

EXECUTIVE SUMMARY

The Digital Markets Act: European Precautionary Antitrust

AURELIEN PORTUESE | MAY 2021

The European Commission's proposed Digital Markets Act (DMA) aims to regulate competition in digital markets and ensure that these markets are "fair and contestable." Should the proposal be adopted as it stands, the negative implications cannot be underestimated.

The DMA proposal represents a paradigm shift from ex post antitrust enforcement of rules on a case-by-case basis toward ex ante regulatory obligations that apply to only a few targeted companies—the so-called "digital gatekeepers." Contrary to traditional antitrust enforcement, the economic merits of firms' practices can no longer be argued—they apply even in the absence of economic harm. The DMA may thus preclude efficient and competitive practices, prohibiting or allowing them based on whether firms have been questionably designated as gatekeepers. However, this paradigm shift also generates an uneven playing field, which clashes with the DMA's objective to foster "fair and contestable" competition.

The DMA embodies a regulatory preference for precaution over innovation. Thus, the DMA illustrates "precautionary antitrust." The underlying precautionary antitrust of the DMA contradicts the European Commission's ambition to foster an innovation economy in that it distorts, rather than enhances, innovation incentives. For these reasons, the DMA represents a considerable threat to the vitality, dynamism, and fairness of the European competitive and innovative landscape.

The "Digital" in the DMA

The fundamental premise of the DMA is that the "digital sector" has peculiar characteristics that need to be addressed by a specific economic regulation. "Digital markets" should not be subject to a different competition regulation than non-digital markets. While the DMA applies vertically to the digital sector, it should also apply horizontally to all sectors of the economy, as all companies will ultimately be digital. A horizontal approach, rather than a vertical one, would ensure a fair level-playing field and avoid regulatory threshold effects between rival companies.

The Nebulous Concept of Gatekeeper

The DMA aims to target digital markets only—and within these markets, only those large platforms labeled as "gatekeepers." The gatekeeper notion creates threshold effects at the expense of small and medium-sized companies' ability to expand. Also, the notion of gatekeepers creates entrenchment effects of large digital platforms that are subject to heavy regulation. These effects, which take place at the expense of the dynamism of the competitive process, stifle

innovation and thereby harm both efficient and innovative companies and consumers alike. Moreover, successful companies that become gatekeepers will be subject to the DMA's stringent obligations, which is tantamount to a barrier to expansion, not a preservation of competition.

Fundamentally, the notion of “gatekeepers” is legally vague, economically damaging, and based on the underlying belief that narrowly but well-identified platforms have amassed unparalleled market power, enjoy entrenched market positions, and prevail in their unassailable positions. It builds on misguided assumptions to target a well-identified handful of corporations, mostly American (and Chinese).

The controversial idea behind gatekeepers—which misses the DMA's essential objective of quickening regulatory compliance and avoiding legal disputes—not only is detrimental to the economy by discouraging large companies from innovating and competing fairly with rivals, but also sets incredibly powerful threshold effects between gatekeepers and non-gatekeepers.

Article 5 Obligations

Article 5 obligations increase transaction costs in digital markets (despite calls for an innovation economy), deter innovation (despite Europe's weakness on digital innovation leaders), and neatly embody precautionary antitrust over innovation-based antitrust.

Article 6 Obligations

Article 6 includes “obligations for gatekeepers susceptible of being further specified.” It is not a “grey list” different from Article 5's “blacklist,” contrary to initial plans by the European Commission. Articles 5 and 6 are in fact both blacklists, as all gatekeepers must comply with all obligations of Articles 5 and 6. This is a daunting increase of the asymmetrical regulatory burden gatekeepers must cope with in sheer opposition to their rivals' regulatory exemptions.

The DMA organizes legal vagueness with Article 6, which makes its obligations particularly prone to countless lawsuits. These unintended consequences contradict the DMA's objective to avoid legal disputes and favor regulatory compliance. Not only will there not be regulatory compliance before legal disputes have clarified the enigmatic meaning of Article 5 and 6 obligations, but most unfortunately, the legal indeterminacy generated via Articles 5, 6, and 7 may deter investments and innovation in the digital ecosystems.

Precautionary Antitrust

The DMA embodies a transformational shift from ex post antitrust enforcement toward ex ante regulatory compliance, albeit for a narrowly selected set of companies. This transformational shift represents a historical change in the competition law's framework, with regulatory standards substituting for evidence-based antitrust laws. This paradigm shift departs from the traditional error-cost framework that has dominated antitrust laws over the last decades. It downplays the analysis of balancing out the cost of the intervention (i.e., false positives) against the cost of non-intervention (i.e., false negatives). The paradigm shift avoids the balancing exercise inherent to the error-cost framework of antitrust enforcement.

The DMA's paradigm shift corresponds to a dramatic change of perspective concerning innovation. The DMA underpins the entrenchment of precautionary antitrust over innovation-based antitrust, as it features core elements of the precautionary principle in addressing concerns regarding competition. The precautionary principle's foundational characteristics are

present in the European Commission’s antitrust policy—and the DMA illustrates this underlying phenomenon with considerable acuteness. The precautionary principle increasingly dominates antitrust policy as much as any other regulatory policy adopted by the European Union. “Precautionary antitrust” means the transposition of the precautionary principle into antitrust policy, as illustrated by the DMA proposal.

Policy Recommendations

The Commission could improve the DMA proposal by:

- Restoring a fair level playing field with a reform of competition law applicable to all firms, not only those operating in “digital markets;”
- Eliminating the convoluted classification of “gatekeepers,” which creates threshold and entrenchment effects, and will inevitably lead to endless legal disputes against the DMA’s stated objectives;
- Developing market investigation rules with capacity building by the European Commission, with staff resources expanded in order to take evidence-based fact-finding exercises seriously;
- Creating a new team that’s insulated from the directorate-general for competition (DG-Comp), and ensuring that the DG-Comp in charge of market investigation rules is not also in charge of antitrust enforcement, thereby avoiding conflicts of interest and confirmation bias; and
- Recognizing the need to analyze competition issues dynamically with an explicit focus on longer-term analysis, and providing firms with the ability to justify their conduct thanks to a generalized rule of reason.

About the Author

Aurelien Portuese is director of antitrust and innovation policy at ITIF. He focuses his research on the interactions between competition policy and innovation objectives. He is also an adjunct professor of law at the Global Antitrust Institute of George Mason University, and at the Catholic University of Paris.

About ITIF

The Information Technology and Innovation Foundation (ITIF) is an independent, nonprofit, nonpartisan research and educational institute focusing on the intersection of technological innovation and public policy. Recognized by its peers in the think tank community as the global center of excellence for science and technology policy, ITIF's mission is to formulate and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress.

For more information, visit us at www.itif.org.