

Strengthening the Digital Markets Act and Its Enforcement

Over the last decades, the digital transformation has profoundly changed the functioning of the global economy. Due to the Covid-19 crisis the importance and use of digital products and services has further increased. While digital products and services have brought many benefits to European consumers and businesses, in many constellations only a few, very large providers control the access to digital markets. Therefore, the undersigning Friends of an effective DMA welcome the Commission's Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) and fully support its goal to ensure a fair and contestable Single Market for digital services where companies and innovation can thrive and where users have genuine choices and control. Though to ensure that this goal can be achieved, the DMA should be re-enforced in a number of areas as well as put together in a broader perspective with modernised competition policy instruments.

1. The scope of the DMA should be targeted and take the role of ecosystems into account more explicitly:

The DMA is intended to provide a targeted set of harmonised mandatory rules, which are meant to apply to a small number of large providers of core platform services which typically have the ability to leverage their advantages from one area of their activity to new ones. While we welcome the combination of quantitative thresholds with qualitative criteria through a market investigation, the proposed list of criteria does not cover the issue of whether a platform offers an ecosystem of services. We propose to add such criterion which corresponds to an admittedly important driver of limited contestability and unfairness in digital markets.

The current definition of gatekeeper might cover a range of more than 10 undertakings which differ in terms of business models and regarding the number and variety of the (core platform) services they offer. Too wide a scope could be questionable in terms of proportionality and impact negatively the enforceability of the DMA. It might therefore be worth considering prioritizing enforcement, for instance by further narrowing down the scope of the DMA.

2. The relation of the DMA to European competition law must be further specified:

Aside from safeguarding fairness for users of gatekeeper platforms, the DMA is aimed at preserving markets' contestability. This implies the Regulation applies adjacent to competition law. We have doubts about whether the Commission's proposal fully addresses all the issues raised by this. It is of utmost importance that the new instrument actually complements existing tools (i.e. European and national competition law), rather than weakening or substituting them. As the DMA and competition law are to pursue complementary and proximate goals, both sets of rules must not hamper but indeed complete one another, throughout synergy effects This requires a sound coordination of both the content and the enforcement of the rules.

3. The DMA must leave sufficient leeway for national rules applicable to gatekeepers:

National and European legislation should be complementary for addressing issues of market foreclosure and unfairness entailed by the behaviour of digital gatekeepers. These legislations should not undermine each other either. Since the digital economy is complex and multifaceted, a number of constellations may bear national peculiarities. Member States should therefore remain able to set and enforce national rules including national competition law applicable to gatekeepers' unilateral conduct. The framework should grant such national provisions and the enforcement thereof a sufficient and clear leeway, as granted, for example, by the provisions of Article 3 of Council Regulation (EC) No 1/2003 of 16 December 2002.

4. DMA should offer more flexibility and tailor-made remediation to cope with the reality of digital markets:

Digital markets are highly dynamic and innovative. The DMA must therefore be designed in a way to keep up with changing environments and new developments in technology and market behaviour. We welcome that Article 10 will allow the Commission to update obligations for gatekeepers. Although this mechanism yet provides some degree of flexibility to adapt the regulation over time, we are concerned that the current proposal could not suffice to tackle the fast-moving patterns of gatekeepers' behaviour. We would suggest a further step, based on broader and complementary principles or objectives, towards a fully-fledged tailor-made intervention befitting the heterogeneity of business models and the dynamic nature of these markets. This approach should complement Articles 5 and 6, which should remain directly applicable.

5. The role of Member States must be strengthened, especially with regard to the possibility to update the DMA:

To ensure that the DMA keeps up with the fast pace of digital markets, the DMA already includes a market investigation tool to update its rules. We welcome this future-proofness-oriented mechanism. However, this framework should provide for a swift and proactive cooperation between Member States and the Commission. Procedurally, this means one Member State should not only be entitled to request a market investigation under Article 15 of the DMA. This should also be possible under Articles 16 and 17 of the DMA. Since these articles allow to overhaul the substantial provisions of the Regulation, the role of the Member States is to be clarified and strengthened to ensure their proper contribution to the law-making process.

6. All available resources to enforce the DMA must be used to avoid an enforcement bottleneck:

Centralising certain powers at the EU level, for example designating globally active gatekeepers improves effectiveness and reduces fragmentation. However, the importance of the digital markets for our economies is too high to rely on one single pillar of enforcement only. Therefore, a larger role should be played by national authorities in supporting the Commission. This does require sufficient enforcement capacity and expertise, especially in the area of competition enforcement, but possibly also beyond, e.g. as regards market regulation, data analysts and IT experts. Moreover, this might also help to address the issues mentioned under point 2 (see above).

Against this background, there is a need for a steering institution to ensure coordination and cooperation. This must include the exchange of relevant information. Due to the closeness of the DMA to competition policy, there is at least the need for coordination and cooperation with national competition authorities.

Private enforcement would further increase the effectiveness of the DMA. Therefore, it must be clarified that private enforcement of the gatekeeper obligations is legally possible.

7. Merger control vis-à-vis gatekeepers should be further strengthened:

We have to strengthen and speed up merger control in particular vis-à-vis certain gatekeeper platforms to tackle the strategies of platform companies consisting in systematically buying up nascent companies in order to stifle competition. Article 12 of the DMA proposal lacks ambition in this context and this calls for further initiatives. A possibility is to enhance article 12 to modify the merger control system under Regulation (EC) No 139/2004 with two goals in mind. First, setting clear and legally certain thresholds for acquisitions by gatekeepers of targets with relatively low turnover, but high value. Second, adapting the substantive test to effectively address cases of potentially predatory acquisitions. The enhancement of Article 12 should not alter the legislative procedure and voting rules for the adoption of the DMA. And the reinforcement of Article 12 should be swiftly attainable without delaying the timeline set for the DMA adoption.

To this end, we welcome further in-depth discussions with the European Commission, the European Parliament, the Council Presidency and other Member States. We will constructively engage in the negotiations with the aim to conclude these in the beginning of 2022.

The DMA is a crucial element and a first step in the right direction but it cannot be the final point. Further action is urgently needed for the modernisation of European Competition law and must be pursued with the same energy and priority.

Friends of an effective Digital Markets Act



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Bruno Le Maire

Minister of the Economy, Finance and the Recovery

Cédric O

Minister of State for the Digital Transition and Electronic Communication, attached to the Minister of the Economy, Finance and the Recovery and the Minister for Territorial Cohesion and Relations with Local Government



**Federal Ministry
for Economic Affairs
and Energy**

For Germany,

Peter Altmaier

Minister for Economic Affairs and Energy



**Ministry of Economic Affairs
and Climate Policy**

For the Netherlands,

Mona Keijzer

State Secretary for Economic Affairs and Climate Policy