ICLE tl;dr

The Digital Markets Act: EU's Flawed Effort to 'Tame' the Gatekeepers

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tl;dr

Background: The European Union has unveiled draft legislation that seeks to tame so-called "gatekeeper" Big Tech firms. If passed into law, this Digital Markets Act ("DMA") would create a list of "dos and don'ts" by which the platforms must abide, such as allowing interoperability with third parties and sharing data with rivals. In short, the DMA would give the European Commission significant powers to tell tech companies how to run their businesses.

But... The DMA essentially shifts competition enforcement against gatekeeper platforms away from an "effects" analysis that weighs costs and benefits to a "blacklist" approach that proscribes all listed practices as harmful. This will constrain platforms' ability to experiment with new products and make changes to existing ones, limiting their ability to innovate and compete.

Moreover... By granting extremely wide powers to the commission, the DMA will govern digital markets according to short-term political concerns. The commission will be free to pursue cases that best fit within this political agenda, rather than focusing on the limited practices that are most injurious to consumers.

KEY TAKEAWAYS

THE DMA PREVENTS EFFICIENT BUSINESS PRACTICES

Under the DMA, the commission would have extensive power to bring competition proceedings against Big Tech firms, including for conduct that isn't always anticompetitive. Many of the practices the DMA seeks to eliminate have important redeeming virtues. As a result, the act comes with significant costs and risks.

The draft DMA would prohibit gatekeepers from: using data relating to their rivals in order to compete against them; treating their own services more favorably than those of competitors; and preventing users of their platforms from using third-party applications and uninstalling their apps.

It also would force them to: allow third parties to inter-operate with their platforms; allow third parties to "steer" users away from their platforms; allow users of their platforms to offer products at more competitive prices on third-party platforms; and ensure data portability.

Many of these prohibited practices can be good for competition and consumers. This is notably the case when it comes to

self-preferencing, anti-steering provisions, and exclusivity requirements.

Categorically preventing platforms from adopting these practices will thus lead to significant social costs, since valuable applications of these practices will be banned as well.

SELF-PREFERENCING

Self-preferencing is common in many markets, such as when supermarkets stock their private-label goods in highly visible parts of the store. In digital markets, introducing first-party content on a platform often drives user and developer adoption. Self-preferencing allows platforms to promote this content. Self-preferencing also can be a way for platforms to rapidly deploy their superior capabilities. Similarly, vertical integration can align incentives to reduce opportunistic behavior, moral hazard, and double marginalization. Again, this often entails some form of self-preferencing.

ANTI-STEERING

Anti-steering provisions may also be guided by efficiency considerations rather than anticompetitive intent. They can notably address the free-rider problem experienced by platforms that are not vertically integrated. Platforms can also use these sorts of provisions to intensify competition on one end of a two-sided market. In short, they are not presumptively anticompetitive.

EXCLUSIVITY AGREEMENTS

Much of the same can be said about exclusivity agreements. For instance, it is widely accepted that they can increase competition for distribution. These agreements can also be used by innovators to appropriate investments in new platforms — "exclusive" pre-installation of the Google Search bar on Android smartphones was arguably necessary to spur investments in the Android ecosystem.

PROTECTIONISM

Consumers and smaller firms will indirectly bear the costs of this new regulation through higher prices, existing services being degraded, or fewer innovative ones being introduced. By prohibiting efficient behavior, the DMA will serve as a tax on Big Tech that will then be passed on to these firms' business partners and consumers.

Since the new rules will apply to a European firm that achieves comparable scale, this "tax" will reduce their expected profits and potentially deter investment in European startups, as was the case with the General Data Protection Regulation (GDPR). Moreover, increased compliance costs will also raise barriers to market entry, which was a notable unintended consequence of the GDPR.

For more on this issue, see ICLE's comments about digital competition policy issues in Europe.

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