The Scope of the DMA

Teresa Rodríguez de las Heras Ballell 2021-08-30T14:34:49

The Digital Markets Act (DMA) deploys an *ex ante* regulatory strategy aimed to ensure contestability of digital markets across the Union and to prevent unfair practices in the digital sector, where certain actors operate as 'gatekeepers'. Therefore, the concept of the gatekeeper is pivotal in the delimitation of the scope, and its correct definition is instrumental to the success of the proposal. But there are other elements of the scope to consider.

The full achievement of the policy goals inspiring the proposal, its perfect compatibility and complementarity with the competition rules and other acts of Union law, the guarantee that innovation is preserved and that no barriers to market entry are artificially raised for competitive new entrants, require a thoughtful, precise, scope-delimiting definition. Should the scope be vague, the criteria designating gatekeepers be ambiguous or inadequate, or the Commission decisions unpredictable or discretionary, at best, the entire system fails and, at worst, the regime will produce undesired effects on the market. Therefore, the feasibility, efficacy, and success of the proposal to address Big Tech actors' power is contingent on its scope and its definitions.

The scope-delimiting solution of the DMA pivots on three elements: (i) the definition of the core platform service, (ii) the concept of the gatekeeper, and (iii) the substantial connection with the Union market. These elements embody the policy goals of the proposal: to capture those providers that, even if they are not necessarily dominant in competition law terms, have an impact on the internal market due to their considerable economic power, and their role as a gateway for a large number of users to markets, services, or infrastructures. The combination of the features characterising gatekeepers is likely to create significant power imbalances in the market and lead to unfair practices that the proposal aims to prevent and repair.

I argue that the list-based definition of core platform services is not optimal for guaranteeing a technology-neutral, structure-agnostic adaptability of the DMA to future challenges. A list of selected services may instil rigidity in the proposal in the face of new emerging models. Simultaneously, the current list of selected services does not succeed in ensuring terminological consistency and conceptual coherence with other Union acts. The risk of overlaps, gaps, or conflicts among applicable rules should be prevented and minimized. Therefore, I propose an alternative option for definitions, based on a functional description of core platform services.

As regards the designation of gatekeepers, whether the proposal aims to adopt a service-based approach or a provider-based one is not clear. A service-based approach should prevail and be expressly articulated in the determination of both the quantitative and the qualitative criteria.

Core platform services

The Regulation shall apply to ‘core platform services’ (Art. 1.2 DMA), defined as any digital service included in the exhaustive list enumerated by Article 2.2 DMA: online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communication services, operating services, cloud computing services, advertising services. Only these services qualify.

In the scoping process, the decision to select such specific services was based on their widespread and common use, their importance for connecting business users and end users, and, as per current market conditions, a higher risk of weak contestability and unfair practices. The merit of this drafting option is primarily that it provides predictability and legal certainty to the market players, while also reducing the sphere of discretion of the Commission in designating gatekeepers under the Regulation.

Nonetheless, the formula chosen to define which services fall under the Regulation invites some critical considerations.

An exhaustive list of core platform services

First, although the list of selected services seems to be quite complete today, given the constant development of the market, the absence of a functional definition of core platform services may lead to undesired results. On the one hand, the rapid transformation of the market and the emergence of innovative business models could render the list outdated and obsolete in the (near) future. Unless the listed services prove to be sufficiently broad to embrace not only analogous services, but also other new services sharing similar characteristics and raising equivalent policy concerns, the Regulation might lack future-proof adaptability. In particular, it is doubtful whether the DMA intends to adopt a technology-neutral approach: is the DMA structure-agnostic? It has been questioned, for example, whether the current list would include distributed ledger technology-based networks, which are gaining popularity and significant scale for a varied array of purposes and sectors. The central role of the provider of core platform services might mean excluding from the scope decentralized/distributed models. However, in the near future, they could become relevant in magnitude and gatekeeping power.

The DMA does rightfully provide for a review mechanism in Article 17. But its design neither guarantees total adaptability nor a prompt reaction to market evolution: the Commission ‘may’ conduct a market investigation, it ‘may’ propose the addition of new core platform services. The investigation must be concluded within 24 months, including a proposal to amend the Regulation, as delegated acts cannot enlarge the scope. The Regulation must be amended every time – itself a lengthy process. Before an amendment is agreed and becomes effective, the Regulation would not apply to those services not included in the list of core platform services, independently of their potential to impact on the market contestability. The risk of asymmetric regulation of the digital markets should be prevented.

To counter this risk, it might be worth considering the inclusion of a functional definition of core platform services, replacing either the entire list, or adding it as a final general clause. Already, the Recitals provide clear guidance on the characteristics and features of the core platform services the proposal aims to address (Recitals 2, 3 and 4). They could inspire a functional definition. Certainly, a general clause or a functional definition may compromise the desired legal certainty and cloud the clarity that the current wording and scope ensures; however, the gains on generality, adaptability, and coherence counterbalance the losses.

Terminological consistency

Second, terminological and conceptual consistency with other Union instruments is highly desirable, but not fully assured at the moment. To delimit the scope of application, the Digital Services Act (DSA) employs the well-established legal concepts of 'intermediary services' and 'information society services', whereas the Platform to Business Regulation (P2B) also adds the concept of 'online intermediation services' to the EU's repertoire. In addition, the DSA attempts to formulate its own comprehensive definition of online platforms. The DMA's scope departs from this sound terminological background.

The services listed in the DMA as core platform services are not consistent with the entrenched EU regulatory terminology for digital services. Such a disparity has consequences beyond the mere terminological fragmentation: It may negatively affect the conceptualization of digital services and digital markets, hinder a smooth complementarity among Union acts, and cause unexpected policy contradictions or interpretation issues among the applicable instruments.

The perimeters of the DMA's scope

Third, due to the terminological disparities, it is uncertain to which extent the DMA's scope of application is intended to go beyond the online intermediation services of the P2B Regulation and the online platform services of the DSA. Comparison is not easy, as the variables to outline the perimeters are not equivalent.

One might wonder whether all or most of the core platform service providers under the DMA amount to online platforms as defined in the DSA. Social networks are clearly online platforms (Recital 1 DSA), even if they are independently defined by the DMA at Article 2(7). There are no strong reasons to define them differently and on the basis of the specific content, format, or purpose of use. Social networks can evolve in the form and the means of interaction, and they can easily overlap. For example, video-sharing platforms lie at the intersection of many interactive formats of use and regulatory regimes. While video-sharing platforms and some online intermediation services providers (such as online marketplaces) may also fall under the DSA's definition of online platform; concurrently, video-sharing platform providers are *inter alia* also subjected to the applicable rules of Audiovisual Media Services Directive, as amended in view of changing market realities.

Further, by using the concept of 'online intermediation services' (Art. 2.5 DMA), the proposal applies the concept as defined by the P2B Regulation. However, there

are no reasons why the DMA should restrict its scope to business-to-consumer transactions, as the P2B Regulation does, and, therefore, the use of this term as defined by the Regulation might not be convincing.

A business-agnostic, technology-neutral functional definition of core platform services, underpinned by the basic concepts and the consolidated terminology of the Union regulation on digital services, would enhance the coherence of the entire legislative package, and greatly alleviate inconsistencies, contradictions, or misinterpretations.

Listing the services which qualify as core platform services in the Recitals, as an illustration of the functional definition laid down in the subsequent provision, can strike a proper balance between the desired proximity to the market, the recognition of business models and the necessary level of abstraction for robust legal rules.

The concept of gatekeeper: a service-based or a provider-based approach

Article 3 DMA sets out the quantitative and the qualitative criteria for the Commission to designate a provider of core platform services as a 'gatekeeper'.

As is, it is not clear whether the DMA adopts a service-based approach or a provider-based approach. A service-based approach entails that all the criteria for the designation of a gatekeeper are applied to and determined by the provision of each individual service. Under a provider-based approach, the spotlight is on the provider as a whole, independently of the services provided. If the thresholds are applied to each core platform service, a company can be provider of multiple core platform services and be concurrently designated as a gatekeeper in some or all of them. Hence, large companies are not necessarily to be designated a gatekeeper unless the relevant criteria are met in relation to the provision of a core platform service, and only to that extent. That would mean that the criteria to designate gatekeepers are to be applied under a service-based approach (Art. 3.3 DMA). However, the reference to 'undertakings' in the estimation of the quantitative criteria may lead to a different conclusion (Art. 3.2 DMA). The use of the concept of an economic unit within the meaning of competition law does not seem appropriate under this new regulatory strategy.

The importance of clarifying the approach is crucial to avoid unintended consequences and to disproportionately prevent new entrants from accessing the market in reasonable and competitive conditions. For example, non-platform traditional businesses are particularly concerned about the implications of a provider-based approach. New entrants running incipient core platform models might be captured too early, if the relevant criteria for estimating gatekeeping potential apply to the whole non-platform business. Inadvertently, the DMA would be raising entry barriers for new entrants to the platform business and consolidating the entrenched position of incumbents.

Recitals 15 to 28 DMA reveal that the underlying policy is aligned with the above-proposed service-based approach, but the wording of the main provisions may lead to undesired interpretations. Both in Article 3(c) DMA and other related provisions, an explicit mention of a service-by-service analysis could provide clarity.

Further, a clarifying definition of the concept of a provider of a core platform service as a distinct and separate term from 'undertaking' would be advisable. Although the intra-group dynamics may be relevant in the determination of the obligations, the definition of a provider of a core platform service should be neutral in terms of legal form and internal organization: An entity or entities or parts of entities which provide core platform services. In effect, the definition would be service-centred and service-defined. The relevant qualitative criteria and quantitative thresholds would then be assessed and calculated per core platform service. Otherwise, the entry of or the scaling-up of non-platform traditional companies in the platform business might unintentionally be hampered, even if their core platform services were not significant enough to create a risk to contestability or of unfairness.

Conclusion

The decision to delimit the scope of the DMA on the basis of an exhaustive list of core platform services has the merit of providing legal certainty and predictability to the market. However, it constrains the adaptability of the proposal to the evolution of the market and the emergence of future business models. The review mechanism laid down in Article 17 DMA will not be agile enough to keep the DMA duly accommodated to the upcoming challenges of the platform economy, thereby risking that it will fall short of its objective. Also, the list of selected services to qualify as core platform services neither ensures terminological consistency nor conceptual coherence with other relevant instruments of the Union. That could mean overlap, incompatibility among applicable rules, interpretation issues, or undesired gaps. In these gaps, Big Tech's power may continue to grow, whereas smaller actors may be hampered by uncertainty.

The use of a functional definition of core platform services would be a preferable alternative option. In determining the qualitative and quantitative criteria for the designation of a core platform service provider as a gatekeeper, it is my proposal that a service-based approach would be more effective to achieve the policy goals inspiring the DMA, without inadvertently raising barriers to market entry or capturing new entrants to the platform business too early. A service-based approach would ensure that the Regulation does accurately target the relevant actors, if they provide core platform services, if they act as gatekeepers, and if they hold economic power to cause imbalances in the market, without further organizational, structural or legal considerations. The strategical design of the business model, the internal structure of the provider, or the legal form adopted should not divert the regulation from its main policy goals. A service-based approach is structure-agnostic, design-neutral, and does not risk business innovation and market competition.

(cc) BY-SA