FLORENCE SCHOOL OF REGULATION

ROBERT SCHUMAN CENTRE

POLICY BRIEF

Digital Markets Act in the making: Challenges and potential of the new EU regulation on Big Tech

Introduction

On 1st October, 2021, the Robert Schuman Centre for Advanced Studies (RSCAS) hosted a conference: "Digital Markets Act in the making: Challenges and potential of the new EU regulation on Big Tech", which was organized by the Florence School of Regulation – Communications and Media (FSR C&M) at the European University Institute (EUI) campus in Florence.

The conference focused on the Digital Markets Act (DMA): the proposed EU Regulation, which was published by the European Commission on 15th December, 2020, and which aims to ensure fair and open digital markets.[1] The proposal is currently pending approval by the European Parliament and the Council.

The Conference gathered academics, practitioners, officials from the National Competition Authorities (NCAs), the European Commission, the industry, as well as from law and economic consulting firms, to discuss and exchange views on the controversies that have been generated by the DMA proposal. The diversity of views ensured a lively debate. This Policy Brief summarizes the main points raised during the discussion.

1 Proposal for the REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON CONTESTABLE AND FAIR MARKETS IN THE DIGITAL SECTOR (*Digital Markets Act), COM/2020/842 final*.

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Institutional issues in the DMA proposal

The first roundtable focused on the institutional setup of the Commission's proposal and on the reactions that have been spurred by the architecture that is envisaged by the DMA, both at the national (competition vs. regulatory authorities) and the supranational levels (Member States vs. EU). The issues related to the enforcement of the DMA, concentrating, in this respect, on the role of the EU institutions, of the Member States and of the national regulatory and competition authorities, were discussed in this session.

It is worth noting that the institutional dimension was not central at the beginning of the legislative process, but has gained prominence in the context of the legislative debate within both the Council and the European Parliament.

In the last few months, several proposals that are related to the institutional dimension of the DMA have been put forward, including the Opinion of the Body of European Regulators for Electronic Communications (BEREC), on the DMA proposal, which was published in March, 2021,[2] which was then followed by two thematic papers[3] and, lastly, by a Report on the *ex-ante* regulation of digital gatekeepers,[4] the common position that was elaborated by the European Competition Network (ECN) in June, 2021,[5] and the proposals elaborated by France, The Netherlands and Germany to improve the DMA, which were published in May and September, 2021.[6] The proposed amendments concern institutional aspects, such as the role of national authorities in the DMA's enforcement, the role and composition of the Advisory Committee (Article 32 of the DMA), and the introduction of an out-of-court dispute settlement system (i.e., in the BEREC proposal).

The discussion addressed the issue of the distribution of competencies at two different levels: between the competition and the regulatory authorities, and between Member States and the Commission. The positions presented by the speakers were quite different, especially with regard to the role of the regulatory and competition authorities. The proposed Art. 1 the DMA clearly attributes to the Commission the exclusive power to enforce the DMA's rules, but it also states that the Commission and the Member States 'shall work in close cooperation' and coordination in their enforcement actions. Some speakers argued that the National Regulatory Authorities (NRAs) have solid experience in applying ex-ante regulation and in monitoring electronic communications markets. Furthermore, it was pointed out that all of the Core Platform Services (CPS) are already subject to several European legislative provisions, which are applied at the national level by NRAs The NRAs should therefore take up a more relevant role in the institutional framework of the new Regulation, so as to contribute to its effective monitoring and enforcement at the national level, and to ensure consistency and proportionality between the application of the DMA and the existing sectoral regulations. On the other hand, the NCAs have, over time, accumulated relevant experience in giving transversal consideration to different kinds of markets and to the possible abuses that may arise. The DMA Regulation derives from the outcomes of a series of antitrust investigations, some of which are still ongoing, on the anti-competitive conduct of gatekeepers in the digital markets. These investigations have shown that digital services and products encompass a very wide range of economic activities, including retail, financial activities, advertising, cultural activities, social networks, and many others. Hence, successful enforcement of the DMA requires it to be implemented through a much wider prism than would be required for sector regulation.

During the Conference, a number of participants called for the joint application of the DMA by the European Commission and by the National Competition Authorities (NCAs), following the example of the referral of concentrations under the EU Merger Control Regulations.[7] Other speakers, on the other hand, supported the view that the NCAs could enforce the DMA 'in parallel' with the European Commission, similarly to the example supplied by Art. 3 Reg. 1/2003, underlining that the

2 BoR (21) 35 BEREC Opinion on the European Commission's proposal for a Digital Markets Act.

3 BoR (21) 93 BEREC Proposal on the Setting-up of an Advisory Board in the Context of the Digital Markets Act. BoR (21) 94 BEREC Proposal on Remedy-Tailoring and Structured Participation Processes for Stakeholders in the context of the Digital Markets Act.

4 BoR (21) 131 BEREC Report on the Ex-Ante Regulation of Digital Gatekeepers.

5 See https://ec.europa.eu/competition/ecn/DMA_joint_EU_NCAs_paper_21.06.2021.pdf

6 Please see https://www.bmwi.de/Redaktion/DE/Downloads/M-O/non-paper-friends-of-an-effective-digital-markets-act.pdf?__blob=publicationFile&v=4 and https://www.bmwi.de/Redaktion/DE/Downloads/XYZ/zweites-gemeinsames-positionspapier-der-friends-of-an-effective-digital-markets-act.pdf?__blob=publicationFile&v=4

7 Council Regulation (EC) No 139/2004 of 20th January, 2004, on the Control of Concentrations Between Undertakings (the EC Merger Regulation). OJ L-24/1, 29.1.2004. Art. 9.

Regulation and the ECN provide a well-established and successful model for cooperation and co-ordination.[8]

From the perspective of the NCAs, a key problem that may emerge in the DMA application is the possibility of overlapping the NCAs' competencies. According to the proposal in Art. 1(6) DMA, the DMA does not prevent the NCAs and the European Commission from enforcing both Art. 101-102 TFEU and the corresponding provisions under national competition law, in order to sanction anti-competitive conduct by digital gatekeepers. Similarly, the NRAs point out that there is a need for the DMA provisions to be applied in a close and consistent way with the sector specific regulation, in order to ensure complementarity and to avoid potential overlaps.

Proposals to reinforce the role of the national authorities in DMA enforcement was a topic that also referred to the composition of the Advisory Committee, which has been introduced by Art. 32 of the DMA proposal. While the Commission's proposal provides for an Advisory Committee that is composed of representatives of the national Ministries, the NCAs and the NRAs, Conference speakers welcomed the suggestion that the majority of the proposals for amendments to the text of the DMA's Regulation include modifications to the current formulation of Article 32, either in respect of its composition or of its power.

The discussion of this issue led to the last major point that was touched upon during the first workshop panel: whether it would be possible and, above all, desirable, that a reversal of the 'centralized' enforcement approach should be contained in the DMA's proposal.

A centralized approach, according to some speakers, seems necessary, both from the political and the technical points of view. On the one hand, the DMA is clearly an element of the political challenge that the European Commission has undertaken vis-à-vis digital platforms; a centralized institutional setting appears to be coherent with this approach. In addition, the conduct to which the rules apply concern a few large economic players who operate on a global scale. From this perspective, the case law must necessarily be harmonized and coherent. Another speaker added that the DMA might also be interpreted as a timely response to the risk of market disintegration, which may result from the fragmented and individual interventions that have, in recent years, been put in place by individual Member States in relation to the digital markets.[9]

In conclusion, despite the different opinions on the desirability of a centralized approach, a large number of those taking part in the panel agreed that it seems fairly unlikely that the Commission will reverse the institutional approach of the DMA proposal, since a unitary and central response to challenges that cannot be addressed individually by the single countries would seem to be essential in the coming years.

The impact of DMA obligations on the business models of digital gatekeepers

The aim of the second roundtable was to discuss the the set of positive and negative obligations that are introduced by Arts. 5 and 6. The Roundtable began with a discussion of the general principles of these Articles, and of how to improve them. The panel then moved on to discussing the details of some of the obligations.

A general and shared premise was that some kind of regulation of the digital markets must be welcomed. The panel acknowledged that the application of Competition Law (Art. 102 and merger control) has not been effective enough in respect of the digital markets, which has resulted in such occurrences becoming stacked up, resulting in long-lasting and costly cases.

It was suggested that we might consider the actual proposal of the DMA as being the first generation, which will, over time, evolve, and that will be reformed by the EU legislator on the basis of enforcement experience. In this regard, a speaker mentioned that we may expect that the rigidities that characterize the first generation of DMAs' current proposal will be relaxed over time as enforcers gain in experience and expertise, as has happened in relation to other regulations.[10] The comparison was made with telecommunications regulation: this applies to players with more or less the same

8 Council Regulation (EC) No 1/2003 of 16th December, 2002, on the implementation of the rules on competition that are laid down in Arts. 81 and 82 of the Treaty. OJ L-1/1, 4.1.2003. Art. 3.

9 In this regard, please see Marco Botta (2021), 'Sector Regulation of Digital Platforms in Europe: Uno, Nessuno e Centomila', *Journal of European Competition Law & Practice* 12(7), 500-512.

10 See P. Larouche and A. de Streel (2021), 'The European Digital Markets Act: A Revolution Grounded on Traditions', *Journal of European Competition Law & Practice* 12(7), 556-558.

business model, and it evolved from being a rigid original telecom framework to becoming a more flexible one over time. On the other hand, the DMA applies to players who adopt very different business models and it presents a quite rigid system of rules that may struggle to produce significant impact in those sectors that are characterized by dynamism and diversity.

According to some speakers in the panel, the DMA provisions have the potential to be efficient and effective, but there are several points that might be improved. During the Roundtable discussion, three main points were discussed as being crucial to the enhancement of the effectiveness of the Act:

1. the specific rules;
2. the question of whether the Act is overly broad;
3. the key role of the "regulatory dialogue" (which is envisaged in Art. 7) as a way to define solutions.

According to one speaker, it appears that the rules put forward in Arts. 5 and 6 may be divided into three categories, those that are applicable to all gatekeepers (e.g., Art. 5f), those that are applicable only to some, but that are not clear as to whom they are applicable, and, finally, those that are applicable to some and that are also clear as to whom these apply. One speaker made the point that clarity with respect to the applicability of the provisions is particularly important, since some will require profound changes in business models. The same speaker also mentioned that, given the actual form of Arts. 5 and 6, it appears to be difficult to have legal clarity, and the net effect may be that there is a strong imbalance in the market.

The speakers engaged in a constructive discussion on the specific provisions that are included in Articles 5 and 6, and this was mostly focused on the following articles: For the sake of synthesis, we include in this Policy Brief just some of the issues discussed.

According to a part of the panel, a transversal issue is that of "data", which lacks a definition that is able to encompass the several meanings that this word can assume. For example, raw data are basically useless, while the data that is useful for platforms' business are those that have been processed by (often) proprietary algorithms. Provision 5(a), which deters companies from combining personal data that is sourced from core platform services, with personal data from any other services that are offered by the gatekeeper, or with personal data from third-party services, and this is one of the provisions that belongs to the self-executable *per se* rules. Essentially, it prohibits the gatekeepers from combining data that is collected from the core platform with data collected from other platforms, unless the users of those platforms give their consent. This consent needs to be compliant with the General Data Protection Regulation (GDPR)[11] and the objectives of the provision refer to this as a mean through which to ensure contestability, thus eliminating barriers to entry, not using this practice as a consumer protection issue. Nonetheless, one panellist expressed that it is not entirely clear how consumer consent, within the meaning of the GDPR, counteracts the barriers to entry, or why consumer consent makes combining data less dangerous. The entanglement between antitrust and data protection enforcement, in the light of GDPR, is so controversial that the relevant questions are currently pending before the European Court of Justice,[12] suggesting that interpretative guidelines for this Article may be indispensable.

Another provision that was widely discussed is that given in 6.1(d): the banning of preferential rankings. It refrains from treating ranking services and products that are offered by the gatekeeper itself, or by any third party belonging to the same undertaking, more favourably, if compared to the similar services or products of a third party, and to applying fair and non-discriminatory conditions to such ranking. The applicability of this provision looks quite straightforward for any search engine with listings, while may become ambiguous for those gatekeepers who operate in different businesses. One of the proposals made by a panellist was to formulate this provision to refer to the criteria that are used to list and to rank the products/services on the platform. The Commission, in this respect, would have to evaluate whether such different treatment is, or is not, based on the actual quality of the products/services. However, there was also discussion that suggested that it is often hard to assess whether the criteria utilised for ranking are genuinely objective.

In general terms, one of the main criticisms raised by some panellists was that the DMA follows a one-size

11 Regulation (EU) 2016/679 (General Data Protection Regulation).

12 Please see https://fpf.org/blog/upcoming-data-protection-rulings-in-the-eu-an-overview-of-cjeu-pending-cases/ for a recent review of the data protection cases pending at the CJEU.

fits all approach[13] and, given the wide diversity and the transversal nature of the gatekeepers, this approach may encounter problems in relation to implementation: conversely, the proposed document should recognize the diversity of the gatekeepers' business models, in the interests of fairness and applicability. One of the main arguments suggested that there should be a call for regulation that was more tailored and that assured the proportionality of measures since the legal challenges that might follows the DMA's application might undermine its effectiveness. In the same way, calls for extreme flexibility including a recent proposal by several Member States could also undermine the effectiveness of the DMA by rendering overly broad and non-circumscribed. Another point raised by a panellist concerned the timely implementation of the obligations: Article 3.8 foresees that the gatekeepers would have to comply with the obligations under Articles 5 and 6 within six months of a core platform's services being included in the list, a timing that would seem to be impossible to respect from the perspective of the digital companies, particularly if this implies the implementation of complex obligations (such as data portability and sharing or interoperability), or a partial redesigning of the business model for that service.

In conclusion, the role and procedure of this tool of the "regulatory dialogue" between the gatekeeper and the Commission has been discussed as being a potential opportunity, one that is not to be missed, in order to ensure that the new competition policy's season, which has been opened by the DMA, is more effective, and is potentially less adversarial, than was the preceding one.

13 Please see, in relation to this argument, Cristina Caffarra, Fiona Scott Morton, "The European Commission Digital Markets Act: A Translation", blogpost 5th January, 2021, available at: https://voxeu.org/article/european-commission-digital-markets-act-translation.

The Florence School of Regulation

The Florence School of Regulation (FSR) was founded in 2004 as a partnership between the Council of the European Energy Regulators (CEER) and the European University Institute (EUI), and it works closely with the European Commission. The Florence School of Regulation, dealing with the main network industries, has developed a strong core of general regulatory topics and concepts as well as inter-sectoral discussion of regulatory practices and policies.
Complete information on our activities can be found online at: fsr.eui.eu

Robert Schuman Centre for Advanced Studies

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