



OVERVIEW OF THE DIGITAL MARKETS ACT FOR RESEARCH ECONOMISTS

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WHAT IS THE PROBLEM?

- In a number of critical digital platform markets, we are seeing:
 - ❖ Markets tending towards monopoly or duopoly
 - ❖ The growth of a small number of extensive digital ecosystems
 - ❖ Platforms with strong 'gatekeeper' or 'bottleneck' market power over users
 - ❖ High barriers to entry and expansion
- Leading to harm to consumers:
 - ❖ Direct: eg via reduced quality or excessive data collection/use
 - ❖ Indirect via business users: eg via higher charges (passed on) or reduced quality
 - ❖ Indirect via publishers: eg less advertising revenues to fund eg news content
 - ❖ Indirect via impact on innovation.

WHY ARE WE SEEING THIS?

➤ Factors driving these outcomes include (both *within* and *across* markets):

- Strong trans-global economies of scale and scope
- Network effects and lack of multi-homing/interoperability
- Data as a critical input – and associated feedback loops
- Consumer behaviour/biases, including in relation to data protection.
- Substantial M&A activity
- Strategic anti-competitive conduct

Inherent economic factors

WHY NOT COMPETITION LAW?

- ❖ It is true that there has been substantial (and growing) antitrust activity in this space.
- ❖ BUT:
 1. Some key drivers are inherent in the economics of these markets.
 - In economic terms, entry or expansion in these markets may be 'blockaded', not deterred. Need to be more proactive to promote competition.
 2. Concerns that *ex post* competition law enforcement:
 - takes too long and is too backward looking in these fast moving, tippy markets.
 - is too narrowly focussed to create deterrence given the complexity of these markets and the patchwork of different issues arising.
 - risks creating a panoply of requirements which require ongoing monitoring, and sanctions for non-compliance, which comes close to ongoing regulation anyway.

2020-2022: BIG YEARS INTERNATIONALLY (ALBEIT SOME RECENT HICCUPS)



- ❖ **Germany:** Amendment to competition law in Jan 2021. Reverses burden in cases against 'UPSCAM' digital platforms.* Bundeskartellamt currently in process of carrying out UPSCAM designations. Google and Meta have now been designated.
- ❖ **Europe:** Proposals for a Digital Markets Act published December 2020. Finally wording complete and should be legislated this Autumn, to apply from April 2023, albeit legal obligations won't be in force until Feb/March 2024.
- ❖ **UK:** Digital Markets Taskforce, led by CMA, published advice on digital regulation December 2020. Shadow Digital Markets Unit established April 2021. BEIS/DCMS consultation published July 2021, and response published May 2022. However, legislation missed out on 2022 Queen's Speech.
- ❖ **US:** House Judiciary Committee published hard-hitting report in October 2020, paving way for FTC/DoJ case openings but also five (later six) Bills proposed for 'covered platforms' in June 2021. But process now stalled. Internal wrangling even over the EU DMA (see letter from Elizabeth Warren to Gina Raimondo). Possibly more likely to see state-level legislation than Federal.

REGULATORY DESIGN - SUBTLETIES

- Regulation is intended to complement (not substitute) antitrust.
 - Aim is to make regulation far quicker and more administrable than antitrust.
 - But this does raise risks.

“Move fast and break things. Unless you are breaking stuff, you are not moving fast enough.” *Mark Zuckerberg*

- Here, there is a risk that regulation could itself ‘move fast’ and ‘break things’.
- But equally, if we are too cautious, the ‘best could be the enemy of the good’.
- Nonetheless, best to limit regulation to firms that raise the biggest issues, to focus it on those issues, and to provide a clear framework for competition.



Objectives:

Fairness and Contestability

'Gatekeeper' Designation Criteria:

Significant, entrenched market **position**, with important gateway 'Core Platform Service'. Designation for firm as a whole but also relevant CPS.

Obligations for Relevant CPS:

Art 5 absolute, Art 6 can be further specified (see Article 7). Suspension if non-viable or on narrow PI grounds.

Market Investigations

Can add to (or remove from) CPS list or obligations. Ownership separation powers or ban on M&A activity if systematic non-compliance

Enforcement:

Sanctions of 10% of world turnover (or 20% for repeat offending).

**DMA
PROPOSED
ARCHITECTURE**

SCOPE BY FIRM

- ❖ Quantitative presumption gateway (7.5bn EEA turnover/75bn market cap plus >45m active EEA end users and >10k active EEA business users)
- ❖ Must also provide a CPS.
- ❖ BUT **semi-flexible**. Presumption can be rebutted, and designation also possible via qualitative analysis.
- ❖ **Thought to capture c. 15 firms. Is this too many? Will rebuttal process be used?**

SCOPE BY ACTIVITY

- ❖ 9 Specified 'Core Platform Services': Online intermediation; search; social networking; video-sharing; number-independent interpersonal communication services; operating systems; Web browsers; cloud computing services; online advertising services.
 - Browsers and Virtual Assistants added last minute; Connected TVs missed out.
- ❖ Each needs to meet criteria in Art 3.2b (ie 45m end users and 10k business users)
- ❖ NB: "The undertaking providing core platform service(s) shall consider as *distinct* core platform services those core platform services, which despite belonging to the same category of core platform services *are used for different purposes* by either their end users or their business users, or both, even if their end users and business users may be the same."
- ❖ **Interesting! Are FB/Instagram different? Amazon/Amazon Prime? (NB New anti-circumvention rules to limit gaming of this approach to designation via strategic fragmentation)**

RULES: GENERAL FRAMEWORK

- ❖ 21 relatively specific obligations
 - 8 (Article 5) are intended to be self-enforcing.
 - 13 (Article 6/6a) may be further specified by the Commission, to ensure the measures are effective and proportionate in the specific circumstance of the firm and activity.
 - But NB, while a gatekeeper can ask the Commission to assess whether specific measures are effective in achieving the objective of an obligation, the Commission has discretion over whether to engage in this process.
- ❖ Rules can be revised over time by the Commission, following market investigation, to extend/restrict them or to specify them further.
- ❖ Specific anti-avoidance provisions.

RULES: MONITORING COMPLIANCE

- ❖ The DMA has a strong focus on self-execution and self-reporting:
 - The gatekeeper shall ensure and demonstrate compliance with the obligations. (Art 7.1)
 - It will report this to the Commission in a detailed and transparent manner, including publishing a non-confidential summary, to be updated at least annually. (Art 9a).
 - **Interesting! What will/should this include. Could it be useful for research?**

CONDUCT RULES: WHAT TO ADDRESS?

- ❖ Two core areas of focus:
 1. Interventions that are designed **to open up** monopolized (or duopolised) markets to new competition. (Fits best with DMA contestability objective).
 - NB May not be about preventing anti-competitive conduct, but rather requiring pro-competitive conduct, eg interoperability, data access.
 2. Interventions that are designed **to prevent strong market positions from being leveraged or exploited**. (Fits with contestability and fairness objectives)
 - Eg related to tying, self-preferencing, discrimination

CONDUCT RULES: 1 - OPEN UP MARKETS TO COMPETITION

- ❖ With network effects, markets have a tendency to concentrate and to generate market power where there are 'bottlenecks'. But there are two important limits on this:
 - **Interoperability:** Network effects are reduced if users of Platform A can engage with users of Platform B.
 - **Multi-homing:** Bottleneck gatekeeper effects are reduced if users on one side of the market have multiple ways to reach users on the other side of the market.
- ❖ In the DMA, these are addressed through, eg:
 - Interoperability requirements, both *vertical* (Art 6.1c/6.1f) and *horizontal* (Art 6a)
 - A ban on limiting alternative routes to market (Art 5c/5ca)
 - A ban on MFNs/parity clauses (should encourage multi-homing) (Art 5b)
 - A ban on restrictions to switching or multi-homing (Art 6.1e)
 - Real time end user data portability may also facilitate multi-homing (Art 6.1h)

CONDUCT RULES: 1 - OPEN UP MARKETS TO COMPETITION

- ❖ With data feedback loops, markets have a tendency to concentrate and to generate market power. But there are three important limits on this:
 - **Data silos:** Limiting the extent to which gatekeepers can amass/utilize data from across different activities (including from third parties).
 - See DMA Article 5a.
 - **Data portability:** May provide a way for third parties to gain data
 - See DMA Articles 6.1h and 6.1i (free - for end users and business users)
 - **Data sharing:** Can directly facilitate enhanced quality of rivals
 - See DMA Article 6.1j (FRAND data sharing for search engine data)

CONDUCT RULES 2 - ADDRESSING LEVERAGE/EXPLOITATION

- ❖ For example, via a ban on **tying**. In the DMA, we see:
 - A ban on tying from CPS into particular services (ID services, web browser engine or payment services) (Art 5e)
 - A ban on tying one relevant CPS to another (Art 5f)
- ❖ For example, rules prohibiting **self-preferencing/discrimination**: In the DMA, we see
 - A ban on using information from business users to compete against them. (Art 6.1a)
 - A requirement for an initial 'choice box' to choose default search engine, virtual assistant and browser. (Art 6.1b)
 - A ban on self-preferencing in ranking services.
 - Requirement for FRAND access for business users to app stores, search engines and social networking services. (Art 6.1k)

THE ISSUE OF UNINTENDED HARM

- There are genuine risks of unintended harm from the DMA.
 - Eg around quality of user experience, innovation, pricing, privacy/data protection; system integrity/security; consumer protection.
- DMA includes some – but arguably limited – protections:
 - Caveats within specific obligations (eg provisos around security and integrity), but burden on firm to show that this is strictly necessary and proportionate.
 - The specification process (proportionality relative to objectives) but Commission discretion
 - Specific defences (economic non-viability in EU, public health, public security)
- NB Proportionality sounds good, but does risks reducing speed/administrability.
 - And recall that efficiencies are part of the problem!

IMPLICATIONS FOR RESEARCH ECONOMISTS

- ❖ Big issues around implementation!
 - Likelihood of substantial legal challenge and strategic non-compliance.
 - Economists can help: What does good implementation look like?
- ❖ General theory questions:
 - More understanding of the problem – especially around multi-platform ecosystems.
 - How might these regulatory interventions work in theory, esp. given asymmetric info? (Who is going to write the new ‘Laffont and Tirole’?)
- ❖ HUGE empirical research potential around impact of DMA:
 - Rich set of policy changes over time AND differences across jurisdictions.
 - **Real need to learn from successes and failures of DMA to enhance future regulation!**

SUMMARY OF DMA OBLIGATIONS - 1

Article	Summary of Obligation
5a	No data fusion without user consent
5b	No MFNs/parity clauses
5c	No restriction of communications between business users and end users
5ca	Allow access and use by end users of services even if acquired elsewhere
5d	No prevention of raising issues of non-compliance with public authorities
5e	No tying of CPS to ID services, web browser engine or payment services
5f	No tying from any designated CPS to further designated CPS
5g	Price and remuneration transparency for ads
6.1a	No use of data related to business users to compete against them
6.1b	Enable un-installing of apps, unless essential to OS/device, enable easy changing of default settings on OS/virtual assistance or browser, and require initial prompt (at first use) for choice of default search engine, virtual assistant and browser.
6.1c	Enable interoperability for third party apps and app store and allow prompts to users to make these defaults, unless impossible for integrity/security reasons.
6.1d	No self-preferencing or discrimination in ranking, and related indexing and crawling, services, and transparency around ranking criteria.

SUMMARY OF DMA OBLIGATIONS - 2

Article	Summary of Obligation
6.1e	No restriction of switching or multi-homing across services accessed via the CPS
6.1f	Free access and interoperability for providers of services or hardware to same features of OS or virtual assistant that are available to gatekeepers own services and hardware, unless impossible for integrity reasons
6.1g	Performance transparency for ads and provision of data required for verification.
6.1h	Provide free real time data portability for end users
6.1i	Provide free real-time data access for business users to data associated with their services. This may include personal data if consent is given.
6.1j	Data sharing obligation for search engines: FRAND access to ranking, query, click and view data (subject to anonymisation for personal data)
6.1k	FRAND access for business users to app stores, search engines and social networking services. Requirement for alternative dispute settlement mechanism.
6.1ka	No disproportionate conditions or process for termination of service.
6a	Requirement for interoperability of number independent interpersonal communications services (NB longer time period allowed for implementation)



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