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ARTICLES

DIGITAL MARKETS ACT: A HINDRANCE TO INNOVATION AND BUSINESS DEVELOPMENT

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Abstract

The Digital Markets Act (DMA) is a significant regulatory effort of the European Union aimed at curbing the power of large tech companies and promoting fair competition in digital space. Despite its noble goals, there are growing worries about the negative impact it could have on innovation and entrepreneurship. This paper aims to determine the specifics of how the DMA could inadvertently impede innovation and discourage entrepreneurship. Through an analysis of the DMA's provisions, such as interoperability mandates and restrictions on self-preferencing, it is apparent that these stringent regulations could create significant barriers to entry for startups and discourage investment in emerging digital ventures. Additionally, the increased regulatory oversight mandated by the DMA could suppress willingness to take the risks necessary for entrepreneurial achievement, ultimately hindering the development of revolutionary advances. By thoroughly analyzing economic principles, real-world data, and relevant examples, this study clarifies the intricate relationship between regulation, innovation, and business in the digital realm. Furthermore, it suggests different regulatory strategies that aim to find a finer equilibrium between encouraging competition and fostering innovation, while highlighting the importance of customized structures that recognize the unique characteristics of digital markets. By shedding light on the possible compromises involved in the DMA, this research can be beneficial to policymakers and interested parties in order to facilitate scientific debates and regulatory choices regarding digital markets.

Keywords

Digital Markets Act, innovation, entrepreneurship, European Union regulations, restrictions, ex-ante, interoperability, self-preferencing, gatekeepers, data portability, fairness, antitrust, Digital Single Market, national competent authorities

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СТАТЬИ

АКТ О ЦИФРОВЫХ РЫНКАХ ЕВРОПЕЙСКОГО СОЮЗА: ПРЕПЯТСТВИЕ ДЛЯ ИННОВАЦИЙ И РАЗВИТИЯ БИЗНЕСА

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Аннотация

Акт о цифровых рынках Европейского союза (DMA) представляет собой важный шаг в ограничении власти крупных технологических компаний и содействии добросовестной конкуренции в цифровом пространстве. Несмотря на благородные цели данного акта, растет беспокойство по поводу его возможного негативного влияния на развитие инноваций и предпринимательской деятельности. В статье рассматриваются риски негативного влияния нового акта на инновационный и предпринимательский климат. Анализ требований к совместимости и ограничения на предоставление преимуществ собственным товарам показывает, что эти строгие правила могут создать существенные барьеры для входа стартапов и препятствовать инвестициям в новые цифровые предприятия. Кроме того, усиленный нормативный надзор, предписанный актом, может подавить готовность идти на риски, неотъемлемо присущие всякой предпринимательской инициативе, в конечном счете затрудняя развитие прорывных достижений. С учетом принципов развития экономики и опыта участников рынка автор проясняет сложную взаимосвязь между нормативным регулированием, инновациями и бизнесом в цифровой сфере. Кроме того, в работе предложены различные модели более тонкого и сбалансированного регулирования, направленные на поощрение конкуренции, стимулирование инноваций и учет уникальных характеристик отдельных цифровых рынков. Проливая свет на возможные компромиссные решения в толковании DMA, это исследование стремится способствовать развитию и углублению дискуссии о регулировании цифровых рынков.

Ключевые слова

акт о цифровых рынках, инновации, предпринимательство, регулирование Европейского союза, ограничения, ex-ante, совместимость, предоставление преимуществ собственным товарам, привратники, переносимость данных, справедливость, антимонопольное право, единый цифровой рынок, национальные антимонопольные органы

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Introduction

The Digital Markets Act (DMA)[1] marks a pivotal stride in curbing the dominance of tech giants and nurturing a more competitive digital environment.[2] The Digital Markets Act (DMA) is founded on the idea that competition law alone is not adequate to effectively handle the challenges and systemic issues brought about by the digital platform economy. Antitrust regulations are limited to specific cases of market power and anti-competitive behavior. Nevertheless, numerous substantial challenges pose a threat to its efficacy. The DMA could potentially worsen regulatory fragmentation in the European Union by allowing member states to interpret and implement its rules in varying ways, resulting in inconsistencies and inefficiencies.[3] Additionally, the Act's wide-ranging responsibilities and restrictions may unintentionally lead to negative economic impacts, hindering innovation and disrupting market dynamics. Furthermore, the likelihood of legal conflicts due to uncertainties in the DMA's wording presents a significant obstacle, adding further complexity to its execution and regulation. The DMA needs to address provisions that are in conflict with current European regulations, which raises questions about its compatibility and consistency within the wider regulatory framework.[4] This article explores all of these barriers, providing valuable perspectives on possible approaches to minimize their influence and improve the effectiveness of the DMA. By directly confronting these difficulties, policymakers can guarantee that the DMA achieves its desired goal of fostering competition, innovation, and consumer well-being in the digital era.

The initial objective of the DMA was to prevent regulatory fragmentation within the EU's Digital Single Market (DSM). However, it falls short of accomplishing this commendable objective, as it may cause member states to further increase regulatory fragmentation.[5] The DMA's inclination towards

[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 (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), 2022 OJ (L 265).

[2] The Digital Markets Act (DMA), implemented by the European Union (EU), encompasses a series of regulations designed to diminish the influence of prominent technology companies to foster a more competitive landscape within European digital markets. These laws specifically target eliminating market obstacles erected by dominant «gatekeeper» platforms like Google, Facebook, and Amazon. See: Willige, A. (2023, September 19). *What does it mean for tech companies and consumers?* World Economic Forum. https://www.weforum.org/agenda/2023/09/eu-digital-markets-act-big-tech/ — Regulations are introduced by the Digital Markets Act for platforms that serve as «gatekeepers» in the digital industry. These platforms impact the internal market significantly, operate as a vital conduit for corporate users to connect with their end customers, and currently hold, or will likely hold, a strong and long-lasting position. In addition to guaranteeing the openness of significant digital services, the Digital Markets Act seeks to stop gatekeepers from placing unjust restrictions on companies and end users. See also: European Commission. (2023, September 6). *Questions and answers: Digital Markets Act: Ensuring fair and open digital markets** https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2349

[3] See Teece, D. J., & Kahwaty, H. J. (2021). *Is the proposed Digital Markets Act the cure for Europe's platform ills? Evidence from the European Commission's impact assessment.* BRG Institute. https://lisboncouncil.net/wp-content/uploads/2021/04/TEECE-AND-KAHWATY-Dynamic-Digital-Markets1.pdf Here, the authors were of the view that a comprehensive evaluation of the provisions of the DMA would reveal that it is probable to exert a restraining influence on research and development (R&D) as well as innovation. This assertion is firmly grounded in fundamental economic principles. The stipulations of the DMA foster a culture of exploiting the investments made by others, thereby dissuading parties from undertaking such investments themselves. To safeguard Europe's capacity for innovation, it is imperative to prioritize the independent cultivation of dynamic capabilities.

[4] Burwell, F. (2021, March 30). *Regulating platforms the EU Way? The DSA and DMA in transatlantic context.* Wilson Center. https://www.wilsoncenter.org/article/regulating-platforms-eu-way-dsa-and-dma-transatlantic-context

[5] Portuese, A. (2022, August 24). *The Digital Markets Act: A triumph of regulation over innovation.* Information Technology and Innovation Foundation. https://itif.org/publications/2022/08/24/digital-markets-act-a-triumph-of-regulation-over-innovation/)

pre-emptive regulatory actions and its focus on equity and constancy may inadvertently impede innovation. This prudent strategy has the potential to impede pioneering companies that aspire to disrupt prevailing market conventions.[6] The DMA's emphasis on maintaining the existing status quo and ensuring fairness may prioritize stagnant competition, which depends on current market conditions, rather than dynamic competition that involves innovation and market advances.[7] The favoritism could limit the opportunities for emerging players and creative business approaches. Giving more importance to disruption rather than fairness might hinder the ability of innovative companies to compete with established players and drive positive changes in the market. Long-term, this disparity may stifle competition and impede innovation.

The Digital Single Market (DSM) seeks to boost digital innovation, efficiency, and productivity throughout the European Union. Critics argue that the DMA could potentially impede these objectives rather than support them, as it may impose burdensome regulatory requirements on digital firms.[8] Such requirements have the potential to suppress innovation and hinder gains in efficiency and productivity. The regulatory framework of the DMA is perceived as possibly burdensome for digital companies, potentially impeding their capacity to innovate and compete efficiently. Through the enforcement of stringent regulations and obligations, the DMA might establish obstacles for smaller entities looking to enter the market and discourage innovation (Bania, 2023, p. 116–149). The enforcement powers granted to individual EU member states under DMA's design result in a decentralized approach. This approach may result in regulatory fragmentation, as different countries may interpret and enforce the rules in varying ways (Bania, 2023, p. 116–149). Such fragmentation can create uncertainty for digital companies operating across borders and undermine the objective of achieving regulatory harmonization within the DSM.

The Digital Markets Act (DMA) has faced criticism for its per se prohibitions, with concerns raised about the lack of balance between pro-efficiency and pro-innovation justifications. Let us examine the specifics:

1. Prohibitions are regulations that categorize specific actions or behaviors as anti-competitive without the need for evidence of actual harm to competition. The criticism suggests that the DMA incorporates these prohibitions without considering efficiency or innovation. This inflexibility may fail to acknowledge complex scenarios where certain practices could genuinely enhance consumer welfare or foster innovation (Podszun, 2023).
2. The principle of proportionality necessitates that regulatory actions align with their intended goals and do not surpass what is essential to attain those goals (Podszun, 2023).[9] If the DMA's inherent prohibitions lack valid reasons rooted in efficiency and innovation, they might contradict this principle. Consequently, this could result in excessive regulatory burdens on digital companies, potentially impeding innovation without satisfactory justification.

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6 Lobo, S. (2024, March 15). *Apple opposes ex-ante regulations, similar to Digital Markets Act, in India.* Medianama. https://www.medianama.com/2024/03/223-apple-digital-markets-act-ex-ante-regulations-india/

7 See: Crémer, J. (2024, March 25). Will the Digital Markets Act create a level playing field? Toulouse School of Economics. https://www.tse-fr.eu/Digital-Markets-Act. The author was of the view that the leading technological platforms persist in their remarkable ability to foster innovation. Rather than questioning the extent of innovation achieved by today's platforms, the real inquiry lies in determining whether the level of innovation from both platforms and other companies would be greater and more tailored to the advantages of their users if they encountered heightened competition.

8 Broadbent, M. (2021, September 15). *Implications of the Digital Markets Act for transatlantic cooperation.* Center for Strategic and International Studies. https://www.csis.org/analysis/implications-digital-markets-act-transatlantic-cooperation

9 The principle of proportionality arises from the necessity to restrict governmental interference — through regulations, penalties, and supervision — to the extent required to accomplish the intended policy goals.

3. The DMA's imposition of rigid per se prohibitions, without taking into account the potential advantages in terms of efficiency or innovation, may result in higher compliance expenses for digital companies.[10] Moreover, the inflexible nature of the regulatory framework could discourage companies from exploring innovative business strategies, due to concerns about potential legal consequences. Ultimately, this could stifle innovation within the digital sector.

The requirements of the DMA could potentially create uncertainty for businesses operating in the EU when they come into conflict with other EU regulations or directives. For example, if a company is required to comply with both the DMA and current data protection regulations, issues may arise regarding data sharing or processing procedures.[11] Conflicting demands could result in legal disputes and lawsuits as businesses strive to understand how to navigate the regulatory environment. These legal battles have the potential to prolong decision-making processes and raise compliance expenses for companies. Additionally, the uncertainty surrounding which regulations hold more weight may discourage innovative businesses from investing in the EU market due to concerns about potential legal liabilities. The possibility of maneuvering through intricate and possibly conflicting regulatory obligations might dissuade inventive enterprises from venturing into or enlarging their influence in the European Union market.[12] This could impede competition and restrict consumer options, ultimately hindering progress in the digital industry.

A Decentralized DMA

The decentralized enforcement of the DMA poses a threat to the DSM. In the course of discussions, the European Parliament introduced an amendment to Article 31a which establishes a "European High-Level Group of Digital Regulators" consisting of a Commission representative, a representative from pertinent Union entities, representatives from national competition authorities, and representatives from other National Competent Authorities (NCAs).[13] The group is tasked

[10] Bal, M., Debroy, B., & Ravi, S. (2022, November 25). *Devising an emerging market perspective for competition regulation in the digital age. Observer Research Foundation.* https://www.orfonline.org/research/devising-an-emerging-market-perspective-for-competition-regulation-in-the-digital-age

[11] The Digital Markets Act (DMA) seems to draw heavily from previous and current competition inquiries within the digital sector. The strategy of transforming solutions implemented for individual firms and business structures in particular market circumstances into universally applicable regulations poses challenges. This approach may lead to the regulation of practices that are not typically problematic and result in unintended consequences for business models that were not initially taken into account. See: Digital Europe. (2021, May 27). *Digital Markets Act position paper*. https://www.digitaleurope.org/resources/digital-markets-act-position-paper/

[12] Bal, M., Debroy, B., Gowda, R., & Ravi, S. (2022). *Devising an Emerging Market Perspective for Competition Regulation in the Digital Age.* ESYA Centre. https://www.orfonline.org/public/uploads/posts/pdf/20230411144650.pdf See also: Kavanagh, C. (2019, August). *New tech, new threats, and new governance challenges: An opportunity to craft smarter responses?* Carnegie Endowment for International Peace. https://carnegieendowment.org/2019/08/28/new-tech-new-threats-and-new-governance-challenges-opportunity-to-craft-smarter-responses-pub-79736

[13] According to G. Colangelo, recognizing the connection between competition law and the DMA, the European Competition Network (ECN) and certain EU member states (referred to as "friends of an effective DMA") have put forward a suggestion to grant national competition authorities (NCAs) the authority to enforce DMA obligations. According to this proposal, the European Commission would retain its primary responsibility for enforcing the DMA and would have exclusive jurisdiction in designating gatekeepers or granting exemptions. However, NCAs would be authorized to enforce the obligations of the DMA and exercise investigative and monitoring powers at their discretion. See: Colangelo, G. (2022, March 23). *The Digital Markets Act and EU antitrust enforcement: Double & triple jeopardy.* International Centre for Law and Economics. https://laweconcenter.org/resources/the-digital-markets-act-and-eu-antitrust-enforcement-double-triple-jeopardy/

with guiding the Commission on the integration of national competition authorities (NCAs) in the decentralized enforcement of the DMA. Article 31c, as introduced by the European Parliament, reinforces this by outlining the responsibilities of NCAs and other relevant authorities. It specifies that NCAs are required to assist the Commission in overseeing adherence to and implementation of the rules outlined in this Regulation. Thus, the DMA will be under the control of the NCAs, leading to decentralized enforcement and contradicting the aim of reducing regulatory fragmentation. The coalition is also in favor of allowing firms to engage in "private" enforcement of the DMA, which means that they should have the ability to take legal action against gatekeepers to uphold their obligations. This perspective is based on the belief that private enforcement will enhance the DMA's efficiency, but it could lead to attempts by dominant competitors to suppress competition and hinder innovation.[14] Pressure exerted by influential states within the Friends of an Effective Digital Markets Act coalition have yielded positive results. Margrethe Vestager, the Executive Vice President of the European Commission, is now advocating for the involvement of national authorities in enforcing the DMA.[15] Germany is already demonstrating its authority and impact in shaping the implementation of the DMA.[16]

Member states have been actively advocating for a redistribution of enforcement responsibilities among the NCAs in the latest version of the DMA, giving them a more significant role. The EU institutions have successfully reached a political consensus leading to a thorough revision of Article 31d (1) of the DMA.[17] Originally proposed by the European Parliament, the above provision established certain constraints and obligations on the involvement of Member States in the enforcement of the DMA. Article 32a (6) of the most recent edition of the DMA allows NCAs to directly enforce the DMA without resorting to the covert application of national competition regulations. This provision explicitly states, "If a competent authority of a Member State has the necessary jurisdiction and investigative authority under national legislation, it may independently investigate a potential violation of Article 5, 6, and 6a of this Regulation within its jurisdiction."

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[14] Colangelo, G. (2022, March 23). *The Digital Markets Act and EU antitrust enforcement: Double & triple jeopardy.* International Centre for Law and Economics. https://laweconcenter.org/resources/the-digital-markets-act-and-eu-antitrust-enforcement-double-triple-jeopardy/

[15] According to Margrethe Vestager, "What we want is simple: Fair markets also in digital. We are now taking a huge step forward to get there — that markets are fair, open and contestable. Large gatekeeper platforms have prevented businesses and consumers from the benefits of competitive digital markets. The gatekeepers will now have to comply with a well-defined set of obligations and prohibitions. This regulation, together with strong competition law enforcement, will bring fairer conditions to consumers and businesses for many digital services across the EU." See: European Commission. (2022, March 25). *Digital Markets Act: Commission welcomes political agreement on rules to ensure fair and open digital markets* [Press release]. https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1978

[16] Kabelka, L. (2022, April 12). *DMA: Germany the test bench for complementarity with competition authorities.* Euractiv. https://www.euractiv.com/section/digital/news/dma-application-could-lead-to-legal-uncertainty-in-germany/ Section 19a of the Act against Restraints of Competition (ARC) in Germany is commonly known as the DMA's blueprint, mainly due to its comparable scope of application. See: Secure Privacy. (2023, December, 23). *A comparison of the German Competition Act (GWB) and the Digital Markets Act (DMA).* https://secureprivacy.ai/blog/german-competition-act-digital-markets-act-comparison

[17] Carugati, C. (n. d.). *The role of national authorities in the Digital Markets Act.* Jean Monnet Network on EU Law Enforcement Working Paper Series No. 34/22. https://jmn-eulen.nl/wp-content/uploads/sites/575/2022/05/WP-Series-No.-34-22The-Role-of-National-Authorities-in-the-Digital-Markets-Act-Carugati.pdf

The duty of the relevant NCA to inform the Commission of any investigation is the only requirement for the unilateral and local enforcement of the DMA's obligations and prohibitions.[18] The latest version of the DMA enables decentralized enforcement without imposing any major restrictions, which is in line with the recommendations made by the Friends of an Effective Digital Markets Act.[19] Nevertheless, due to the absence of coordination, decentralized enforcement of the DMA at the EU level may prove to be less efficient, leading to an increased likelihood of judicial actions at the national level. This could also weaken the legal foundation for NCAs to enforce a regulation primarily created to eliminate regulatory fragmentation.

Non-Acknowledgment of Legitimate Justifications by the DMA

The DMA's arbitrary line-drawing rules concerning size thresholds and qualitative criteria for identifying 'gatekeepers' lack economic rationale. This results in the unequal treatment of firms with comparable market positions solely based on their inclusion within the DMA's scope (Podszun, 2023). The DMA fails to provide clear definitions of markets and overlooks essential concepts of competition law, such as 'market dominance'. As a result, companies that are not dominant will be subject to the new competition rules, while certain dominant companies will be exempt from them. This presents a paradox within the DMA, as it may potentially scrutinize market challengers more rigorously than incumbents. Recital 5 of the DMA indicates that designated gatekeepers may not necessarily be dominant in terms of competition law. This is because digital marketplaces typically have a large number of players, complex ecosystems, and fast innovation. In these situations, a single company may have significant control over important infrastructure or services, even if it does not strictly meet the definition of dominant. It is possible that the power dynamics found in digital marketplaces are not fully reflected by conventional measures of dominance, such as market share or entrance obstacles.

The DMA contains size thresholds that are highly questionable, and the regulation itself is harmful because it establishes ex-ante rules that are essentially prohibitions. It is undeniable that attaining market supremacy in the digital economy requires exceptional efficiency. It is important to remember that users are just as eager to take advantage of network effects. However, having less competition can negatively impact customers, who might have had to make fewer compromises in terms of privacy in a more competitive market. The only ways to promote competitiveness in the absence of interoperability are through legislation or disruptive innovation

[18] According to the Centre on Regulation of Europe, there are mechanisms in place to facilitate the collaboration between the enforcement of the DMA and competition law. It is mandatory to ensure that all relevant authorities are kept up to date on enforcement actions and that confidential data can be exchanged between different entities. Specifically, (i) if a National Competition Authority (NCA) plans to initiate an investigation on one or more gatekeepers according to national legislation, it must notify the Commission and may also inform other NCAs; (ii) if an NCA intends to impose obligations on gatekeepers based on national law, it must share the proposed measures with the Commission, even if they are temporary measures. The information exchanged is solely to coordinate enforcement efforts. See p. 184 in De Streel, A., Borreau, M., Micova, S. B., Feasey, R., Fletcher, A., Kraemer, J., Monti, G., & Pietz, M. (2023). *Effective and proportionate implementation of the DMA*. Centre on Regulation of Europe. https://cerre.eu/wp-content/uploads/2023/01/DMA_Book-1.pdf

[19] Rurali, G., & Seegers, M. (2023, June 20). *Private enforcement of the EU Digital Markets Act: The way ahead after going live*. Kluwer competition law blog. https://competitionlawblog.kluwercompetitionlaw.com/2023/06/20/private-enforcement-of-the-eu-digital-markets-act-the-way-ahead-after-going-live/

which, in itself, is anti-innovative and capable of stifling business development and enterprise.[20] Nevertheless, rules of reason, which allow for legitimate justifications to be weighed against regulatory obligations, are more effective for avoiding incorrect judgments and identifying practices that promote competition. The blanket prohibitions under the DMA that are imposed on designated gatekeepers cannot be challenged by the gatekeepers' economic justifications. The DMA will only consider exceptions that are grounded in "public morality, public health, or public security." As a result, practices that are prohibited are assumed to hurt competition regardless of any efficiency arguments put forth by the defendant, such as enhancing consumer welfare or product innovation through technological advancement (Monti, 2022, p. 40–68). The transition from ex-post antitrust enforcement to ex-ante regulatory measures mirrors the implementation of the precautionary principle in antitrust cases: regulatory interventions at an early stage aim to deter harmful practices and uphold the current state of affairs.

Over or Under Enforcement of the DMA?

It is challenging for any regulatory framework to achieve the ideal degree of enforcement. Excessive enforcement can hinder creative thinking and productive enterprises. The objectives of the regulating legislation may be compromised by inadequate enforcement. It is difficult to forecast whether there will be systematic over- or under-enforcement.[21] Today, it is believed that the "more economic approach" contributed to a more cautious antitrust enforcement strategy that would be partially replaced by the DMA. It is nearly impossible to conduct a thorough study of the DMA's effects on enterprises and innovation ahead of time given the variety of responsibilities involved.

The equilibrium between over- or under-enforcement is not solely determined by matters of substance, but also by the enforcement regime and its institutional framework (Knapstad, 2023, p. 394–409). The data protection regulations in the EU, although comprehensive in terms of substance, serve as an illustration of inadequate institutional design. The European Commission is designated as the exclusive enforcement authority for the Digital Markets Act (DMA), with agencies from EU Member States limited to assisting. The internal structure of the European Commission will need to address key considerations such as staffing levels dedicated to DMA enforcement, the expertise of case handlers, their motivations, and the extent of judicial oversight over their rulings.[22] These factors will play a crucial role in shaping the effectiveness of enforcement actions. Private individuals have the option to initiate legal proceedings against gatekeepers through private enforcement, leading to a substantial enhancement in the enforcement measures.[23] It is widely acknowledged that private enforcement can be pursued in domestic courts, even though the provisions concerning this aspect in the DMA are notably inadequate. Users have the right to

[20] Heimann, F. (2022, June 13). The Digital Markets Act — We gonna catch 'em all? Kluwer competition law blog. https://competitionlawblog.kluwercompetitionlaw.com/2022/06/13/the-digital-markets-act-we-gonna-catch-em-all/

[21] European Commission. (2023, September 6). *Questions and answers: Digital Markets Act: Ensuring fair and open digital markets** https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2349

[22] The enforcement of digital competition rules against big tech will be carried out by the European Commission, which should internally guarantee a dedicated process and teams. See: Martins, C., & Carugati, C. (2022, May 11). *Insights for successful enforcement of Europe's Digital Markets Act.* Bruegel. https://www.bruegel.org/blog-post/insights-successful-enforcement-europes-digital-markets-act)

[23] Margvelashvili, T. (2023, December 14). Tracing forum shopping within the DMA's private enforcement: Seeking equitable solutions. Kluwer competition law blog. https://competitionlawblog.kluwercompetitionlaw.com/2023/12/14/tracing-forum-shopping-within-the-dmas-private-enforcement-seeking-equitable-solutions/)

file lawsuits seeking cease-and-desist orders, interim relief, and potentially even compensation for damages incurred.[24]

The Negative Impacts of Ex-Ante Regulations

Article 5(1) prohibits self-preferential practices, despite their prevalence in the business world, which often stimulate competition, drive innovation, and improve consumer welfare.[25] However, the DMA unequivocally bans these practices, including tying, bundling, and leveraging strategies, despite their positive effects on competition and innovation (Hornung, 2024, p. 396–437). The prohibition will have a substantial impact, negatively affecting consumers and numerous businesses within the gatekeepers' network that rely on and benefit from their services and products. These restrictions may also result in a significant deterrent effect. Platforms that are not gatekeepers may perceive such behaviors as potentially anticompetitive according to regulators, even though the DMA might not place any limitations on them (Andriychuk, 2023, p. 123–132). In reality, the DMA's automatic bans on supposedly 'unfair' practices will impact the entire economy, as the DMA could ultimately be invoked in conventional competition lawsuits (Bostoen, 2023, p. 263–306). The per se prohibition rules of the DMA are expected to have an impact on innovation, consumer welfare, and the choices available to both consumers and business users. These rules lack economic justification and may result in a decrease in innovation, a decline in consumer welfare, and limited options for consumers and businesses (Deutscher, 2022, p. 302–340). The DMA purportedly seeks to prevent the "extreme nature of unjust practices." However, the DMA is ultimately likely to prohibit and discourage practices that promote competition and innovation, such as self-preferencing, data aggregation, data merging, and leveraging strengths that may impact consumer well-being and innovation (Cennamo et al., 2023, p. 44–51).

The EU principle of proportionality may be violated by blanket prohibitions on potentially procompetitive practices, as these prohibitions are not specifically designed to address unfair practices, which goes against the claims of the DMA (Lamadrid de Pablo & Bayón Fernández, 2021, p. 576–589). To ensure reasonableness, EU judges have the authority to reduce the set of obligations and prohibitions imposed by the DMA. The ex-ante rules of per se prohibitions implemented by the DMA are an unfavorable policy that greatly hinders the principles of fair competition and disregards the fundamental legal principles of the EU's legal order (Colangelo, 2023, p. 538–556). A more rational approach would involve the application of the rule of reason, where judges assess the positive and negative impacts of the rules through a balancing test. In the end, it is likely that EU judges will inevitably embrace this approach when adjudicating the DMA.[26]

The implementation of the DMA is expected to exacerbate an already intricate regulatory structure, leading to more disorder. As an illustration, the DMA compels gatekeepers to separate essential

[24] The DMA's endorsement of private enforcement is additionally demonstrated in Article 42 and Recital 104, particularly emphasizing consumer rights. Consumers are enabled to pursue their claims against gatekeepers' obligations through representative actions that are consistent with Directive (EU) 2020/1828. See: Directive 2020/1828, of the European Parliament and of the Council of 25 November 2020 on Representative Actions for The Protection of the Collective Interests of Consumers and Repealing Directive 2009/22/EC, 2020, OJ (L 409). https://eur-lex.europa.eu/eli/dir/2020/1828/oj/eng

[25] The general obligations of gatekeepers are specified in Articles 5 and 6 of the DMA. Article 6(5) specifically addresses the issue of self-preferencing. See p. 7 in Peitz, M. (2022, November). *The prohibition of self-preferencing in the DMA.* Centre on Regulation in Europe. https://cerre.eu/wp-content/uploads/2022/11/DMA_SelfPreferencing.pdf

[26] Bauer M., Erixon, F. Guinea, O. van der Marel, E., & Sharma, V. (2022, February). The EU Digital Markets Act: Assessing the quality of regulation. European Centre for International Political Economy. https://ecipe.org/publications/the-eu-digital-markets-act/

platform services from each other. According to Article 5(f) of the DMA, gatekeepers are obligated to abstain from mandating that business users or end-users avail themselves of additional core platform services to utilize, access, or register for any of the core platform services specified under that Article.[27] The provisions of the DMA that mandate unbundling will hinder gatekeepers from adhering to Article 7 of Directive 2019/770, which requires platforms to provide a detailed description of the functionality and interoperability of their primary platform services.[28] This is because the DMA also permits other business users to modify the original functionality and interoperability of any core platform service, thereby rendering it practically impossible for gatekeepers to possess comprehensive knowledge of the interoperability and functionality of their services. The DMA establishes data portability rights for business users about gatekeepers.[29] However, these rights could potentially infringe upon the privacy rights of end-users protected under the GDPR[30]. According to Article 6(i) of the DMA, gatekeepers are required to:

> "provide business users and third parties authorized by a business user, upon their request, free of charge, with effective, high-quality, continuous and real-time access and use of aggregated and non-aggregated data, including personal data, that is provided for or generated in the context of the use of the relevant core platform services or services offered together with or in support of the relevant core platform services by those business users and the end users engaging with the products and services provided by those business users; for personal data, provide access and use only where the data are directly connected with the use effectuated by the end user in respect of the products or services offered by the relevant business user through the relevant core platform services, and when the end-user opts into such sharing by their consent."

The DMA imposes an obligation on the gatekeeper to transfer data to a business user once the end-user has given consent to such sharing.[31] However, following a one-time blanket approval by the end-user upon initial registration with the business user, the business user may obtain an excessive amount of personal data from gatekeepers. The sharing of this data could occur without the end users being completely informed that the data produced while utilizing the gatekeepers'

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27 The Digital Markets Act establishes an equitable digital landscape by defining rights and regulations for major online platforms (known as 'gatekeepers') and guarantees that gatekeepers do not exploit their dominant position. By overseeing the digital market on a European Union scale, it fosters a just and competitive digital atmosphere, enabling both businesses and customers to take advantage of digital advancements (https://www.eu-digital-markets-act.com/).

28 Directive 2019/770, of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contracts for the Supply of Digital Content and Digital Services, 2019 OJ (L 136).
The gatekeeper must ensure that the fundamental features of its number-independent interpersonal communications services are compatible with those of another provider in the EU, either already providing or planning to provide such services. This can be achieved by offering technical interfaces or other solutions that promote interoperability, without any additional cost (Article 7). See: Małobęcka-Szwast, I. (2023, August 24). *The Digital Markets Act: A revolution, and not only for gatekeepers.* Lexology. https://www.lexology.com/library/detail.aspx?g=1417472a-4597-4ea3-9925-0a7060aafbde

29 The DMA defines "interoperability" as "the ability for hardware and software elements to work with other hardware and software elements and with users in all how they are intended to function, and to mutually use the information which has been exchanged through interfaces or other solutions" (Art. 2(29)). Vertical (Art. 6(4), (7)) or horizontal (Art. 7) interoperability is possible.

30 Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to The Processing of Personal Data and On the Free Movement of Such Data, And Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 OJ (L 119).

31 Usercentrics. (2024, January 18). How the European Digital Markets Act (DMA) impacts user privacy and consent management. https://usercentrics.com/knowledge-hub/digital-markets-act-dma-impacts-user-privacy-and-consent-management/

services will eventually be owned by numerous business users. Consequently, this situation is likely to contradict the GDPR, which requires the consent of end users to process their data. Article 7(4) prohibits the excessive processing of personal data for contract performance. Despite this, the DMA gatekeeper may mandate gatekeepers to disclose data to business users that goes beyond what is essential to deliver the requested services. Simultaneously, the DMA could potentially clash with the data portability stipulations outlined in the GDPR (Turner & Tanczer, 2024). The DMA specifically pertains to the disclosure of data that is "directly linked to the actions taken by the end-user about the products or services provided by the respective business user." The interpretation of the term "directly connected" has yet to be established by regulatory bodies and judicial authorities through practical application. Nevertheless, imposing limitations on the types of data that can be transferred may prompt gatekeepers to breach Article 20 of the GDPR, which governs the portability of personal data. This provision entitles individuals to transfer their data from one data controller to another "without hindrance".

The gatekeeper must choose between adhering to Article 6(i) of the DMA, which restricts data portability of personal data and may lead to a breach of Article 20 of the GDPR, or enabling data portability "without hindrance" in accordance with Article 20 of the GDPR, which could result in a violation of Article 6(I) of the DMA. The DMA encompasses numerous obligations, such as Article 6(i), which may potentially clash with the data protection regulations of the European Union.

The Digital Markets Act (DMA) may also come into conflict with requirements outlined in the Digital Services Act (DSA). For example, while Article 5 of the DSA mandates that online platforms must promptly remove or disable access to illegal content to avoid liability, Article 6(1)(k) of the DMA stipulates gatekeepers must ensure fair, reasonable, and non-discriminatory conditions of access for business users to their software application store, online search engines, and online social networking services. Essentially, gatekeepers are obligated to offer fair treatment to all business users. The outcome of these regulatory challenges leads to the emergence of gatekeepers who will embrace a more cautious stance towards innovation in order to mitigate their legal liabilities. Unfortunately, this approach will ultimately have detrimental effects on consumers and hinder overall economic progress.

Findings

As intended by the EU, the DMA lays out rules for larger digital platforms classified as 'gatekeepers' to promote fair competition and prevent anti-competitive practices. While this is a noble aim, the DMA creates several difficulties on the legal front, especially with respect to conflicts between laws. Conflicts arise from differing regulatory environments and extraterritorial impacts, as well as innovation-compliance rifts. An extensive analysis of the nature and essence of those conflicts is presented here. Though the DMA's ambitious goal of ensuring fairness in digital markets and reducing the dominance of gatekeepers is to be warmly commended, it is shadowed by complex legal panoramas. The conflicts between laws would arise from differing regulations, extraterritorial effects, and constraints on innovation. An approach that specifically reflects the other angles of harmonization, cooperation, and adaptability would allow for the resolution of such conflicts without compromising the fairness and competitiveness of that global digital ecosystem.

Divergent Regulatory Approaches

The DMA sets stringent guidelines that contrast with the more laissez-faire approach of other jurisdictions, such as those exhibited in the United States and China. For example, in US antitrust law, actions that damage the interests of consumers are prioritized, with a focus on pricing and quality, while the DMA is oriented towards fair competition and markets. In China, the primary focus in regulating digital markets is on ensuring government control and data sovereignty, while they are minimally regulated for competition.

Discrepancies between the regulations of individual jurisdictions may lead to challenges for multinational businesses that operate in a number of them due to inconsistent compliance requirements.

Impact on Multinational Gatekeepers

With so many countries requiring different considerations/guidelines that may be less restrictive or somewhat contradictory, multinational firms like Google, Apple, and Amazon face compliance conflicts with the DMA within their ecosystem, leading to operational inefficiencies, and possibly to litigation.

Extraterritoriality and Jurisdictional Overreach

The DMA carries international implications, as it applies not only to EU gatekeepers, but those located outside of the EU that conduct business in its market.

Conflict with Principles of Sovereignty: the DMA may be perceived as encroaching upon the sovereignty rights of non-EU nations by extending its regulations to foreign enterprises. An illustrative example would be:

A gatekeeper based outside of the EU could be penalized under the DMA for conduct that might be lawful in its home country. This establishes a complex tension between international trade and digital diplomacy, which may result in potential retaliatory measures and trade conflicts.

Dual Compliance Burden: companies that operate in more than one jurisdiction are necessarily made to comply with overlapping or contradictory rules.

For example, a data-sharing obligation from the DMA could violate data privacy requirements imposed by the USA Cloud Act or the Data Security Law of China, resulting in various legal quandaries.

Innovation vs. Regulation

Chilling Effect on Innovation:

Innovation: Restrictions on self-preferencing, demands for interoperability, and forced data sharing under the DMA may chill, if not freeze, innovation altogether.

Companies may think twice about the costs and time involved in launching new products and services to the market if caught up in regular DMA compliance disputes.

As with small businesses that are dependent on various platforms run by gatekeepers, startups may have fewer investment opportunities considering the demand for tighter operational scrutiny.

Misalignments in Global Standards

Due to compliance with the DMA, gatekeepers might amend their platforms and business models, which may inhibit their ability to innovate on a global scale. An example is given below:

The interoperability mandated by the DMA might conflict with US market protections for proprietary technologies, thereby creating disincentives for investments in research and development.

Conflict between EU member states and the EU framework

National vs. EU-Level Regulation:

The DMA is supposed to bring about harmonization, but conditions may arise that create conflicts between the DMA and national competition or consumer protection:

Some EU member states may develop their own national regulations that are stricter than those outlined in the DMA, thus introducing fragmentation.

Companies must operate under both the DMA and diverse national regulations, bolstering an increase in their legal liabilities and compliance costs.

Inconsistencies in Enforcement:

The European Commission is designated as the sole enforcement authority under the DMA, but different national authorities may have different views on compliance, which could lead to disputes and inconsistent application of rules.

Sectoral and Industry Conflicts

Sectoral Regulations vs. DMA:

Certain sectors, like finance and health, are more stringently controlled than others. Their broad mandates could possibly conflict with those put in place by sector-specific laws.

Interoperability demands for gatekeepers may at times collide with banking secrecy laws within finance.

Health organizations may have difficulty reconciling DMA requirements with GDPR privacy requirements.

Impact on SMEs and Startups

In implementing the DMA with the objective of protecting small firms, some provisions might fortuitously erect barriers:

Difficulties that deprive gatekeepers of the ability to give start-ups platform access, hence challenging the submission of such start-ups, may eventually limit market entry and innovation.

International Trade and Economic Relations

Trade Conflicts and Retaliation:

This module on the scope of the DMA might elicit retaliation from non-EU countries, especially the US, which is where most of these gatekeepers are based. This could end up as a dire global trade war that hampers overall digital trade.

Fragmentation of Digital Markets:

One of the many ways the DMA might affect digital markets is by having different regional solutions developed by gatekeepers to meet conflicting legal requirements, thereby undermining global integration and innovation.

Recommendations for Resolving Conflicts Between Laws

- Harmonization of Global Standards:
  - Encourage a new international dialogue and cooperation through institutions like the World Trade Organization (WTO) and the Organization for Economic Cooperation and Development (OECD) to identify commonalities within regulations dealing with competition and digital markets.

  - Establishment of a global framework for the regulation of digital markets that respects regional specifics while minimizing potential conflicts.
- Clarification of Jurisdictional Boundaries:
  - The DMA should have clearer limits for its extraterritorial applicability to avoid disputes over sovereignty and to minimize legal uncertainties.
  - Mutual agreements with third-party states to prevent inconsistencies between respective regulatory frameworks should be proposed.
- Flexible and Adaptive Frameworks:
  - The DMA must incorporate provisions for the review and adjustment of regulations to address evolving technological and market dynamics.
  - The European Commission ought to allow for industry-specific exemptions or adjustments that reduce conflicts with current regulations.
- Collaborative Compliance Models:
  - Encourage joint compliance initiatives that engage gatekeepers, national authorities, and the European Commission in order to streamline enforcement and minimize disputes.
  - Introduce a mechanism for cross-border dispute resolution that would address disputes arising from jurisdictional conflicts.

Conclusion

As stated in Article 1(1), the DMA aims to enhance the internal market by establishing uniform regulations. However, it falls short of this goal. Instead of solely fostering the beneficial impact of European regulation on digital markets, the DMA allows for various national regulatory actions, maintains barriers to online operations, and increases the likelihood of inconsistent enforcement measures. Article 1(6) specifies that Member States have the authority to establish additional regulations and requirements for gatekeepers, provided they relate to "national competition rules." Since the DMA introduces new competition rules and Member States can add further competition rules for gatekeepers, this will likely result in greater regulatory fragmentation.

The Digital Markets Act (DMA) diverges from modern competition law by placing less emphasis on economic evidence and concepts. This shift suggests that economic reasoning may not align seamlessly with the current legal framework for evaluating individual cases. Nevertheless, economics continues to play a significant role in shaping legislation at a broader level. The creation and enforcement of the DMA will introduce regulatory ambiguity. Gatekeepers will need to determine whether to adhere to the DMA or other EU regulations, such as the GDPR. This uncertainty will further hinder covered platforms' capacity to innovate and promote consumer welfare. The DMA's prohibition of practices that could potentially promote competition may impede economic progress and harm consumer well-being. This issue is compounded by the lack of adequate economic reasoning behind these restrictions, potentially breaching EU principles of proportionality. Judges will need to address conflicts between the DMA and the principle of proportionality, potentially limiting future DMA enforcement.

The DMA is nearing its final stages of adoption by EU institutions, but significant concerns remain regarding its approval and enforcement. As noted earlier, the primary objective of the DMA is to address regulatory fragmentation within the EU's Digital Single Market (DSM). Regrettably, it falls short of achieving this goal, as it inadvertently encourages Member States to exacerbate regulatory fragmentation.

The shift in the DMA from ex-post to ex-ante rules, using per se antitrust prohibitions, fails to differentiate between conduct that fosters competition and conduct that hinders it. Consequently, the DMA overlooks the benefits of economic efficiency and conflicts with the EU's principle of proportionality. Implementing the DMA is expected to pose challenges, particularly for the limited number of companies identified as Internet gatekeepers, who will need to comply with rules that may contradict other existing EU regulations.

To address these concerns, it is essential to establish a regulatory framework for the DMA that effectively targets anti-competitive behavior while fostering efficiency and innovation. This can be achieved by incorporating mechanisms to evaluate the positive competitive effects of specific practices and allowing exceptions to absolute prohibitions when efficiency or innovation justifies them. Such an approach would ensure the DMA adheres to the EU's principle of proportionality while minimizing adverse effects on competition and innovation.

EU lawmakers must address the deficiencies in the legislation, possibly by introducing enforcement guidelines. At the same time, EU judges will need to harmonize the obligations of the DMA with other rights provided under EU laws. If these fundamental issues are not resolved by lawmakers or judges, European innovation and consumers will undoubtedly suffer adverse effects. Policymakers should conduct a thorough review of the DMA's provisions to align them with existing EU laws, addressing concerns that the DMA could stifle innovation and discourage enterprise. Establishing clear guidelines and mechanisms for resolving regulatory conflicts will minimize uncertainty and reduce the likelihood of legal disputes. Enhancing regulatory clarity and certainty will foster a more favorable environment for innovation and competition in the EU digital market. EU judges must also address the deficiencies of the DMA through judicial review to mitigate the legislation's unintended repercussions.

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