

Where did the Digital Market Act lose competition, property, innovation and user interests?

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The European Parliament, the European Commission, and the European Council continue negotiations on the Digital Markets Act (DMA), a proposed regulation aimed at curtailing the anti-competitive behaviour of big digital players and creating a level playing field for everybody. Intentions notwithstanding, the DMA is not likely to harmonise the field and may hurt end users and small and medium enterprises (SMEs) in addition to the big platforms themselves and ultimately hamper this dynamic and innovative market.

The DMA is based on vague concepts and a dubious impact assessment with wishfully positive projected outcomes and underestimated negative consequences. Proposed with the goal of improving the innovative capacity of the European Union and enhancing the digital sector, the act, ironically, ignores both consumer interests and the basic mechanisms of competition and innovation.

This discussion on improving the functioning of digital markets is dominated by a political viewpoint, marginalising discussions about economic consequences. By failing to address how innovations and technologies are created and what motivates people to pursue them, the DMA will hinder Europe's creative potential.

Introduction

The Digital Markets Act (hereafter 'DMA') was proposed in December 2020 to regulate markets in the digital sector. The European Commission justifies the proposal by pointing to the need to avoid regulatory fragmentation in a single market, create a safer digital space, and establish a level playing field for businesses, considering that some large online platforms act as 'gatekeepers' in digital markets.

The measures stipulated in the DMA do not match its calls to strengthen the internal market, improve competition, and drive innovation. Although the authors of the DMA claim that the regulation will restrict only big firms, the enforcement of the proposed law will inevitably hurt SMEs and end users. All market participants are interconnected. Many SMEs whose business models rely on the results of an internet search or those who provide services for the so-called 'gatekeepers' will be seriously affected. Restrictions on one segment will inevitably hurt many others while benefiting few. The DMA Impact Assessment fails to provide adequate evidence in support of the promised benefits, and it underestimates likely losses. It is a source of concern that the proposed regulatory framework neglects some fundamental economic principles and values such as private property rights and presumption of innocence. The DMA attempts to construct an artificial competition and market whereby the consumer is left in the background.

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The declared goal of the DMA lost along the way

The declared goal of the DMA is to harmonise digital market regulations in the EU to leverage the benefits of a single market. However, Article 1 of the act seems to encourage rather than discourage national initiatives to independently regulate digital firms.³ The logical inconsistency in the formulation of the goal and its explication in the text makes the declared goal of the DMA unclear and hence unachievable.

Regulator's power to interpret vague concepts

The DMA introduces vague, poorly defined concepts while vesting the regulator with unrestricted scope and powers to interpret them. The core concept of the 'gatekeeper' refers to platforms holding "a significant impact on the internal market," operating as an "important gateway for business users to reach end-users," and enjoying (or projected to secure) an "entrenched and durable position." The regulator will decide how much impact is 'significant,' what gateways are 'important,' and how long is 'durable' or 'entrenched.' The regulatory uncertainty associated with the DMA is likely to cost years of legal consideration just for this

1. ¹The original study "Digital Market Act: Competition, Private Property, Innovation and the Interests of the Users" was prepared by the Lithuanian Free Market Institute with the cooperation and contributions of Dr Aurelien Portuese of the Information Technology and Innovation Foundation, Dr Carlo Stagnaro of Bruno Leoni Institute, Dr Matthias Bauer of the European Center for International Political Economy, and Dr Robert Chovanculiak of the Institute for Economic and Social Studies. The study is available at: https://www.llri.lt/wp-content/uploads/2022/02/Paper-On-Digital-Market-Act_LFMI-2021-12-14.pdf.

designation of gatekeepers. They may also pose tremendous financial and time expenses for companies as they try to avoid – or comply with – the new regulatory framework.

Misrepresentation of the digital sector as more prone to monopoly

The DMA intends to limit the power of large online platforms such as Amazon, Google, Facebook, Apple and Microsoft. They are treated as natural monopolies, but little (if any) evidence is provided that they operate as such. Compared to industries that have some natural monopoly characteristics, such as energy networks, large online platforms do not possess any such attributes, neither in terms of property in the online world nor in any historical sense. In contrast to traditional antitrust policies under which concrete cases of ‘competition jams’ are investigated, the DMA assumes that big platforms behave anti-competitively and states that the regulation is needed because digital firms are too fast for case-by-case enforcement.

Failure to meet consumer needs

What are the needs of consumers? First, users are interested in continuing to receive services and not having them terminated, degraded, or unexpectedly changed. Second, users are interested in optimising, not maximising, choice. Platforms enable users to navigate the chaos of the open internet safely and efficiently. Thus, filters, clear structures, pre-installed software, default settings, rankings, and ratings – all of the so-called ‘limitations’ that platforms impose on the market – serve as tools for the ordinary user to navigate the vast and dangerous digital ocean. The DMA will hinder the ability of digital platforms to perform these functions.

In a free enterprise system, competition for consumers unfolds in a process similar to that of democratic direct elections: the users/voters select what they like regardless of projections by political pundits and polls. The artificially constructed competition of the DMA fails to capture the evolutionary nature of competition and is therefore doomed to over-expand regulators’ influence and thus the regulatory burden on society.

Property rights not even mentioned

In a free-market economy, new businesses emerge as monopolies with private rules: they decide what to produce, what to sell, where, and for how much. Economically, this represents a fair situation whereby an entity controls its private property – the core platform, ancillary services and other products – and makes business, marketing, and other decisions freely to the extent the consumers and business users support them with their choice to buy or use their services. However, the protection of private property rights is wholly overlooked in the DMA.

Restricting the role of Innovation as the accelerator of change in the market

The digital sector is a vast innovation laboratory. It provides cheap and accessible tools for everyone. Changes in laboratory rooms and tools inevitably impact productivity and motivation of the users. When innovators first create something new, they take a significant risk and experience high costs. Only later – and only if they succeed (which is more of an exception than a rule) – do they earn higher returns either in the form of earnings and/or market power. Under the DMA, however, such pioneers will be labelled as ‘gatekeepers’ and will face the regulatory, administrative, and financial burden imposed by the regulator.

Sketchy impact assessment: dubious benefits, underestimated losses

The Impact Assessment (IA) (2020) admits that the present situation in digital services has created much value for other actors in the market as well as end users. However, all who benefit now – not only so-called ‘gatekeepers’ but also their users and potential competitors – will be severely affected by the enforcement of the DMA.

The argument in favour of the DMA is based on three major (faulty) assumptions:

- With the DMA in place, the internal market will be devoid of legal fragmentation. However, this assumption does not hold because the DMA allows additional national legislation for digital services.
- With the DMA in place, competition will increase as the gatekeepers will be restricted but they will maintain their services at the same level and continue innovating, employing and investing in R&D. However, such outcomes are unlikely under the new regulatory conditions where incentives to innovate and rewards for success are reduced, and more resources have to be geared towards compliance
- With the DMA in place, other market participants, especially SMEs, will benefit and have more opportunities to compete, grow, employ, innovate, and spend on R&D. This is false because all market participants are interconnected through user–provider relationships. Restricting one segment will inevitably hurt many others while benefiting a few.

The impact assessment makes a series of questionable, conclusory, and unsubstantiated assumptions.

As Treece and Kahwaty (2021) put it: ‘IA makes a series of questionable, conclusory, and unsubstantiated assumptions.’ The Impact Assessment contains flawed interpretations of economic laws and common logical fallacies. In addition to dubious positive projections, the negative consequences are neglected altogether.

Wishful thinking in the form of perfect services and perfect providers

Like any other market or sector, the digital market constantly pursues improvements. The European Commission (2020) thinks that it can accelerate development to realise better outcomes 'for consumers in terms of prices, quality, choice, and innovation' by transforming or replacing existing digital service providers. No argument is provided why these new market players who will come after the DMA has been implemented and the rules of the game have been changed will bring only positive effects and not have any adverse impact on consumers, innovation, and market potential.

No one except the same or another innovator can decide which aspects are to be improved. All companies have to balance long- and short-term goals and only the most disruptive prioritise the long term. They all have to experience times of trial and failure (especially while implementing something new) to identify which characteristics of their services consumers desire. These business decisions may sometimes be considered abusive or discriminatory. But it is impossible to innovate and make progress while trying to maintain all business aspects and product features at some maximum desired level.

The dynamism and striving towards completeness is a *Perpetuum mobile* of human behaviour, which is realised through market competition. Perfect competition or any other manifestation of perfection in the market is impossible and undesirable because they preclude the change – perfection is a status of stagnation or death. The so-called 'gatekeepers' of today have risen to their positions because they have outcompeted their predecessors. Yet they continue improving their products and offering new solutions, because some unexpected, extremely successful competitor with a still better one can disrupt their positions any time, as demonstrated by the story of Apple and Samsung ending the dominance of Nokia.

'We must do something' – the prevailing spirit of the DMA

The European Commission claims that there is a legitimate fear that the market power that large platforms have acquired will be hard to challenge. It is difficult to judge how much of this striving to regulate comes from a naïve but genuine belief that it is possible to engineer the market and how much of it is driven by various interests.

One of the forces driving such initiatives is a negative attitude towards big companies and technologies (tech lash) among certain groups and society. Building a policy based on such negative attitudes is sheer populism, if only with a technological flavour in this case. And as populism always does, it seduces politicians with simple and visible solutions for problems that are neither simple nor visible. And what is most regrettable is that it ultimately harms those actors and processes that it was supposed to improve.

There are numerous sensitive issues, some of which are caused by mistakes of particular firms, while others by the fact that the global digital industry is still a new phenomenon. This creates a tense atmosphere around digital services and collective biases (like tech-lash) and acting on them would hamper Europe's creative potential. Therefore, it is important for policy makers to put aside biases and emotions before introducing new regulation, so the mechanisms of innovation, competition and human motivation are also taken into consideration.

Otherwise, the only epilogue is that the DMA's goal is not about competition, not about innovation, not about the users, and not about economics at all.

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