POLICY PAPER 16

The Digital Markets and Services Acts: Context and Outlook[1]

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Policy Papers

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1. Introduction

The digital revolution is transforming economies around the planet. While ever more tasks are based on information processing or electronic communications, it is the very nature of the relationship between businesses and their customers that is changing: One of the considerable benefits of the digital revolution is the creation of new breeds of intermediaries that allow matching of businesses and customers at an unprecedented scale. This change involves both benefits and risks, and the latter have become more salient over recent years, leading to market investigations and proposals for new laws and regulations on several continents.

The purpose of this paper is to put into context the recently published proposals for the new laws of the European Union for digital markets, the "Digital Markets Act" (DMA) and the "Digital Services Act" (DSA)[2], explain their objectives and functioning, and summarize the arguments that have been brought forward in favour or against their introduction.

At a very general level, the objective of these proposals is to strengthen the European economy by improving the functioning of digital markets in Europe, raising growth, innovation, and trust. This is to be done from a variety of different angles: Guaranteeing competition in digital services themselves, protecting businesses using these services against market power and restrictions to their commercial freedom, and strengthening the rights of end users concerning privacy, digital interactions, and exercise of their fundamental rights.

In SECTION 2, we first present the special characteristics of digital markets that give rise as much to benefits as competition problems. In SECTION 3, we describe the existing legal framework, the new proposals, and some parallel national initiatives. Finally, SECTION 4 lays out different points of view and some evidence on central aspects of these proposals.

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[2] Available at https://ec.europa.eu/digital-single-market/en/digital-services-act-package.

2. Characteristics of Digital Markets

"Digital Markets", or markets based on intermediation by digital platforms, have a set of characteristics that both create huge benefits for societies and can quickly lead to the collapse of competition and an exercise of market power of various kinds. This Section offers short descriptions of some of these characteristics.

Returns to scale and scope: Many digital platforms can be provided at a cost that is to a large degree independent of the number of users and the number of services provided. This leads to average cost that decrease very quickly with the number of users ("returns to scale") and the number of services ("returns to scope"). In classical economic parlance, this feature can (but need not) lead to a "natural monopoly", where only one firm can survive in a competitive market: A market with several competitors can "tip" towards a single firm, which becomes permanently dominant ("winner-takes-all market"). This tendency is reinforced by the next characteristics on our list. As a result, platforms gain by maximizing their user base both for each single service and across services and can go as far as offering these services for "free".[3]

Network effects: Many platform services become more attractive the more users they have. These network effects are "direct" when users interact directly, as on social networks, or "indirect" as with operating systems (more developers and apps) and search (more data thus better search results). Market with strong network effects have a tendency for tipping.

Multi-sidedness: Platforms match different types of users and treat them differently according to their type. The business model of platforms is actually very old: any ancient farmer's market already matched buyers and sellers in one place. Digital platforms add immense scale that maximizes indirect network effects, and control of the flow of data and possibly payments. If a platform service competes with some side of the platform, a conflict of interest arises that may lead to "self-preferencing", i.e., demoting competing offers in order to benefit the platform's own offers.

A particularly important feature of the digital economy is advertising. Many seemingly one-sided services to end users are in fact (at least) two-sided because they involve the

[3] Free services are actually "paid" by handing over individuals' user data. The point here is that the per-user cost to the platform is so low that no positive price needs to be charged to cover cost.

provision of advertising services, whose workings are entirely hidden from the user.[4] A typical business model involves a service that is given for “free” to end users, who will actually “pay” with their personal data.

Data-driven: Digital services allow for the creating, harvesting, processing and strategic use of vast amounts of data on platform transactions and individuals’ data that are not related to their activities on platforms. The value of data also involves increasing returns to scale (up to a point, at least), so that platforms that have assembled vast troves of data can offer services of a quality that is hard to match by potential competitors. This information is used to personalize services such as search results or content recommendations but can also be used for personalized pricing and targeted advertising.

Feedback mechanisms: Platforms can increase engagement (or trust, in the case of marketplaces) by creating mechanisms that make users react to each other. “Likes” and forwarding of content on social networks and product and seller reviews not only allow users to give and receive feedback, but they also provide platforms with highly valuable information about users’ preferences and views. These mechanisms can be abused to disseminate “viral” content, often containing hate speech and disinformation (“fake news”) that increase interaction revenues but have started to attack the foundations of trust and unity of democratic societies.

Ecosystems & Conglomerates: Platform often branch out to offering related services, based on the same service architecture and consumer data, harvesting strong economies of scope. Several types of competition problems can arise: Bundling or tying of services with a service where a platform is dominant may make it difficult for potential competitors to enter or remain profitable (“foreclosure”), and platforms’ acquisitions of start-ups, potentially to increase their portfolio of services, will also nick any nascent competition in the bud (“killer acquisitions”).

Algorithmic decision-making: The immense amount of data collected in the digital economy cannot be parsed or subsumed into decision-relevant information by human hands. Therefore, algorithms have become essential elements of the digital economy, and increasingly take decisions that affect citizens’ lives. Examples are vetting of job applicants and credit requests, recommender systems on platforms, and the choice of product portfolios and their prices of online sellers. An important issue in this context is the

[4] Recent research found that many apps contact hundreds of advertisement providers immediately after they are installed, with or without users’ explicit consent.

attribution of accountability for, and redress of, decisions taken by algorithms that affect citizens or businesses. An additional level of complexity arises because algorithmic learning may lead to, e.g., discriminatory or anti-competitive, behaviour that was not written into the algorithm's original programming code.

Gig economy: Digital intermediation also has changed how some labour markets function, creating large numbers of permanently "temporary" jobs in programming and other online work, transport and other offline services. While offering flexibility, these also undermine labour market rules and the possibility for organized labour to improve working conditions.

3. The Legal Framework and New Proposals

3.1. The Existing Legal and Regulatory Framework

The existing rulebook of the European Union is already large, so the question whether new laws are really needed is justified. Here we quickly present the available relevant legal instruments and their respective limitations. It is argued that these laws are either to slow in their application or outdated concerning developments in the digital economy, and that therefore new rules and tools are necessary.

Protection of businesses as customers:

- Article 102 TFEU (Treaty on the Functioning of the European Union) forbids abuses of a dominant position. Enforcement happens after an accusation of abuse is made and involves investigations and court proceedings that tend to take years. Subsequent requests for damages take even longer. Smaller victims of abuse, especially recent market entrants, are likely out of business by then.
- The EC Merger Regulation prescribes that mergers between sufficiently large companies must be notified to national or EU competition authorities, after which they are either cleared, with or without commitments, or prohibited. This instrument does not "see" acquisitions of small potential competitors by larger incumbents.
- The P2B (Platform-to-business) Regulation of 2019 mandates fairness and transparency in all platforms' dealings with their business users and is still being transposed into national laws. It does not deal with potentially abusive behaviour that arises from imbalances of power, nor with competition in platform markets itself.
- The e-Commerce Directive of 2001 was created to define rules and promote the growth of e-commerce businesses and platforms, including through "safe-harbour defences", certain exclusions from liability for contents and services provided via platforms. It is to be replaced by the Digital Services Act.

Protection of EU citizens as consumers of goods, services, and media:

- The GDPR (General Data Protection Regulation) provides rules for the collection and processing of personal data, including on consent. It does not oblige platforms

to disclose how they profile individuals, nor does it deal with pooling of data between different services.

- The ePrivacy Directive of 2002, amended in 2009 ("Cookie law"), lays out how platforms can use and process individuals' data, including the need for consent.
- Other rules on consumer protection, including "sector-specific" laws, such as the 2016 Code of Conduct on hate speech,[5] the 2018 Code of Practice on Disinformation[6], and the 2018 Audiovisual Media Services Directive[7].
- The European Convention on Human Rights protects the rights to free speech and to receive information.

Legal initiatives under preparation are:

- Regulation on Privacy and Electronic Communications (ePR). A draft proposal was adopted by the European Commission in 2017 and is meant to replace the ePrivacy Directive of 2002, with a new proposal accepted at European Council in February 2021. It updates rules on cookies and other tracking technologies, communications data, and digital direct marketing.
- Copyright Directive of 2019, to be implemented into national laws by June 2021.
- Proposed Regulation on terrorist content[8], which has been adopted in the European Council in March 2021.

3.2. The Proposals for the DMA and DSA

Both the DMA and DSA have arisen in the context of the European Union's Digital Market Strategy, recently reformulated as "Europe's Digital Decade" as one of the 6 priorities of the European Commission that took office in 2019.[9] A fundamental aim of this policy is to the shape the digital future of the European economy, empower people and businesses, and strengthen the functioning of European democracies.

Both the DMA and DSA are laws ("regulations") that will apply directly in all Member States, contrary to "directives", which must first be transposed into national laws. This former approach guarantees a maximum degree of harmonization in the rules that will

[5] See http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf.
[6] See https://ec.europa.eu/digital-single-market/en/code-practice-disinformation.
[7] See https://eur-lex.europa.eu/eli/dir/2018/1808/oj.
[8] See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0640.
[9] See https://digital-strategy.ec.europa.eu/en.

apply to platforms and other businesses in the digital economy across Europe. Having this unified approach is a central aim, as it significantly reduces the cost of compliance and increases legal certainty in its application.

Even though their names (Digital *Markets* and *Services* Acts) do not clearly convey this, the scopes of the two proposals are quite different. In short, the DSA is meant to protect EU citizens, and the DMA is meant to protect EU businesses (indirectly again to the eventual benefits of EU citizens). The DMA is concerned with the effect that market power in digital intermediation can have on the businesses and their development in the European Union. Its provisions intend to protect businesses by making sure that either there can be competition in intermediation services that keeps market power in check, or by prohibiting specific behaviours of large "gatekeepers".[10] The DSA, on the other hand, is intended to clarify the responsibilities and obligations of all digital platforms, independently of their size, with respect to their users and for a wide variety of different contexts. It is meant to protect users in the exercise of their fundamental rights (such as freedom of speech), protect them from abusive commercial practices by online sellers and advertisers, and create trust in the digital economy.

3.2.1. The Digital Markets Act

The declared purpose of the DMA is to address imbalances between large platform and their business users by working towards *contestable* and *fair* European digital markets. These two expressions relate specifically to the i) possibility of having competition and ii) the absence of abuse of market power, both in the provision of important digital intermediation services. The thrust of these provisions is to improve the conditions under which European businesses can interact, using digital intermediation services, with their end customers, promoting growth and innovation, and potentially also to compete with the gatekeepers themselves. This is to be achieved by imposing obligations and prohibitions on large providers of platform services, to be administered by the European Commission with Member States in an advisory role.

The DMA first specifies a set of *core platform services* (CPS), which are considered essential for businesses to reach their end users in the digital economy. The present list (which can be updated according to market developments) contains the following: online intermediation services, search engines, social networks, video-sharing, number-

[10] A more descriptive name would indeed be "Digital Gatekeepers Act".

independent interpersonal communications, operating systems, cloud computing, online advertising services.

Second, those providers of core platform services that are large enough are denominated *gatekeepers*. This is formalized by three criteria: (i) significant impact on the internal market, (ii) operate one or more important gateways to customers, and (iii) enjoy or are expected to enjoy an entrenched and durable position in their operations. Platform providers that satisfy the following set of quantitative thresholds are assumed to satisfy the above qualitative criteria and are obliged to inform the Commission: i) the undertaking (conglomerate) to which they belong achieves an annual EEA[11] turnover equal to or above EUR 6.5 billion in the last three financial years or has an average market capitalisation or the equivalent fair market value of at least EUR 65 billion in the last financial year, and it provides a core platform service in at least three Member States; ii) provides a core platform service that has more than 45 million monthly active end users established or located in the Union and more than 10 000 yearly active business users established in the Union in the last financial year; and iii) if the thresholds in ii) were met in the last three financial years. There are both processes for platforms to defend themselves and processes for denomination even if the above criteria are not (yet) fulfilled, alongside regularly reviews of the denomination, the corresponding list of core platform services of the undertaking, and the resulting obligations.

Our description of the latter will have to be short of detail, as the list is already long enough. Roughly, they fall into several groups, some apply automatically, and some are meant to be further specified in a dialogue with the Commission.

- Commercial freedom: business must be able to make different offers and freely contract with end users outside the platform, nor restrict end users' ability to switch.
- Identification and data of end users: the gatekeeper must not force businesses to use its end user identification services, nor merge their data into the platform's. Data derived from the business' activity may not be used to compete with the latter; effective access to and portability of data generated by their activity must be provided to businesses.

[11] The European Economic Area (EEA) includes the EU plus Iceland, Liechtenstein, and Norway (but no longer the UK). Still, the DMA only applies to EU Member States.

- Search data: Search platforms must give access, on request from third-party search providers, to (anonymised) ranking, query, click and view data generated by end users.
- Tying and self-preferencing: gatekeepers must not force businesses to use some other core platform service of the same undertaking to use the desired core platform service and must give providers of ancillary services the same conditions as to their own; neither are they allowed to treat their own services more favourably in rankings for end users.
- Complaints: gatekeepers must not prevent business from making complaints to the relevant authorities.
- Transparency in advertising: gatekeepers must inform advertisers and publishers on request about price paid by advertiser and amount received by the publisher for a given ad and provide access to performance measuring tools.
- Apps and app stores: end users must be allowed to uninstall pre-installed apps and install apps from other sources; gatekeepers must provide fair and non-discriminatory general conditions for access to the app store.
- Gatekeepers must inform the Commission of any planned acquisition in the digital sector.
- Gatekeepers must provide the Commission with an independently audited description of their techniques for profiling customers across their core platform services.

There are further provisions about the implementation of these obligations, proceedings for exemptions, new or corrected information, and non-compliance (including fines and remedies). A Digital Markets Advisory Committee, composed of representatives from Member States, will support the Commission in decisions about denominations, revisions, and market investigations, though the proposal is short on detail in this respect.

3.2.2. The Digital Markets Act

Contrary to the DMA, the DSA will apply to all digital intermediation services (defined as “conduit”, “caching”, “hosting”, or “online platform”) provided to end users in the EU, independently of the former’s size. Its purpose is to set out clear rules of how the platforms providing these services must respect citizens’ fundamental rights to express themselves and obtain information, and how to protect citizens in their online activities. An important

part of the proposal is taken up with rules of how to deal with “illegal content”, defined as information that is not in compliance with Union Law or the law of a Member State, both concerning its removal, information about how this is done, and processes to appeal against removal decisions. Furthermore, there are transparency and information obligations about online traders, advertising, and rankings procedures.

First, the DSA defines some rules under which platforms are not liable for transmitted or stored content, including when illegal content is removed after the platform has been informed. These rules mostly reflect those of the e-Commerce Directive, while updating the latter with case law and a new rule that platforms do not lose protections from liability if they act actively against illegal content or apply the provisions of the DSA.

On the other hand, no “general monitoring obligation”, which would force platforms to check all content, can be imposed. Both are provisions taken over from the e-Commerce Directive of 2000.

All intermediation platforms must establish a unique point of contact and legal representative in the EU, clearly state any content restrictions in their terms and conditions and publish yearly reporting on their content moderation (take-down of illegal content or suspension of providers thereof) activity. Hosting services, which store content, must create a mechanism to be notified of illegal content, and when removing content informing its provider of the reasons for doing so.

Additional obligations are foreseen for online platforms, which are hosting services that also publicly disseminate content. These obligations do not apply to micro and small platforms, since they involve more burdensome measures as the creation of internal processes for complaint handling, interactions with dispute settlement bodies and trusted flaggers, an obligation to notify serious criminal offences, vet and publish information on traders using the platform, publishing of reports on content removal, and transparency obligations for advertising.

A further layer of obligations is applied to “very large online platforms”, defined as those with an active user base of at least 45m, corresponding to 10% of EU population (the DMA end user threshold for gatekeepers). These platforms must access the systemic risk posed by their services and take measures to mitigate these risks, submit themselves to external audits, report on the functioning of recommender systems and online

advertising. They also must provide data to its DSC, the Commission or vetted researchers, appoint compliance officers, and are subject to other specific reporting obligations.

Contrary to the DMA, supervision and enforcement under the DSA will be performed by independent authorities denoted as “Digital Service Coordinators” (DSC, which could be the national competition authority) in the Member State where the platform has its main establishment (the *country-of-origin principle*, emanating from the devolved governance structure of the European Union under its subsidiarity principle). It is also the individual Member State that defines the rules on penalties applicable to platforms under its jurisdiction. DSCs will coordinate their efforts via a “European Board for Digital Services” consisting of DSC representatives and chaired by the Commission.

The European Commission will only get involved, performing investigations or imposing penalties, when a very large platform consistently violates DSA rules.

3.3. Other National Proposals

As was mentioned above, a central objective of the proposals for the DMA and DSA is the creation of a *harmonized* framework for the digital economy in the European Union. The creation of harmonized rules in a larger number of areas, i.e., rules that are identical or at least consistent with each other throughout all Member States, has been at the heart of the European project. It is a necessary ambition, too, in order to reduce the existing *fragmentation* of the internal market and give European companies the possibility to gain the scale needed to compete effectively with their global rivals.

Several countries on different continents are putting forward their own proposals concerning different aspects of the digital economy, as laid out in compressed form below. While European laws might benefit from some fruitful ideas advanced abroad, it is more troubling from a Union perspective that some EU countries are advancing with their own laws. It is natural that some countries prefer stricter rules on some issues, while others prefer weaker ones; examples are stricter privacy laws in Germany or stronger concern about terrorist content in France. But not having the same rules in the end leads exactly to the legal fragmentation that the proposals for the DMA and DSA are designed to avoid. Thus, either stricter rules introduced now must be rolled back later,[12] or they will condition the level of regulation if harmonization is to be achieved. This type of pre-

[12] As happened with the Dutch legislation on net neutrality, which was stricter than subsequent EU rules.

emption is precisely what the makers of these new laws have been accused of, while they defend their initiatives as being necessary because of the slow legal process until the DMA/DSA will enter into force.

In January 2021, Germany passed a law (GWB-Digitalisierungsgesetz) to update its national competition rules, including for interventions in the digital economy. The competition authority now will be able to act preventively against “undertakings with paramount significance for competition across markets”, established on a case-by-case basis using qualitative criteria, by imposing certain prohibitions. In order to speed up proceedings, legal recourse can only be taken directly to Germany’s Supreme Court. The new law also regulates data access in relations of economic dependency (“relative market power”, a concept that has also just been included into Swiss competition law, but which does not exist in EU rules).

Also in January 2021, Austria’s new Communication Platforms Act (“Kommunikationsplattformen-Gesetz”) came into force. It applies to for-profit communication platforms that have more than 100,000 users in Austria or revenues in Austria of more than 0.5m, the list of which a regulatory authority must compile by itself. The Act imposes procedures and obligations for take-down of illegal content (many categories of which are defined in the act, including hate speech which is a particular concern given recent events in Austria), and fines for violations of the Act. By *inter alia* violating the country-of-origin principle, which is an essential building block of the DSA proposal, these provisions both pre-empt and contradict those of the DSA. Indeed, the European Commission sent a communication (which does not seem to be publicly available) to the Austrian government, stating that these provisions are incompatible with EU law, impede the freedom to provide services, and will have to be repealed once the DSA enters into force.[13]

In March 2021, a member of the Portuguese government announced that Portugal will create a law regulating marketplaces.[14] Seemingly, it will make marketplaces partly responsible for goods sold by third parties, including warranties, but no further information is publicly available.

[13] See https://www.lexology.com/library/detail.aspx?g=fcf46df4-4694-4f10-b11b-67564a824470.
[14] See https://www.jornaldenegocios.pt/empresas/comercio/detalhe/governo-prepara-lei-para-tornar-mais-efetivos-os-direitos-dos-utilizadores-de-marketplaces.

United Kingdom: In 2019, the "Furman report" was published, laying out a view of the digital economy and potential competition problems in the UK,[15] and the "Online platforms and digital advertising market study" produced by its national competition authority (CMA). Subsequently, the UK government proposed a new code with the creation of a "Digital Markets Unit" at the CMA, which will supervise firms with "strategic market status", create and control codes tailored to specific business models (contrary to the DMA approach of general rules). The new code is expected to include measures similar to the DMA and DSA, but may include stricter provisions in some areas, such as targeted advertising, explicit consumer protection provisions, structural remedies such as data silos, and stricter rules for merger control. In 2020, the UK also introduced a law that forces video-sharing platforms established in the UK to take measures to protect under-18s from potentially harmful video content and all users from videos likely to incite violence or hatred, as well as certain types of criminal content, to be enforced by the communications regulator Ofcom. An "Online Harms Bill" is also moving through the legislative process, with its scope (e.g., disinformation) still being discussed.

USA: High-profile policy reports on the functioning digital markets were published (Stigler Committee and House of Representatives),[16] and federal and state lawsuits were introduced against Facebook and Google, while a case against Amazon may be launched soon. These cases use standard competition law instruments, but the alleged misdemeanours correspond to some which in EU legal practice have been found need the approach outlined in the DMA to be addressed effectively and in a timely manner. No new legislation has been approved so far, though the new Biden administration shows signs of being more willing to intervene in digital markets in particular, and news reports indicate that several new antitrust bills are about to be presented in Congress. The congressional hearing on misinformation of 25th March 2021 also indicated that several bills to regulate content mediation and change liability rules ("section 230") for hosted content might be introduced.

India: In February, the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, were published. They contain rules about transparency and redress policies, the application of a code of ethics for digital media publishers, the

[15] Furman, J., Coyle, D., Fletcher, A., McAuley, D. and Marsden, P., Unlocking Digital Competition. Report of the Digital Competition Expert Panel, HM Treasury Publications, London, 2019.

[16] Stigler Committee on Digital Platforms, Final Report, George Stigler Center for the study of the Economy and the State, University of Chicago Booth School of Business, Chicago, 2019. US House of Representatives Sub-Committee on Antitrust, Investigation of Competition in Digital Markets, Washington, 2020.

government's possibility to block content, and the obligation of messaging platforms to identify the first originator of messages by court or government request. Some of these provisions seem to violate fundamental rights of Indian citizens.

In a parallel development, France and Australia have introduced new rules for how platforms must pay for content from news publishers, and several countries are preparing laws defining rights of "gig economy workers". Neither topic is covered in the DMA or DSA.

4. Arguments and Potential Evidence

A great amount of work has gone into the preparation of the DMA and DSA, consultations, workshops, policy reports and studies by well-known academic specialists in competition law and economics.[17] These have assembled a large amount of empirical and practical evidence of wide-spread competition problems in digital markets. The purpose of our paper is not to review or discuss this evidence, but rather it is to point to some arguments and evidence that may indicate how these measures will fare.

In order to evaluate the rules proposed in the DMA and DSA, it is necessary to be clear about the relevant "counterfactual", i.e., the system of rules that would be in place if the DMA and DSA were not to enter into force as currently envisaged. It is clearly unrealistic to postulate a counterfactual of no additional regulation, since competition problems and market failures have been identified around the globe, and new laws and regulations are being put into place within and outside the European Union. The creation and effect of such rules will depend on Member States' tastes for intervention and on the strength of their regulatory and democratic institutions.

Therefore, one should be clear which of the two following counterfactual comparisons is being performed: First, comparing a set of rules that are harmonized at EU level to a thicket of national rules with different scopes and levels of intervention; or second, taking as given there will be harmonized rules, comparing weaker and stricter sets of rules for intervention.

Attention should also be given to the identities and interests of the different stakeholders concerned: i) EU citizens, as participants in democratic processes, users of digital services, and customers of EU businesses; ii) businesses inside and outside the EU that use intermediation platforms to connect with customers, and iii) intermediation platforms inside and outside the EU, both as incumbents and potential competitors.

[17] See e.g. Motta M. & Peitz M., "Intervention triggers and underlying theories of harm"; Larouche P. & de Streel A., "Interplay between the New Competition Tool and Sector-Specific Regulation in the EU"; Schweitzer H., "The New Competition Tool: Its institutional set up and procedural design"; Whish R., "Legal comparative study of existing competition tools aimed at addressing structural competition problems, with a particular focus on the UK's market investigation tool"; Crawford G. S., Rey P. & Schnitzer M., "An Economic Evaluation of the EC's Proposed 'New Competition Tool´" (Report by the Economic Advisory Group on Competition Policy). These are available at https://ec.europa.eu/competition/consultations/2020_new_comp_tool. The latest addition to this literature is the "JRC Expert Panel Report": Cabral, L., Haucap, J., Parker, G., Petropoulos, G., Valletti, T. and Van Alstyne, M., March 2021. "The EU Digital Markets Act", Publications Office of the European Union, Luxembourg, 2021, ISBN 978-92-76-29788-8, doi:10.2760/139337, JRC122910.

Relevant evidence for this issue comes in two forms: Expert opinions and predictions, and *ex-post* analyses of similar regulatory initiatives. Of the former a lot is available, while the latter is rare. A rather important obstacle for the latter is that government interventions in markets apply universally, which does not allow a comparison between "treated" and "untreated" entities that is necessary to separate the effect of the intervention from other kinds of influences and parallel technological or societal developments. A related issue is that interventions may take time to reveal their effects.

4.1. Competitiveness of European Companies

The proposals for the DMA and DSA are not, as is sometimes alleged, a plot against US companies, nor is their aim to reign in the latters' businesses for the sake of it. Still, one needs to recognize that the geographic location of the recipients of the platforms' profits may not (and in several cases clearly does not) coincide with the location of the businesses and citizens that are to be protected from abuse. As explained above, scale and network effects imply that some digital markets are easily dominated by one or two very large companies with global reach. Having been able to grow their business in a domestic market of roughly the same size as Europe, but where everybody speaks the same language and is subject to the same laws, allowed some US companies to achieve huge scale very quickly (The same is true with Chinese companies). Rather, the objective of the proposal is to guarantee that businesses, both those competing with the gatekeepers and those making use of their intermediation services to serve European customers, can grow and innovate unhindered by any exercise of market power. The issue of contestability of platform markets arises in this context because effective potential competition is expected to discipline the exercise or abuse of market power by gatekeepers.

In March 2021, the Body of European Regulators for Electronic Communications (BEREC) published its opinion on the DMA and a report with proposed changes.[18] While strongly agreeing with the objective and main thrust of the proposal, it identified several factors that in its view limit the proposal's potential to make European businesses more competitive. First, it pointed out that the proposal neglects interactions, for the purposes of information gathering and knowledge building, with stakeholders other than the gatekeepers themselves. BEREC proposes a continuous regulatory dialogue with

[18] See https://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/9879-berec-opinion-on-the-european-commissions-proposal-for-a-digital-markets-act.

businesses, potential competitors, providers of complementary services, and consumer associations, in order to maximize the information available and guide implementation.

Second, BEREC takes issue with the obligations listed in the proposal. The Commission based its proposal to a significant extent on previous competition law cases, the problems that were identified and the remedies that were imposed and codified these as specific obligations applying to all designated gatekeepers. BEREC indicates that different modes of application should be applied to different obligations in order to make them both effective and proportional (strong enough to function but weak enough to not overburden gatekeepers). It proposes to distinguish between different types of obligations: i) remedies that are directly applicable to all CPS without adaptation, such as transparency rules; ii) remedies that are directly applicable only to a specific CPS and are specifically designed for the context of this CPS; iii) remedies that are tailored to new and complex problems that may arise, and to guarantee that the intervention is not more intrusive than needed. The directly applicable remedies would guarantee "swift and effective" implementation, while the tailored remedies would be "proportionate and future-proof", helping to safeguard innovation by both hosted businesses and the gatekeepers themselves.

A specific example of market intervention is given by electronic communications markets (voice telephony, broadband). Technological progress made competition possible, with large benefits from innovation accruing to end users and operators. The regulatory approaches between the US and the EU differed (and continue to differ) in several respects, with unclear effects on innovation, and with regulatory policies that may not achieve their stated objective.[19] An important difference is that the EU has imposed obligations on the previously monopolistic incumbents to provide access to their communications networks so that competitors could participate with retail voice and broadband offers. After 20 years of this policy, the market has moved towards competition in separate infrastructures, as is the case in the US. Both have similar rollouts of next-generation infrastructure, but there are more competitors and lower prices in Europe. Still, while historical operators benefit less from their previous monopoly positions, in most cases they remain the largest firms in the market.

[19] Vogelsang I., 2013, "The Endgame of Telecommunications Policy? A Survey", Review of Economics, 64(3), 193-270; 2017, "The role of competition and regulation in stimulating innovation – Telecommunications", Telecommunications Policy, 41, 802-812; 2019, "Has Europe missed the endgame of telecommunications policy?", Telecommunications Policy, 43, 1-10.

A quite different example, this time of deregulation, is provided by energy markets. In many countries incumbents that were vertically integrated in generation, transmission, distribution, and retail services were structurally separated into business segments where competition was possible (generation, retail) or not (transmission and distribution are natural monopolies). It is unclear, though, whether end users benefited in any respect. Competition at retail did not reduce prices because these had already been tightly regulated before deregulation. An additional important factor is that there have been no innovations on the consumption side that could have been taken up by market rivals for the benefit of consumers.

The timing of intervention has a strong effect on their effectiveness. Opening access to certain services may not be enough for creating competition if strong network effects have already tipped the market. This seems to have happened with NFC (contactless) payments on iPhones: Germany introduced a law in 2020 that would allow all payment services providers to access Apple's NFC interface. Yet, network effects through the installed base of Apple Pay were so strong that rival services did not emerge and that even previous proponents of mandated access went on to contract Apple's services instead.[20] Radical "policy experiments" such as China's prohibition of Google's app store show that markets with network effects can be competitive (at least for a while), while some benefits such as quality control may be lost.[21]

The GDPR is the EU's most recent example of a strong regulatory intervention in digital markets. While its purpose was to protect privacy, its implementation implied many restrictions on firms' behaviour and commercial strategies. Some commentators claimed that the imposition of such restrictions would principally benefit the largest platforms because most other businesses would find their implementation too burdensome. Researchers have found that the entry into force of the GDPR coincided with a significant transitory decrease in the number of apps provided for different operating systems, or a significant short-term reduction in venture capital investment[22]. What is not clear, though, is whether this decrease occurred because of implementation costs or because these apps' business models were based on privacy-violating strategies ruled out by the GDPR. What seems to be clear, though, is that regulatory uncertainty for small businesses hosted on

[20] Franck, J. U. and Linardatos, D., 2020. "Germany's 'Lex Apple Pay': Payment Service Regulation Overtakes Competition Enforcement", Journal of European Competition Law and Practice.

[21] Wang, H. et al., 2018. "Beyond Google Play: A Large-Scale Comparative Study of Chinese Android App Markets", Proceedings of the Internet Measurement Conference 2018 (IMC '18), Association for Computing Machinery, New York, doi: https://doi.org/10.1145/3278532.3278558.

[22] See https://voxeu.org/article/short-run-effects-gdpr-technology-venture-investment.

platforms was very large, because some big platforms made their implementation of GDPR rules public only days before the GDPR entered into force. This points to the importance of clear rules and transparency already in the introductory phase of regulations, and also highlights the difference between their potential short-term and long-term effects.

4.2. Regulatory Philosophy

The DMA and DSA are intended to be complementary to the existing legal framework in the EU. While the DSA adds to the existing laws on fundamental rights, illegal content, and consumer protection, among others, the DMA complements competition law. With the latter there is a large difference in approach, though: Competition law is based on the principle of *ex-post* intervention, that is, abuses of competition law must have happened before any action is taken.[23] On the other hand, the purpose of the DMA is to create a set of *ex-ante* rules that prevent abuses from happening in the first place. This difference in approach merits some discussion. For now, we abstract from the question of which investigative authority is involved (in competition law cases, these are national competition authorities or the European Commission).

Ex-post competition rules are based on broad principles defined in competition law, which are enforced through thorough investigation of each individual case after a complaint has been made. The aim of competition law (including fines imposed) is to deter abuses, but it is not its aim to “remake” the market into what it would have been without the abuse, nor is it to reimburse victims or the public for any damage done (In theory, this would happen in private damages cases after a final conviction, taking even longer than the original proceedings). After a complaint has been received, a “relevant market” (description of the demand side, actual and potential competitors, and their products) must be defined, including by studying substitution patterns. Within this market, dominance of the alleged abuser or group of abusers must be established, then the existence of abuse and its effects, all in the context of a large asymmetry of information between the authority’s investigators and the platforms concerned.

This process therefore takes time and consumes a large amount of investigative resources, while the burden of proof is fully on the competition authority. This approach

[23] This is different with mergers, where investigations take place after a planned merger is notified but before it is completed.

offers the alleged infringer a maximum of fair process and rights of defense but at the same time neglects the needs and incentives of the other stakeholders. As a result, in fast-moving markets this approach neither provides safeguard for keeping the market functioning, nor does it offer sufficient deterrence against abuses. Forward-looking entrepreneurs will rather invest elsewhere than risk being pushed out of the market without any chance of timely redress.

Ex-ante clear and specific rules on behaviour ("bright line rules" in US parlance), such as those the DMA intends to impose, limit behaviour before abuse happens or before markets positions become entrenched. Most importantly, in the interest of speed and legal certainty, the rules proposed in the DMA do away with the traditional competition law procedure of considering the position firms have relative to the market(s) in which they are embedded. Instead of a necessity of establishing dominance in a specific market, a hierarchy of criteria on firm size is used to impose increasingly stricter automatic obligations on platforms. As pointed out by the JRC Expert Panel, the automatic imposition of obligations also strongly reduces the Commission's information disadvantage with respect towards platforms. On the economic policy front, such automatic criteria also have the advantage of being neutral with respect to the provenance of the platforms concerned, while a case-by-case intervention is too easily interpreted as politically motivated.

Still, a good design of *ex-ante* rules must solve the difficult trade-off between rules that are too weak (and thus ineffective) and rules that are too strong (not proportionate). This trade-off is complicated by the fact that rules can have different effects in the short and long run. The DMA presents procedures for platforms to contest their designation as gatekeepers but does not allow them to defend themselves by claiming that their conduct is actually pro-competitive and based on efficiencies, contrary to competition law. The automatic obligations are applied without arguing about their implementation. Both BEREC and the JRC Expert Panel set out potential changes to the DMA's obligations. As mentioned above, BEREC proposes different modes of implementations. The JRC Expert Panel instead proposes a blacklist of forbidden behaviour and greylist of behaviours that are in principle considered anti-competitive but for which gatekeepers could offer an efficiency defense (triggering an investigative phase). The Panel also proposes a complementary quicker formal complaint mechanism for business customers and an independent arbiter issuing binding decisions. Here the Panel cites telecommunications regulation as an example where the existence of arbitration seems to have played a

positive role (though without providing further detail), while the lack of credible third-party arbitration hampered competitor access to railways networks.

A further issue that could be taken with the DMA proposal is that it is not clear whether its focus is contestability or fairness. As mentioned above, the former is a preferred means of achieving the latter, so one could establish a hierarchy of aims. Too much attention may be spent on promoting potential contestability of markets that have tipped already, instead of paying attention to markets where market power might be leveraged. An issue that is intimately related to this is the absence of a framework setting out criteria to determine the effectiveness and proportionality of the measures. Indeed, several levels of review processes are foreseen (of the gatekeeper designation process, the obligations, individual cases) but there is no indication yet of how success or failure are to be defined.

4.3. Governance

An important aim of the DMA and DSA is harmonization of rules and processes, but the governance structures foreseen in the two proposals are very different, each with its own advantages and issues.

The DMA centralizes implementation and supervision in the European Commission. This makes sense, since the DMA is to apply only to the largest platforms with activities spanning (at least) several Member States. There will be a Digital Markets Advisory Committee representing Member States, and individual Members States can propose gatekeeper denominations, but otherwise the participation of individual EU states is limited.

One potential issue is that the European Commission, more so than with traditional competition policy, ends up defining both the rules (in co-decision with the EU parliament and the Council), supervising their implementation, and judging the outcome. In its opinion of March 2021 on the DMA, BEREC proposes an approach that incorporates more input from the field. BEREC considers it essential that a dispute resolution mechanism be included, in order to solve disputes quickly and transparently, to contribute to creating a knowledge base of potential issues, and to reduce asymmetric information. BEREC also proposes that national independent authorities (NIAs), such as sectoral regulators, competition and data protection authorities, should work closely with the Commission, including via an Advisory Board of NIAs.

The DSA on the other hand adopts the principle that intervention can only take place in the Member State where a platform has its main establishment (Platforms are obliged to indicate one when the DSA enters into force), with the argument that this allows for the "swiftest and most effective enforcement". This continues the "internal market principle" of the e-Commerce Directive, which the DSA will replace. Clearly, this country-of-establishment rule also creates legal certainty and safeguards the principle of *ne bis in idem*, i.e., any offense should only be prosecuted once.

Still, this proposal has proved highly controversial, as there are several potential problems concerning incentives for Member States to prosecute cases and for platforms to choose Member States, as is already being highlighted with disagreements around the enforcement of the GDPR between Ireland and other Member States. An individual Member State may not have the incentives to intervene, for various reasons: i) It does not recognize the issue as policy problem that affects its own citizens; ii) it may have a bias to protect local companies, including for fear of relocation and loss of tax revenue; iii) local institutions may not have the capability to intervene effectively if they do not have enough resources – there could be too many companies to supervise (say, Ireland with Apple, Facebook, Google, Microsoft, Twitter), or an inability to provide the needed resources (say, Luxembourg with Amazon). The biggest risk for the effectiveness of the DSA would be that platforms choose their seat of establishment depending on expectations of (non)enforcement, playing Member States off against each other as already happens with corporate taxation.

In the ongoing negotiations about the DSA, France has claimed that each EU state should be able to fine platforms and force the removal of illegal content, independently of where a platform is established. This of course raises the prospect of separate legal proceedings in many Member States, quite contrary to what the DSA is meant to achieve. An alternative would be to designate a centralized EU institution for at least some areas of supervision, especially for larger (and "more mobile") platform operators.

A further issue, and which to our knowledge has not yet been highlighted in public discussion, is the interplay of the definition of illegal content as information that is not in compliance with Union Law "or the law of a Member State" and the country-of-establishment principle. It is unclear how the identity of this Member State that finds some content illegal relates to the Member State in which the platform is established: Do they have to be the same? Can or should the Member State of Establishment apply some

other country’s law to prosecute a platform, or does it have to use its courts? Does it have to take action on request, or can it refuse to do so? This issue needs to be resolved as long as individual Member States can adopt their own legal definitions of what is (or is not) illegal content.

4.4. Ownership of information, Data Access, and Transparency

The DMA and DSA create new transparency obligations and in some cases data access obligations for the platforms concerned, in various dimensions: for businesses concerning the data their activities have generated, for advertisers concerning the performance of advertising tools, for users the portability of data, and even access to specific data for rival search engines.

There are many different aspects that are relevant to these obligations, and we will mention only a few in the following, focusing on the DMA. It is noteworthy that the DMA and DSA also contain transparency obligations that benefit parties with competing interests, such as advertisers on the one hand and citizens on the other. We also mention here that new technological developments, such as the upcoming phasing-out of third-party cookies,[24] provoking concerns about “walled-garden” advertising systems, may need to be taken into account.

The JRC Expert Panel argues that promoting access of businesses to their own data still leaves all the gains from aggregating data across businesses to the gatekeeper. That is, its data is of much less interest by itself than in the larger context of other businesses’ data that the platform taps into. Disclosing more of this data would have to strike the right balance between exposing too much of platform’s activity, and preserving enough value when data is too aggregated. End user rights to privacy must also be respected.

Furthermore, the JRC Expert Panel states that “data portability runs into a number of technical, legal and economic obstacles” and that no rules or standards have been defined in the DMA proposal. These are also critical issues identified in recent reports on data ownership and portability.[25] One alternative approach mentioned in the JRC report would be to define rules for accessing data where they are. This would obviate the questions of

[24] “Third-party cookies” are packets of data stored on users’ devices that have the function to track their browsing and other behaviour across sites and applications and are an important issue in the debate about online privacy. Google is preparing an alternative system that tracks users in groups.
[25] See e.g. Krämer J., Senellart P. & de Streel, A., 2020. “Making data portability more effective for the digital economy: Economic implications and regulatory challenges”, CERRE Report, Brussels.

how and where to transfer them, how to keep them updated, and how to preserve their value once they are out of context. This kind of setting could in principle prepare a more level playing-ground for businesses competing on platforms but raises additional issues for guaranteeing end-user rights to privacy.

This takes us to DMA's prohibition for gatekeepers to use data generated or provided by hosted business in order to compete with the latter. The members of the JRC Expert Panel are divided on the issue. On the one hand, they point out that innovation will be reduced if businesses expect to be "expropriated" by their platform once they have found a profitable product or service. On the other, the platform using this data can benefit consumers through new products or lower prices. It is very difficult to choose the exact trade-off between these two factors and even harder to implement it; the proposed blanket prohibition at least does not have this disadvantage.[26] Experience from implementing the 2019 Directive on Unfair Trading Practices in the agricultural and food chain could prove useful in this respect, but its introduction may be too recent.

As concerns transparency for advertisers, again according to the JRC Expert Panel, allowing rivals of advertising gatekeepers access performance measuring tools makes sense but is a minor intervention; rather, they recommend that rivals should be given direct access to data. As an example to avoid they refer to a change in Google's policies after the introduction of the GDPR, where Google blocked access to advertising data through third-party tools, increasing its control over the advertising stack.

Finally, a comment on the specific obligation of search gatekeepers to provide "ranking, query, click and view data" to other search engine providers: The wording seems to imply that only platforms whose main service is search can benefit from this obligation. Since the specific objective of this obligation is to keep search contestable, it might make sense allow for search as a (presently) secondary business line of a company that is already established in other platform services.

Concerning the DSA, the JRC Expert panel argues that more transparency for advertising is good but does neither address the structural nor the behavioural issues in the advertising services market. In February 2021, the European Data Protection Supervisor, an independent body supervising data use of the European institutions, published its opinion on the DMA and DSA. Among many different comments, it states

[26] See Hagiu A., Teh T.H. & Wright J., 2020. "Should Platforms Be Allowed to Sell on Their Own Marketplaces?", http://andreihagiu.com/wp-content/uploads/2020/08/DualModePlatform_20200818.pdf.

that transparency rules on targeted advertising are not enough. Rather, it proposes that the DSA should phase out targeted advertising and at a later date prohibit any advertising based on the profiling of individuals.[27]

4.5. Scope of Rules

In this Section we want to refer to some issues where the scope of intervention itself merits discussion.

First, the DMA prohibits the tying of a core platform service with other core platform services. The question at hand is whether the aim of preventing the leverage of market power between service markets can be achieved in this manner. It has been pointed out that this obligation could be widened to restricting the tying of other (not necessarily core) platform services with a core platform service as well.

Second, the DMA introduces mandatory notifications for gatekeepers of any acquisition in digital markets. No stronger enforcement powers or lower thresholds are included, nor are mergers with firms outside of the digital economy included (such as Amazon buying Whole Foods Market). Available evidence seems to indicate that while some acquisitions by large digital platforms had the explicit aim of eliminating potential competition, most were acquisitions of complements to existing services.[28] The proposed notification rules do not imply that more mergers are automatically invalidated but will lead to more investigation and control. While this may reduce the number of transactions, it safeguards the freedom of startups to choose their business model and exit strategy.[29] An entirely different question, though, is whether society's entrepreneurial resources should anyway be spent on startups whose only purpose it is to be bought by large competitors (essentially extracting rents from the latter), instead of creating value for society through viable innovation and growth.

The main point of contention concerning the scope of the DSA, on the other hand, might be the range of content that must be monitored or taken down. The DSA keeps the "prohibition of general monitoring" from the e-Commerce Directive which states that platforms must not be obliged to check all hosted or transmitted content. The DSA limits

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[27] See https://edps.europa.eu/press-publications/press-news/press-releases/2021/edps-opinions-digital-services-act-and-digital_en.

[28] See Argentesi et al., 2020. "Merger policy in digital markets: An *ex-post* assessment", Journal of Competition Law and Economics (The JRC Expert Panel criticizes their methodology for being only descriptive and not involving a control group).

[29] This corresponds to the position defended in Cabral L., 2021. "Merger policy in digital industries", Information Economics & Policy, 54, 100866, which considers both economic theory and short case studies.

moderation to illegal content, but as mentioned above, there may be disagreement about what illegal content is. Furthermore, some Member States such as France push for the including of harmful content and disinformation in the moderation obligations. Here there is a difficult trade-off to be found between tough problems in specific Member States and fundamental rights such as freedom of expression and information on the other.

As a final note, we mention some topics that are not at all touched upon in the DMA and DSA: Environmental protection and sustainability (e.g., data centres and server farms consume large amounts of energy), non-discrimination issues (user tracking and identification can lead to unfair discrimination in the online environment), and labour relations (business models based on reducing worker rights and social contributions in the “gig economy”).

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