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De Streel, Alexandre

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EU Digital Markets Act: changing the four ‘regulators’ of the digital society

Alexandre de Stree^{1,2,*}

¹Law School, University of Namur, Namur, Belgium
²College of Europe (Bruges) and Sciences Po, Paris, France

*Corresponding author. Email: alexandre.destree@unamur.be

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The European Union (EU) Digital Markets Act (DMA) of 2022¹ aims to increase contestability of the EU digital markets by reducing entry barriers as well as to increase fairness by ensuring a better distribution of the value generated collectively by the digital platforms and their business users.² Doing so, the DMA aims to increase users’ choice as well as the level and the diversity of innovation in the EU. This new important law is enforced by the European Commission, which for the first time in its long history has become a fully-fledged ‘federal’ regulator.³

To better understand the possible effects of the DMA and to contribute to its effective implementation, this short note relies on the four regulatory forces in cyberspace identified by Lessig in his seminal book: the law, the technical architecture, the market, and the norms.⁴ The note claims that the DMA changes each of those forces and that the implementation of the DMA should maximize the feedback loops between them to achieve its ambitious goals.

1. LAW

The first regulatory force is the law. Although the DMA is named ‘Act’ which is not a legal category in EU law, it is formally Regulation. This is the most powerful legal instrument in EU law because it has direct effect in the 27 Member States and could be enforced by the EU as well as the national judges.⁵

¹ Regulation 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives 2019/1937 and 2020/1828 (Digital Markets Act), OJ [2022] L 265/1.

² J Cremer and others, ‘Fairness and Contestability in the Digital Markets Act’ (2023) 40 Yale Journal of Regulation 973.

³ It is ironic to note that the US Big Tech are a now a powerful vector of EU integration.

⁴ L Lessig, *Code and Other Laws of the Cyberspace, Version 2.0* (Basic Books 2006).

⁵ art 288 TFEU.

The DMA is part of a broader EU regulatory framework applicable to digital platforms, including (i) the *Platform-to-Business Regulation 2019* which aims to increase transparency on contractual and ranking conditions and out-of-court dispute resolution mechanisms,⁶ (ii) the *Digital Services Act 2022* which aims to understand better the functioning and the consequences of the algorithms used by the digital platforms and to reduce illegal content and products on Internet,⁷ (iii) the *Data Governance Act 2022* and *Data Act 2023* which aim to increase data mobility and therefore innovation as data are the infrastructure for contemporary innovation,⁸ and (iv) the *AI Act 2024* which aims to increase the safety of AI-based products and services.⁹

This quickly emerging regulatory framework indicates a clear willingness of the EU to take back control of the cyberspace and ensure that digital technologies are shaped by our democratically agreed values and not that our values are transformed by technologies.¹⁰ Those EU values have now been solemnly proclaimed in an important Declaration on Digital Rights and Principles which has been adopted in December 2022 by the main EU political institutions.¹¹

In particular, the DMA aims to achieve two principles of this Declaration: ‘(i) that everyone should be able to effectively and freely choose which online services to use, based on objective, transparent, easily accessible and reliable information, and that (ii) everyone should have the possibility to compete fairly and innovate in the digital environment’.¹²

To do that, the DMA imposes on the biggest digital platforms (the so-called gatekeepers)¹³ four categories of obligations: (i) increase transparency in the online ads value chain,¹⁴ (ii) prohibits *ex ante* some anti-competitive leverage (such as self-preferencing or tying), (iii) reduces entry barriers on the demand side and facilitating switching and multi-homing (with data portability or the prohibition of Most Favoured Nation Clause (MFN)), and (iv) reduce the entry barriers on the supply side and opening of the platforms and the data of the existing gatekeepers (with interoperability and data access).¹⁵ Therefore, the

⁶ Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ [2019] L 186/55.

⁷ Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31, OJ [2022] L 277/1. On this important new law, M Husovec, *Principles of the Digital Services Act* (Oxford University Press 2024).

⁸ Regulation 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation 2018/1724 (Data Governance Act), OJ [2022] L 152/1; Regulation 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonized rules on fair access to and use of data and amending Regulation 2017/2394 and Directive (EU) 2020/1828 (Data Act) OJ L, 2023/2854.

⁹ Regulation 2024/XXX of the European Parliament and of the Council laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts. <https://www.europarl.europa.eu/doceo/document/TA-9-2024-0138_EN.html> accessed 20 March 2024.

¹⁰ A Bradford, *Digital Empires: The Global Battle to Regulate Technology* (Oxford University Press 2023) contrasting this EU model with the American and Chinese approaches.

¹¹ European Declaration of 15 December 2022 on Digital Rights and Principles for the Digital Decade, OJ [2023] C 23/1.

¹² *ibid* paras 10 and 11.

¹³ So far, six digital platforms have been designated in September 2023 by the European Commission as ‘digital gatekeepers’ subject to those obligations: *Alphabet* for eight services (Android, Chrome, Google Play, Google Search, YouTube, Google Maps, Google Shopping, Google Ads), *Amazon* for two services (Amazon Marketplace and Amazon ads), *Apple* for three services (iOS, Safari, and Apple App store), *Byte Dance* for one service (TikTok), *Meta* for six services (Meta Marketplace, Facebook, Instagram, WhatsApp, Messenger, and Meta Ads), and *Microsoft* for two services (Windows PC OS and LinkedIn). <https://digital-markets-act.ec.europa.eu/gatekeepers_en> accessed 20 March 2024.

¹⁴ Note that the DMA only impose transparency and does not directly address the ‘original sin’ of the Internet which is that important tech platforms providing essential services are mostly financed by advertising. Already back in 1997, the Google founders warned in their seminal paper on PageRank on the danger of financing search with ads: Sergey Brin and Lawrence Page, *The Anatomy of a Large-Scale Hypertextual Web Search Engine*, Computer Networks, and ISDN Systems 30 (1998) 107–117 observing in Appendix A that: ‘For this type of reason and historical experience with other media (...) we expect that advertising funded search engines will be inherently biased towards the advertisers and away from the needs of the consumers’.

¹⁵ A de Streel and P Alexiadis, ‘The European Way to Regulate Big Tech: the EU’s Digital Markets Act’ in D Moura Vicente, S de Vasconcelos Casimiro and C Chen (eds), *The Legal Challenges of The Fourth Industrial Revolution: The European Union’s Digital Strategy* (Springer 2023) 91–123.

DMA does not break-up the biggest digital platforms but it opens them up; hence, it creates competition while preserving the important and beneficial network and ecosystem effects.

2. TECHNICAL ARCHITECTURE

In turn, such platforms and data opening will lead to new technical architectures and re-engineering of the digital services provided by the gatekeepers as shown by their first compliance reports.¹⁶ On the one hand, gatekeepers are developing new technical tools to give to business users a smooth access to their platforms. On the other hand, gatekeepers must also design new interfaces to propose and manage more choices for the end users and consent mechanisms where personal data are involved.¹⁷

This will require new governance tools and institutions to make digital infrastructures more open while preserving security, privacy, and service integrity, a key condition for the development of the digital society.¹⁸

3. MARKET

In turn, those new legislative and technical codes should increase market contestability and diverse types of competition. The DMA promotes *intra-platform competition* by supporting the entry or the development of products and services which are complements to existing platforms (eg, Epic or Spotify on the Apple app store). It also promotes *inter-platforms competition* by facilitating the entry and the development of services which are substitutes to existing platforms, either with similar products (eg, Microsoft, Verizon, or Epic developing their own app stores) or with disruptive innovation (eg, ChatGPT powered Bing displacing Google Search). It will be interesting to observe which type of competition will develop first and with which actors: the big tech themselves, the small tech, or non-digital actors developing their own digital platforms. In practice, one of the most immediate results of the DMA may be to increase the competition among the Big Tech for existing and new services.

In essence, the DMA is a liberalization law that strengthens the role of the ‘market’ in governing cyberspace.¹⁹ Obviously, this is a massive challenge because the platforms will not easily and willingly transfer the important governance and regulatory power they currently hold. Therefore, the European Commission, with the support of national regulatory and all stakeholders which have the ability and the incentives to make the digital markets work better, should forcefully enforce the DMA. Moreover, markets can only function well and deliver when there is trust among market participants. Today, this trust is mostly ensured by the Big Tech which, for instance, guarantees the security of the apps offered on app stores, the integrity of services proposed, or the security and privacy of data exchanged. Tomorrow, such trust should be ensured by independent governance tools and institutions, such as private certification bodies and/or governmental agencies.

4. NORMS

Ultimately, the changes in law, architecture, and market should lead to changes in social norms for each category of stakeholders in cyberspace. This is probably the most difficult change as norms tend to be stickier than the other three regulatory forces. First, Big Tech

¹⁶ <<https://digital-markets-act-cases.ec.europa.eu/reports/compliance-reports>> accessed 20 March 2024.

¹⁷ A de Streeel and others, *DMA Implementation: Substantive and Procedural Principles* CERRE Report, 2024.

¹⁸ See, for instance, the Data Transfer Initiative. <<http://dtinit.org/>> accessed 20 March 2024.

¹⁹ For a call for the market to regain power over the cyberspace, V Mayer-Schönberger and T Ramge, *Reinventing Capitalism in the Age of Big Data* (John Murray 2018).

have to move from a corporate culture of ‘moving fast and breaking things (including the laws)’ to a culture of complying with the laws and possibly moving slower and more cautiously. In the future, Big Tech may become like Big Banks which are constantly supervised and deeply regulated.

Second and more fundamentally for the success and the effects of the DMA, users of both sides of the Big Tech platforms will have to change their norms. On one side, the business users and the small tech should feel more independent from the main digital platforms and complain before an agency or a judge when the DMA is not well implemented. On the other side, end users have to be accustomed to a new extended choice paradigm. Citizens and consumers will have to learn to make choices and vote with their feet when they are unsatisfied with a service provider.

Thirdly, the European Commission has to move from an antitrust culture with a ‘hit-and-run’ sort of intervention in prohibiting specific firm conducts to a regulatory culture where intervention is permanent and changes the whole market structure. Also, the Commission should learn to become an agile regulator. To do that and maybe be ironically, it can learn a lot from the digital platforms it will regulate and, as suggested by O’Reilly, behave ‘as a platform’.²⁰ This has three main implications: first, the Commission should orchestrate an ecosystem of compliance. Second, the Commission should experiment, and move from a ‘regulate and forget’ to ‘adapt and learn’ approach. Third, the Commission should use AI technologies to supervise the platforms (SupTech).²¹

5. REGAINING THE PROMISES OF THE INTERNET

Seeing the DMA through the Lessig framework shows that the success of this new law is an enormous challenge because it requires a change of each regulatory force of cyberspace. To do that, the European Commission with the support of national authorities should design specific actions for each force. On technical architectures, regulators should establish new governance mechanisms to make those architectures more open without undermining security, privacy, and service integrity. On competition, regulators should be ensure that the transfer of power from the platforms to the market does affect the quality of digital services and the trust of their users. On norms, the regulators be more agile and ensure that all the other stakeholders, big tech, small tech, and their users alike, should change their habits and culture.

The Lessig framework also shows that the DMA is an important opportunity to regain some of the early promises of the Internet so nicely described by John Perry Barlow in his 1996 Declaration of the cyberspace, in particular the creation of ‘a world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth’.²²

²⁰ T O’Reilly, ‘Government as a Platform’ in D Lathrop and L Ruma (eds), *Open Government: Collaboration, Transparency, and Participation in Practice* (O’Reilly Media 2010) 11–40.

²¹ Recommendation of the OECD Council of 6 October 2021 for Agile Regulatory Governance to Harness Innovation, OECD/LEGAL/464 and World Economic Forum, *Agile Regulation for the Fourth Industrial Revolution: A Toolkit for Regulators*, 2020.

²² <<https://www.eff.org/fr/cyberspace-independence>> accessed 20 March 2024.

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