

Making sense of the substantive obligations in the DMA

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<http://chillingcompetition.com>



Summary

- **On contestability and fairness**
- Market restructuring through behavioural and structural action
- A taxonomy of obligations
- On obligations as aspirations

On contestability and fairness

- The DMA is driven by contestability and fairness considerations:
 - References to these objectives signal that the DMA is not conceived to be constrained by EU competition law
 - Underpinning the notions of contestability and fairness, there are three concerns:
 - Injecting competition (dominance being an issue as such)
 - Addressing the risk of leveraging to adjacent markets (lower threshold)
 - Preventing exploitative conduct

On contestability and fairness

- A key point to note is that all three concerns are intimately intertwined:
 - Issues in and around digital markets are as much about exclusion as they are about exploitation:
 - Apple vs Epic and Spotify
 - Amazon vs third party retailers
 - Similarly, the DMA seeks to reshape (and indeed create) digital markets for redistribution and competition purposes





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Market restructuring through behavioural and structural action

- The obligations in the DMA can be broken down into the behavioural and the structural:
 - Behavioural obligations:
 - Some do not require further specification (typically, a negative obligation)
 - Some do (typically, a positive obligation)
 - Structural obligations
 - Changing the functioning of markets
 - Opening up layers that were closed to rivals (modularity)

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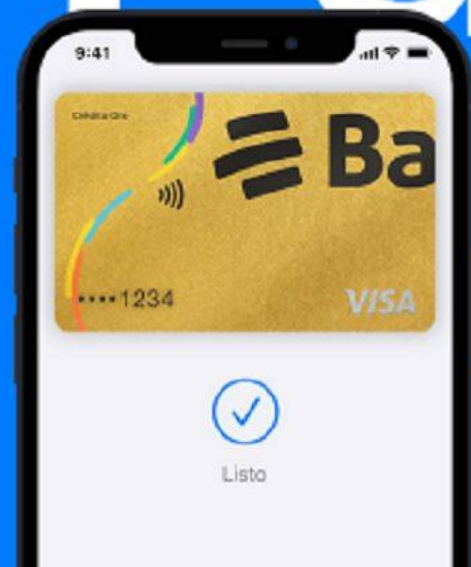
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A taxonomy of obligations

- They can also be classified by paying attention to the mechanism through which the objectives are achieved, including:
 - Change the operation of the gatekeeper's core market to inject rivalry/prevent dominance
 - Change the operation of the value chain to inject rivalry within some layers that the gatekeeper had kept for itself
 - Change the way in which the gatekeeper deals with rivals on markets adjacent to the gatekeeper's core market

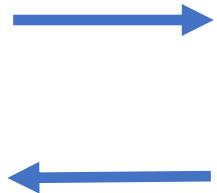
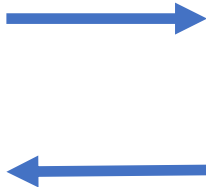
A taxonomy of obligations

- This approach to the classification of obligations makes it possible to arrange obligations around a spectrum:
 - The more extreme obligations would be structural duties aimed at altering the functioning of markets
 - One can think, second, of duties that seek to open up layers of the value chain to third parties
 - Third, positive obligations that seek to regulate the behaviour of gatekeepers on markets open to rivals
 - Fourth, negative obligations of a behavioural nature

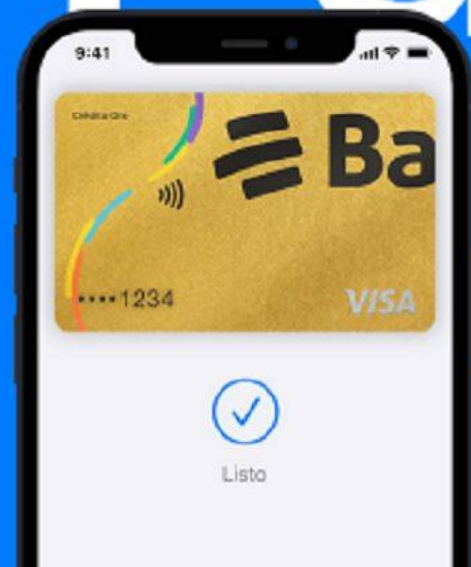
A taxonomy of obligations

Change the operation of the market			
Open up layers of the value chain			
Regulate layers already open			
	Behav. (-)	Behav. (+)	Struct.

A taxonomy of obligations



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On obligations as aspirations

- There has been much debate about the legal status of obligations under the DMA:
 - The aspiration is to ensure that they are ‘self-executing’, in that they do not need any further implementation measures
 - One should see these obligations, in fact, as aspirations, more than operational legal duties:
 - The nature of the field that is regulated is particularly complex
 - Some of the obligations would justify setting up a regulatory regime of their own (which is what is likely to happen de facto, if not de iure)

On obligations and aspirations

‘The gatekeeper shall provide to any third party undertaking providing online search engines, at their request, with access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data in relation to free and paid search generated by end users on its online search engines. Any such query, click and view data that constitutes personal data shall be anonymized’

On obligations and aspirations



On obligations and aspirations

Ofcom accepts undertakings from Board of BT Group plc on operational separation

22 September 2005

22 September 2005

BT access services business – Openreach – formally established today

The Ofcom Board has formally accepted legally-binding undertakings from the Board of BT Group plc. The undertakings, which were offered to Ofcom in June 2005, were subject to consultation over the summer. They create a new regulatory approach to the access infrastructure operated by BT in the UK.

Separately, BT has today announced the establishment of its new access services business - Openreach.

On obligations and aspirations

- It seems likely that there will be a gap between the ‘law in the books’ and ‘law in action’
 - The ‘law in the books’ suggests the adoption of a regime revolving around strict top-down obligations and sanctions to ensure compliance
 - ‘Law in action’ is likely to work differently: as a cooperative venture in which commitments and experimentation play a central role