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Bacchiega, Alberto; Tombal, Thomas

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Agency Insights: The first steps of the DMA adventure

Alberto Bacchiega[1], Thomas Tombal[2,*]

[1]Director, European Commission—DG Competition, Directorate J "Digital Platforms"
[2]Case Handler, European Commission—DG Competition, Directorate J "Digital Platforms"

*Corresponding author. Email: Thomas.TOMBAL@ec.europa.eu

ABSTRACT

This piece is a short essay on the first steps of the implementation of the Digital Markets Act. Our paper is divided in three sections. In the first section "Why does the DMA exist?", we come back on the genesis of the DMA and the complementing role it plays with competition law. In the second section "Challenges of Gatekeeper Designations", we look back at this first important step in the implementation of the DMA, and highlight that a key topic in the context of these designation proceedings has been the determination of the appropriate delineation of the core platform services to be designated. Finally, in the third section "Challenges of DMA compliance", we set out our high-level vision and approach for the concrete implementation of the DMA by the gatekeepers and their endeavour to comply with the various obligations and prohibitions contained in the DMA. In this regard, we highlight that our aim with the DMA is to create room for opportunities.

KEYWORDS: DMA, Contestability, Fairness, Digital markets
JEL CLASSIFICATION: K2

1. WHY DOES THE DMA EXIST?

To date, the Digital Markets Act (DMA) represents the most comprehensive attempt to regulate large digital platforms worldwide.[1] It witnesses the capacity of the European Union (EU) legislators to respond to widespread and concrete concerns regarding the lack of fairness and contestability in digital markets, and the legislators' willingness to provide businesses and users with more choice and control over their operations and personal data. It also poses an important challenge to the European Commission, the sole enforcers of the DMA, to translate this powerful legislative tool into tangible changes and opportunities to the benefit of European citizens and all companies operating in the EU.

[1] The DMA sits coherently within a broader regulatory effort of the European Union in the digital sector, which notably includes the Digital Services Act, the AI Act, the Data Governance Act, and the Data Act. This article concentrates on the DMA only.

The DMA was not born in a vacuum. As a measure to harmonize the legislative treatment of digital platforms, it is not a competition enforcement tool. However, it is undeniable that the DMA, and indeed many of the obligations it contains, has its roots in more than two decades of experience accumulated in enforcing competition rules in the digital sector, both in sanctioning abuses of dominant positions and in vetting mergers and acquisitions. Without that experience, we would not have a targeted, largely self-enforcing regulatory tool. We would have an uninformed attempt at regulation, which would most likely cast the net too wide or too narrow. It would give no certainty to gatekeepers about what they have to do, and no certainty to other companies about what they can expect.

Importantly, the DMA was not born to substitute competition enforcement, but to complement it. It is part of a natural evolution in the public intervention in the economy, aimed at correcting market failures: competition tools detect and sanction individual conduct, while regulatory tools address systemic issues. We have seen this at play in the telecommunication, energy, and payments sectors and it is only natural to witness the same evolution in the digital sector.

The interesting questions going forward in our view are: how will competition enforcement in the digital sector and regulation under the DMA work together? Is there still space for antitrust enforcement now that the DMA is in place?

Formally speaking, the interplay between the DMA and competition law—be it Article 102 of the Treaty on the Functioning of the European Union (TFEU) on abuses of dominant positions or merger control—is straightforward. Article 1(6) of the DMA makes clear that the DMA is without prejudice to the application of Articles 101 and 102, the merger regulation and national rules to the same effect. Thus, formally we can apply competition law in parallel to the DMA.

The real question is however of substance, not form. And on substance, it is clear that we should aim for mutual reinforcement, rather than duplication of effort. And we need to closely coordinate the instruments, as the case law teaches us, and Article 1(7) DMA tells us to do.

To start with, the DMA covers only a subset of practices that could be caught by competition law. First, it applies to core platform services, not all digital services. Secondly, it applies to gatekeepers, not all providers of digital services. Thirdly, it contains a specific list of obligations and prohibitions that address specific behaviours of gatekeepers, but not all of their possible conducts.

This means that there is ample room for competition law enforcement outside of the DMA. This may, for example, concern practices by non-gatekeeper players. But it may also concern designated gatekeepers. For example, some of their services have not been designated or they may engage in conduct that is not covered by the obligations and prohibitions in the DMA.

Similarly, merger control in the digital sector continues unabated. Merger control has the capacity to prevent the creation of dysfunctional market structure and the problems that the DMA is trying to address. Again, complementarity is the keyword.

For genuinely new behaviours and new services that affect competition in digital markets, competition law will remain our best intervention tool. Conversely, the DMA will be the more effective tool to tackle ex-ante specific and identified conduct which is more of a systemic nature and whose harmful effects are well known.

In the longer term, the relationship between competition law and the DMA will evolve into a mutually beneficial relationship. On the one hand, competition law will benefit from the fact that the DMA will tackle systemic issues and free resources to address new and emerging conduct. On the other hand, the DMA will evolve and continue to be inspired by competition law, as is the case for many of the current DMA obligations.

The complementary nature of regulation and competition law requires ensuring close, proactive, and sustained coordination across instruments and across the EU. The European Commission is the sole enforcer of the DMA, but by no means a lonely enforcer. The DMA provides for the necessary mechanisms to ensure that national authorities and the Commission cooperate with each other and inform each other about their respective enforcement actions, principally through the well-established European Competition Network and a High-Level Group that gathers the most important European regulatory and competition authorities.

2. CHALLENGES OF GATEKEEPER DESIGNATIONS

Moving on to the work that has already been done since the entry into force (1 November 2022) and application (2 May 2023) of the DMA, a first important milestone was reached on 6 September 2023, with the adoption of 6 designations decisions spanning 22 core platform services.[2]

Looking back at this first important step in the implementation of the DMA, a key topic in the context of these designation proceedings has been the determination of the appropriate delineation of the core platform services to be designated.

Indeed, while the DMA contains clear language on the definition of the various core platform services in Article 2 and clear guidance on the core platform services delineation in the DMA Annex, some concrete technical and policy challenges still appeared and needed to be addressed in the context of this core platform services delineation exercise. This led to sometimes intense discussions with gatekeepers on this point, already in the months leading to the gatekeepers' expected notifications in early July as per Article 3 DMA. Indeed, the appropriate delineation of the gatekeepers' core platform services was far from trivial, as this would have an impact on the scope of their compliance efforts.

To give one example, Article 5(2)(c) DMA provides that the gatekeeper shall not '*cross-use personal data from the relevant core platform service in other services provided separately by the gatekeeper, including other core platform services, and vice versa*'. Accordingly, it is paramount to determine the core platform services boundaries (where do they start and when do they finish) and to determine whether a specific functionality offered by the gatekeeper constitutes a distinct service from the core platform services (potentially provided together with or in support of the said core platform service) or merely an additional feature that constitutes an integral part of the core platform service.

In this regard, we have conducted the relevant analyses for each core platform service for which such delineation issue arose, on a case-by-case basis in light of the relevant facts. In doing so, the clear guidance contained in Section D, point 2, of the DMA Annex has been extremely valuable.

First, the DMA Annex makes clear that the undertaking providing core platform services shall not identify core platform services that belong to the same category of core platform services as distinct mainly on the basis that they are provided using different domain names, whether country codes top-level domains (ccTLDs) or generic top-level domains (gTLDs), or any geographical attributes.[3] Indeed, if it were sufficient to consider that core platform services that belong to the same category of core platform services were distinct merely because they are offered through a different domain name, then the undertaking offering such services could artificially split the same core service across various domains in order to avoid meeting the end user and business user presumption thresholds contained in Article 3(2) on

[2] <https://digital-markets-act.ec.europa.eu/gatekeepers_en> accessed 24 April 2024. At the time of writing, the Commission was considering new notifications that could lead to further designations.

[3] DMA Annex, Section D, point 2, a.

each of these domains taken separately. Accordingly, it makes sense to consider these various domains as a whole, as they pertain to one single underlying core platform service.

Secondly, the DMA Annex makes clear that the undertaking providing core platform services shall consider as distinct core platform services those core platform services, which are used for different purposes by either their end users or their business users, or both, even if their end users or business users may be the same and even if they belong to the same category of core platform services pursuant to Article 2, point (2).[4] Conversely, services which are used for the same purpose by both end users and business users should be considered as belonging to the same core platform service. It was important to get this right when determining whether a service offered by the gatekeeper constitutes a distinct service from the core platform service (and potentially a distinct core platform service) as it has a distinct purpose, or, on the contrary, constitutes an integral part of the core platform service as it shares the same purpose. Indeed, this not only has an impact on the end user and business user presumption thresholds contained in Article 3(2) but also on the scope of the DMA obligations and prohibitions.

Thirdly, the DMA Annex makes clear that the undertaking providing core platform service(s) shall consider as distinct core platform services those services, which the relevant undertaking offers in an integrated way, but which do not belong to the same category of core platform services or are used for different purposes by either their end users or their business users, or both, even if their end users and business users may be the same and even if they belong to the same category of core platform services.[5] This clarification that the technical integration of various services is not, in itself, a key determining factor when assessing the delineation of core platform services is also extremely important. Indeed, holding the contrary would mean that in a hypothetical scenario where a gatekeeper offers a 'super app' containing various different services integrated together, this would have to be considered as one single core platform service merely due to the technical integration, even if in practice this 'super app' contains various distinct services which do not belong to the same category of core platform services or are used for different purposes by either their end users or their business users. Once again, this would have an important impact on the scope of the DMA obligations and prohibitions.

To conclude on this point, this first experience of assessing the delineation of core platform services on a case-by-case basis has been enriching and will serve as a basis to assess any similar issue that might need to be analysed in the context of the assessment of future gatekeeper notifications.

3. CHALLENGES OF DMA COMPLIANCE

While the first wave of designation decisions has been an important milestone for the DMA, we are now working on the concrete implementation of the DMA by the gatekeepers and their endeavours to comply with the various obligations and prohibitions contained in the DMA.

Our aim with the DMA is to create room for opportunities. Such opportunities should not only stem from the possibility for third parties to create the same exact type of services as those offered by gatekeepers but also from allowing third parties to disrupt the current ecosystems by developing the 'next big thing'.

Indeed, both contestability and fairness, which are the two core objectives inscribed in Article 1 of the DMA, have an important (disruptive) innovation component. If a core

[4] DMA Annex, Section D, point 2, b.
[5] DMA Annex, Section D, point 2, c.

platform service is offered by a gatekeeper in such a way that it creates contestability issues, business users' and third parties' incentives to innovate and to improve their products and services are reduced. Similarly, if a business user cannot adequately capture the benefits of its innovative efforts because the gatekeeper can either unfairly appropriate or simply deny these benefits, it will not invest in those innovations.

As a result, our aim under the DMA is to create a fair and contestable digital landscape without closed ecosystems, with real opportunities for new business users to enter and expand into new markets, with real choice for end users, and where all companies have a fair chance to innovate and strive to develop the 'next big thing' without fear that, ultimately, they will not benefit from their innovation efforts. Although it might not necessarily be possible to imagine already today what this 'next big thing' would be and what benefits this would bring to consumers, we have seen in the past how much consumers have benefitted from increased innovation, and we believe that the DMA can be a strong vector for such innovation.

Moving on to the concrete assessment of the gatekeepers' compliance efforts, it is important to underline from the outset that the 'compliance deadline' of 7 March 2024 is by no means the end of the compliance story. Indeed, while gatekeepers had to make significant improvements by that date, which we are in the process of assessing, continued work will be required from the gatekeepers, as the DMA will require ongoing enforcement. The 7 March 2024 is the beginning of a compliance journey that will redefine the fairness and contestability of digital markets in Europe.

In this regard, it is also important to remind that the DMA is very clear that the burden of proof of demonstrating compliance is on the gatekeepers. This is because gatekeepers are the ones who know best about their business and the true technical possibilities and limitations of their services. They are thus in the best position to determine how to offer their core platform services in a DMA-compliant way.

That being said, as an enforcer, it is important to be critical about the allegations made by the gatekeepers in this regard and to be mindful of the existence of an important asymmetry of information with the gatekeepers, which needs to be bridged as much as possible. We do this by engaging very actively with gatekeepers, including at a quite deep technical level, as we have a clear mapping of which obligations are relevant to each core platform service.

Importantly, while some elements of the DMA obligations and prohibitions are quite straightforward and full and complete compliance should already be achieved, some other aspects of these obligations and prohibitions might raise more complex technical issues. For those, having an iterative process will be key and we will continue to dialogue with gatekeepers to ensure they keep working on their compliance solutions to make them more effective.

In this regard, we will have to find the right balance between acknowledging the gatekeepers' efforts and requiring high DMA effectiveness. Indeed, some compliance solutions might require more time to be developed properly, and in such scenarios, it might be better to make sure that we have the right effective solution, rather than a quick fix which is not effective.

A key tool for us to assess the gatekeepers' compliance plans is the 'Compliance reports' required by Article 11 of the DMA, and especially the public versions of these reports. These should be sufficiently detailed and explicit as to the solutions put in place by the gatekeepers, in order for third parties to be able to provide us with valuable feedback on any shortcomings they see in the gatekeepers' compliance plans. It is in this perspective of collecting third-party feedback that we have asked gatekeepers to present their compliance reports in workshops open to the public.[6] Indeed, third parties will play a key role because

[6] <https://digital-markets-act.ec.europa.eu/events/workshops_en> accessed 24 April 2024.

they operate in the same markets as gatekeepers and have very capable software engineers and data scientists, who should be able to critically assess the gatekeepers' proposals. Obtaining valuable input from third parties will allow us to reduce the above-mentioned information asymmetry with gatekeepers.

In the same vein, we encouraged gatekeepers to involve these third parties as early as possible in the design of their compliance solutions. In this regard, whether the gatekeepers have market-tested their compliance solutions presented in their compliance report is an integral part of our assessment of their compliance efforts, as it is an indicator that gatekeepers understand that having the market's input is necessary to develop an effective compliance solution.

Moreover, engagement by third parties will be key for us to identify potential non-compliance issues. We have no doubt that they will do so, as we have been engaging constructively with a wide set of third parties, on all obligations, for the past months and this has really helped us to develop our lines of thought and to come to the gatekeepers with more concrete proposals.

In terms of the way forward, our current view is that as long as we see genuine engagement and progress from the gatekeepers, we will tend to privilege giving the opportunity to the gatekeepers to fix things that are not as effective as they should to meet the DMA requirements, through constructive regulatory dialogue.

We believe this would ensure the most efficient use of resources on issues where we do not see any progress and where it is apparent that we are stuck at a dead-end and have fundamental disagreements with the gatekeepers. In such cases, we will not hesitate to deploy the full strength of the enforcement powers granted to us by the DMA, such as imposing behavioural remedies and fines of up to 10% of the company's total worldwide turnover, which can go up to 20% in case of repeated infringement. Moreover, if we were to be faced with systematic non-compliance by a gatekeeper, we would not hesitate to adopt more structural remedies whenever necessary.

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