



THE DIGITAL MARKETS ACT PROPOSAL OF THE EUROPEAN COMMISSION: EX-ANTE REGULATION, INFUSED WITH COMPETITION PRINCIPLES

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ABSTRACT: This *Insight* on the legislative proposal for a Digital Markets Act (DMA), issued on 15 December 2020 by the European Commission, discusses the importance of clearly delineating the objectives under which enforcement of the said act will take place. This is necessitated because of the closeness, if not overlap with the domain of EU Competition Policy and the concomitant danger of over- or double-enforcement against the norm addressees of the DMA.

KEYWORDS: DMA – goals of competition – Economic Regulation – enforcement – digital giants – EU Competition Law and Policy.

I. THE DIGITAL MARKETS ACT PROPOSAL: CORE OBJECTIVES

During the previous significant legislative innovation for EU Competition Policy – namely the adoption of the revolutionary¹ Modernization Regulation 1/2003² – Laura Parret rightly asked the pertinent question: “Do we know what we are protecting?”³ Echoing the goals of competition policy and enforcement, this question stands before us once again today, now in the context of upcoming ex-ante regulation of digital giants through the recently proposed legislative draft of the Digital Markets Act (hereinafter, the DMA).⁴ This *Insight* purpose is to discuss the said legislative proposal in light of the goals that it sets out to achieve,

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¹ Regulation (EC) 1/2003 of the European Council of 16 December 2002 on the Implementation of the Rules on Competition Laid down in Arts 81 and 82 of the Treaty.

² CD Ehlermann, ‘The Modernization of EC Antitrust Policy: a Legal and Cultural Revolution’ (2000) CMLRev 537.

³ L Parret, ‘Do We (Still) Know What We Are Protecting?’ TILEC Discussion Paper (2009-2010) 29.

⁴ Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act) SEC [2020] 437 final.



and their interaction and compatibility with core goals of EU Competition Policy. Although the DMA is to apply as an ex-ante regulatory tool (and not as ex-post competition one), the intellectual basis, on which it rests, is competition-inspired.⁵ As such, the question of interaction and communication between the two fields with regard to their respective goals becomes both pertinent and important. The main point that we make is simple: at no time should these goals be allowed to overlap as this can hypothetically lead to over – or even double-enforcement – against the same harm on the basis of the same objection to it (i.e. inappropriate use of market power).⁶ Given that the ex-ante regime of the DMA and ex-post competition policy are intellectually very close to each other (both are embedded in and informed by economic thought), this danger should be guarded against dynamically. Therefore, at all times, the relevant national and supranational enforcers should be guided by strictly distinct principles in their reasoning under the DMA and competition policy, respectively. In this light, it is worrisome that the legislative draft of the DMA does not go to great lengths to acknowledge the distinctiveness of the objectives under which ex-ante enforcement will happen. This might be partly due to the aforementioned common intellectual roots of the two domains, but a turbulent drafting process certainly also affected the final draft of the DMA. It is these points we turn to in next sections.

II. BACKGROUND

The DMA in the Making. In June 2020, the European Commission opened a public consultation for the adoption of legislation to control digital giants (big tech).⁷ Initially, the framework was to consist of two binding instruments – one on competition and one on broader (likely)⁸ consumer-protection grounds.⁹ Both legislative instruments were to be based on the so-called ex-ante intervention principle, i.e. before harm on the market materializes. However,

⁵ Although the legal basis of the DMA is art. 113 TFEU only (Internal Market), it is no secret that the DMA also incorporates elements of the suspended New Competition Tool, which was to be based on a joint legal basis of art. 113 TFEU (Internal Market) and art. 103 TFEU (Competition).

⁶ Since it is now established that competition law works as a quasi-criminal domain of EU policy enforcement, one can venture to ascertain a potential tension of such a hypothetical situation with the *ne bis in idem* principle.

⁷ The inception impact assessment and its motivations can be downloaded from the website of the European Commission: ec.europa.eu. Note that there is also an additional tool with relevance for ex-ante enforcement on digital markets (although not via competition tools); this is the so-called Digital Services Act package that is to contain an “ex ante regulatory instrument of very large online platforms acting as gatekeepers”.

⁸ The leaked version of the ex-ante regulatory instrument for digital gatekeepers seems to be exploring issues going directly to the core of competition law, therefore creating confusion as to how the two regimes will apply.

⁹ Information on the new competition tool can be found from the website of the European Commission: ec.europa.eu. Information on the broader tool can be found on the website of the European Commission, *Digital Services Act package – ex ante regulatory instrument of very large online platforms acting as gatekeepers* ec.europa.eu.

it seems that the Commission did not opt for its initial approach in the end of the day, coming up with a single legislative proposal in mid-December 2020 – the DMA. It is this sudden merging into one of two initially different proposals, with non-identical legal bases and motivations, which triggers questions. Specifically, the question we address here is whether such a move is warranted, given the danger of an overly-broad objective for the DMA that encompasses the objectives of competition enforcement and as such duplicates them.¹⁰

III. THE CHALLENGE: TWO REGIMES WITH SIMILAR OBJECTIVES

At this point it is also worth mentioning that the Commission allegedly had to make last-minute changes to what came to be the DMA due to outrage sparked by an earlier leaked draft of the said instrument.¹¹ Therein, the Commission proposed a categorical ex-ante black-/grey-/and white-listing approach of practices of digital giants that have been or are currently under review in competition cases before the CJEU¹² and within national jurisdictions.¹³ One can easily see the conflict between the approaches of competition and ex-ante regulation here, given that intervention happens under the same premises and goals – namely, curbing undesirable behaviour exercised under conditions of market power.¹⁴ By applying a black-or-white approach to practices that are currently under review and thus not condemned in the domain of competition (specifically, under art. 102 TFEU), such ex-ante intervention encroaches upon ongoing competition enforcement on digital markets. Facing backlash (likely) on these grounds, the Commission opted for changing its approach and dispensing with the black-/white- and grey-listing in its ultimate legislative proposal for the DMA. However, this does not change the fact that the objective for intervention under the DMA remains very similar to that under competition policy – curbing undesirable be-

¹⁰ Page 3 of the Preamble to the draft DMA is even explicit about the overlap with competition goals: “It [the DMA] addresses unfair practices by gatekeepers that either fall outside the existing EU competition rules, or that cannot be as effectively addressed by these rules, considering that antitrust enforcement concerns the situation of specific markets, inevitably intervenes after the restrictive or abusive conduct has occurred and involves investigative procedures to establish the infringement that take time”.

¹¹ For the leaked text, refer to the website of politico.eu at www.politico.eu.

¹² The proposals for blacklisting self-preferencing practices go to the core of the Google Shopping decision currently at the General Court. See case T-612/17 *Google and Alphabet v Commission* pending.

¹³ The proposals on blacklisting data related practices go to the core of the debates in the German Facebook case. See the final decision of the German Federal Supreme Court Ruling of 23 June 2020, KVR-69/19, available as a press release by the said court: Bundesgerichtshof, *Bundesgerichtshof bestätigt vorläufig den Vorwurf der missbräuchlichen Ausnutzung einer marktbeherrschenden Stellung durch Facebook* www.bundesgerichtshof.de.

¹⁴ The term “gatekeeper” used by the leaked draft is a reference to the extreme market power of digital giants, which, combined with the practices put under a category “black or grey”, would amount to an ex-ante intervention. Intervention under competition law (art. 102 TFEU in particular) works under the same premises – market power, combined with an anti-competitive action, leads to prohibition.

behaviour exercised under conditions of market power. To the extent this DMA objective remains unqualified and indistinct from the classical competition enforcement view under art. 102 TFEU, the risk for over- or double-enforcement for the same harm remains. This is because the EU (unlike the US) accepts the dual application of both ex-ante regulatory and ex-post competition enforcement.¹⁵ This means that a digital giant already subject to ex-ante regulation can also be subjected to an ex-post antitrust investigation should it also run afoul of the competition rules – a near certainty given the overlap of objectives of the two regimes. In this sense, it is important that the upcoming ex-ante rules envisioned by the Commission do not encroach upon the mandate that art. 102 TFEU fulfils.

IV. THE WAY FORWARD: TEMPORAL AND CONCEPTUAL SEPARATION OF REGULATION AND COMPETITION

Given the above background, this Insight suggests that ex-ante regulation and ex-post competition enforcement on digital markets should not only be separate temporally (as argued by the Commission itself)¹⁶ but also conceptually, along the lines of enforcement objectives. As the DMA proposal mentions, its scope is rather broad, dealing with practices generally “unfair” to the consumer. It then subsumes under this goal the rather specific competition policy objective of curbing undesirable behaviour exercised under conditions of (severe) market power. Beyond expediency, the Commission gives no concrete reason as to why ex-ante regulation is supposed to achieve this same objective in parallel with ex-post competition enforcement. In this sense, the case for the DMA regulating digital markets on competition grounds, among others, seems rather weak. This is of course not to say that digital giants should not be regulated ex-ante, but that should happen on the grounds of better reasoned and justified enforcement objectives that – importantly – do not overlap with intrinsically competition-based goals. Otherwise, we risk not to know what we are protecting, just as Parret suggested more than 10 years ago.

¹⁵ This is a consequence of the different rules created by the respective case law of the EU (case C-280/08 P *Deutsche Telekom v Commission* ECLI:EU:C:2010:603 para. 84) and the US (Supreme Court of the United States judgment of 13 January 2004 *Verizon Communications Inc. v Law Offices of Curtis v Trinko, LLP* (02-682) 540 US 398 (2004), on the other. For a detailed account, see P Larouche ‘Contrasting Legal Solutions and the Comparability of EU and US Experiences’ in F Leveque and H Shelanski (eds), *Antitrust and Regulation in the EU and US: Legal and Economic Perspectives* (Edward Elgar 2009) 76.

¹⁶ Refer to note 10 of this *Insight*.