

# CAN THE EU DIGITAL MARKETS ACT ACHIEVE ITS GOALS?

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## ABSTRACT

Over the past few years, EU and national regulators accelerated their plans to regulate digital platforms. The EU is not alone in this quest, as many other jurisdictions around the world are considering various options for regulatory intervention in digital markets. Rather than being an ‘outlier’ on this issue, Europe has a chance to set new standards in this domain, which other countries may end up emulating. In this context, the proposed EU Digital Markets Act (DMA) represents a major endeavour to tackle the concentration of economic power in the hands of large-scale Tech companies. One of its most significant features is that it marks a transition from the traditional application of ex post antitrust rules, towards an entirely new ex ante regulatory scrutiny, aimed at systematically preventing possible abuses by those platforms that can be defined as gatekeepers of entire digital ecosystems. This paper explores the pros and cons of this shift, and discusses whether the proposed enforcement of the DMA, concentrated in the hands of the European Commission, is likely to prove sufficiently effective. The author assesses whether the DMA, together with other legislative proposals presented by the European Commission over the past few months (Data Governance Act, Data Act, Digital Services Act, Artificial Intelligence Act, etc.) will pave the way for a more economically and socially sustainable digital ecosystem in the years to come.

### CAN THE EU DIGITAL MARKETS ACT ACHIEVE ITS GOALS?

On March 25, 2022, the European Commission, the European Parliament and the Council of the EU reached a political agreement on the Digital Markets Act (DMA), a proposed regulation that targets specific practices adopted by large technology corporations that operate as “gatekeepers” in specific digital ecosystems. The DMA is one of several proposed new regulatory measures proposed by the Von der Leyen Commission to promote a more competitive and sustainable digital economy in the European Union: these include other, far-reaching proposals such as the Digital Services Act (DSA), the Artificial Intelligence Act (AIA), the Data Governance Act (DGA) and the Data Act. Altogether, these proposals may lead to a paradigm shift in the EU approach to digital markets, featuring more proactive regulatory interventions and an overall orientation towards public steering of an environment that has, over the past decades, traditionally remained shielded from regulation (Renda 2021). In this broader context, the DMA should be seen as a targeted initiative, with a scope limited to eight “core platform services” (CPS).<sup>1</sup> In practice, it is often seen as a surgical measure to diminish the prominence of

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<sup>1</sup> The eight CPS include: online B2C intermediation (e.g. Amazon Marketplace, Apple App Store, Google Play store); online search engines (e.g. Google search, Microsoft Bing); online social networks (e.g., Facebook/Meta); video-sharing platform services (e.g., Youtube); number-independent communication services (e.g. WhatsApp, Skype, Gmail); Cloud computing

so-called GAFAs (Google, Amazon, Facebook, Apple): however, in its final form, the DMA is likely to apply also to a limited number of other subjects, including Booking.com, SAP, Oracle and Salesforce (Anderson and Mariniello 2021).

The DMA pursues three distinct objectives. First, it aims at strengthening the contestability of the gatekeepers' positions, by lowering entry barriers to gatekeepers' markets. In the DMA, gatekeepers are defined as undertakings meeting three cumulative criteria: having a significant impact on the internal market; operating at least one of the eight CPS; and enjoying an entrenched and durable position in their operations.<sup>2</sup> Gatekeepers thereby transcend the traditional reliance on the notion of "relevant product market" in competition law, as well as the reference to market shares as indicators of market power. Instead, they cross traditional market boundaries, orchestrating a multi-sided ecosystem that is large and pervasive enough to be seen as a necessary bridge between businesses and consumers. The Commission further believes that their "entrenched position", already fuelled by economic effects typical of digital markets such as strong network externalities and overall "centripetal forces", was further strengthened by a wide variety of ongoing strategic practices, which the DMA now seeks to prohibit. These include discriminatory conducts such as self-preferencing, as well as the pre-emptive acquisition of smaller companies to avoid that they evolve into potential competitors (so-called "killer acquisitions").

Second, the DMA tackles the growing economic dependency of business users vis à vis gatekeepers. This dependency, according to the European Commission and evoked also at national level, allows gatekeepers to engage in a wide variety of abusive practices. In this respect, the DMA ends up "codifying" many of the practices already found to be unfair or anticompetitive in past (mostly national) competition cases. These include. anti-steering clauses (*i.e.* banning developers from pointing users outside of a gatekeeper's app ecosystem, as in the case of *Epic Games v Apple*); most-favoured nation clauses (*i.e.*, prohibiting users from offering the same products/services through third party online intermediation services at different prices or conditions, as in several cases on *Booking.com*, *Apple* and *Amazon e-books*); various bundling practices (*i.e.* forcing app developers to subscribe to additional CPS, such as identification or payment services, as in the case of *Apple's App Store* and the provision of access to its NFC chips for tap-and-go payments); the appropriation of data from businesses using the platform (a practice attributed to all GAFAs in past investigations at EU and Member States level); and the

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services (e.g. Amazon webservice, Microsoft Azure); operating systems (e.g. Google Android, Apple iOS, Microsoft Windows); advertising services offered by a CPS provider (e.g., Google AdSense).

<sup>2</sup> A firm that does not (yet) fulfil all these requirements may still be designated as gatekeeper if "it is foreseeable that it will enjoy such a position in the near future".

denial or late provision of data access. In this respect, the DMA reinforces the rather timid provisions already included in the Platform to Business regulation, entered into force in 2019; and echoes similar approaches adopted at the EU level in the retail and agrifood sector (Renda 2012, 2014).

Third, the DMA seeks to avoid that Member States take different routes in the regulation of large digital platforms. This is a legitimate concern, since many European countries, including Germany and France, had taken action to introduce changes in their competition laws, which would allow them to more effectively tackle the concerns created by gatekeepers, platforms of paramount (Germany) or systemic (France) importance. The centralisation effect is made stronger by the decision to leave the enforcement of the DMA in the sole hands of the European Commission, in what may become an exclusive competence of DG COMP, or of a combination of Directorate-Generals (COMP, GROW, CONNECT and perhaps others). The effort required for such an ambitious regulatory intervention is such that estimates on the need for additional personnel in European Commission services range from 80 new staff to as many as 220.<sup>3</sup>

Against this backdrop, Article 3 of the DMA essentially introduces the new concept of gatekeeper, specifies criteria that would trigger a rebuttable presumption that a given platform is in fact a gatekeeper, and leaves the door open for the Commission to designate other undertakings as gatekeepers, even when the key thresholds are not (yet) met. Then, the DMA lists a number of “Dos and Don’ts”, essentially translating years of lengthy antitrust investigations into a single list of obligations to be applied *ex ante*, without proof of market power or consumer harm. The regulation contains both a “black list” of practices that are *per se* prohibited (Article 5); and a “grey list” of practices that are subject to further specification, including a possible negotiated procedure between the gatekeeper and the European Commission (Article 6). Notable provisions include also Article 12, which obliges gatekeepers to notify any concentration involving another provider of CPS or “any other services provided in the digital sector”, even if not falling under the scope of EU or national merger rules (a provision aimed to control possible “killer acquisitions”); and Article 13, which mandates that gatekeepers promptly submit to the Commission (and updated on a yearly basis) an “independently audited description of any techniques for profiling of consumers that the gatekeeper applies to or across its core platform services”. The designation of gatekeepers (beyond the ones already presumed to fall under the definition) occurs after a market investigation carried out by the Commission, but Member States can also empower national competition authorities to start investigations into possible infringements and transmit their findings to the

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<sup>3</sup> See <https://table.media/europe/en/news-en/competition-meps-call-for-more-posts-for-eu-commission/>.

Commission. Violations of the rules laid down in the DMA leads to fines of up to 10% of the violator's total worldwide turnover, but in case of repeat offence the fine can reach 20% of worldwide turnover; systematic failure to comply can also lead to further market investigations and harsher behavioural or structural remedies.

## WAS THE DMA REALLY NEEDED?

There are many reasons to believe that the shift from the application of competition law rules to an ex ante regulatory framework is needed. Antitrust investigations in landmark cases such as *Microsoft* and *Google Shopping* showed how lengthy, cumbersome, outdated and ineffective competition rules can be when applied in this domain. Suffice it to think that Google was under investigation for over eight years before a first (record) fine was announced by the European Commission, and that the *Google Shopping* case is still pending a decision of the Court of Justice (after the General Court largely upheld the Commission's decision). The peculiar features of digital markets are so elusive for competition authorities that technology corporations have consistently preferred to risk incurring a late condemnation, rather than exercising self-restraint in the first place. The importance of retaining the first-mover advantage, leveraging network effects, keeping competitors small is such that, in comparison, paying a one-off fine of 10% of the annual turnover is much preferable to allowing maverick firms to evolve into dangerous competitors. Concepts such as market definition, dominance and abuse, and even key pillars of antitrust enforcement such as allocative efficiency and consumer welfare seem to have become relics of the past. And the impact of past decisions on the digital ecosystem seems to have been rather limited: economists have consistently documented the rise of the tech giant's market power, and their market valuation (reaching a breathtaking three trillion USD in the case of Apple) confirms that antitrust enforcement has done very little to erode the market power of this fistful of players.

Of course, one could object that being big or even "supersized", at least in mainstream views of antitrust, is not a crime in and of itself. Several commentators have pointed out that many features of the digital environment force these large players to continue investing in research and development to bring innovation to the market; and that their mere existence promotes innovation in the application layer, with millions of apps being made available to end users at a fraction of the search costs that they would otherwise face. Yet the extraordinary ability of these players to capture the attention of end users and exploit the centripetal effects of the Internet has evidently led to value capture, and the appropriation of innovation by emulating promising new products (e.g., Microsoft copying Netscape Navigator, or Meta copying every new feature of TikTok or Snapchat) or acquiring small emerging businesses right away. This is why several competition

authorities in Member States started looking beyond traditional antitrust tools, and either worked on comprehensive reforms or started relying on other legal provisions, such as unfair competition, or abuse of economic dependency, which at national level are often entrusted to the competition authority when it comes to enforcement (Renda 2012).

The need for new tools beyond standard antitrust investigations and merger control also led to the gradual abandonment of an approach to competition policy, which was grounded on cost-benefit analysis and a “more economic approach”, often termed as “effects-based”. In the DMA, the European Commission declares the end of the (exclusive reliance on the) *ex post* approach, which requires demonstration that a given practice exerted a negative impact on consumer or total welfare; and rather embarks on a structuralist approach, which looks at entrenched positions in the digital environment and immediately follows up with behavioural remedies. This completes a rather spectacular U-turn for the European Commission: only a decade ago, the Commission’s priority was the elimination of all national competition rules on unilateral conduct that would fall outside the rather narrow remit offered by Articles 101 and 102 TFEU, and the merger regulation; today, Brussels relies on the broader experience of Member States on quasi-competition rules (abuse of economic dependency, abuse of superior bargaining power, etc.) to sharpen its arguments against big tech.

The need for such a quantum leap is, after all, felt almost everywhere around the world, and absent efforts to find alignment on the regulatory framework, global tech companies risk facing a highly fragmented regulatory landscape. In the United Kingdom, a long and deep reflection on the dynamics of digital markets led to the identification of corporations with “Strategic Market Status” (SMS), which requires “a finding that the firm has substantial, entrenched market power in at least one digital activity, providing the firm with a strategic position.” An *ad hoc* Digital Markets Unit in the Competition and Markets Authority (CMA) takes care of the designation of SMS firms, and relies on an enforceable, principles-based code of conduct that identifies specific activities to be undertaken by the SMS firm, and possible pro-competitive remedies tackling the root cause of concentrated market power. Besides this, a new Digital Regulation Cooperation Forum was established in 2020, including the CMA, the Information Commissioner’s Office (ICO) and the Office of Communications (Ofcom).

In the United States, an extensive investigation on practices by large tech giants was undertaken by Congress already in 2019, and several bills have been introduced to strengthen the scrutiny of large-scale digital platforms, including the ‘Merger Enforcement Improvement Act’ and the ‘Platform Competition and Opportunity Act’ in the Senate, and the ‘American Choice and Innovation Online Act’, the ‘Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021’ (ACCESS Act),

and the ‘Ending Platform Monopolies Act’ in the House of Representatives. Australia recently amended the Competition and Consumer Act of 2010 to introduce a News Media and Digital Platforms Mandatory Bargaining Code, which focuses on imbalances of bargaining power between platforms and business users, and a special unit was established in the competition and consumer commission (ACCC) to monitor and report on the state of competition and consumer protection in digital platform markets. China started to crack down on its own platforms by imposing fines on Alibaba (2.75 billion USD) and Tencent (fine unknown). And in Japan, an Act on Improving Transparency and Fairness of Digital Platforms (TFDPA) has been in force since February 2021, imposing transparency and fairness requirements (similarly to the EU 2019 Platform to Business Regulation).

In other words, the DMA is neither an EU “whim”, nor the product of protectionist industrial policy masqueraded as competition law. The need for intervention is widely acknowledged in several countries. The DMA reflects the EU’s traditional approach to competition, which looks at preserving a pluralistic market structure and is wary of the perils of firm size *per se*, regardless of proven abuses. This approach, which many trace back to the ordoliberal school that was very influential in the drafting of the Treaty of Rome, explains the EU desire to transition from the rather reactive and deferential approach of mainstream antitrust law, towards an era of proactive inquiry in an environment that seems incapable of generating sufficient contestability.

Yet, once the justification for this initiative is established, three main questions remain. Is the DMA a proportionate measure or will it build a straitjacket for the digital ecosystem, constraining innovation? Can the DMA be effectively enforced in practice? And finally, will it create geopolitical frictions, particularly in the case of transatlantic relations?

### **A PROPORTIONATE, EFFICIENT REGULATION?**

The DMA is a courageous move, as well as an existential one for the European Commission. Many commentators have argued that the Act was mostly conceived with the intention to target large-scale American platforms, and indeed some of the amendments proposed in the European Parliament (in the so-called “Schwab proposal”) seemed to surgically limit the scope of the DMA to the GAFA. In reality, the application will likely be a bit broader, and will also encompass European corporations such as SAP. That said, the DMA ends up introducing a wholesale prohibition, for all gatekeepers, of practices that until now had been found to be unfair or anticompetitive for individual platforms. The generalisation of these obligations may, if not adequately kept under control, lead to a rather indiscriminated blanket regulation that may affect existing



business models way beyond the immediate concerns expressed by the European Commission.

In addition, several provisions appear to be likely to partly disrupt existing business models, by forcing gatekeepers to unbundle their services, reverting to a service-by-service approach that will entail limited possibilities for the cross-subsidisation practices that are typical of multi-sided platforms. Some gatekeepers, and most notably Apple, have complained about prohibitions related to the bundling of CPS with payment and ID services, claiming that this may undermine the economic viability and overall security of their system. Commentators have also noted that, depending on the Commission's interpretation, the DMA could also (with some adjustment) lead to device neutrality obligations, with iPhones now having to open up to Android or Windows operating systems and app stores; and far-reaching interoperability requirements (Krämer and Feasey, 2021).

Importantly, the DMA adopts what could be defined as a backward-looking “codification” approach, which translates the individual practices that were found to be unfair or anticompetitive in several (national) *ex post* competition investigations into generalised, *ex ante* obligations for all gatekeepers. This may lead to imposing a rigid, one-size-fits-all approach to multi-sided platforms with extremely different business models, and as such may lead to a disproportionate imposition of regulatory constraints. At the same time, the apparent intrusiveness of these provisions must be gauged against the amply demonstrated ability of large-scale IT players to dodge regulatory obligations, or to engage in various, invisible forms of non-price discrimination. Moreover, the prescriptive approach, which comes with a detailed description of the practices in Articles 5 and 6, also puts the DMA at risk of rapid obsolescence, which in turn may condemn the Commission to periodically update, *ex post*, the black and grey lists. Compared with this approach, the UK solution, centred on enforceable, principles-based codes of conduct, appears to be simpler to implement and update, as it is more tailored to the specific case, and more future-proof. Against this background, whether the Commission will be able to continuously update and evaluate the legislation and the lists of prohibited practices, thereby reflecting the evolution of the market, is difficult to foresee at the time of writing.

Finally, the effectiveness of the DMA must be appraised in combination with other provisions, in particular the Digital Services Act and the Data Act. The latter (still at proposal stage) contains provisions on unbundling, interoperability and fair P2B relations that partly overlap with those of the DMA, potentially strengthening their reach and impact. To be sure, the introduction of these combined provisions will bring about significant change in the digital ecosystem. Intra-platform competition is likely to

increase as a result of the obligations imposed. As for what concerns inter-platform rivalry, as well as gatekeeper contestability, the DMA appears to merely scratch the surface, Gatekeepers will likely find ways to maintain their privileged relationship with end users as they have since at least the days of the Microsoft EU client-server interoperability case, e.g. by making it more convenient to exploit “one-stop-shop” multi-service offers such as theirs, without infringing the DMA provisions.

### CAN THE DMA BE EFFECTIVELY ENFORCED?

Enforcement has traditionally been a weak spot in the regulation of digital markets, and not only in Europe. Past attempts, from copyright enforcement to the EU GDPR, have shown the difficulty of adopting traditional means of monitoring and oversight to a world dominated by private governance and often rather obscure algorithmic practices. At the EU level, a lengthy regulatory cycle and reliance on national authorities have also backfired in the past years, with GDPR remaining part of an undesirable race to the bottom, with national data protection authorities at once lamenting scarce resources, and “competing for leniency” to attract investment by tech giants on their national territory.

The DMA tries to address some of these problems by centralising enforcement in the hands of the Commission. At the same time, it does not address other key features of large-scale digital platforms. Most of the practices included in Articles 5 and 6 are implemented through algorithms, often hiding sophisticated and ever-evolving Artificial intelligence systems. This may represent an important obstacle to enforcement; not only algorithmic inspection is a procedure that is largely unknown to most European Commission officials, including those in DG COMP, but the practice of algorithmic versioning and constant update has become so pervasive that it is difficult to rely on one-off inspections. Borrowing from Heraclitus’s *Panta Rhei*, one could say that inspecting twice the same algorithm has become impossible. Observing discrimination practices and behaviours through inspections risks creating a situation akin to a “Volkswagen scandal on steroids”, which large tech giants being able to show the best version of their technology solutions to inspectors, and then implementing different specifications vis à vis their business users.

The other issue that will have to be addressed is the lack of resources to enforce the DMA. As already mentioned, key EU policymakers have invoked an increase in the staff available to DG COMP, especially to enforce the DMA: while the Commission allocated 80 staff members to the DMA, members of the European Parliament have invoked as many as 220 staff. These additions may be grouped into an *ad hoc* unit similar to the ones created in Australia and the UK and feature a larger-than-average presence of data scientists and AI experts. All in all, the DMA does not seem to tick all the boxes when it

comes to enforcement. Whether the centralised approach (which may preclude, *i.a.*, private enforcement) will create more problems than the ones it seeks to solve, it remains to be seen.

## THE DMA: A GEO-ECONOMIC PERSPECTIVE

From a geo-political and geo-economic perspective, the DMA has created tensions, in particular with the United States, where the EU's attempt to regulate digital platforms is traditionally met with scepticism. At the same time, as already recalled, the problems that the DMA seeks to solve are not exclusively a concern of EU institutions, and have become widespread also in China and the United States. Through the adoption of extra-territorial rules, the EU will seek to establish global standards by leveraging the sheer size of its single market. To some extent, and for the sake of irony, the EU is presenting the DMA in full awareness of its role as a gatekeeper, *i.e.* an inevitable market for any transnational digital corporation, regardless of recent announcements that excessive regulation may even trigger the exit of some tech giants from the EU market. At the same time, the likelihood that the DMA will generate a so-called "Brussels effect" around the world is rather minimal: as explained elsewhere (Renda 2022), in view of the increasing regulatory density and international activity on platform regulation, as well as the transnational dimension of the issue and of the regulated entities, the EU may not be able to trigger the spontaneous emulation that, at least in some countries, seems to have followed the adoption of the GDPR (Bradford 2019).

A broader set of considerations can however be made on the EU's approach to rebalancing competition and building stronger European companies in the digital sphere. The DMA is by no means the only measure proposed by EU institutions to strengthen Europe's competitiveness in the digital sphere. On the one hand, other legislative provisions such as the Data Act may strengthen the DMA's attempt to force the unbundling of goods and services in the online world by specifically disentangling devices and services from the data they generate and, thus, trying to reduce vendor lock-in, which is considered one of the major forces blocking new entrants from challenging the market position of gatekeepers. On the other hand, the EU has identified the decentralised architectures emerging in the context of the digitalisation of industry as a terrain where no obvious leader has already emerged. So-called edge/cloud architectures are being associated with industrial investments, inter-governmental agreements, large public-private partnerships and dedicated data spaces, aimed at avoiding value capture by large tech giants. In this domain, the EU seems to oscillate between two different approaches: traditional industrial policy (as in the case of the newly proposed CHIPS Act) and new-generation federated environments. In the latter, interoperability and legal compliance

become essential preconditions to operate in the EU market, but no European giant is in the making.<sup>4</sup> It is exemplified by the (highly ambitious) Franco-German GAIA-X project, which replies to the highly centralised and concentrated US-based cloud giants with a federated environment. However, technical protocols still leave space for both large incumbents and new entrants.

In this respect, the DMA appears likely to produce impacts prevalently falling on US-based giants but cannot be considered *per se* as a discriminatory or a protectionist measure. Rather, it applies to all firms that interact with European businesses and consumers, and as such produces extra-territorial impacts. Since it tackles systemic market power in cyberspace, it is hardly surprising that it will end up affecting US-headquartered companies more than the European ones.

#### **CONCLUDING REMARKS: HOW TO MAKE THE DMA WORK?**

Implementing the DMA will not be easy and its novelty will certainly require a period of trial and error, as well as future adjustments. However, a number of measures may improve its chances of succeeding.

First, a special unit on digital markets should be created inside the European Commission, a joint effort of DG COMP, DG GROW and DG CONNECT, in line with the examples of the UK and Australia. Such a unit should include relevant new staff members with enhanced technical competence in IT and be fluent in data science as well as in conducting algorithmic inspections.

Second, the special unit should coordinate with the European Data Innovation Board (to be created following the Data Governance Act), the AI Board (created by the AI Act), the European Board for Digital Services (created by the Digital Services Act) and the European Data Protection Board to ensure economies of scale and scope in monitoring and enforcement activities.

Third, the special unit should issue guidance on how to handle the practices listed in Article 6 of the DMA, gradually moving towards a principles-based approach, rather than a very prescriptive, rigid list of practices. Such an approach will preserve and nurture regulatory certainty. In order to achieve this, the Commission will have to ensure that

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<sup>4</sup> A federated architecture allows interoperability and information sharing between semi-autonomous de-centrally organised units. In the case of GAIA-X, data are acquired in all sectors across the globe and are therefore not concentrated in single places. Thanks to this approach, several data owners can exchange data amongst each other, minimising data transfers and leveraging services for data that are trustworthy and guaranteed in terms of identity, description, service characteristic, and service controllability.

delegated acts with guidance on individual practices are adopted in due time (see Article 10 of the DMA proposal).

Fourth, the impact of the DMA on the market should be evaluated early on, possibly after two years from the entry into force, to check for possible unintended effects and assess the efficiency, effectiveness, relevance and coherence of its relevant provisions. The evaluation should involve as many relevant market players and consumer associations as possible.

Fifth, the final text of the DMA should be subject to negotiation within the EU-U.S. Trade and Technology Council, with a view to a possible alignment of the treatment of large-scale technology corporations across the two sides of the Atlantic.

Finally, the first years of implementation of the DMA will likely mark a transition towards more sophisticated technology-enabled forms of regulation. These may include so-called RegTech or SupTech approaches, such as automatic, zero-contact information sharing between regulated entities (the designated gatekeepers) and regulatory authorities (the special unit), to allow for secure, real-time monitoring of compliance with the obligations set forth by the Digital Markets Act and related legislation. Absent this transition, there seems to be little if no hope that new, however ambitious, regulatory measures will end up significantly addressing the issue of gatekeeping in the digital space.

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