Competition Policy and Big Tech: The European Approach

The Digital Markets Act Proposal

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Competition law in the European Union

Based on two Articles of the Treaty on the Functioning of the European Union

- Article 101 addresses anti-competitive agreements and concerted practices that may affect trade between member states or reduce competition in the common market
- Article 102 aims to tackle the abuse of dominant positions

Consensus that in fast changing digital markets new rules are needed
Digital Markets Act (DMA)

Proposed by European Commission in December 2020

Requires approval by
- European Council (representing member states)
- European Parliament (elected representatives)

Note
- DMA will be part of legislation for Digital Single Market to enhance coherence and legal certainty (legal basis: Article 114 on Harmonization)
- It is not part of competition law, which would require unanimous vote by all member states
Objective of Digital Markets Act

- Ensure contestable and fair markets in the digital sector across the Union
- Where gatekeepers are present
- By means of uniform rules
Proposed DMA Designation Process (Art 3)

3 designation criteria (¶1):
- a) Significant impact on internal market
- b) Operates core platform service (CPS) which is an important gateway for business users to reach end users
- c) Entrenched and durable position (or in foreseeable future)

NB CPS defined in Art 2, but can be added to over time (Art 17)

Measures (¶6): size, #users, entry barriers, scale and scope effects lock-in, etc

Criteria presumed to be satisfied if (¶2):
- a) EEA Turnover >= EUR 6.5bn in last 3 years and provides (CPS) in >= 3 member states.
- b) >45M active end users AND >10k active business users in EU
- c) Thresholds in b) held for last 3 years.

NB Thresholds can be adjusted over time (¶5):

Identify ‘relevant’ CPS which satisfy Art 3(1b) (¶7)

Potential for Rebuttal (¶4)
Proposed obligations for core platform services

Two lists of obligations (black list and grey list)
Art 5: seven obligations that apply to relevant core platform services
Art 6: eleven obligations susceptible to further specification

Note
- List of obligations seems backward looking, based on previous antitrust cases not on general principles
- General application (one-size fits all)
Proposed DMA architecture around obligations

**Seven Art 5 Obligations:**
- simply apply to relevant core platform services

**Eleven Art 6 Obligations:**
- are susceptible to further specification (see Art 7)

**Notes:**
- Fines can be imposed for breach (including for period prior to ‘specification’) (Art 26)
- New obligations can be added over time (Art 10), following market investigation (Art 17)
- Suspension possible if services non-viable in EEA
- Exemption on narrow PI grounds
- No other objective justification possible (except Art 6.1j&k)

If Commission considers measures taken are not compliant, it can specify alternative measures (¶2).

Or gatekeeper can request determination on whether measures are effective ¶5.

Specified measures must be effective in achieving the objectives of the obligation and proportionate in the specific circumstances of the gatekeeper and the relevant services (¶5).
## Proposed DMA obligations (for relevant CPS)

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| **Restricting tying or self-preferencing** | • No tying from CPS to ID services (5.e)  
• No tying from CPS to other CPS (5.f) | • Allow un-installing of apps, *unless essential to OS/device* (6.1b)  
• Allow ‘side loading’ of third party apps or app stores, *unless threatens integrity* (6.1c)  
• No self-preferencing in rankings (6.1d) |
| **Data use/sharing** | • No data fusion without user consent (5.a) | • No use of non-public data generated by the activity of business users to compete against those business users (6.1a)  
• Data sharing obligation: real-time, free of charge data to be provided to business where generated through their activity, albeit only where relevant consumer consent (6.1i)  
• Data sharing obligation: FRAND access to search data (6.1j) |
| **User mobility** | • No MFN/parity clauses (5.b)  
• No anti-steering (5.c) | • No technical restriction of switching or multi-homing across apps using OS (6.1e)  
• Access and interoperability for business users and ancillary services to OS should be as for proprietary ancillary services (6.1f)  
• Provide real-time data portability (6.1h) |
| **Ad transparency** | • Price transparency (5.g) | • Performance transparency (6.1g) |
| **Fair conduct** | • No prevention of complaints to public authorities (5.d) | • FRAND access to app stores (6.1k) |
Enforcement

- Obligations supposed to be self-enforcing
- Too few resources
- Limited role for national competition authorities
Overall assessment

- Step in the right direction
- With room for improvements