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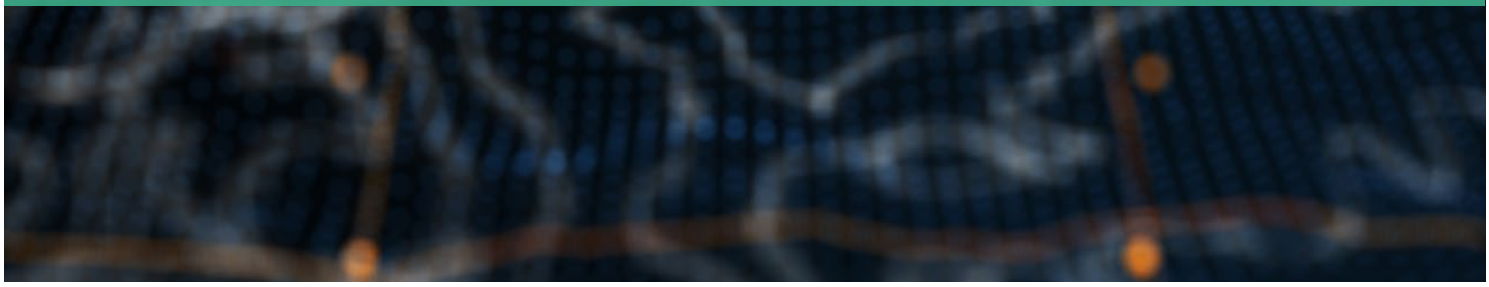

GATEKEEPER REGULATION WITHIN THE EU AND BEYOND: A COMPARATIVE ANALYSIS OF DMA, 19AGWB GERMAN COMPETITION ACT, AND UK STRATEGIC MARKET STATUS

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I. INTRODUCTION

Around the world, jurisdictions are grappling with how to regulate digital markets. The debate is no longer about whether regulation is necessary, but rather on how to implement it effectively[1]. Recent reports from experts, competition authorities, and international organisations[2] underscore that traditional antitrust tools are ill equipped to address the specific dynamics of the digital economy[3], advocating instead for ex ante regimes imposing targeted obligations on major platforms[4]. Nevertheless, despite broad agreement on the need for such frameworks, consensus remains elusive regarding their design[5]. As Andriychuk explains, "*the shift from the 'if' to the 'how' raises a host of challenges*"[6]. One of these challenges regards the methodology used to identify the entities that should be subject to regulation.

In Europe, Germany was the first country to adapt its competition framework to address digital ecosystems[7]. In January 2021, the government introduced a significant reform—Section 19a of the Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, or "GWB")[8]—as part of its 10th amendment to the law[9]. This new provision gave the German competition authority, the Bundeskartellamt ("BKARTA"), a new tool to address anticompetitive behaviour by dominant digital platforms. The European Union ("EU") and the United Kingdom ("UK") quickly followed. In November 2022, the Digital Markets Act ("DMA")[10] entered into force in the EU, marking the first regulation to impose ex-ante rules on digital platforms[11]. The UK subsequently adopted its own regulatory approach. In 2024, the Digital Markets, Competition and Consumers Act ("DMCCA")[12] established a new "pro-competition regime" for digital markets. This new legislation granted the Competition and Markets Authority ("CMA") with enhanced tools to tackle competition barriers in these sectors[13].

All three regulatory regimes share the common goal of responding to growing concerns about the increasingly entrenched economic power of major digital platforms[14]. However, their frameworks differ in structure[15]. While a common feature of the DMA, the DMCCA and Section 19a GWB is that they all "*revolve around a designation process that ensures that the new platform regulations only apply to the most powerful digital platforms*"[16], the method used to identify these undertakings varies across regimes.

1 Anne C Witt, 'Platform Regulation in Europe – Per Se Rules to the Rescue?' (2022) 18 Journal of Competition Law & Economics 670. p.1
2 For a comprehensive catalogue of reports from competition authorities, government bodies, and organisations, see University of Chicago Stigler Centre, 'World Reports on Digital Markets' https://www.chicagobooth.edu/research/stigler/events/antitrust-competition-conference/world-reports-on-digital-markets, accessed 27 September 2025.
3 Marco Botta, 'Sector Regulation of Digital Platforms in Europe: Uno, Nessuno e Centomila' (2021) 12 Journal of European Competition Law & Practice 500. p.500
4 Damien Geradin, 'What Is a Digital Gatekeeper? Which Platforms Should Be Captured by the EC Proposal for a Digital Market Act?' [2021] SSRN Electronic Journal <https://www.ssrn.com/abstract=3788152> accessed 4 August 2025. p.2
5 Amelia Fletcher, 'International Pro-Competition Regulation of Digital Platforms: Healthy Experimentation or Dangerous Fragmentation?' (2023) 39 Oxford Review of Economic Policy 12. p.19
6 Oles Andriychuk, 'EU Digital Competition Law: The Socio-Legal Foundations' (2023) 25 Cambridge Year-book of European Legal Studies 81. p.82
7 Jasper van den Boom and others, 'Digital Regulation Synthesis: Comparative Analysis of the DMA, Sec. 19a and the DMCCA' (Social Science Research Network, 15 December 2024) <https://papers.ssrn.com/abstract=5079869> accessed 3 August 2025. p.1
8 Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB) (Federal Law Gazette I 1957, 1081, as amended).
9 Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer Bestimmungen (GWB-Digitalisierungsgesetz) 2021 (BGBl I 2021, 2) 2.
10 Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act) 2022 ([2022] OJ L265/1).
11 van den Boom and others (n 7). p.1
12 Digital Markets, Competition and Consumers Act 2024 2024 (c 13).
13 Competition and Markets Authority, 'Overview of the CMA's Provisional Approach to Implement the New Digital Markets Competition Regime' (2024) <https://assets.publishing.service.gov.uk/media/659ee36de8f5ec000d1f8b60/20240110_overview_of_digital_markets_regime_-_FINAL_for_publication.pdf> accessed 16 September 2025. para.1.2
14 Elias Deutscher, 'Reshaping Digital Competition: The New Platform Regulations and the Future of Modern Antitrust' (2022) 67 The Antitrust Bulletin 302. p.304
15 van den Boom and others (n 7). p.32
16 Deutscher (n 14). p.304

This divergence is particularly important because, as argued by Ribera Martínez, "*designation lies at the core of the application*"[17] of each regime. The methodology used for designation is crucial for the potential addressees, who face a wide range of obligations and prohibitions once identified[18]. Accordingly, this process must be clear and practicable to ensure legal certainty[19], guiding the conduct of both gatekeepers and regulatory beneficiaries. At the same time, regulators must balance the demand for legal certainty with the flexibility[20], required to adapt the framework to evolving business models, technologies, and market developments[21]. Adding further complexity to regulatory design, an overly broad or ambiguous application of the rules may generate unintended and disproportionate effects[22]. Therefore, "*the designation criteria must avoid the pitfalls of being both over- and under-inclusive*"[23].

Against this backdrop, this paper will aim at answering the following research question: How do the methodologies for designating the addressees of the DMA, DMCCA and Section 19a GWB differ across these three regimes, and what are the implications of these differences for legal certainty, flexibility, and the risks of over- or under-inclusion? This work argues that the designation methodology reflects different legislative choices regarding how to balance the three objectives. The DMA adopts a "semi-flexible"[24] approach that seeks to strike a balance between legal certainty and flexibility, thereby limiting the risks of over- and under-inclusion. On the other hand, the DMCCA employs a flexible methodology that enables the regime to adapt to the evolving digital market landscape and mitigate these risks. However, the five-year forward-looking assessment when determining whether to designate a firm inevitably creates some legal uncertainty for potential subjects. Finally, while Section 19a GWB provides the BKARTA with significant flexibility, it faces legal uncertainty and the risk of both over-inclusion and under-inclusion.

This research adopts a comparative methodology informed by van den Boom et al.'s "*taxonomy for the comparison of digital regulation*"[25], analysing the three regulatory with a focus on designation methods and their effects on legal certainty, flexibility, and risks of over- or under-inclusion. Due to the regimes' complexity, the analysis excludes detailed examinations of individual designations, obligations, prohibitions, procedures, or institutions, referencing these only for context.

The paper is organised into five sections: Section II provides a general overview of the regimes; Section III examines addressees, designation criteria and procedures, and review mechanisms, highlighting commonalities and differences; Section IV critically assesses the implications of the designation methodologies for legal certainty, flexibility, and the risks of over- or under-inclusion; and Section V offers conclusions.

17 Alba Ribera Martínez, 'The Requisite Legal Standard of the Digital Markets Act's Designation Process' (2024) 20 Journal of Competition Law & Economics 265. p.266
18 Geradin (n 4). p.3
19 Alexandre de Streel and others, 'Digital Markets Act: Making Economic Regulation of Platforms Fit for the Digital Age' (Centre on Regulation in Europe (CERRE) 2020) <https://cerre.eu/wp-content/uploads/2020/11/CERRE_DMA_Making-economic-regulation-of-platforms-fit-for-the-digital-age_Full-report_December2020.pdf> accessed 23 September 2025. p.100
20 Pinar Akman, 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act' (Social Science Research Network, 1 December 2021) <https://papers.ssrn.com/abstract=3978625> accessed 19 August 2025. p.29
21 de Streel and others, 'Digital Markets Act: Making Economic Regulation of Platforms Fit for the Digital Age' (n 19). p.100
22 Fletcher (n 5). p.20
23 Geradin (n 4). p.3
24 European Commission, Directorate-General for Communications Networks, Content and Technology, 'Com-mission Staff Working Document: Impact Assessment Report Accompanying the Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)' (European Commission 2020) Staff Working Document SWD(2020) 363 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52020SC0363> accessed 4 September 2025. para.181
25 van den Boom and others (n 7). p.1

II. OVERVIEW OF THE DMA, DMCCA AND SECTION 19AGWB

The **Digital Markets Act**[26] is the EU's regulation on digital markets and competition. Introduced in 2022 and fully applicable since May 2023, it establishes a hybrid regime that combines ex ante regulatory obligations with oversight of conduct traditionally addressed through antitrust enforcement[27]. According to Article 1(1) DMA, its objective is to promote the internal market by ensuring contestable and fair digital markets in which gatekeepers operate to the benefit of business users and consumers. To prevent internal market fragmentation, Article 1(5) DMA prohibits Member States from imposing additional obligations on gatekeepers, although they may adopt ex ante rules for digital platforms or amend national competition law regarding unilateral conduct (Articles 1(5)(6) DMA), subject to certain limitations[28]. The European Commission is the sole enforcer of the DMA (Articles 20-33 DMA) with duties of cooperation and coordination involving Member States (Articles 37 and 38 DMA).

In January 2025, Part 1 of the UK's **Digital Markets, Competition and Consumers Act 2024**[29] entered into force, instituting a new "pro-competition regime" that granted the CMA enhanced tools to tackle both the sources and effects of firms' market power[30]. This framework responded to the Furman Report's call for a dedicated digital markets unit to develop a "*code of competitive conduct*"[31] tailored to particularly powerful firms. The DMCCA represents a hybrid of competition law and regulation, integrated into the Competition Act while advancing distinct goals[32]. It pursues three main objectives: strengthening competition and consumer protection, improving consumer welfare, and addressing the most significant market harms[33]. The regime is administered by the CMA through its Digital Markets Unit (DMU), established in April 2021 in a non statutory capacity to facilitate its swift implementation[34].

Section 19a GWB was introduced in Germany in January 2021 through the 10th amendment to the GWB[35], with the aim of modernising abuse of dominance control in response to the challenges of preserving competition in the digital economy[36]. Within German competition law, the provision seeks to protect competition on the merits and safeguard the competitive process[37]. Hinck and Podszun characterise Section 19a as a "*national competition law in the shadows of EU digital regulation*"[38], implying three key consequences: (i) its enforcement is limited by the DMA pursuant to Article 1(6)(b); (ii) decisions of the European Commission under the DMA offer indicative guidance; and (iii) compliance with the DMA does not preclude platforms from scrutiny

26 Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act).
27 Giuseppe Colangelo and Alba Ribera Martínez, 'The Metrics of the DMA's Success' [2025] European Journal of Risk Regulation 1. p.1
28 van den Boom and others (n 7). p.26-27
29 Digital Markets, Competition and Consumers Act 2024.
30 OECD (Organisation for Economic Co-operation and Development), 'G7 Inventory of New Rules for Digital Markets' (OECD Competition Division 2024) Policy Report / Summit Document <https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/competition-and-digital-economy/g7-inventory-of-new-rules-for-digital-markets-2024-update.pdf> accessed 20 September 2025. p.2
31 Jason Furman and others, 'Unlocking Digital Competition. Report of the Digital Competition Expert Panel' (UK Government 2019) Expert Panel Report <https://assets.publishing.service.gov.uk/media/5c88150ee5274a230219c35f/unlocking_digital_competition_furman_review_web.pdf> accessed 15 September 2025. p.5
32 van den Boom and others (n 7). p.31
33 Department for Business and Trade and Department for Science, Innovation and Technology, 'Digital Markets, Competition and Consumers Bill Impact Assessment' (UK Government 2023) Impact Assessment <https://assets.publishing.service.gov.uk/media/655f3d355a2c2d000df3f2c6/digital-markets-competition-and-consumers-bill-impact-assessment-summary.pdf> accessed 19 September 2025. para.39
34 Department for Business, Energy and Industrial Strategy (BEIS) and Department for Digital, Culture, Media and Sport (DCMS), 'A New Pro-Competition Regime for Digital Markets' (UK Government 2021) Consultation Paper <https://assets.publishing.service.gov.uk/media/60f59c938fa8f50c76838784/Digital_Competition_Consultation_v2.pdf> accessed 31 August 2025. para.24
35 GWB-Digitalisierungsgesetz.
36 OECD (Organisation for Economic Co-operation and Development) (n 30). p.8
37 van den Boom and others (n 7). p.8
38 Sarah Hinck and Rupprecht Podszun, 'Beyond DMA: The Amazon Section 19a Case (Germany)' (2025) 16 Journal of European Competition Law & Practice 35. p.39

under German law, particularly regarding designation[39]. The BKARTA is responsible for enforcing Section 19a GWB (Section 48 GWB) and must collaborate and coordinate with the European Commission in accordance with Articles 37 and 38 DMA.

Although the DMA, DMCCA, and Section 19aGWB take different forms, they share many common features[40]. First, all three initiatives seek to address the entrenched concentration of power in core digital platform markets[41]. Second, as discussed in the next section, each establishes a designation process to regulate only major systemic platforms that dominate their ecosystems, albeit under different labels across jurisdictions[42]. Third, they impose directly binding obligations on designated platforms, varying in specific design[43]. Fourth, unlike traditional antitrust, these regimes offer limited exemptions or justifications for non-compliance[44]. Finally, enforcement is entrusted respectively to the European Commission, the CMA, and the BKARTA, each equipped with distinct tools and remedies to ensure compliance and strengthen competition in digital markets[45]. The regimes diverge, however, in how they integrate and intensify these remedies[46].

In conclusion, the DMA, DMCCA, and Section 19aGWB "*bring about a fundamental reconfiguration of the regulation of competition in the digital economy*"[47]. Although these regimes share numerous commonalities, they exhibit notable differences[48], particularly in the designation methodologies that determine their scope and application. The following section analyses these processes in detail, delineating the designation criteria and scope of each regime.

III. COMPARATIVE ANALYSIS OF THE DMA, DMCCA AND 19A GWB'S DESIGNATION METHODOLOGY

This section examines how the DMA, DMCCA, and Section 19a GWB are organised, focusing on the divergent methodologies used to designate their addressees. As Botta explains, the three frameworks employ an "*asymmetric regulation*" approach, meaning that their rules apply only to the largest undertakings[49]. While all three regulatory systems employ a formal, onetime designation process to determine which platforms are included in the regime, they have fundamental differences in this crucial step.

Before delving into the analysis, it is important to note that the platform designation process under the DMA, DMCCA, and Section 19a GWB diverges from traditional antitrust in two keyways[50]. First, authorities identify relevant industries without needing formal antitrust market definitions[51]. Second, despite criteria targeting substantial, enduring market power, no explicit dominance or monopoly finding is required[52]. According to

39 ibid. pp.39-40
40 Deutscher (n 14). p.304
41 Witt (n 1). p.671
42 Botta (n 3). p.502
43 Deutscher (n 14). p.307
44 ibid. p.309
45 ibid. p.310
46 ibid. p.310
47 ibid. p.312
48 Botta (n 3). p.502
49 ibid. p.502
50 Deutscher (n 14). p.306
51 ibid. p.306
52 ibid. p.306

Deutscher, this expansion of unilateral conduct regulation beyond the traditional concepts of "dominance" and "monopoly power" demonstrates the increasing concern that these terms fail to recognise that digital platforms "may wield important "*intermediation power" allowing them to harm competition, even though they do not hold a dominant position in a clearly defined relevant product market*"[53].

This paper employs the "*taxonomy for the comparison of digital regulation*"[54] developed by van den Boom et al. to critically analyse the DMA, DMCCA, and Section 19a GWB, "*Personal Scope and Criteria for Designation*"[55]. Specifically, it examines (i) the addressees and designation criteria, including the addresses labelling, the scope of application, and thresholds; (ii) the procedures followed during the designation process; and (iii) how designations can be reviewed or challenged. The analysis highlights the common features and differences between the EU, UK, and German regimes[56].

1. Addressee and designation criteria

a. Addresses labelling

The DMA, DMCCA and Section 19a GWB employ distinct terminology for regulated entities and differ in capturing what renders powerful platforms particularly concerning[57]. The addresses of the DMA are the "*Gatekeepers*", a concept that had entered antitrust terminology several years before the regulation's adoption[58]. Gatekeepers are those undertakings designated by the European Commission that provide a "*core platform service*" ("CPS") (Article 2(2) DMA) and that satisfy three cumulative criteria that "*indicate gatekeeper power*"[59]. On the other hand, building on the Furman Report[60], the **DMCCA** uses the term "Strategic Market Status" ("SMS") to label firms with "*substantial and entrenched market power in at least one activity, providing it with a strategic position*"[61]. Similarly, **Section 19a GWB** refers to entities with "*Paramount Significance for Competition Across Markets*" as those "*which are particularly capable of extending their position of power across markets or secure their unassailable position*"[62].

b. Scope of application

The **DMA** confines its scope to a specific and comprehensive list of ten "core platform services"[63] (Article 2 (2) DMA). Recital 14 states that for the purposes the Regulation, the definition of CPS "*should be technology neutral and should be understood to encompass those provided on or through various means or devices*"[64]. The DMA focuses specifically on those digital services most widely used by business users and end users, where gatekeeper contestability weaknesses and unfair practices are most evident[65]. The CPS list can be expanded

53 ibid. pp. 306-307
54 van den Boom and others (n 7). p.1
55 ibid. pp.10-14
56 The work "Digital Regulation Synthesis: Comparative Analysis of the DMA, Sec. 19a, and the DMCCA" also includes exemptions as a point of comparison between the three regimes regarding "Personal Scope and Crite-ria for Designation". However, this aspect was excluded from the present analysis as it does not concern genu-ine exemptions from designation and would divert the focus. Still, they are referenced in Section II.
57 Witt (n 1).p.700
58 Friso Bostoen, 'Understanding the Digital Markets Act' (2023) 68 The Antitrust Bulletin 263.p.272
59 van den Boom and others (n 7).p.10
60 Furman and others (n 31).
61 Department for Business, Energy and Industrial Strategy (BEIS) and Department for Digital, Culture, Media and Sport (DCMS) (n 34). para.50
62 van den Boom and others (n 7).p.11
63 Article 2(2) DMA lists ten CPS: (a) online intermediation services; (b) online search engines; (c) online social networking services; (d) videos-haring platform services; (e) numberindependent interpersonal communications services; (f) operating systems; (g) web browsers; (h) virtual assistants; (i) cloud computing services; (j) online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by an undertaking that provides any of the core platform services listed in points (a) to (i).
64 Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act). Recital 14.
65 ibid. Recital 13.

through Commission market investigations identifying additional digital sector services, followed by proposals to amend the DMA via EU legislative bodies (Article 19 DMA). As argued by de Streel and Larouche, "*the list of CPSs is therefore considered to form an essential element of the DMA, since it can only be expanded through a legislative act*"[66].

In the context of the **DMCCA**, a "*digital activity*" is a fundamental concept that outlines the scope for identifying undertakings that should be regulated. The UK government aimed to "*limit the scope of the regime to activities where digital technologies are a 'core component' of the products and services provided as part of that activity*"[67]. Unlike the DMA, the UK adopts a flexible approach to defining the types of activities subject to regulation, rather than relying on a fixed list of activities. Section 3 DMCCA establishes the scope of "*digital activity*" through three broadly characterised categories of activity, namely: (i) the provision of a service via the internet; (ii) the provision of digital content; or (iii) any other activity carried out for the purpose of either of the above.

Finally, **Section 19a GWB** does not require the operation of a platform service or the provision of a digital activity. The reference point for the designation decision is "*the undertaking as an economic entity*"[68], which must be active on multisided markets and networks. This implies that an undertaking is designated holistically, encompassing its complete digital ecosystem of products and services[69].

c. Thresholds

The process of designating regulated platforms among the three regimes occurs through two primary methods. Regulated platforms are identified either based on specific quantitative thresholds that act as proxies for their size, competitive influence, and market dominance, or according to qualitative criteria that highlight their significant and lasting market power[70]. The **DMA** classifies undertakings as gatekeepers using a binary approach that combines both qualitative and quantitative criteria. If an undertaking fails to satisfy any of these conditions, the DMA does not apply to it at all[71]. Article 3(1) DMA establishes a threepart test for identifying gatekeepers, which "*is intended to cover cases of platform power that reach a threshold level of substantiality, criticality, and durability*"[72]. Under this framework, an undertaking qualifies as a gatekeeper if: (a) it has a significant impact on the internal market; (b) it provides a CPS which is an important gateway for business users to reach end users; and (c) it enjoys an entrenched and durable position in its operations, or it is foreseeable that it will enjoy such a position in the near future (Article 3(1) DMA).

The DMA is the only regime among the three that explicitly established a rebuttable presumption. To facilitate gatekeeper identification[73], it presumes that each of the three criteria in Article 3(1) DMA is matched in Article 3(2) DMA by a corresponding quantitative threshold[74]. However, Article 3(5) DMA allows undertakings to rebut

66 Alexandre de Streel and Pierre Larouche, 'The European Digital Markets Act Proposal: How to Improve a Regulatory Revolution' (Social Science Research Network, 12 May 2021) <https://papers.ssrn.com/abstract=3844667> accessed 6 September 2025. para.9

67 Department for Business, Energy and Industrial Strategy (BEIS) and Department for Digital, Culture, Media and Sport (DCMS) (n 34). para.59

68 Bundeskartellamt, 'Ex-Ante Regulation and Competition in Digital Markets – Note by Germany' (Organisation for Economic Cooperation and Development (OECD) 2021) Working Document / Country Note DAF/COMP/WD(2021)61 <https://one.oecd.org/document/DAF/COMP/WD(2021)61/en/pdf> accessed 14 September 2025. para.48

69 van den Boom and others (n 7).p.32

70 Deutscher (n 14). p.306

71 Andriychuk (n 6). p.97

72 Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (2021) 12 Journal of European Competition Law & Practice 529. p.533

73 Alexandre de Streel and others, 'Effective and Proportionate Implementation of the DMA' (Social Science Re-search Network, 13 January 2023) <https://papers.ssrn.com/abstract=4323647> accessed 30 August 2025. p.11

74 These thresholds are: (a) an annual Union turnover of at least €7.5 billion in each of the last three financial years, or an average market capitalisation (or fair market value) of at least €75 billion in the last financial year, provided the undertaking offers the same CPS in at least three EU Member States; (b) at least 45 million monthly active end users and more than 10,000 yearly active business users established in the Union in the last financial year; and (c) the thresholds in point (b) must be satisfied in each of the last three financial years.

this presumption and present with its notification, "sufficiently substantiated arguments" to demonstrate that, exceptionally, although it meets all the quantitative thresholds, "due to the circumstances in which the relevant core platform service operates", it does not satisfy the qualitative criteria. As Fletcher et al. note, "*The standard of proof for such rebuttal has been set deliberately high*"[75]. Where these arguments credibly challenge the presumption, the Commission may initiate a market investigation under Article 17(3) DMA to assess qualitative compliance (Article 3(5) DMA), potentially accepting the rebuttal upon notification of the thresholds[76].

Recognising the limitations of presumptions, the DMA establishes an alternative designation mechanism through a market investigation (Article 17 DMA)[77]. Where a CPS provider does not meet the quantitative thresholds set out in Article 3(2) DMA, the Commission may still designate it as a gatekeeper under Article 3(8) DMA, taking into account several factors[78]–[79].

The **DMCCA** applies a "*evidence-based assessment*"[80], rejecting a mechanistic approach based on quantitative thresholds[81]. Under Section 2 DMCCA, an undertaking may be designated as an SMS if the relevant digital activity is connected to the UK and satisfies both SMS conditions: (a) substantial and entrenched market power; and (b) a position of strategic significance (Section 2(2) DMCCA). Substantial market power arises "*when users of a firm's product or service lack good alternatives to that product or service, and there is a limited threat of entry or expansion by other suppliers*"[82]. Such power is entrenched when it "*is expected to persist over time and is unlikely to be competed away in the short or medium term*"[83]. Section 5 DMCCA mandates a forward looking assessment over at least five years to evaluate substantial and entrenched market power, contrasting sharply with the DMA's retrospective approach[84]. As for the second SMS condition, a "position of strategic significance" exists "*where the effects of its market power are likely to be particularly widespread or*

75 Amelia Fletcher and others, 'The Effective Use of Economics in the EU Digital Markets Act' (2024) 20 Journal of Competition Law & Economics 1. p.10

76 This was the case for Samsung's browser and the email services of Microsoft and Google, where the Commission considered it unnecessary to open a market investigation because the companies "clearly and comprehensively demonstrate that the requirement of that CPS constituting an important gateway laid down in Article 3(1)(b) of that Regulation is not fulfilled". Following market investigations, the Commission accepted rebuttals for several Microsoft services, Apple's iMessage, TikTok Ads, and X's social network and advertising service. Conversely, the Commission rejected rebuttals from ByteDance's TikTok social network and Meta's Marketplace. However, in April 2025, the Commission overturned its Marketplace decision because Meta successfully demonstrated that the service no longer qualified as a CPS under the criteria specified in Article 3(1), point (b) DMA.

77 Inês Neves, 'A Reading of the Digital Markets Act in the Light of Fundamental Rights' in Annegret Engel, Xavier Groussot and Gunnar Thor Petursson (eds), New Directions in Digitalisation: Perspectives from EU Competition Law and the Charter of Fundamental Rights (Springer Nature Switzerland 2025) <https://doi.org/10.1007/978-3-031-65381-0_8> accessed 30 August 2025. p.136

78 These factors are: (a) the size of the undertaking; (b) the number of business users using the CPS to reach end users and the number of end users; (c) network effects and data driven advantages; (d) any scale and scope effects from which the undertaking benefits, including with regard to data, and, where relevant, to its activities outside the Union; (e) business user or end user lockin; (f) a conglomerate corporate structure or vertical integration of the undertaking; or (g) other structural business or service characteristics.

79 Apple's iPadOS has been the sole CPS provider designated following a market investigation.

80 Department for Business, Energy and Industrial Strategy (BEIS) and Department for Digital, Culture, Media and Sport (DCMS) (n 34). para.6

81 ibid. para.72

82 ibid. para.61

83 ibid. para.64

84 In its evaluation, the DMA has to take into account developments that "(a) would be expected or foreseeable if the CMA did not designate the undertaking as having SMS in respect of the digital activity, and (b) may affect the undertaking's conduct in carrying out the digital activity" (Section 5 DMCCA).

significant"[85]. An undertaking is deemed to hold such a position if it satisfies at least one of the four criteria outlined in Section 6 DMCCA[86]. Finally, Section 7 DMCCA imposes an additional turnover condition as a necessary prerequisite for SMS designation[87].

Finally, **Section 19a GWB** relies only on qualitative criteria to designate an undertaking as an addressee. Section 19a(1) GWB establishes two cumulative requirements. First, the undertaking must be "active to a significant extent on markets within the meaning of Section 18(3a)", encompassing "multisided markets and networks". This targets firms operating twosided platforms that serve as intermediaries between user groups, provided such activities are sufficiently "significant"[88] to distinguish them from other business operations[89]. Second, and most critically for designation[90], the undertaking must be of "paramount significance for competition across markets". To guide this assessment, Section 19a(1) GWB provides a nonexhaustive list of five qualitative criteria that the Bundeskartellamt shall consider[91].

2. Designation procedures

Under the DMA, an undertaking providing CPS that meets all the thresholds outlined in Article 3(2) DMA must notify the Commission within two months of reaching those thresholds and submit "relevant information" (Article 3(3) DMA). Once notified, the Commission has 45 working days to decide whether to designate the undertaking as a gatekeeper (Article 3(4) DMA). Designation requires a formal decision specifying the relevant CPSs that individually serve as important gateways for business users to access end users (Article 3 (9) DMA). These listed CPSs are the services to which the DMA's obligations will apply. Recital 88 mandates that the decision provide sufficient factual and legal reasoning to ensure the gatekeeper understands its basis[92]. If designated, the gatekeeper is given six months to comply with the obligations specified in the Regulation

85 Department for Business, Energy and Industrial Strategy (BEIS) and Department for Digital, Culture, Media and Sport (DCMS) (n 34). para.66

86 These criteria are: (a) the undertaking has achieved a position of significant size or scale in respect of the digital activity; (b) a significant number of other undertakings use the digital activity as carried out by the undertaking in carrying on their business; (c) the undertaking's position in respect of the digital activity would allow it to extend its market power to a range of other activities; (d) the undertaking's position in respect of the digital activity allows it to determine or substantially influence the ways in which other undertakings conduct themselves, in respect of the digital activity or otherwise.

87 This occurs when: "(a) the total value of the global turnover of an undertaking or, where the undertaking is part of a group, the global turnover of that group in the relevant period exceeds £25 billion, or (b) the total value of the UK turnover of an undertaking or, where the undertaking is part of a group, the UK turnover of that group in the relevant period exceeds £1 billion".

88 Jens-Uwe Franck and Martin Peitz, 'Digital Platforms and the New 19a Tool in the German Competition Act' (2021) 12 Journal of European Competition Law & Practice 513. p.515

89 Tabea Bauermeister, 'Section 19a GWB as the German "Lex GAFA" – Lighthouse Project or Superfluous National Solo Run?' (2022) 15 Yearbook of Antitrust and Regulatory Studies 75. p.80

90 Franck and Peitz (n 88). p.516

91 These criteria are: 1. its dominant position on one or several market(s); 2. its financial strength or its access to other resources; 3. its vertical integration and its activities on otherwise related markets; 4. its access to data relevant for competition; 5. the relevance of its activities for third party access to supply and sales markets and its related influence on the business activities of third parties.

92 Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act). Recital 88.

(Article 3(10) DMA). Seven companies have been designated as gatekeepers under the DMA by the European Commission: Alphabet[93], Amazon[94], Apple[95], ByteDance[96], Meta[97], Microsoft[98], and Booking[99]. Twentythree core platform services offered by these gatekeepers are also designated[100].

Unlike the DMA, the DMCCA does not operate through a notification system; instead, it grants the CMA discretion to initiate investigations. Under Section 9(1) DMCCA, the CMA may initiate an investigation if "reasonable grounds" suggest an undertaking holds SMS in a digital activity. The CMA must issue an "SMS investigation notice" (Section 11 DMCCA) detailing those grounds, scope, purpose, and decision timeline, with updates if these change. Interestingly, and in contrast to the DMA and Section 19a GWB, Section 13 DMCCA mandates public consultation on potential SMS decisions. The CMA has nine months to issue an "SMS decision notice" (Section 14(2) DMCCA), covering the undertaking, digital activity, reasons, and designation period (Section 15(3)). The CMA may extend the investigation period by up to three months if it considers there are special reasons for doing so (Section 104 DMCCA). In October 2025, the CMA confirmed that both Apple and Google had met the legal requirements for designation with SMS in their respective mobile platform[101].

Under **Section 19a GWB**, the BKARTA independently begins proceedings to issue a declaratory decision designating an undertaking as having "paramount significance for competition across markets". Unlike the DMA and DMCCA, there is no statutory deadline for completing the designation process. However, as Bauermeister notes, the legislative intent behind Section 19a GWB expected a timeframe of up to two years to reach a declaratory decision[102]. Five companies have been designated under Section 19a GWB by the BKARTA: Meta (Facebook)[103], Alphabet (Google)[104], Amazon[105], Apple[106] and Microsoft[107].

3. Review of designations

Under the **DMA**, the Commission reviews gatekeeper status at least every three years (Article 4(2) DMA), evaluating ongoing compliance with Article 3(1) criteria and potential CPS list updates. It also conducts at least annual checks for new CPS providers meeting thresholds. Additionally, per Article 4(1) DMA, the Commission may, at any time upon request or initiative, reconsider, amend, or revoke status due to substantial factual

93 Commission Decision of 5 September 2023 C(2023) 6101 final [Public version] (Cases DMA100002, DMA100004, DMA100005, DMA100006, DMA100008, DMA100009, DMA100010 and DMA100011 – Alpha-bet) para.150.
94 Commission Decision of 5 September 2023 C(2023) 6104 final [Public version] (Cases DMA100018, Amazon - online intermediation services – marketplaces; DMA.100016 Amazon - online advertising services).
95 Commission Decision of 5 September 2023 C(2023) 6100 final [Public version] (Cases DMA100013, Apple – Online intermediation services – App Stores; DMA100025, Apple – Operating systems; DMA100027, Apple – Web browsers).
96 Commission Decision of 5 September 2023 C(2023) 6102 final [Public version] (Case 100040 ByteDance – Online social networking services).
97 Commission Decision of 5 September 2023 C(2023) 6105 final [Public version] (Cases DMA100020, Meta – Online social networking services; DMA100024, Meta – Number-independent interpersonal communications services; DMA100035, Meta – Online advertising services; DMA100044, Meta – Online intermediation services).
98 Commission Decision of 13 May 2024 C(2024) 3176 final [Public version] (Case DMA100019, Booking – Online intermediation services).
99 Commission Decision of 13 May 2024 C(2024) 3176 final [Public version] (Case DMA100019, Booking – Online intermediation services).
100 (1) Alphabet: Google Play; Google Maps; Google Shopping; Google Search; YouTube; Android Mobile; Alphabet's online advertising service; Google Chrome.; (2) Amazon: Marketplace; Amazon Advertising; (3) Apple: AppStore; iOS; Safari; iPadOS; (4) ByteDance: TikTok; (5) Meta: Facebook; Instagram; WhatsApp; Messenger; Meta Ads. On 23 April 2025, Meta was undesignated for its online intermediation service Facebook Marketplace; (6) Microsoft: LinkedIn, Windows PC OS; (7) Booking: Online intermediation services.
101 https://www.gov.uk/government/news/cma-confirms-apple-and-google-have-strategic-market-status-in-mobile-platforms
102 Bauermeister (n 89). p.85
103 Meta B6-27/21 (Bundeskartellamt).
104 Google B7-61/21 (Bundeskartellamt).
105 Amazon B2-55/21 (Bundeskartellamt).
106 Apple B9-67/21 (Bundeskartellamt).
107 Microsoft B6-26/23(Bundeskartellamt).

changes or reliance on incomplete, incorrect, or misleading information (Article 4 (1) DMA)[108]. For Alexiadis and de Streel, the three year review period mirrors a standard innovation cycle in fast moving digital markets, while the shorter annual review responds to the rapid evolution of revenues and user bases in platform ecosystems[109]. The Commission's designation decisions can be challenged before the European General Court and the European Court of Justice (Article 263 TFEU). Several of the gatekeepers challenged their designations before the General Court[110].

Under the DMCCA, the designation period lasts five years, though the CMA can revoke or renew the designation. At least nine months before the five year designation ends, the CMA must initiate a new SMS investigation to reassess the firm's status (Section 10(2) DMCCA). This "*further SMS investigation*" involves determining whether to revoke an SMS designation, redesignate a firm as having SMS concerning the same digital activity, or consider if a firm should be designated as having SMS regarding a similar or connected digital activity (Section 10(3) DMCCA). SMS designation decisions can be reviewed before the Competition Appeal Tribunal (CAT) on judicial review grounds pursuant to Section 103 DMCCA, with further appeals to the Court of Appeal on points of law.

Designation decisions under Section 19a GWB are also "limited to five years from the date on which it becomes final" (Section 19a(1) GWB). Consequently, as van den Boom et al. observe, "*judicial review of designation decisions under Sec. 19a GWB "extend" the designation period*"[111]. The provision features an expedited judicial review system that enables swift agency intervention in fastevolving digital markets[112]. Appeals against a declaratory finding of an addressee status under section 19(1) GWB are lodged directly before the German Federal Court of Justice as the first and last instance (Section 73(5) GWB)[113].

IV. CRITICAL ANALYSIS

As shown in the previous section, each regime adopts different approaches to designating the regulated platforms. This section now examines the implications of these differences for legal certainty, flexibility, and the risks of over- or under-inclusion.

Legal certainty is a fundamental principle of good regulation that "*shapes the expectations and the incentives of the regulated firms (the gatekeepers) as well as the beneficiaries of the regulation*"[114]. It is generally understood as having two main dimensions: formal legal certainty and substantive legal certainty. Formal legal certainty "*implies that laws and, in particular, adjudication must be predictable: laws must satisfy requirements of clarity, stability, and intelligibilty*"[115]. On the other hand, substantive legal certainty "*is related to the rational acceptability of legal decision□making*"[116]. Accordingly, the methodologies for designating the entities covered by the DMA,

108 On 23 April 2025, the Commission amended its Meta's Designation Decision and removed Marketplace from the list of designated CPS under Article 3(9) DMA. According to the Commission, Meta "demonstrated a change in the facts capable of leading to a change in the Commission's assessment in the Designation Decision". Meta proved that Marketplace was no longer an important gateway connecting businesses and end users.

109 Peter Alexiadis and Alexandre de Streel, 'The EU's Digital Markets Act: Opportunities and Challenges Ahead' (2022) 23 Business Law International 163. p.178

110 These include Apple, which appealed the designations of iOS, iMessage and App Store; Meta, which appealed the designations of Messenger and Marketplace; and Opera Norway, which contested the Commission's decision not to designate Microsoft Edge as a core platform service. In July 2024, the Court dismissed ByteDance's appeal against the TikTok designation.

111 van den Boom and others (n 7). p.14

112 Witt (n 1).p.698

113 Only Amazon and Apple appealed their designations. In April 2024, the Federal Court of Justice confirmed Amazon's designation, and in March 2025, it approved Apple's inclusion. Therefore, all designations under Section 19a GWB are firm.

114 Alexandre de Streel and others, 'Implementing the DMA: Substantive and Procedural Principles' (Social Sci-ence Research Network, 17 January 2024) <https://papers.ssrn.com/abstract=4700134> accessed 14 August 2025., p.11

115 Elina Paunio, 'Beyond Predictability – Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order' (2009) 10 German Law Journal 1469. p.1469

116 ibid. p.1469

DMCCA, and Section 19a GWB should be sufficiently clear and intelligible to enable potential addressees to self-assess their status and anticipate their designation. This is crucial, given that designated gatekeepers are subject to extensive obligations and prohibitions capable of significantly influencing their business models and strategic operations[117].

Ezrachi observes that economic actors naturally prefer a predictable environment and a clear, welldefined regulatory discipline[118]. However, the author acknowledges that flexibility may yield benefits, provided it does not undermine predictability, transparency, or objectivity[119]. Such flexibility acquires particular significance in the context of digital market regulation, where overly rigid frameworks risk rapid obsolescence[120] given the "*everevolving nature of digital markets*"[121]. As Bietti reasons, there is no fixed method for anticipating future legal, moral, and political challenges. Hence, flexibility becomes a vital quality to ensure that digital regulations remain adaptive and resilient over time.

Regulatory design must also prevent the pitfall of over- or under-inclusion of designation criteria[122]. Baldwin et al. highlight that "*illformulated rules may prove over- or under-inclusive*"[123] as rulemakers' pursuit of precision often founders on informational limitations, yielding suboptimal outcomes[124]. Illformulated designation rules risk including firms that should not be subject to regulatory control (type I error) or may fail to identify undertakings that should be regulated (type II error). Geradin contends that type I errors undermine the efficacy of gatekeeper obligations, complicate implementation, monitoring, and enforcement, and may prompt nongatekeeper platforms—fearing designation—to lobby against regulation, eroding industry support while straining stretched regulatory resources as designations proliferate[125]. Regarding type II errors, the author warns that "*it may fail to protect business users from the harmful practices that may be pursued by platforms holding gatekeeping positions*"[126]. To mitigate such risks, Baldwin et al. propose that policymakers should consciously weigh, under conditions of uncertainty, whether regulatory design should err on the side of over- or under-inclusiveness[127]. Unlike the traditional errorcost framework of competition law, digital market regulation is primarily oriented toward minimising type II errors[128].

In the context of digital market regulations, there are unavoidable tradeoffs between legal certainty, flexibility [129] and the risks of over- or under-inclusion. Given the dynamic nature of markets under the DMA, DMCCA, and Section 19a GWB—where practices and features evolve rapidly—a flexible, futureproof approach is essential to ensure regulatory agility while providing sufficient legal certainty to regulated entities[130]. The following subsections will analyse the different designation methodologies for each regime, reflecting the legislative choices made to balance these three objectives in this crucial step.

117 Geradin (n 4). p.3
118 Ariel Ezrachi, 'Sponge' (2017) 5 Journal of Antitrust Enforcement 49. p.67.
119 ibid. p.67
120 ibid. p.67
121Niamh Dunne, 'Pro-Competition Regulation in the Digital Economy: The United Kingdom's Digital Markets Unit' (2022) 67 The Antitrust Bulletin 341. p.356
122 Geradin (n 4). p.3
123 Robert Baldwin, Martin Cave and Martin Lodge, 'Enforcing Regulation' in Robert Baldwin, Martin Cave and Martin Lodge (eds), Understanding Regulation: Theory, Strategy, and Practice (Oxford University Press 2011) <https://doi.org/10.1093/acprof:oso-bl/9780199576081.003.0011> accessed 13 September 2025. p.233
124 ibid. p.233
125 Geradin (n 4). p.3
126 ibid. p.3
127 Baldwin, Cave and Lodge (n 124). p.234
128 Pablo Ibáñez Colomo, 'What Can Competition Law Achieve in Digital Markets? An Analysis of the Reforms Proposed' (Social Science Research Network, 2 November 2020) <https://papers.ssrn.com/abstract=3723188> accessed 13 September 2025. p.4
129 Damien Geradin and Dimitrios Katsifis, 'Selecting the Right Regulatory Design for Pro-Competitive Digital Regulation: An Analysis of the EU, UK, and US Approaches' (Social Science Research Network, 24 November 2021) <https://papers.ssrn.com/abstract=4025419> accessed 28 August 2025. p.10
130 Akman (n 20). p.3

1. Digital Markets Act

The DMA offers legal certainty and predictability for market participants by using objective and clear quantitative thresholds to identify gatekeepers and by maintaining a comprehensive list of CPS. Coupled with a structured designation process, this enables firms to assess their designation risk with relative ease. On the other hand, the rebuttal mechanism (Article 3(5) DMA), the qualitative designation route (Article 3(8) DMA), and the regular reviews of the gatekeeper status (Article 4(2) DMA) introduce flexibility to the system and protect it against the risks of over- or under-inclusion. Authors such as Bauermeister thus regard Article 3 DMA as enhancing manageability and legal certainty while preserving adaptability akin to Section 19a GWB[131]. Similarly, Fletcher et al. commend the DMA's design for its emphasis on clarity, efficiency, administrability, and enforceability[132]. The European Commission itself has described the designation mechanism as achieving "*a reasonable trade-off between speed, legal certainty and flexibility*"[133].

As explained in the previous section, the DMA's designation process relies primarily on quantitative thresholds [134], with qualitative criteria playing a subsidiary role to capture gatekeepers falling below those threshold[135]. This approach reflects a deliberate policy choice. Quantitative thresholds are, in principle, objective and relatively straightforward to determine[136], providing market participants with a clear indication of whether they might qualify as gatekeepers. Van den Boom and Hornung emphasise that prioritising gatekeeper power over ecosystem power constitutes an intentional design decision, which avoids the protracted and complex processes entailed by elusive economic concepts[137]. Nevertheless, scholars such as Alexiadis and de Streel criticise the DMA's pursuit of legal certainty for yielding a test dominated by quantitative elements[138].

The clear identification of CPS further reinforces legal certainty. As the Commission explains, services should be defined as precisely as possible to give gatekeepers and other actors a clear understanding of the regime's scope[139]. In this respect, Moreno and Petit observe that these definitions privilege technicality and specificity, enhancing certainty at the cost of flexibility[140]. Critics, however, warn that the rapid evolution of digital markets and the emergence of new business models risk rendering the list of services obsolete over time[141]. However, the chosen approach reflects a conscious legislative decision to prioritise predictability for potential ad-dressees, even at the expense of regulatory adaptability.

A detailed examination of the DMA shows that it is not as rigid as it first appears[142]. The Regulation incorporates a "future proofing" mechanism through market investigations, designed precisely to balance legal certainty with flexibility where needed[143]. Echoing this, de Streel and Larouche describe these investigations as "*flexibility clauses to adapt the DMA to the evolution of technologies and markets*"[144]. The European Commission likewise acknowledges that while quantitative criteria provide a high degree of legal certainty for market operators, exclusive reliance on them would limit the ability to identify gatekeepers using additional qualitative

131 Bauermeister (n 89). p.93
132 Fletcher and others (n 75). p.19
133 European Commission, Directorate-General for Communications Networks, Content and Technology (n 24)., para.346
134 Fletcher and others (n 75). p.9
135 Giuseppe Colangelo, 'DMA Begins' (2023) 11 Journal of Antitrust Enforcement 116. pp.117-118
136 Geradin (n 4). p.13
137 Jasper van den Boom and Philipp Hornung, 'Ecosystems in DMA Designation Decisions - Bridging the Gap between Legal Text and Economic Reality' (2025) 16 Journal of European Competition Law & Practice 3. p.4
138 Alexiadis and de Streel (n 109). p.200
139 European Commission, Directorate-General for Communications Networks, Content and Technology (n 24). P.26
140 Natalia Moreno Belloso and Nicolas Petit, 'The EU Digital Markets Act (DMA): A Competition Hand in a Reg-ulatory Glove' (Social Science Research Network, 5 April 2023) <https://papers.ssrn.com/abstract=4411743> accessed 4 September 2025. p.10
141 Teresa Rodríguez de las Heras Ballell, 'The Scope of the DMA' [2021] Verfassungsblog <https://verfassungsblog.de/power-dsa-dma-02/> accessed 6 September 2025.
142 Anne C Witt, 'The Digital Markets Act – Regulating the Wild West' (2023) 60 Common Market Law Review <https://kluwerlawonline-com.lse.idm.oclc.org/journalarticle/Common+Market+Law+Review/60.3/COLA2023047> accessed 9 Septem-ber 2025. p.651
143 Filomena Chirico, 'Digital Markets Act: A Regulatory Perspective' (2021) 12 Journal of European Competition Law & Practice 493. p.497
144 de Streel and Larouche (n 66). para.29

factors and would preclude rebuttals of presumptions in exceptional circumstances[145]. Sole dependence on thresholds risks type I errors (false positives) if set too low or type II errors (false negatives) if set too high[146].

To mitigate these risks, the DMA combines quantitative and qualitative indicators, complemented by a rebuttable presumption. Moreover, regular reviews of the gatekeeper also protect the regime against the risks of over- or under-inclusion. As Bostoen and Monti observe, the rebuttal procedure and qualitative designation process avert type I and type II errors, respectively[147]. Similarly, Fletcher et al., describe the qualitative designation route as a "safety net" that permits the designation of gatekeepers in CPS where the quantitative test would otherwise be under inclusive[148]. According to the Commission, the qualitative criteria themselves were selected to ensure a high level of legal certainty for both gatekeepers and other market participants[149]. Regarding the rebuttal procedure, Streel and Larouche further argue that the indicators "*are sound and reflect the (admittedly limited) economic literature on gatekeepers*"[150]. Taken together, these elements reflect the "semi-flexible"[151] approach of the DMA, which seeks to strike a balance between legal certainty and flexibility.

Recital 24 of the DMA clearly states that it "*primarily targets large undertakings with considerable economic power rather than mediumsized, small or micro enterprises*"[152]. The first designation decisions indicate that this approach indeed captures the firms and services perceived as most problematic from a competition perspective[153]. Indeed, the seven companies that have been designated as gatekeepers under the DMA are among "*the most important incumbents in the digital markets*"[154]. Therefore, given their characteristics, it was highly likely that they could foresee their designation as gatekeepers. Importantly, the removal of Marketplace from the list of designated CPS in April 2025 shows that the regime can adapt to the ongoing market changes. Although Fletcher observes that "*the quantitative thresholds are expected to capture many more firms*"[155], the DMA's designation methodology ultimately affords significant legal certainty[156], enabling firms to anticipate their potential labelling.

2. Digital Markets, Competition and Consumers Act

The DMCCA regime emphasises "*flexibility and future-proofing*"[157], although it sacrifices some legal certainty. Because of its broad definition of "digital activity", reliance on qualitative criteria, and the five year forward-looking assessment, it can be more challenging for firms to predict their designation. However, Section 7 DMCCA introduces some guidance for stakeholders. The UK "procompetition regime" should be able to adapt to the "*ever-evolving nature of digital markets*"[158], while also reducing the risks of over- or under-inclusion. As Andriychuk observes, the DMCCA provides the CMA with the necessary degree of flexibility and discretion to effectively implement the new regulatory framework[159].

145 European Commission, Directorate-General for Communications Networks, Content and Technology (n 24). para.187
146 ibid. para. 334
147 Friso Bostoen and Giorgio Monti, 'The Rhyme and Reason of Gatekeeper Designation under the Digital Mar-kets Act' [2025] Journal of Antitrust Enforcement jnae054. p.2
148 Fletcher and others (n 75).p.10
149 European Commission, Directorate-General for Communications Networks, Content and Technology (n 24). para.133
150 de Streel and Larouche (n 66). para.41
151 European Commission, Directorate-General for Communications Networks, Content and Technology (n 24). para.181
152 Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act). Recital 24
153 Philipp Hornung, 'The Ecosystem Concept, the DMA, and Section 19a GWB' (2024) 12 Journal of Antitrust Enforcement 396. p.415
154 Andriychuk (n 6). p.98
155 Fletcher (n 5). p.21
156 Chirico (n 145). p.494
157 Geradin and Katsifis (n 130). p.27
158 Dunne (n 121). p.356
159 Oles Andriychuk, 'Analysing UK Digital Markets, Competition and Consumers Bill through The Prism of EU Digital Markets Act' (Social Science Research Network, 12 July 2023) <https://papers.ssrn.com/abstract=4507277> accessed 27 August 2025. para.50

Similar to the DMA, one of the British regulator's objectives was to provide legal certainty to potential addresses while ensuring flexibility in the system. In its advice to the British government, the Digital Markets Taskforce stressed that clarity is needed so that firms can understand whether they are likely candidates for SMS designation and what evidence will be relevant to that assessment[160]. At the same time, it emphasised that flexibility is essential if the SMS test is to adapt to changing circumstances and remain future proof as business models evolve[161]. Accordingly, the Digital Markets Taskforce recommended an SMS test that "*sought to balance the tradeoffs between these principles*"[162]. This balance is reflected in the DMCCA's open definition of "digital activity", which grants the CMA significant flexibility in identifying the addressees of the rules -particularly when compared with the EU framework, where expanding the list of core platform services requires formal legislative amendment (Article 19 DMA)[163]. However, this breadth risks upfront ambiguity regarding covered activities[164].

Another area where flexibility is prioritised concerns the DMCCA's requirement that digital activity be linked to the UK (Section 2(1)(a) DMCCA)[165]. Unlike the DMA's Article 3(2)(b), which specifies precise numbers of businesses and end users within the jurisdiction, the DMCCA adopts a broader criterion without quantitative presumptions[166]. Section 4 DMCCA defines this linkage through fulfilment of its specified conditions[167], a provision that Andriychuk deems far more flexible than Article 3(2)(b) DMA[168] and thus more adaptable to digital market evolution.

Section 7 DMCCA may be seen as an effort to introduce some legal certainty to the system. While the Digital Markets Consultation rejected a mechanistic approach to the SMS assessment based on quantitative thresholds, it acknowledged that the CMA would need to prioritise which cases to evaluate[169]. Therefore, it proposed to use the firm's revenue as a proxy for prioritising designations and to provide clearer guidance to stakeholders[170]. According to the Consultation, this approach would offer firms—especially smaller digital ones—greater clarity on their likelihood of facing a designation assessment[171]. Given that the DMCCA threshold is relatively low[172] if compared to the DMA[173], the DMCCA may allow the CMA to designate a broader range of activities[174]. Therefore, authors like Auer et al., question the extent to which the monetary threshold constrains the number of firms[175]. However, that revenue merely flags prospective candidates for designation, rather than determining the outcome itself[176]. By combining a turnover requirement as a prerequisite for the CMA to investigate an activity with a qualitative assessment to justify the designation, the DMMCA regime is

160 Competition and Markets Authority, 'A New Pro-Competition Regime for Digital Markets, Advice of the Digi-tal Markets Taskforce, Appendix B: The SMS Regime: Designating SMS Firms' (UK Government / CMA 2020) Policy Advice / Appendix <https://assets.publishing.service.gov.uk/media/5fce72c58fa8f54d564aefda/Appendix_B_-_The_SMS_regime_-_designating_SMS_firms.pdf> accessed 10 September 2025. para.6
161 ibid. para.5
162 ibid. para.9
163 Andriychuk (n 161). para.17
164 Thomas Tombal, 'Ensuring Contestability and Fairness in Digital Markets through Regulation: A Comparative Analysis of the EU, UK and US Approaches' (2022) 18 European Competition Journal 468. p.482
165 Andriychuk (n 161). para.21
166 Andriychuk (n 6). p.99
167 (a) the digital activity has a significant number of UK users, (b) the undertaking that carries out the digital activ-ity carries on business in the UK in relation to the digital activity, or (c) the digital activity or the way in which the undertaking carries on the digital activity is likely to have an immediate, substantial and foreseeable effect on trade in the UK.
168 Andriychuk (n 6). para.21
169 Department for Business, Energy and Industrial Strategy (BEIS) and Department for Digital, Culture, Media and Sport (DCMS) (n 34). para.72
170 ibid. para.77
171 ibid. para.77
172 £1 billion in the UK or £25 billion global annual revenue is sufficient
173 Which requires €7.5 billion in revenue and at least 45 million end-users and 10.000 business users in the EEA.
174 van den Boom and others (n 7). p.32
175 Dirk Auer, Matthew Lesh and Lazar Radic, 'Digital Overload: How the Digital Markets, Competition and Con-sumers Bill's Sweeping New Powers Threaten Britain's Economy' (Social Science Research Network, 18 Sep-tember 2023) <https://papers.ssrn.com/abstract=4718670> accessed 11 September 2025. p.14
176 Dunne (n 121). p.352

unlikely to face many issues with over- or underqualification. This is because the CMA will be able to perform a careful, guided analysis to identify the correct undertakings. Moreover, the turnover requirement serves as a signal for companies, especially small ones.

Perhaps one of the most harmful features of the DMCCA for legal certainty is the forward-looking evaluation to determine the existence of "substantial and entrenched market power" (Section 5 DMCCA). A market power based test inherently requires the DMU to exercise discretion in selecting designation cases[177]. While this system offers flexibility to the regime, it might come at the cost "*of a lack of legal certainty as to whether a specific platform will be considered as an SMS undertaking*"[178]. As explained in the previous section, the CMA must conduct a forward looking assessment covering a minimum of five years—the length of the SMS designation—to determine whether a firm possesses this type of market power. This review considers not only the potential implications of the CMA's inaction, but also developments that could affect the undertaking's conduct in carrying out the digital activity (Section 5 DMCCA). Andriychuk criticises the provision as "*simply illogical, unachievable*"[179], cautioning that it risks unleashing a Pandora's box of judicial challenges from affected undertakings[180]. The author regards the five year assessment period as particularly problematic for digital markets, given the inherent difficulty of reliably predicting how activities will evolve absent or following designation[181]. Even the CMA acknowledged this issue[182] and counter it via post-designation flexibility: should new evidence or developments substantially erode a firm's market power, the CMA may revisit and potentially revoke the SMS designation[183]. Ultimately, the DMCCA's forwardlooking assessment creates legal uncertainty in the designation process, leaving space for disputes and litigation.

A second qualitative element is the assessment of whether a firm holds a "position of strategic significance" (Section 6 DMCCA). To determine if an undertaking holds this position, the CMA must consider the four conditions listed in Section 6 DMCCA, of which at least one must be satisfied[184]. To preserve some flexibility for future-proofing of the regime, the Taskforce Advice did not suggest that the concept of "*position of strategic significance*" be explicitly defined in legislation[185]. Instead, it highlighted "*the importance of providing clarity about the DMU's approach*"[186]. The CMA acted on this recommendation by issuing its "Digital Markets Competition Regime Guidance" which elaborates on each condition with illustrative examples[187]. As Andriychuk observes, the "strategic significance" criterion is sufficiently broad and adaptable to be applied without further legislative modification[188], underscoring a clear policy preference in the DMCCA for flexibility over ex ante legal certainty.

177 Geradin and Katsifis (n 130).p.22
178 Tombal (n 167). p.484
179 Andriychuk (n 161). para.40
180 ibid. para. 40
181 ibid. para. 40
182 Competition and Markets Authority, 'Digital Markets Competition Regime Guidance' (UK Government 2024) <https://assets.publishing.service.gov.uk/media/6762f4f6cdb5e64b69e307de/Digital_Markets_Competition_Regime_Guidance.pdf> accessed 10 September 2025. para.2.58
183 ibid. para.2.58
184 Section 6 DMCCA states that: "An undertaking has a position of strategic significance in respect of a digital activity for the purposes of section 2(2)(b) *where one or more of the following conditions is met— (a) the un-dertaking has achieved a position of significant size or scale in respect of the digital activity; (b) a significant number of other undertakings use the digital activity as carried out by the undertaking in carrying on their business; (c) the undertaking's position in respect of the digital activity would allow it to extend its market power to a range of other activities; (d) the undertaking's position in respect of the digital activity allows it to determine or substantially influence the ways in which other undertakings conduct themselves, in respect of the digital activity or otherwise*".
185 Competition and Markets Authority, 'A New Pro-Competition Regime for Digital Markets, Advice of the Digi-tal Markets Taskforce, Appendix B: The SMS Regime: Designating SMS Firms' (n 162). para.38
186 ibid. para.38
187 Competition and Markets Authority, 'Digital Markets Competition Regime Guidance' (n 185). para.2.66 ff.
188 Andriychuk (n 6). p.99

According to the CMA, the procompetition regime "*is designed to apply only to the very largest firms*"[189] and, states that although the SMS "*is broadly framed, in reality the CMA expects the number of firms designated as having SMS to be very limited*"[190]. Given the regime's notable flexibility, as highlighted earlier, firms might find it challenging to estimate their chances of being designated. Nevertheless, the CMA's initial investigations into Google and Apple indicate that, at least in the early stages, enforcement is likely to focus on the most problematic digital activities and dominant platforms. This alleviates concerns about unpredictability, particularly for smaller firms unlikely to be scrutinised. In this context, the Digital Markets Competition Regime Guidance[191] should provide further clarity to help firms self-assess whether they are likely to fall within the scope of the SMS regime.

3. Section 19a GWB

Section 19a GWB provides the BKARTA with significant flexibility to respond to evolving digital markets by allowing a broad, qualitative assessment of whether an undertaking has a "paramount significance for competition across markets". However, the "vagueness"[192] of Section 19a GWB and the lack of clear prioritisation of the criteria for designation reduce legal certainty and raise the risks of both over- and under-inclusion.

Unlike the DMA and the DMCCA, Section 19 GWB does not include quantitative thresholds to support its qualitative criteria. The BKARTA must demonstrate that the designation is justified through a thorough qualitative assessment[193]. As explained in the previous section, the initial criterion for being designated as the addressee is that the firm "is active to a significant extent on markets within the meaning of Section 18(3a)", that is, multisided markets or networks. Therefore, Section 19a GWB applies solely "*to platforms which bring together at least two different user groups and benefit from indirect network effects*"[194]. The precise scope of this provision is, however, contested. There has been debate as to whether the application of Section 19a GWB should be further confined to digital markets[195]. Bauermeister observes that, although the explanatory notes to Section 18(3a) GWB emphasise digital markets, they also reference credit card systems and shopping malls as analogies, implying that the provision's reach may extend beyond purely digital contexts[196]. Nonetheless, the author further notes that "*the reasoning behind the law published by the government for the 10th Amendment states that Section 19a shall be restricted to digital markets*"[197]. In a similar vein, Franck and Peitz highlight that the legislative materials repeatedly describe the provision as targeting only a "small group of firms" or "digital ecosystems," indicating that the legislature primarily had Big Tech in mind when crafting the Section 19a instrument[198]. This divergence between interpretative approaches introduces a degree of legal uncertainty for potential addressees, particularly for those operating multi-sided platforms outside the core digital sphere, such as credit card companies.

The requirement that the undertaking is active to a "significant extent" on multisided markets or in networks introduces further ambiguity to the system, as it lacks a clear measurement. Bauermeister, suggests that this

189 Competition and Markets Authority, 'How the UK's Digital Markets Competition Regime Works' (GOV.UK, 23 January 2025) <https://www.gov.uk/guidance/how-the-uks-digital-markets-competition-regime-works> ac-cessed 16 September 2025.
190 Competition and Markets Authority, 'Overview of the CMA's Provisional Approach to Implement the New Digital Markets Competition Regime' (n 13). para.5.2
191 Competition and Markets Authority, 'Digital Markets Competition Regime Guidance' (n 185).
192 Bauermeister (n 89). p.85
193 van den Boom and others (n 7). p.32
194 Hinck and Podszun (n 38). p.36
195 Bauermeister (n 89). p.79
196 ibid. p.79
197 ibid. p.79
198 Jens-Uwe Franck and Martin Peitz, 'Section 19a of the Reformed German Competition Act: A (Too) Powerful Weapon to Tame Big Tech?' [2021] Competition Policy International <https://www.competitionpolicyinternational.com/wp-content/uploads/2021/03/6-Section-19a-of-the-Reformed-German-Competition-Act-A-Too-Powerful-Weapon-to-Tame-Big-Tech-By-Jens-Uwe-Franck-Martin-Peitz.pdf> accessed 10 September 2025. p.5

criterion is meant to distinguish an enterprise's "relevant" activities from its other operations, but concedes that it is unclear whether "significant" implies that most of the firm's business must fall under Section 18(3a) GWB, or merely that such activities are more than negligible[199]. Franck and Peitz likewise note that it is difficult to identify which cases are truly excluded from the potential scope of Section 19a(1) GWB, second sentence[200]. Bauermeister therefore, characterises the 'significant extent' criterion as dynamic[201], conferring flexibility on the framework yet engendering uncertainty, as hitherto irrelevant undertakings may abruptly become its addressees[202].

The second core requirement for being designated as an addressee under Section 19a GWB is that the undertaking possesses "paramount significance for competition across markets" a concept that is novel in German competition law and remains conceptually unclear[203]. The law provides a non-binding and non-exhaustive list of five criteria to indicate what might constitute such a position[204]. However, as Koenig argues, the practical application of these criteria proves to be difficult[205]. For the author, the problem is not the criteria themselves, but that the overarching standard "*is so vague that it is not clear what findings must be made regarding the criteria in order for the standard to be met*"[206]. The German legislator explicitly avoided prioritising the designation criteria, encouraging the BKARTA to list as many relevant aspects as possible and to incorporate them, often indiscriminately, into a broad balancing process[207]. As a result, it remains unclear both what exactly constitutes "gatekeeper power" in the sense of Section 19a GWB and how much of it is required to trigger the provision[208]. Adding to this uncertainty is the Bundeskartellamt's discretion in choosing which companies to target, because not all companies meeting the requirements necessarily need to be designated as gatekeepers[209].

Koenig argues that the vagueness of Section 19a GWB has not produced serious consequences in decided cases, as outcomes were evident from the outset[210]. Despite the academic debate and the broader wording, the BKARTA has, in practice, concentrated its efforts on a few major digital companies. The real challenge will arise in borderline cases, where the BKARTA will not be able to avoid clearly defining what constitutes a gatekeeper position[211]. This will require a more precise delineation of gatekeeper power—taking into account the criteria in Section 19a(1)(2) GWB—and of the threshold that justifies imposing stringent conduct prohibitions[212]. Hinck and Podszun further stress that compliance with the DMA does not insulate firms from scrutiny or designation under German law[213]. It is therefore reasonable to expect that a broader range of companies may, over time, be brought within the scope of Section 19a GWB.

In summary, the German legislator opted for "vagueness"[214] when delineating the scope and criteria for designating addressees under Section 19a GWB. This ambiguity not only diminishes legal certainty but also

199 Bauermeister (n 89). p.80
200 Franck and Peitz (n 88). footnote N°24
201 Bauermeister (n 89). p.80
202 ibid. p.81
203 Hornung (n 155). p.427
204 Section 19a (1) GWB states: "*In determining the paramount significance of an undertaking for competition across markets, account shall be taken in particular of: 1. its dominant position on one or several market(s), 2. its financial strength or its access to other resources, 3.its vertical integration and its activities on otherwise related markets, 4. its access to data relevant for competition, 5. the relevance of its activities for third party access to supply and sales markets and its related influence on the business activities of third parties*".
205 Carsten Koenig, 'The Designation of Gatekeepers under the New German Competition Rules for the Digital Economy Reports: Germany' (2022) 6 European Competition and Regulatory Law Review (CoRe) 248. p.249
206 ibid. p.249
207 ibid. p.250
208 ibid. p.250
209 ibid. p.253
210 ibid. p.253
211 ibid. p.253
212 ibid. p.253
213 Hinck and Podszun (n 38). p.40
214 Bauermeister (n 89). p.85

increases the risks of both over-inclusion and under-inclusion of the regime. While some believe that the inherent vagueness of Section 19a GWB alone ensures the requisite adaptability for fast-evolving markets[215], for authors like Körber, the DMA's Art. 3 employs a superior semi-flexible framework for identifying gatekeepers, outperforming the more adaptable yet less reliable method outlined in Germany's § 19a(1) GWB[216].

The previous analysis confirms that the three designation methodologies reflect distinct legislative choices in balancing legal certainty, flexibility, and the risks of over- or under-inclusion—from the DMA's semi-flexible reliance on quantitative thresholds, to the DMCCA's emphasis on adaptability, and Section 19a GWB's broad administrative discretion. These differences are not merely technical; rather, they raise a deeper question about where each regime locates the burden of ensuring accurate designation.

V. CONCLUSIONS

Certainty and flexibility are not independent objectives. Both are, fundamentally, strategies for allocating the risk of over- or under-inclusion: they represent alternative answers to the question of who should bear the risk of error in designation decisions. Under the DMA, that burden falls primarily on the legislator, which must define the relevant criteria in advance. Under the DMCCA and Section 19a GWB, it rests largely with the regulator, which must justify its assessments on a case-by-case basis.

The comparison undertaken in this paper reveals a finding that the initial analytical framework did not fully anticipated. Despite their structural differences, the regimes have largely identified the same firms as warranting intervention: Alphabet and Apple across all three jurisdictions, and Amazon, Meta, and Microsoft under both the DMA and Section 19a GWB. This convergence raises a broader question: if different institutional designs tend to produce similar outcomes in the clearest cases, what is ultimately at stake in the choice of designation model? The answer lies in the cases that remain undecided: ambiguous cases, emerging ecosystems, and the next generation of digital intermediaries whose market power is still developing. It is in these situations, rather than in the designations already made, that the practical significance of the different designation methodologies will become evident.

A further distinction also merits attention. The DMA is not simply another regulatory instrument; as a measure of EU law, it establishes a uniform designation framework across all Member States and thereby reduces the fragmentation that divergent national approaches could otherwise generate. Its emphasis on legal certainty and fixed criteria should therefore be understood not only as a methodological preference, but also as a response to the demands of multi-jurisdictional coordination. By comparison, Section 19a GWB operates within the constraints imposed by Article 1(5)–(7) DMA, while the DMCCA could be read as an expression of the United Kingdom's post Brexit pursuit of regulatory autonomy. The three regimes are therefore not independent experiments but components of a broader legal and institutional landscape that shapes the choices available to each.

The comparative analysis ultimately does not point to a single superior model. Rather, it suggests that the most effective framework may combine elements of all three approaches. This raises a further complication: as each regime confronts its own borderline cases, divergent designations across jurisdictions become

215 ibid. p.86
216 Torsten Körber, 'Lessons from the Hare and the Tortoise: Legally Imposed Selfregulation, Proportionality and the Right to Defence Under the DMA' (Social Science Research Network, 19 October 2021) <https://papers.ssrn.com/abstract=3914669> accessed 22 September 2025. p.24

increasingly likely, potentially requiring more structured alignment mechanisms between regimes that, for now, operate independently. Whether such divergence can be reconciled without undermining the coherence of the broader regulatory landscape remains an open question, as does whether any of the three regimes—individually or in combination—is capable of achieving this.

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