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The DMA and the capitulation of modern EU competition law: A Polemic

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Introduction

More than 20 years ago, this Workshop served as a forum to prepare the modern of era of EU competition law that is embodied by Regulation 1/2003. Today, we witness the untimely, and in the author's view, tragic demise of that system as far as large digital platforms are concerned. We go back to something reminiscent of the "straight jacket" codifications of dos and don'ts laid out in block exemption regulations, and the unwieldy notification system that characterized the pre-modern era of Regulation 17. We abandon a system focused on case-by-case intervention based on demonstrated competitive effects, while giving due consideration to consumer welfare, efficiencies, and preserving incentives for investment and innovation. While the modern era was brimming with confidence that competition authorities and courts could rise to this challenge, the DMA reflects an admission of competition authorities' incompetence to deal with the challenges that digital platforms present. We abandon a focus on targeted intervention to safeguard the competitive process in favor of ensuring "fairness" through perpetual regulation of prices and terms and conditions for access, often primarily aimed at rent shifting. We jettison restraint in terms of not second-guessing companies' choices of business models and product design in favor of forcing them to obtain civil servants' approval for new products and services in the context of a continuous "regulatory dialogue". Strangely absent in all this is any meaningful consideration of consumer preferences and concerns about data security and privacy, especially given Europe's leadership role in adopting the GDPR.

The conceptual flaws of the DMA's post-modern era are magnified by its hasty and ill-considered implementation. The modern era of EU competition law was built on decades of precedent and carefully prepared by Commission notices and extensive consultation. The post-modern era is being cobbled together in a hurried legislative process with limited understanding of the very different business models and complex technological issues involved. The DMA's centerpiece is a catalogue of potential

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"problems" encountered in some very specific situations, which is now being turned into sweeping rules applying to all platforms designated as gate keepers, irrespective of their very different business models. The DMA relies on concepts of "contestability" and "fairness", whose vagueness is exceeded only by a sense of paranoia that gatekeepers might somehow "circumvent" the Regulation's objectives. The combination of (i) short implementation time lines; (ii) tight deadlines for the Commission to take enormously impactful decisions; (iii) the involvement of stakeholders (i.e. complainants); (iv) the uncertainties about the practical workings of the "regulatory dialogue"; (v) the lack of institutional preparedness by the Commission; and (vi) parallel private enforcement by a highly incentivized plaintiffs' bar all but guarantee substantial unintended consequences as well as disproportionate burdens for "gatekeepers". The gerrymandered quantitative thresholds make the DMA vulnerable to the charge that it is selectively targeting a handful of US companies. The need for gatekeepers to be in constant "regulatory dialogue" with the Commission makes effective judicial review illusory.

In short, the sense that "something must be done urgently" appears to have replaced any reflection of what could possibly justify such a massive paradigm shift. The challenges encountered by competition authorities in bringing cases against digital platforms are at least in part related to the efficiencies and consumer benefits generated by platforms, the difficulty of identifying material anticompetitive effects, and concerns about chilling investment incentives. To the extent that the challenges are due to a lack of institutional resources, there would have been far more proportionate means of addressing them than the regulatory sledgehammer of the DMA, which will create very significant institutional challenges of its own.

Cui bono -- European digital sovereignty? There is little to suggest that handcuffing US-headquartered digital platforms will lead to the emergence of alternative "European" platforms, and that competition from such platforms would resolve any of the real or perceived issues with the existing ones.

From an effects-based approach to form-based prohibitions

Article 2 of Regulation 1/2003 makes it clear that the Commission bears the burden of proof for showing an infringement. With respect to Article 101 TFEU, this requires that the agreement or concerted practice have the "object or effect" of restricting competition. With respect to Article 102 TFEU infringements, that means both the existence of a dominant position, and conduct that constitutes a departure from "competition on the merits" with a modicum of competitive effects. No addressee of an Article 102 TFEU decision has successfully challenged the finding of a dominant position. While the Commission has at times struggled to persuade the courts that presumptions apply and/or prove that the conduct in question had the requisite competitive effects (*Intel, Cartes Bancaires*), it has succeed in other cases (*Google Shopping, ISU*). The requisite standard for a showing of competitive effects of presumptively abusive conduct (i.e. that it be "*capable of producing foreclosure effects*") does not seem

unduly high, in particular where conduct has already been implemented and its effects can therefore be observed.

The DMA takes a radically different approach. It reverses burden of proof with respect to the existence of market power: to avoid designation with respect to certain core platform services, the gatekeeper must "prove" that it is *not* an "important gateway" for business users to reach consumers, which would appear to be a considerably lower standard than dominance. Moreover, "*any justification on economic grounds seeking to demonstrate efficiencies deriving from a specific type of behaviour by the provider of core platform services should be discarded, as it is not relevant to the designation as a gatekeeper*.[2] With respect to the "abusive" nature of platforms' conduct, the substantive provisions of Articles 5 and 6 simply outlaw many practices that are common across platforms regardless of any market power that they may possess, such as MFN clauses, preferential treatment for one's own upstream or downstream services, or anti-steering provisions by intermediation platforms to ensure collection of a commission for their services. Very few of these obligations allow platforms to argue that the restrictions in question may be objectively justified, and only in very narrowly defined circumstances. The conditions for a suspension under Article 8 (compliance with a specific obligation demonstrated to endanger the gatekeeper's viability due to circumstances beyond the gatekeeper's control) or public interest exemptions (protection of "public morality, public health, or public security") in Article 9 are so narrowly drafted as to be practically irrelevant. The DMA explicitly rejects the "*individualised assessment of market positions and behaviour, including its likely effects and the precise scope of the prohibited behavior"* and the related *"possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question*."[3]

From self-assessment to ongoing monitoring

The reforms relating to Regulation 1/2003 were built on the notion of "self-assessment": undertakings were to be weaned off the idea that only formal notification and dialogue with the Commission could give them sufficient legal certainty. This idea was initially controversial, almost revolutionary, and it required significant effort by the Commission to persuade the business and legal community that self-assessment was possible and indeed preferable. The fact that the Commission published a swathe of detailed notices based on public consultation to complement existing block exemption regulations helped significantly, as was the already substantial body of case law under Articles 101 and 102. At least until very recently, the Commission also strongly resisted reintroducing a notification system "through the backdoor" by issuing guidance letters, let alone positive decisions under Article 10 of Regulation 1/2003. To the extent that the Commission has accepted behavioral commitments under

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2 DMA Proposal, Recital 23.

3 DMA Proposal, Recital 9.

Article 9 of Regulation 1/2003 and the Merger Regulation, it has limited them in time and designed them to be as self-executing as possible, without any need for continuous monitoring.

The DMA turns back the clock to a system where companies are dependent on continuous guidance from the Commission. The obligations of Articles 5 and 6 are drafted in a way as to make self-assessment virtually impossible, or only in a form that anticipates the strictest possible interpretation of the rules. The core notions that are meant to guide the interpretation of the substantive provisions – "fairness" and "contestability" are not defined by the DMA other than in the context of Article 10(2) (updating obligations for gatekeepers), and even the latter provision does not give much guidance other than confirming that these notions are extremely broad.[4] While many provisions of Article 5 and 6 appear inspired by competition-law cases, the DMA emphasizes its distinctness from the competition rules.[5] The recitals corresponding to individual provisions contain very limited explanation of these provisions, and it seems doubtful that the legislative process will provide any additional clarity. The DMA Proposal does not contain any obligation on the Commission to issue interpretative guidance through soft-law instruments,[6] nor has the Commission indicated any intention of adopting such guidance. The broadly worded "anti-circumvention" provision of Article 11 eliminates whatever remains of legal certainty when it comes to interpreting Articles 5 and 6.

Rather than self-assessment, the DMA proposal, and in particular proposed amendments to Article 7, put the onus on companies to ask the Commission for permission, rather than forgiveness, with respect to their proposed implementation of the DMA's substantive obligations. Proposed amendments to Article 7 would now have the gatekeeper "*ensure and demonstrate*" compliance with Articles 5 and 6 – not only with the letter of the provisions, but also their presumed spirit (the Regulation's "objectives"). Beyond the initial self-reporting, Article 3(3) requires gatekeepers to notify the Commission if any additional core platform services meet the quantitative thresholds. Article 4 tasks the Commission with a continuous review of gatekeepers and broadly-phrased powers to amend designation decisions. Article 12 requires the gatekeeper to "notify" any acquisition (no matter how small) involving "*any services provided in the digital sector*". A company arguing for a restrictive interpretation of existing

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4 Article 10(2)(a) refers to the gatekeeper obtaining an "advantage" from business users that is "disproportionate to the service provided by the gatekeeper to business users", and under Article 10(2)(b) it is sufficient if the contestability of markets is "weakened" as a consequence of the gatekeeper's practice.

5 See in particular Recital 10 („This Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, likely or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market. This Regulation therefore aims at protecting a different legal interest from those rules and should be without prejudice to their application.")

6 The legislative process has now introduced Article 36(a), which allows (but does not require) the Commission to issue interpretative guidelines where it views this as useful.

Article 5 and 6 obligations, even if such an interpretation is entirely defensible, runs the risk of prompting the Commission to amend the respective obligation by means of a delegated act under Article 10.

From deference to business models to design by bureaucrats

The Commission's Article 102 Enforcement Priorities contain an eloquent summary of why mandating a dominant undertaking to deal with rivals requires "*careful consideration*": such intervention risks undermining the investment incentives of the dominant firm as well as those of rivals who might simply prefer to free-ride on the dominant firm's investment – "*neither of these consequences would, in the long run, be in the interest of consumers*".[7] As the CJEU recently recognized in *Slovak Telekom* "*it is generally favourable to the development of competition and in the interest of consumers to allow a company to reserve for its own use the facilities that it has developed for the needs of its business*."[8] The Commission's enforcement practice has been mindful of not questioning the very business model and product design, even of dominant firms. Indeed, in the merger control context, the Commission has identified safeguarding the continued existence of a diversity of products and business models as part of maintaining effective competition.[9] The Non-Horizontal Merger Guidelines also recognize the competitive benefits of vertical integration, including the elimination of double-marginalization and improved coordination of the production and distribution process.[10]

The DMA abandons any pretense of such "*careful consideration*" in favor of one-size-fits-all rules that, if not discouraging innovation by gatekeepers altogether, at the very least give the Commission a strong say in making platforms' business models, and the introduction of new products and services, correspond to its ideals of contestability and fairness. Among the particularly invasive provisions are Article 6(1)(c) and (f), which could be read as mandating gatekeepers to open up all hardware and software layers of their ecosystems to competitors. The consequence would be that every time a gatekeeper intends to add an innovative feature, it would have to engage in a "regulatory dialogue" with the Commission to make sure that it is doing enough to make that feature available to its competitors. Commission officials thus become the gatekeepers for "allowing" platforms to implement technical innovations – without any disrespect to their qualifications, a chilling thought. Unfortunately, the DMA is not the only example of institutional hubris when it comes to giving civil servants power over technical designs – the Commission's recent proposals to amend the Radio Equipment Directive to

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7 Enforcement priorities, para. 75.

8 Case C-165/19 *Slovak Telekom*, judgment of 25 March 2021, para. 47.

9 See, e.g. the Commission's concerns about business models focused on differentiating themselves based on privacy protections in *Microsoft/LinkedIn.*

10 Non-horizontal merger guidelines, paras. 54-57.

mandate USB Type-C device-side connectors for a wide variety of devices[11] and to exclude companies from participating in the elaboration of harmonised standards in key SDOs such as ETSI [12] go in the same direction.

From focusing on the competitive process to price regulation

For sound policy and practical reasons, the Commission has long resisted the temptation of becoming a price regulator. It has never issued guidance on exploitative abuses. Notwithstanding its concerns about the potential misuse of standard-essential patents to hold-up implementers and tax downstream innovation, it has steadfastly avoided specific guidance on what constitutes fair, reasonable and non-discriminatory (FRAND) conditions for SEPs – including in its recently published draft revision of its Horizontal Cooperation Guidelines. In the rare occasions in which the Commission has intervened in excessive pricing situations, such as *Rambus* and *Aspen Pharmaceuticals*, it resolved its investigations with commitment decisions.

The DMA, however, will almost inevitably require the Commission in to become the price regulator it never wanted to be. Articles 6(1)(j) and (k) include an explicit obligation to grant third-party access to search engine data and software application stores on FRAND terms. Moreover, Article 11(1) contains an "anti-circumvention" provision that requires gatekeepers not to use contractual or "commercial" terms that might undermine effective compliance with the substantive provisions of Articles 5 and 6. This includes obligations such as Articles 5(c), 6(1)(c), (f), (h) and (i) that affirmatively require gatekeepers to take certain action (and thus to incur additional expenses), which they may legitimately desire to pass on to business users benefitting from these obligations. It does not take much imagination to see how complainants will argue that any commercial terms other than a price of zero would "undermine" the effective application of those provisions. Given the DMA's claim of distinctiveness, the Commission may find it difficult to resort to the restrictive *United Brands* criteria for excessive pricing or to the enforcement discretion it enjoys under Regulation 1/2003.

Flaws in institutional design

The DMA's conceptual flaws are amplified by its institutional design.

Proper administration of the DMA will be an enormous challenge. Upon entry into force, all gatekeepers meeting the quantitative thresholds (presumably at least the five companies commonly referred to as

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[11] COM(2021)547 - Proposal for a Directive amending Directive 2014/53/EU on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment

[12] COMP(2022)32 – Proposal for a Regulation amending Regulation EU No. 1025/2012 as regards decisions of European standardization organizations concerning European standards and European standardization deliverables.

"GAFAM") will be making notifications to the Commission at the same time. For a number of core platform services, it may not be clear if the quantitative thresholds are reached, as the concepts of "active end users" or "active business users" "established or located in the Union" are not well defined and/or the required data may not be readily available. Where the core platform services do meet the quantative thresholds, gatekeepers may present extensive legal arguments and economic evidence that at least for some of the these services, the criteria of Article 3(1) (significant impact on the internal market, core platform service serving as an "important gateway" for business users, entrenched and durable market position) are not in fact met. The Commission must then take reasoned decisions on these questions, which may well be appealed by designated gatekeepers. It will be interesting to see how the Commission manages to adopt a number of extremely significant decisions on entirely novel issues within the tight time frames foreseen (60 days under the Commission's proposal) at a time when it will still be putting institutional arrangements in place and recruiting qualified personnel.

Additional complications arise from the fact that the DMA, as a Regulation, will be directly enforceable before national courts as of its entry into force. While designation decisions look certain to remain the exclusive preserve of the Commission, Article 5 and 6 obligations will be directly applicable following designation, and can therefore be enforced by complainants in litigation before national courts. It remains to be seen how the proposed cooperation mechanisms modeled after Regulation 1/2003 will work, and how explicit and effective the Commission will be in any *amicus curiae* interventions. It can however be reasonably assumed that complainants and the well-established European plaintiff's bar will be highly incentivized to bring aggressive damage actions against gatekeepers, not primarily to obtain restitution, but also because doing so creates settlement leverage over gatekeepers would rather resolve disagreements with the Commission by means of a bilateral "regulatory dialogue".

Lack of obvious justifications for the radical paradigm shift and risks of unintended consequences

The DMA offers little explanation for why such a radical departure from the established competition framework is justified. It stresses that platform ecosystems can be difficult to challenge by competitors due to high barriers to entry and exit.[13] But to the extent that is true, it should not be difficult for competition authorities to establish that the platform in question holds a dominant position. The DMA cites the increasing likelihood that the "*underlying markets do not function well – or will soon fail to function well*"[14], and that the perceived imbalance between platforms and business users will operate "*to the detriment of prices, quality, choice and innovation*".[15] But this more or less paraphrases Article 102(b) TFEU, which labels as abusive practices by a dominant firm that limit "*production, markets or*

13 Recital 3.

14 Recital 3.

15 Recital 4.

technical development to the prejudice of consumers". And, as explained, the DMA expresses no interest in any arguments or assessment as to whether the practices it prohibits or prescribes are actually conducive to consumer benefits or innovation.

That leaves the lament that competition enforcement is only "*ex post and requires an extensive investigation of often very complex facts on a case by case basis*."[16] Indeed, the length of certain competition proceedings, including but not limited to *Google Shopping*, has been frequently criticized in the discussion leading up to the DMA. However, there has been little examination of the root causes of why competition investigations are not always timely and effective. The lack of investigative tools can hardly be to blame. DG Comp has been remarkably successful in getting companies to produce foreign-located documents, even documents privileged under the applicable national rules (such as communications between in-house counsel and business teams in the US).[17] Clearly a lack of sufficient resources (in particular personnel with a deep understanding of digital platforms) plays a role, but there has been little visible effort by the Commission to expand the number of FTEs tasked with policing presumed abuses by digital platforms – certainly nothing on the scale of what is now being discussed to ensure ongoing monitoring of the DMA obligations.

While the DMA is sometimes mentioned as part of the EU's efforts to promote Europe's "digital sovereignty", it remains a mystery how selectively subjecting US-based digital platform to continuous oversight by European civil servants would lessen Europe's dependence on such platforms. Forcing them to open up their ecosystems and offering third parties access on advantageous terms is unlikely to provide any incentive to build alternative infrastructures such as cloud services or app stores. And in a globalized world with many jurisdictions outside of Europe having considerable success in nurturing start-ups, it is of course by no means guaranteed that the principal beneficiaries of the DMA's strictures would be "European" business users or platforms.

With so few obvious benefits to compensate for the many problematic aspects of the DMA, one is thus left with the expectation that the DMA's unintended consequences will overwhelm its benefits.

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In sum, the DMA appears much like Frankenstein's monster – perhaps borne out of good intentions, but an experiment that has taken on a life of its own and lost touch with its real-life consequences. As

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16 Recital 5.

17 The recent order of the President of the General Court's in the *Facebook* case, while limiting the obligation to turn over documents containing personal data effectively confirms the wide scope the Commission has to conduct fishing expeditions Case T-451/20 R,

a competition lawyer having grown up professionally together with Regulation 1/2003, it is a depressing and slightly frightening prospect to behold.