The Digital Markets Act and EU Antitrust Enforcement: Double & Triple Jeopardy
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Executive Summary

In contrast to its stated aims to promote a Digital Single Market across the European Union, the proposed Digital Markets Act (DMA) could serve to fragment Europe’s legal framework even further, largely due to overlaps with competition law. This paper provides an analytical overview of areas where conflicts would inevitably arise from dual application of the DMA and European and national-level antitrust rules. It counsels full centralization of the DMA’s enforcement at the EU level to avoid further fragmentation, as well as constraining the law’s scope by limiting its application to a few large platform ecosystems.

Introduction

The Digital Markets Act (DMA) has entered the last and decisive stage of its approval process. With the Council of Europe having reached consensus on its general approach[1] and the European Parliament having adopted amendments,[2] the DMA proposal has moved into the inter-institutional negotiations known as the so-called “trilogue.”

The DMA has spurred a lively debate since it initially was proposed by the European Commission in December 2020.[3] This deliberative process has touched on all the proposal’s features, including its aims and scope, the regulations and rule-based approach it would adopt, and the measure’s institutional design. However, given the positions expressed by the Council and the Parliament, the rationale for DMA intervention and the proposal’s relationship with antitrust law remain relevant topics for exploration.

The DMA is grounded explicitly on the notion that competition law alone is insufficient to effectively address the challenges and systemic problems posed by the digital platform economy. Indeed, the scope of antitrust is limited to certain instances of market power (e.g., dominance on specific markets) and of anti-competitive behavior.[4] Further, its enforcement occurs ex post and requires extensive investigation on a case-by-case basis of what are often very complex sets of facts.[5] Moreover, it may not effectively address the challenges to well-functioning markets posed by the conduct of gatekeepers, who are not necessarily dominant in competition-law terms.[6] As a result, proposals such as the DMA invoke regulatory intervention to complement traditional antitrust rules by introducing a set of ex ante obligations for online platforms designated as gatekeepers. This also allows enforcers to dispense with the laborious process of defining relevant markets, proving dominance, and measuring market effects.
The DMA’s framers declare that the law aims to protect different legal interests than antitrust rules do. That is, rather than seeking to protect undistorted competition on any given market, the DMA look to ensure that markets where gatekeepers are present remain contestable and fair, independent from the actual, likely, or presumed effects of the conduct of a given gatekeeper. Accordingly, the relevant legal basis for the DMA is found not in Article 103 of the Treaty on the Functioning of the European Union (TFEU), which is intended to implement antitrust rules pursuant to Articles 101 and 102 TFEU, but rather in Article 114 TFEU, covering “Common Rules on Competition, Taxation and Approximation of Laws.” Further, from an institutional-design perspective, the DMA opts for centralized implementation and enforcement at the EU level, rather than the traditional decentralized or parallel antitrust enforcement at the national level.

Because the intent of the DMA is to serve as a complementary regulatory scheme, traditional antitrust rules will remain applicable. However, those rules would not alleviate the obligations imposed on gatekeepers under the forthcoming DMA regulations and, particularly, efforts to make the DMA’s application uniform and effective.

Despite claims that the DMA is not an instrument of competition law and thus would not affect how antitrust rules apply in digital markets, the forthcoming regime appears to blur the line between regulation and antitrust by mixing their respective features and goals. Indeed, the DMA shares the same aims and protects the same legal interests as competition law. Further, its list of prohibitions is effectively a synopsis of past and ongoing antitrust cases. Therefore, the proposal can be described as a sector-specific competition law, or a shift toward a more regulatory approach to competition law—one that is designed to allow assessments to be made more quickly and through a more simplified process.

Acknowledging the continuum between competition law and the DMA, the European Competition Network (ECN) and some EU member states (self-anointed “friends of an effective DMA”) have proposed empowering national competition authorities (NCAs) to enforce DMA obligations. Under this approach, while the European Commission would remain primarily responsible for enforcing the DMA and would have sole jurisdiction for designating gatekeepers or granting exemptions, NCAs would be permitted to enforce the DMA’s obligations and to use investigative and monitoring powers at their own initiative. According to supporters of this approach, the concurrent competence of the Commission and NCAs is needed to avoid the risks of conflicting decisions or remedies that would undermine the effectiveness and coherence of both the DMA and antitrust law (and, ultimately, the integrity of the internal market.)

These risks have been heightened by the fact that Germany (one of the “friends of an effective DMA”) subsequently empowered its NCA, the Bundeskartellamt, to intervene at an early stage in cases where it finds that competition is threatened by large digital companies—in essence, granting the agency a regulatory tool that is functionally equivalent to the DMA. Further, several member states are preparing to apply national rules on relative market power and economic dependence to large digital platforms, with the goal of correcting perceived imbalances of bargaining power between online platforms and
business users.[17] As a result of these intersections among the DMA, national and European antitrust rules, and national laws on superior bargaining power, a digital platform may be subject to cumulative proceedings for the very same conduct, facing risks of double (or even triple and quadruple) jeopardy.[18]

The aim of this paper is to guide the reader through the jungle of potentially overlapping rules that will affect European digital markets in the post-DMA world. It attempts to demonstrate that, despite significant concerns about both the DMA’s content and its rationale, full centralization of its enforcement at EU level will likely be needed to reduce fragmentation and ensure harmonized implementation of the rules. Frictions with competition law would be further confined by narrowing the DMA’s scope to ecosystem-related issues, thereby limiting its application to the few large platforms that are able to orchestrate an ecosystem.

The paper is structured as follows. Section II analyzes the intersection between the DMA and competition law. Section III examines the DMA’s enforcement structure and the solutions advanced to safeguard cooperation and coordination with member states. Section IV illustrates the arguments supporting full centralization of DMA enforcement and the need to narrow its scope. Section V concludes.

Read the full white paper here.


[4] Ibid., Recital 5.

[5] Ibid.

[6] Ibid.


[8] Ibid., Recital 9 and Article 1(5).


*Strengthening the Digital Markets Act and Its Enforcement*, German Federal Ministry for Economic Affairs and Energy, French Ministére de l’Économie, les Finance et de la Relance, Dutch Ministry of Economic Affairs and Climate Policy, (May 27, 2021), available at


[16] See Section 19a of the GWB Digitalization Act (Jan. 18, 2021),

[17] See, e.g., German GWB Digitalization Act, *supra* note 16; See, also, Belgian Royal Decree of 31 July 2020 Amending Books I and IV of the Code of Economic Law as Concerns the Abuse of Economic Dependence, Belgian Official Gazette (Jul. 19, 2020),


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