# Editorial

# A New Kid on the Block: How Will Competition Law Get along with the DMA?

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The debate on the challenges posed by digital platforms has captured a large share of the attention from the antitrust community in the last years. Large digital platforms have gained significant market power and the economic features of digital markets make them unlikely to retreat.

Following two years of intense discussions, triggered by the Crémer Report[1] in early 2019, on whether the EU competition rules were fit to respond to the challenge, the European Commission has put forward a regulatory proposal (the Digital Markets Act, DMA) that would complement the traditional competition tools in digital markets, strengthening control over large digital platforms that 'serve as an important gateway for business users to reach end users', the so-called 'gatekeepers'.

The DMA basically consists of a list of dos and don'ts for large digital platforms that qualify as gatekeepers. This approach is seemingly different from that of the competition law provisions (Articles 101 and 102 of the Treaty on the Functioning of the European Union, TFEU, and the national equivalent provisions), insomuch as the DMA is a set of general, '*ex ante*' rules, whereas Articles 101 and 102 TFEU would only come 'ex post', and case by case. Indeed, the DMA declares itself 'complementary' to the competition rules and indicates that it 'aims at protecting a different legal interest from those rules'. The DMA formally preserves the efficacy of the competition rules as it is 'without prejudice to the application' of the latter (Article 1 of the DMA).

However, both sets of rules, the DMA and the competition rules, might eventually collide. The DMA would surely comprehend companies and practices that could at the same time fall under the scope of Articles 101 and 102 TFEU. Since the DMA would be applied faster and its investigative requirements would be significantly lower than those of competition law (e.g. shifting the burden of proof on platforms that reach the quantitative thresholds to demonstrate that they are not gatekeepers, and no need to demonstrate harm to consumers, among others), it is not hard to imagine that the DMA could prevail over the application of the competition rules in those cases.

The fact that *ex ante* regulation tackles the same sort of conduct as the competition rules is certainly not new. We have seen that happening in the telecoms markets, for example, where *ex ante* rules have paved the way for a more competitive environment. However, unlike *ex ante* rules in the telecoms sector, the DMA features a great extent of flexibility to adapt its subjective scope to the market reality. Although the proposal declares to be targeting 'a few large platforms', it also indicates that it could apply to a wider spectrum of undertakings than dominant players under Article 102 TFEU. Under the DMA proposal, the conditions to qualify as a gatekeeper are quite loose (e.g. to serve 'as an *important* gateway for business users to reach end users', or to have 'a *significant* impact on the internal market', or 'an *entrenched* and *durable* position'), thus giving ample discretion in practice to the Commission to designate gatekeepers. That kind of flexibility is more typical of an *ex post* instrument than of *ex ante* rules, and it should not undermine legal certainty.

The DMA is, to some extent, a more effective tool to tackle unfair conduct than Articles 101 and 102 TFEU. The DMA has shorter deadlines and does not require to show that a particular course of conduct harms consumers, since once a platform has been designated as a gatekeeper, it has to comply with the full list of obligations, irrespective of any potential efficiencies that might arise from the prohibited practices. In addition, the DMA grants the Commission the power to modify the list of obligations for all gatekeepers and to further specify them in a particular case. This prescriptive and rigid nature of the obligations under the DMA should be balanced against a high degree of predictability as to who might be the subject of the rules.

The DMA will therefore apply not only to instances that escape the scope of the current competition rules, but also to cases that could be targeted by both sets of rules. This implies the necessity to set up strong coordination mechanisms between the application of the DMA and that of competition law provisions, not only within the European Commission but also between

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1 Competition policy for the digital era: A report by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer for the European Commission (2019).

the latter and the national competition authorities of the EU Member States. Just as the enforcement of Articles 101 and 102 TFEU does require strong coordination between the European Commission and the national competition authorities to avoid parallel investigations and discrepancies on the substantive analysis of market conditions, a smooth enforcement of the DMA would require the set-up of similar coordination mechanisms between enforcers.

That is an area where the proposal is certainly not developed. Even though it recognises the need for close cooperation and coordination in the enforcement actions between the European Commission and the Member States, this does not translate into a specific set of mechanisms. The only coordination instrument provided for in the DMA proposal is the Digital Markets Advisory Committee (Article 32 of the DMA), where the participation of national competition authorities is not explicitly foreseen.

So, will the DMA hinder the application of Articles 101 and 102 TFEU to digital markets? It should not, as the DMA is conceived as a tool to reinforce the capacity of keeping digital markets more contestable by early controlling unfair practices. There is room for the competition rules to continue shaping effective competition in digital markets post-DMA. But the DMA as it is currently structured could lead to some tension in the application of both instruments, tension that could be reasonably addressed by setting up adequate coordination mechanisms between both sets of rules.

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