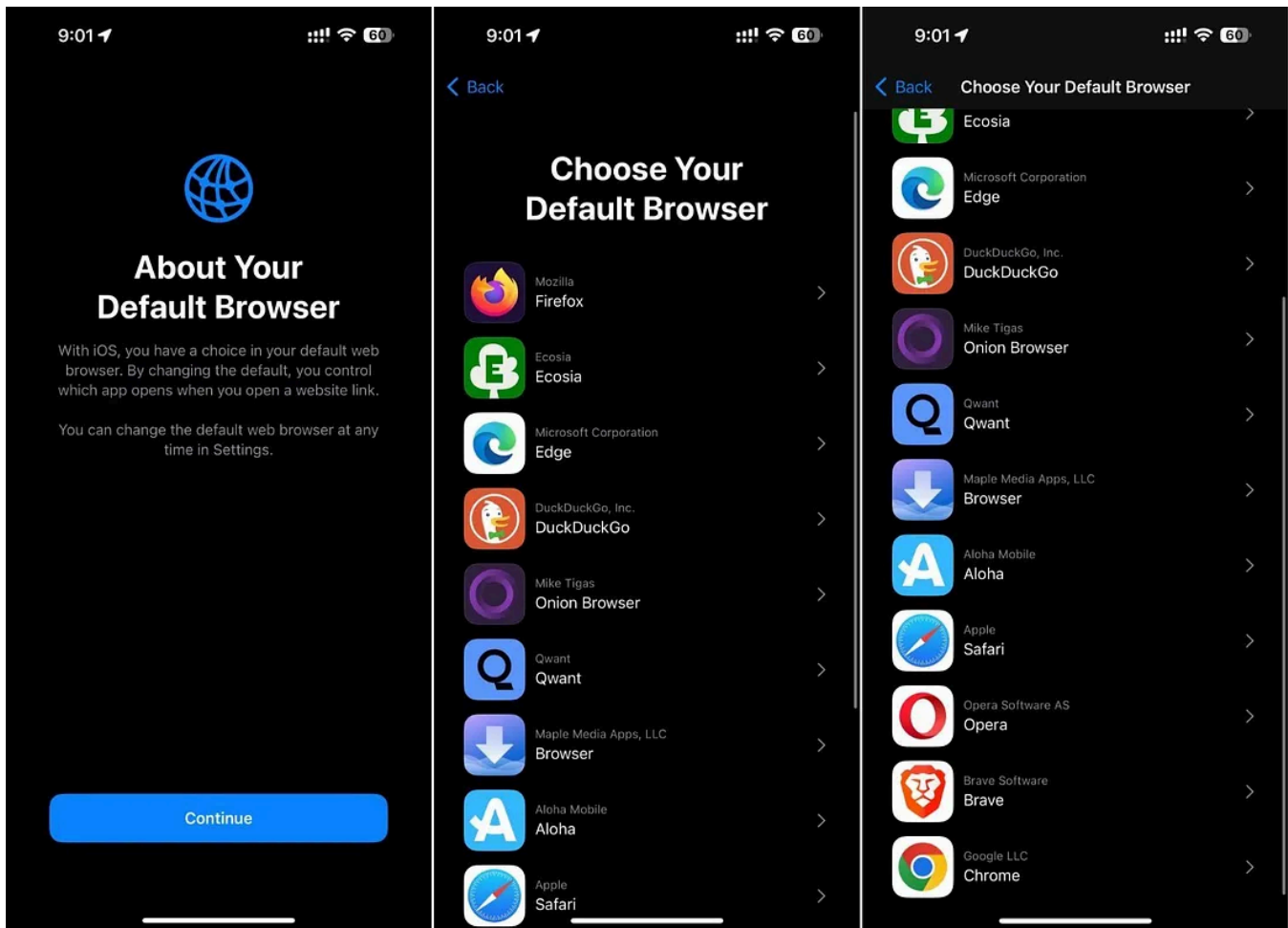
But early indications are that the complainant companies won’t be satisfied with more opportunity. They are already complaining that DMA will be a failure unless it can create the **equal outcomes** that they desire.

Here are some examples:

### **Rival search engine Ecosia unhappy with search engine choice screens**

Under the DMA, iOS and Android must present consumers with a search engine “choice screen” to give more visibility to rival search engines:





But despite this, the CEO of small search engine Ecosia told the [Financial Times](#) that he:

*fears the rules risk leaving his company worse off than before the rules were in place because Google is still able to offer its own services alongside less familiar alternatives. He has already seen evidence that traffic will go straight to Google. “You can’t assume that someone who has been using Google for 20 years will choose something else,” Kroll says. He adds: “The reason this law was made was to repair the damage done to competition. This is not happening. It might even be damaging us.”*

By Ecosia’s measure, the DMA-mandated choice screens will only be successful if Google search is excluded and Ecosia’s market share dramatically increases. What Ecosia wants isn’t “equal opportunity” — it’s vengeance.

### **Spotify unhappy with Apple’s app store changes**

The DMA requires Apple to allow rival app stores on iPhones. But the DMA also states that privacy and security are important, so Apple has announced that it will charge a 50-euro cent fee for each iOS app downloaded through third party app stores — in order to support app “notarization.”

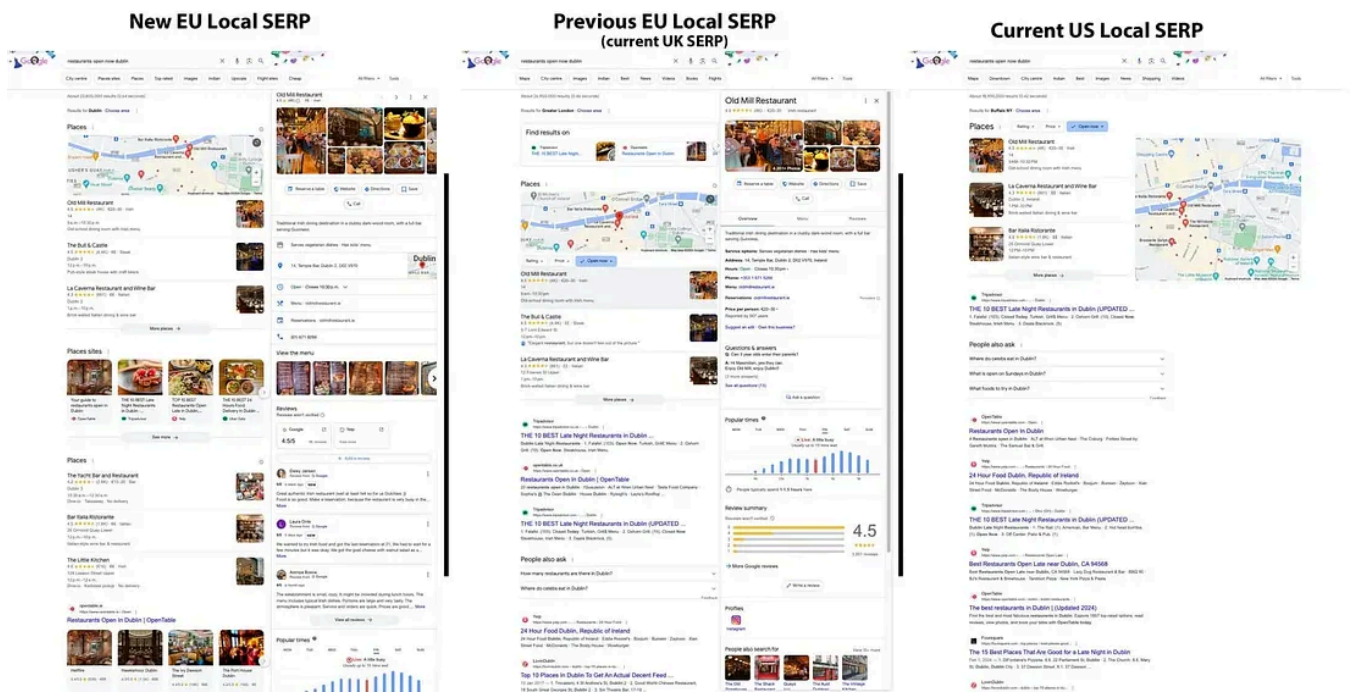
Apple's plans are well within the boundaries of the DMA. Yet Spotify — which has agitated for years against Apple's fees — complained to the Associated Press that Apple's changes are "utterly at odds with the very purpose of the DMA."

So what would Spotify prefer? A redesign of the App Store's business — and presumably a world where Apple is forbidden from charging any commission at all. But as former Congressman Paul Hodes notes, this isn't about consumers at all — but about Spotify's margins:

*"Spotify's CEO, Swedish billionaire Daniel Ek, is personally appealing to American lawmakers and EU regulators, urging them to make changes to app store rules that would make his company money.[...] However, those questionable tactics haven't produced the results executives want, and now the company is hoping lawmakers will step in and change the rules in Spotify's favor."*

### Yelp: Google changes aren't delivering more traffic

The DMA required Google to change its search results page to provide more prominent links to middleman sites like Yelp, TripAdvisor, and Booking.com:



These mandatory changes create more clutter on Google's pages and make it harder for consumers to get a quick answer — but they reflect what the complainants lobbied for.

An early analysis found that consumers aren't clicking on the new mandatory links to Yelp and TripAdvisor:

## SUMMARY

# The new Places Sites module, introduced to comply with European Union regulations around self-preferencing, may as well be invisible.

- Near Media's proprietary research found that 40% of restaurant searchers in Ireland don't scroll down far enough in a typical search result to even encounter the Places Sites module.
- For the 60% of searchers who do see Places Sites, there's almost no engagement and even fewer clicks to the directories that are supposed to benefit from it.

Unsurprisingly, Yelp immediately began complaining that the DMA-mandated changes were a failure **because they didn't result in guaranteed traffic to Yelp:**

*Yelp proposed to EU regulators that to produce more fair outcomes, Google should instead amend the map widget on results pages to show business listings and ratings from numerous providers including Google's directory, Yelp, or others based on how the search algorithms rank them.*

Yelp couldn't be more clear: they're not looking for a "level playing field"; they want **"fair outcomes."** And they've called on the European Commission to open an investigation and force a redesign of Google's search page:

Companies such as Yelp that are critical of the changes in testing have called on the European Commission to immediately open an investigation into Google on March 7, when enforcement of the DMA begins.

"Yelp urges regulators to compel Google to fully comply with both the letter and spirit of the DMA," says Yelp's vice president of public policy, David Segal. "Google will soon be in violation of both, because if you look at what Google has put forth, it's pretty clear that its services still have the best real estate."

**Online travel agencies already unhappy with Google's travel redesign**

I wrote previously about how the DMA forced Google to eliminate Google Flights, which helps consumers quickly find flight options. As Wired reports, "Google is testing a new design in Europe that replaces the Google Flights widget with a more compact listing of options lower down the page that links to airlines rather than Google Flights:



flights from london to madrid



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Flight Status

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Airline	Non-stop	Connecting
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easyJet	€152	– >



Once again however, the complainants are unhappy:

*Annalaura Gallo, a spokesperson for the EU Travel Tech Alliance, which represents Skyscanner, Airbnb, Expedia, and several others, says it hasn't done any user research studies, because the design is blatantly out of step with the DMA. "From our perspective, this is already illegal," she says, pointing to how the new listing is still a distinctive feature on Google's redesigned results page. "They need to treat everyone the same."*

Of course, search engine results have never "treated everyone the same." The value of search engines to consumers is to prioritize the sites that it thinks consumers will find more useful. The goal of search engine "fairness" to websites is an unattainable mirage.

But travel industry sites will continue pushing the European Commission to redesign Google's search results:

*Stables of [online travel agency] Kelkoo says Google's proposed changes for shopping searches, which include a new "Compare offers" button, are also problematic, because Google Shopping results still capture most of the real estate. "Consumers like convenience, but not at the expense of choice, because that creates monopolies and high prices," he says.*

Stables' quote is telling. Like all the complainants, he pretends to call for policy in the best interest of consumers, before accidentally saying what he really thinks out loud: the DMA always was, and always will be about a thumb on the scale for complainants.

### **Mozilla unhappy that Apple browser changes apply only in the EU**

As The Verge reported, "Apple's new rules in the European Union mean browsers like Firefox can finally use their own engines on iOS."

Good news for Mozilla, right? But you know the drill by now:

*Although this may seem like a welcome change, Mozilla spokesperson Damiano DeMonte tells The Verge it's "extremely disappointed" with the way things turned out. "We are still reviewing the technical details but are extremely disappointed with Apple's proposed plan to restrict the newly-announced BrowserEngineKit to EU-specific apps," DeMonte says.*

In short, Mozilla is upset that the EU's law only applies within the EU. But as industry veteran Steven Sinofsky writes, "it's how jurisdiction works. The EU can't mandate software design and functionality where they do not govern and have accountability."

### **"Malicious compliance" complaints = "More product & business changes please"**

As the Big Tech platforms' compliance plans have come out publicly, the Statler & Waldorf complainants have resorted to labeling them "malicious compliance":

But as analyst Benedict Evans notes, this label is really about the gulf between what the DMA mandates and all the changes that the complainants want to see:

More generally, I think the idea that Apple is doing 'malicious compliance' in the EU confuses three rather different things: what you might want from Apple, what the EU wants, and what the law actually says. In particular, you might think Apple's privacy & security arguments are worthless, but the EU *wants* platforms to manage privacy & security. It invented cookie boxes, and thinks they work, and it wants to ban E2EE. This is not an apostle of 'open' computing. [LINK](#)

When you see articles about companies complaining about platforms' DMA compliance plans — and you will, for months on end — keep in mind that the platforms are doing what DMA specified, just not as much as the complainants want.

## We've seen this movie before

EU antitrust chief Margrethe Vestager recently [told Reuters](#) that she has “reservations as to whether or not we will have full compliance.”

But Vestager has also set up a system where “compliance” is determined by the complainants' happiness — and she should know from past cases that their happiness will never come.

Take the [EU's Google Shopping case](#).

It began as a way to “level the playing field” between Google and comparison shopping sites. But after Vestager had imposed a remedy, the comparison shopping sites commissioned a study calling the remedies a “[failure](#)” because *it had not meaningfully increased their revenue or traffic*.

## Google Shopping remedy has failed, study claims

Emily Craig  
29 September 2020

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Or take Vestager's case against Google for preferencing its search engine within Android.

At the urging of rival search engines like DuckDuckGo, Vestager mandated a search ballot screen. But when the ballot screen led to consumers choosing Google, DuckDuckGo's CEO deemed it a [failure](#) — *because it had failed to improve DuckDuckGo's market share*.

That's one reason why former DuckDuckGo exec Megan Gray — no fan of Big Tech — recently declared “[ballot screens](#)” a failure:



Similarly, in the choice screen context, much ink will be spilled, and many meetings will be held to discuss how to improve the choice screen. Companies will jockey to be on it, while demanding other rivals be excluded. They will fight over specific design, performance, and language changes to the choice screen. Officials will collect metrics and monitor the display of the choice screen. This is not speculative; it happened with both the Microsoft and Android choice screens. Busy focusing on the minutia of the choice screen, market participants and regulators will forget the ultimate question: Are consumers sufficiently educated and free from undue influence and attention deficits to actually make a conscious choice in practice?

Of course, the Digital Markets Act **applies the ballot screen approach** to nearly all of big tech's products — providing more visibility to rivals. But the complaints are already howling about not receiving “equal outcomes” — more traffic or revenue.

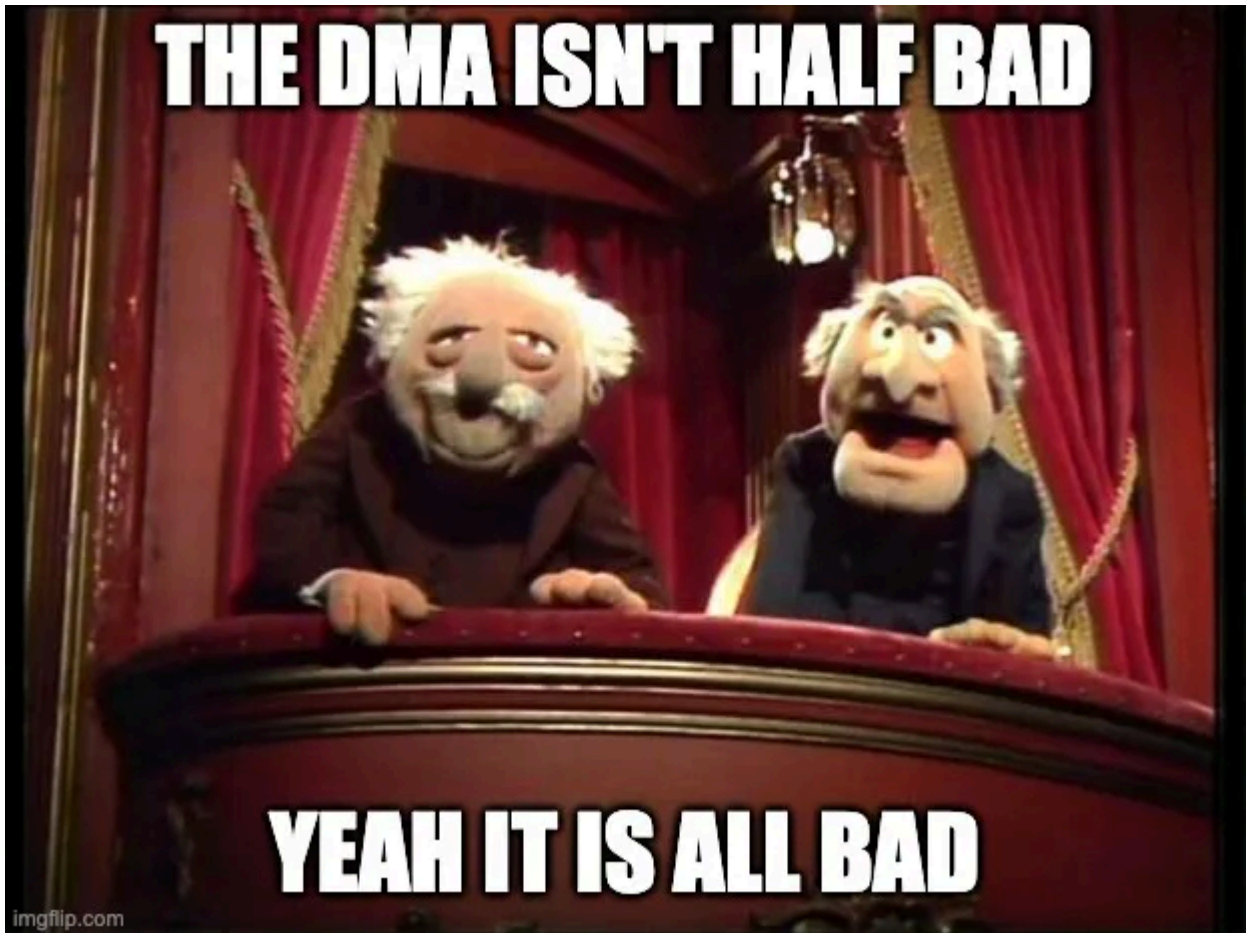
As the [Financial Times](#) put it:

*Industry groups representing travel apps such as Airbnb and Booking.com, and entertainment apps like Spotify and Deezer, complain the tech companies are focused on the letter of the law rather than the spirit of it, and it is having no meaningful impact on their businesses.*

Or [Kay Jebelli](#) again:

*Commissioner Thierry Breton — one of the DMA's architects — said that “[i]f the proposed solutions are not good enough, we will not hesitate to take strong action.” But when will the solutions ever be “good enough,” especially for those rivals who continue to fail the marketplace? At the very least, this seems to contradict claims that the DMA would be deemed successful if companies complied with its “clear list” of obligations.*

The European Commission will soon find that its Digital Markets Act is built upon a no-win trap: forcing changes that hurt consumers, but which help middleman companies — only to find that those middlemen will never, ever be happy unless they can redesign Big Tech's products to achieve a “meaningful impact” on their own businesses.



Digital Markets Act

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### Written by Adam Kovacevich

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# DMA: Setting the Goalposts

By: [Kay Jebelli](#)

February 13, 2024

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**I**n a little less than a month, the European Union’s [Digital Markets Act \(DMA\)](#) will start to bite, but how will it taste?

By March 7, companies that were designated as “gatekeepers” in [September 2023](#) will be required to meet the obligations of Articles 5, 6, and 7 of the DMA Regulation. With the exception of ByteDance Ltd., the Chinese owners of TikTok, all of the designated companies have, by now, presented compliance proposals. The DMA’s expected beneficiaries (and, arguably, the loudest in favor of its passage) have been

**disappointed** by some of these proposals, and seek more. But should the European Commission grant them what they are asking for?

It bears remembering that the DMA applies to only a handful of mostly U.S. tech companies (a far **narrower and more targeted set** than initially advertised). It designates companies based on quantitative thresholds, not any analysis of market power (as evidenced by the fact that there are multiple services within nearly every category of “core platform service”). It imposes competition-law remedies **drawn from** a series of competition-law investigations, not settled case law. It also applies these remedies out-of-context, and with very limited safeguards (no considerations for value creation, or **what would be best for the ecosystem overall**).

For example, the DMA mandates that rivals have access to the infrastructure, features, and functionalities of designated platforms on equal terms to those of the platform owner. It does this ostensibly to promote **ambiguous notions** of “fairness” and “contestability,” which some say opens the door to discretionary enforcement, moving targets, and shifting goalposts. If true, the European Commission can do effectively whatever it wants to achieve its aims.

Given this, there is a clear need for goalposts to ascertain whether enforcement is delivering benefits to consumers. There will even be some at the Commission who recognize that, in the absence of **limiting principles**, they will be subject to rent-seeking, requests for protectionism, and unending lobbying demands for ever-greater concessions. This is not an ideal outcome. Commission officials are also cognizant of the risk that interventions will have **unexpected and undesirable consequences**, particularly where complainants’ arguments are based on specious theories of harm.

Until now, however, the common refrain has been that the DMA establishes a “**clear list of ‘dos and don’ts’**.” Companies know the “rules of the game” and the only question is whether or not they choose to follow them. In other words, what matters for the Commission is whether companies follow the letter of the law. The goalposts were presumably set from the start.

## **Opportunity-to-Contest Versus 'Fair' Outcomes**

Not so many years ago, European Commissioner for Competition Margrethe Vestager [said](#) that “[w]e don’t need a new rule of fairness in our system. Because fair markets are just what competition is about.” In other words, at least under competition law, [a fair competitive process](#) is the policy objective, not some arbitrary notion of what is fair to whomever complains the most or is the most politically favored. Competition law protects the process of competition, not “fair” outcomes for rivals (as the latter increases the risk of regulatory capture, which some have dubbed “[swampetition](#)”).

This distinction between a fair process and fair outcomes is even more important under the DMA. Commission officials have stated that the DMA is about creating the *opportunity* for platforms’ business users and rivals to take advantage of the DMA’s access provisions. But the coming months will test whether they stick to their guns.

If the goal is to have a fair process—rather than particular outcomes—then successful enforcement (and compliance) does not require that rivals actually take advantage of the opportunities offered by the DMA, nor that users choose to switch to their services. After all, if users choose not to switch to European alternatives, it could simply be because users still deem the services of the designated companies as superior, on the merits. It’s a possibility that Commission officials have to consider.

For example, there may be a plethora of new cross-platform mobile-app stores available post-DMA, but consumers may find their selection of apps unappealing; app developers may find it uneconomical to port their apps and maintain separate distribution channels; and some of these app stores may never approach the scale of the stores most closely associated with the device operating system. It could be that users have chosen their devices specifically because of the ecosystem, and don’t actually care for the services of other ecosystems.

It would be hard to convince the average citizen that a regulation ostensibly about fairness means forcing users to adopt services they don’t want. It will therefore be incumbent on the Commission to disentangle causation and correlation, better understand evolving market dynamics, and dismiss complainants’ calls for ever more interventionist enforcement where it’s clearly inconsistent with market demand. As former European Commission Director General for Competition Johannes Laitenberger has [said](#): “far from being a ‘weasel word,’ used to justify voluntaristically desired outcomes, fairness only rings true if it is understood as a call to rigour, coherence and consistency.”



# What About the Costs?

It will also be important for the Commission to consider what level of compliance costs (for both firms and users) are acceptable. Indeed, there are concerns that, even if the DMA leads to a more competitive landscape, this may come at the cost of more expensive goods and a degraded online experience for European users. Such an outcome could hardly be described as “success.”

For a while, industry analysts have been raising concerns that DMA compliance will lead to [a worse experience for users](#) (pointing to the [consent fatigue failure of the GDPR](#), and the likely proliferation of choice screens).

Some of these have seemingly been vindicated by the compliance plans announced by gatekeepers. Apple has repeatedly [warned](#) users that alternative app stores will provide a less-secure environment. Some have argued Google’s (forced) decision to unbundle its services [increases friction](#) for users. Likewise, the [consent forms](#) that are central to Meta’s compliance plan may be a waste of time for [the majority](#) of users that are not especially privacy conscious, or simply desire to have more personalized advertising.

The upshot is that, even if the DMA leads to more competition on the market, this will not be a victory for the bill unless European users are ultimately more satisfied with their online experience.

## Rules of the Game

Given these important uncertainties, it will be essential for enforcers and politicians to clearly signal that the rules of the game have been set, and to measure the DMA’s success free from preconceived notions of how the competitive process should unfold. Unfortunately, early pronouncements suggest this is unlikely to be the case.

Potentially sensing that the DMA would not lead to the outcomes that were initially promised, Commission officials have recently raised the possibility of going *beyond* the “clear list” of obligations, and imposing on gatekeepers to achieve particular market outcomes. On a trip to Silicon Valley, Vestager [expressed](#) her expectation that designated companies will “work with market participants to test if this can bring real

changes in the digital marketplace.” But what is a “real change,” other than a particular outcome?

Likewise, Commissioner Thierry Breton—one of the DMA’s architects—[said](#) that “[i]f the proposed solutions are not good enough, we will not hesitate to take strong action.” But when will the solutions ever be “good enough,” especially for those rivals who continue to fail the marketplace? At the very least, this seems to contradict claims that the DMA would be deemed successful if companies complied with its “clear list” of obligations.

MEP Stéphanie Yon-Courtin, who also helped draft the legislation as one of the lead rapporteurs, [has even suggested](#) that some of the compliance measures could amount to circumvention, punishable by significant fines.

For those with a legal background, this can all be rather frustrating. Clients don’t like to hear “it depends” as an answer, especially if “it depends” on how favorably competitors react. For a business that has to make investment or engineering decisions on the basis of clear legal rules, it can be maddening.

It remains to be seen how much these warnings from Europe’s most powerful officials can be brushed off as pre-campaigning for the 2024 European elections. Several politicians think “[Europe’s battle to reign in Big Tech](#)” will lead to electoral success. But will citizens be impressed if their favorite digital services are dis-integrated and de-personalised? Will regulators be tempted to push even harder, to try and force market outcomes, at the expense of users and overall ecosystem health?

There has been [an antitrust revolution](#) brewing in Europe for quite some time, but there’s a risk it will look a bit too much like some older, idealistic, and ultimately misguided economic revolutions. If that day comes, who in Europe will remember how far the goalposts have moved from “the principle of an open market economy with free competition, favouring an efficient allocation of resources,” as laid out in TFEU [Article 120](#)?

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#### ABOUT THE AUTHOR



### Kay Jebelli

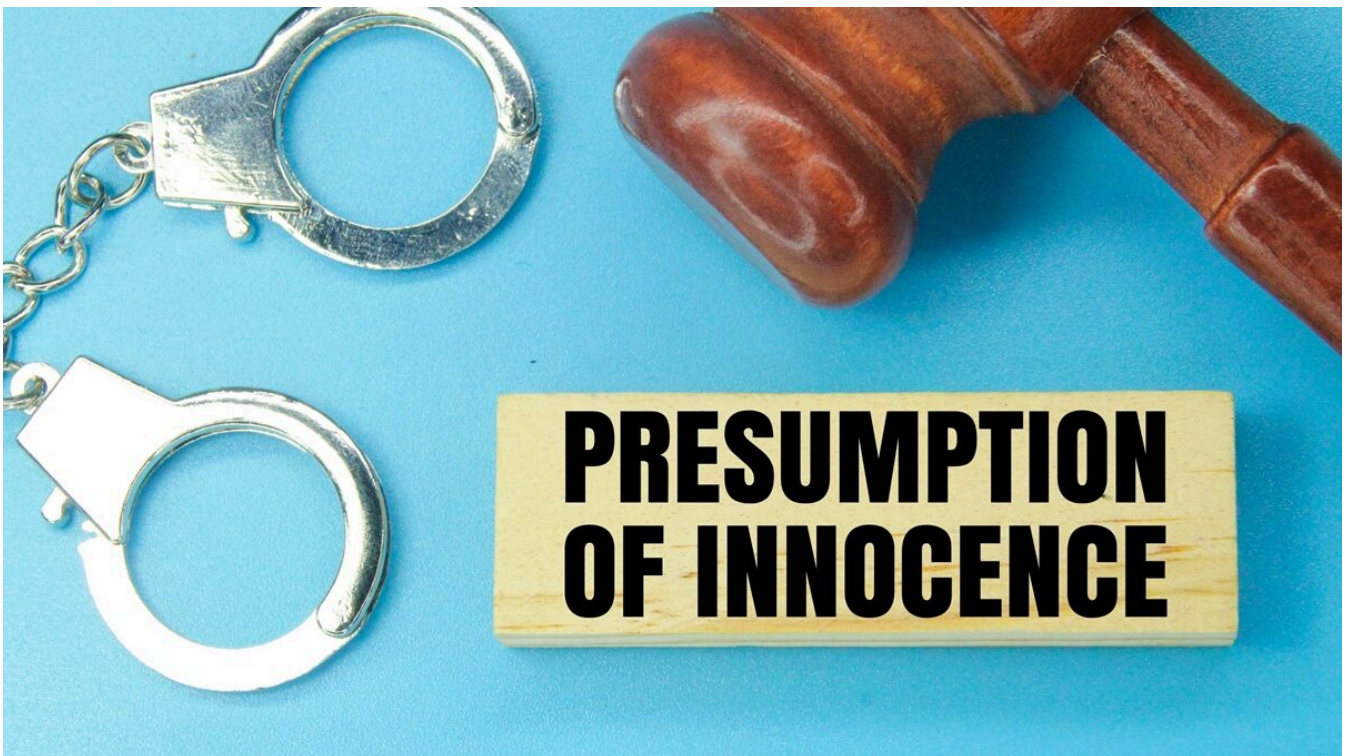
Kayvan Hazemi-Jebelli is principal at Evalusion, a consultancy firm focused on digital-competition policy.

# The DMA's Missing Presumption of Innocence

By: [Kay Jebelli](#)

March 05, 2024

[CITE THIS ARTICLE](#)



**T**he EU's Digital Markets Act (DMA) will come into effect March 7, forcing a handful of digital platforms to change their market conduct in some unprecedented ways. The law effectively judges them guilty (with a very limited, formalistic trial), and brands them “gatekeepers” based purely on size. It then sentences them to far-reaching, one-size-fits-all antitrust-style remedies in pursuit of the stated objectives of “fairness” and “contestability.” We’ll soon begin to see what that looks like in practice, and whether innocent conduct will be caught in the crossfire.



Under competition law, even dominant companies are presumed innocent; bigness alone is not a crime. Almost any kind of business conduct can potentially be justified if it can be proven to lower price, increase output, or improve quality for consumers. Yet the DMA's *per se* approach removes these important safeguards ensuring that pro-competitive, value-creating, and welfare-enhancing behaviors can continue. While other technology companies—even those with proven market power—can still justify such conduct on pro-competitive grounds, designated gatekeepers cannot (except on narrow grounds of security).

The DMA creates a two-tiered legal regime in which some digital companies—that is, those not subject to the DMA—are “[more equal](#)” than others. If applied too strictly, a host of pro-competitive conduct will be prohibited. Companies that benefit from the existing digital ecosystems efficiencies and network effects will lose out, as will consumers. But why is that the law, and can these negative outcomes be avoided?

## Inequality Before the Law

Proponents of the DMA say that it's not about targeting large U.S. technology companies, but you wouldn't know that from looking at [the list](#) of designated core platform services (five out of the six designated companies are from the United States, and none is from the EU). The conduct of concern [is largely the same as that already covered by competition law](#), and the obligations to be imposed are [modeled on competition enforcement](#), with some based on ongoing investigations (or those still subject to judicial review). There is, however, no effects-based analysis or case-by-case assessment for application of the DMA. The Commission's projections on what this will mean economically [are shaky at best](#).

The Commission itself admits that, for some of the DMA's interventions, “there is no decision or judgment confirming its effects on the market” ([at para. 155](#)), and those intimately familiar with the law's details [note](#) that the DMA “also covers practices that have not been yet the subject of antitrust investigations in the EU or any of its Member States.” Unlike competition law, however, these novel obligations do not apply to all dominant companies—only those labeled as “gatekeepers.”

These rules are already forcing the designated platform owners to redesign their products and services, [reducing their quality and exposing them to vulnerabilities](#). While the conduct has not been found illegal in Court, the defendants (and their users)

will be punished and cannot appeal either on grounds of lacking a theory of harm or on efficiencies, because the latter are not cognizable. They will be forced to relinquish their technology, infrastructure, and—in some cases—trade secrets and intellectual property to their rivals “with the overall aim of ensuring the contestability of gatekeepers’ digital services”.

European policymakers like to present the DMA as, in effect, an embodiment of the adage from Spider-Man’s Uncle Ben that “with great power comes great responsibility.” But all companies have a responsibility to follow the law and, under antitrust law, all companies are prohibited from restricting competition.

Importantly, the DMA goes a step further. If taken literally, it treats these companies like state-owned public utilities, directed by the regulator to pursue a particular form of European industrial policy. Instead of competition law’s focus on consumer welfare, gatekeepers’ products and services will be geared towards “contestability” and the European Commission’s particular notions of “fairness.” Unlike all other companies built on private investment, successful risk taking, investment, ingenuity, and hard work, these designated companies could be tasked by the regulator to pursue an ever-moving series of goalposts, with no defenses in sight.

## No Harm, No Defenses

In competition cases, enforcers must not only show harm, but also afford the defendants a chance to provide defenses. Defendants can argue that their behavior was pro-competitive; that it led, on balance, to increased competition and improved consumer welfare; or that it lowered prices or led to increased quality or innovation. Dominant platforms who engage in the same kind of anticompetitive conduct that is prohibited (for gatekeepers) by the DMA will continue to have the right to defend themselves on these grounds — for conduct that is essentially the same as that covered by the DMA (self-preferencing, lack of interoperability, use of nonpublic third-party data, anti-steering provisions, MFNs, etc).

But under the DMA, designated gatekeepers do not have the right to defend themselves on these same grounds. This goes against the recommendation of experts, who recognize that the conduct in question can be pro-competitive and should not be prohibited *per se*. Even the DMA-modeled regulatory proposals of some U.S. lawmakers have added “affirmative defenses,” while the UK’s Digital Markets Competition and

[Consumers Bill](#) contains a “countervailing benefits exemption” that at least theoretically looks at consumer welfare, so that companies have a chance to prove their innocence, and compete fairly on the market.

The lack of pro-competitive defenses in Europe under the DMA means that there is a very real risk that some of the law’s provisions could end up prohibiting procompetitive conduct when applied in the wrong context.

## International Antitrust Reform?

[Legislators around the world](#) have been considering their own models of antitrust reform, and how best to address the enforcement challenges posed by the digital industrial revolution. But there shouldn’t be a debate on whether antitrust reform includes basic legal pillars like the right of defense or judicial review, or whether the law ought to [unfairly target specific companies](#) with a different legal standard. Punishing companies’ market conduct without proof of harm, and instrumentalizing them to achieve certain market outcomes without consideration of competitive effects or consumer welfare, is not a sound basis for reform.

The DMA was [first mooted](#) as a reform updating antitrust law to address existing flaws. The explosion of new enforcement actions in the digital sector might itself be sufficient to show that evolution of the existing tools can make reform itself unnecessary.

Then why do we have the DMA? There’s a saying that “[the purpose of a system is what it does](#).” To put it plainly, the DMA removes legal protections from a handful of large technology companies in order to apply far-reaching economic interventions that go beyond existing competition-law precedents.

European stakeholders rightfully take umbrage with foreign governments who would punish European companies arbitrarily and without rights of defense. U.S. lawmakers do, as well, and this unified front helps ensure that open-market economies can continue to deal on fair terms when trading abroad. The EU [benefits greatly](#) from this, and yet has created these new rules that could force leading U.S. tech firms to subsidize European rivals for their services (and potentially [pay for the privilege](#), as well).

This can hardly be seen as “fair.” But it is a reality that, unless European policymakers find some limiting principles for the DMA, they could soon find European champions facing similar difficulties abroad.

## Conclusion

The DMA is law and it must be enforced. There is, however, room in the enforcement regime to take account of “the specific circumstances of the gatekeeper” ([Article 8\(3\)](#)). Moreover, proportionality is a general principle of European law. There is room to avoid the worst outcomes and to ensure that, in practice, the DMA promotes consumer welfare, innovation, and value creation. Some of the conduct prohibited by the DMA will inevitably be beneficial and should be permitted.

There is a lot of commentary suggesting [guiding principles](#) that could limit unintended consequences. The question remains whether the Commission will do a thorough investigation and to reflect before enforcing changes that could have harmful consequences. After all, with great power comes great responsibility, and the greatest power is the power of governments.

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### ABOUT THE AUTHOR



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### TAGGED TOPICS

[DMA](#)[Efficiencies](#)[EU](#)[International Antitrust](#)[Monopolization](#)[Platforms](#)[Vertical Restraints & Self-Preferencing](#)

# Confronting the DMA's Shaky Suppositions

By: [Kay Jebelli](#)

April 16, 2024

[CITE THIS ARTICLE](#)



It's easy for politicians to make unrealistic promises. Indeed, without a healthy skepticism on the part of the public, they can grow like weeds. In the world of digital policy, the European Union's Digital Markets Act (DMA) has proven fertile ground for just such promises. We've [been told](#) that large digital platforms are the source of many economic and social ills, and that handing more discretionary power to the government can solve these problems with no apparent side effects or costs.



These promises were based on “[questionable, conclusory, and unsubstantiated](#)” assumptions about how digital markets work, what consumers want, and how industry would respond—sometimes, despite warnings and contradicting evidence as to the necessary tradeoffs.

It reminds me a bit of “[cakeism](#),” a phrase that became popular during debates over the United Kingdom’s departure from the European Union. Cakeism embodied the idea that the UK could leave the single market it shared with its largest trading partner, while also increasing trade with that partner, as well. The problem, as many warned at the time (and most can clearly see today), is that you can’t have your cake and eat it too. There are tradeoffs inherent to policy decisions.

So what happens when the DMA’s assumptions prove false, and those promised sunlit uplands fail to materialize?

## Realistic Expectations

The DMA’s proponents made a lot of promises. [They said this new regulation](#) would usher in a new era of fairness and contestability in Europe’s strengthened digital single market, creating more innovation, more accessibility, more opportunity, more growth, lower prices, higher quality, safer services, more privacy, more control, more choice, more European tech rivals, less inequality, better-protected kids, and a stronger democracy, and all [without any legal uncertainty](#).

A person with a healthy degree of skepticism might question whether a single policy instrument could legitimately deliver on these promises. Or they might at least ask: “what’s the catch?” The large tech companies targeted by the law as “gatekeepers” pointed to a host of unintended consequences, but these were generally dismissed by the legislation’s proponents as “myths.” It was [assumed](#) the companies were exaggerating, at best.

“You can have your cake and eat it too,” some seemed to say. We were [promised that](#) the “DMA will never prevent any innovative technological company to develop and introduce new services to its users,” [and that](#) “any online search engine provider may very well continue offering other digital services.”

Gatekeepers cautioned about the security risks that some of the DMA's data-access and interoperability requirements would engender. They also generally downplayed any possible positives, noting that their services were two-sided markets that required careful balancing, that changes benefiting one side might disadvantage others, and that users, in fact, already enjoyed integrated, easy-to-use, curated, and personalized services. These were the conditions that made those companies' services popular in the first place.

Benedict Evans, a well-known tech analyst, likes to refer to [the three "nos"](#) of the tech-policy response. The first "no" comes in response to policy changes that are merely inconvenient, the second as a warning against significant unintended consequences, and the third because the requested changes are, by any realistic measure, impossible. Many European policymakers thought the tech industry's response to the DMA was largely just the first of these "nos," and acted accordingly. "Nerd harder," they seemed to say, "you've got all the resources in the world; surely, you can solve for that."

## Rubber Meets the Road

Europeans have been experiencing the heartbreak of [broken promises](#) ever since March 7, when the DMA's conduct obligations kicked in. A number of the changes, like the disintegration of services, make these services less user-friendly. Some business-user groups have found that the changes forced tradeoffs that have left them worse off. For other changes, the longer-term effects have yet to reveal themselves.

For many, the first most obvious change was that Google's search results were [missing useful links](#). Microsoft also [removed its information units](#) from LinkedIn. While perhaps helpful for competitors, these changes have degraded the European user experience. Users of Google Maps, in particular, [are complaining](#) and [sharing workarounds](#). It hasn't helped direct suppliers either. They used to get free traffic from these information units, but are now [complaining](#) that the new "fair" ranking methods mean less opportunities for them, and more for intermediaries and comparison-shopping services.

These "intermediary" businesses [still aren't happy](#), of course. They've been demanding more and more from European enforcement [since 2018](#), and are now [asking for quotas](#) for guaranteed free traffic from designated services. The tradeoff between the interests of some user groups and others only becomes more apparent.



With respect to alternative app distribution, it seems that the [first alternative app store](#) is a haven for piracy, security vulnerabilities, [and fraud](#). Despite policymakers' assumption that gatekeepers' steps to protect ecosystem participants were an “[aberration to democracy](#),” the reality is that even competitors like Microsoft [have adopted](#) Apple's curated app-distribution model for security and performance benefits.

Despite the General Data Protection Regulation (GDPR), platforms still need to be able to [protect against privacy and security risks](#). National governments have also [recognized the risks](#) of alternative app distribution. You'd think the European Parliament would be more sensitive, as well, at a time when the phones of European Parliament officials [have been targeted by spyware](#). Meanwhile, Executive Vice-President Margrethe Vestager continues to tell the same Parliament that these concerns are “[complete nonsense](#).”

As for browser-choice screens, they have given [rivals significant installation jumps](#), including as much as a [164% increase for Opera](#) and a [250% increase for Aloha](#). But does this confirm the European Commission's supposition that users demand to be freed from the shackles of default settings, or merely that “[mandated nagware](#)” will inevitably drive some to try alternatives? The important question is, will users continue to stick to these services, or eventually return to the familiar market leaders? And what conclusions will regulators draw from these changes?

## Confronting Assumptions, Facing Reality

It could be that the DMA proves unpopular with end users, that only niche hobbyists are interested in interoperability with third-party services, and that only the largest business users (like Epic, Match, and Spotify) will benefit. The new rules could make gatekeepers' ecosystems less convenient and easy-to-use, destroying [the brand promise](#), and limiting their potential for the vast majority of European business users. Indeed, the DMA could make the overall pie smaller, or even result in the [loss of new artificial-intelligence services](#) or [delays to pro-competitive rivalry](#) among the platforms.

All these changes also create an [opportunity for Chinese rivals](#), who are poised to enter the European market with a unique value proposition: an integrated digital ecosystem that “just works” without annoying “nagware” or the requirement to give rivals gratuitous access. We've already seen these Chinese rivals [making their demands](#)

**known**. So does it really make sense to make things worse for European consumers in the short term, and to drive demand to Chinese alternatives, all for a **hypothetical future** where this will stimulate European rivals to make things better for consumers in the long term?

The first step toward correcting this is to recognize that these negative consequences are real. Rather than some kind of malicious “**noncompliance**,” much of what we are seeing is core to the inherent tradeoffs that industry warned about at the beginning. They are the consequence of ignoring the second of Benedict Evans’ “nos.”

The second step involves correcting these assumptions and better understanding the inherent tradeoffs of product-design decisions and the demands of the modern consumer. The internet **has come a long way** from the early 2000s, when it was dominated by hobbyists and hackers who grew up in a world of command prompts, custom modding, and root access.

Unfortunately, many of those in policy circles still give disproportionate weight to the opinions of those hobbyists, who would be happy to return the internet to a friction-filled state where their technical skill gives them a sense of superiority. The reality is that an internet used by more than five billion people cannot operate on the assumptions that work for an internet of **only 100 million people**. That’s the reality of Benedict Evans’ third “no.”

Another hard reality is that, regardless of how much money they make in other areas, businesses can’t be expected (or, in reality, forced) to offer loss-making services in Europe. While some policymakers may have preferences as to **what they would enjoy** or be willing to pay for, many users might weigh things differently. Besides the difficult question of **what is an appropriate price**, even if **the price is low**, a large portion of European users might still prefer the free ad-funded option.

That doesn’t mean these people are wrong; just that they value the services differently. In any case, insisting that companies offer services for free, but removing their ability to fund those services with advertising, is pretty close to the digital version of eating one’s cake and expecting to have it, too.

With its open DMA investigations, we’ll now see whether the Commission is willing to accept these realities, and to adjust its enforcement accordingly, or whether it thinks it

can ignore inherent tradeoffs, force end users to change their behavior, and force companies to defy market realities. One hopes the Commission will choose the more proportionate approach. The alternative is that both end users and the vast majority of business users may end up suffering some **very predictable** negative consequences.

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