

TRADE WAR OR MARKET REGULATION? THE CHALLENGES OF REGULATING DIGITAL MARKETS IN THE EUROPEAN UNION*

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In recent decades, the EU internal market has witnessed the emergence of various new market phenomena requiring state regulation. A common characteristic of these phenomena is that legislation consistently lags behind practical experience rather than anticipating it. The operational characteristics of digital companies have prompted legislators worldwide to reassess regulatory frameworks in competition law, data protection, consumer protection, and other legislative areas. The rise of digitalisation and artificial intelligence has also posed challenges to EU legislation. The adoption of EU-wide market regulations for digital services in 2022 exemplifies this ongoing transformation at both public policy and legislative levels. This paper aims to examine the challenges and legislative responses concerning the regulation of digital services - beyond merely addressing the characteristics of digital giants - by analyzing specific provisions of the Digital Markets Act.

Keywords: Digital Markets, EU Legislation, Platform Law, Competition

1. Introduction

The framework and content of economic integration have evolved significantly in recent decades. It is widely accepted that we have entered a new era of state intervention in market relations (Bartha et al., 2022). Certain aspects of this global trend are increasingly evident at the level of European integration, particularly in legislation and legal practice. Traditional policies of privatisation and liberalisation appear to be giving way to new instruments of 'reprivatisation, reliberalisation, and regulation' (Bordás 2023). This shift is occurring in ways and at levels that were previously unanticipated.

A clear example of regulatory change is the rise of digital services and the subsequent efforts to address regulatory gaps. EU internal market regulations were initially designed for a vastly different economic environment than that of the 21st century. The rapid digitalisation, transformation of service content, and emergence of novel market situations have prompted national and EU legislators to reassess existing frameworks (Bordás 2023). The unprecedented pace of digital and economic development has made it difficult for legislation to preemptively address market scenarios. While it is unrealistic to expect national or EU laws to regulate non-existent or unforeseeable legal relationships, the EU legislator faces persistent criticism. This

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paper aims to explore this issue through an examination of digital market regulations via a case study approach.

The primary objective of our study is to highlight a subset of interconnected issues: the regulatory challenges posed by digital companies, the evolving role of regulators, and the management of competition concerns within the framework of the Digital Markets Act (EU Regulation 2022/1925 on Digital Markets, hereinafter: DMA). In addition to conducting a legal and comparative analysis of EU legislation and proposed legislative measures, our research examines key judicial precedents and the economic and public policy developments that significantly influence EU legislation and enforcement. Our central hypothesis is twofold: first, that traditional privatisation and liberalisation policies are increasingly being replaced by a new set of instruments encompassing 'reprivatisation, reliberalisation, and regulation'; second, that implementing tailored regulatory frameworks to address specific economic characteristics can encounter considerable obstacles without due diligence.

2. The challenges of competition policy in the European Union

Protectionism, widely applied in European countries in the mid-20th century, resulted in market isolation and fragmentation. Consequently, one of the primary objectives of European economic integration was to unify European markets. Liberalisation - the elimination of trade and other barriers between Member States - was an integral component of European economic integration, effectively mitigating market fragmentation. The expansion of the EU in the 2000s opened new markets for businesses.

Since the economic crisis of 2008, and particularly following the COVID-19 pandemic of 2020, the EU has entered a new phase of regulation and deregulation (Supiot 2021). Criticism regarding the slow pace of EU legislation, combined with various socio-political and global developments, has reshaped EU policy objectives and the roles of EU institutions. Meanwhile, protectionist attitudes and the expansion of national regulatory frameworks have gained traction in some Member States.

Economic governance within the EU is a complex and multifaceted domain, encompassing a wide range of policies and regulatory measures. The overarching regulatory framework of the EU seeks to establish and maintain a single market where goods, services, capital, and labor move freely, while simultaneously addressing market failures, monopolies, and unfair competition. Competition policy remains the oldest and most significant domain of economic regulation. The EU enforces strict antitrust laws to prevent anti-competitive behaviors, such as cartels, abuse of dominant market positions, and anti-competitive mergers. Additionally, state aid regulations aim to prevent distortions of competition by prohibiting preferential treatment for specific businesses, particularly at the national level.

However, the COVID-19 pandemic led to a more lenient approach to state aid enforcement (Bartha 2023). The EU temporarily relaxed competition rules to facilitate economic recovery. This approach presents unique challenges in digital markets, where regulatory measures must balance fostering innovation with preventing anti-competitive behavior.

Several EU regulations safeguard consumer rights, including the right to information, contract withdrawal, and protection against unfair commercial practices. The DMA and the Digital Services Act (hereinafter: DSA) (Regulation 2022/2065), which took effect in 2023, represent a new frontier in market and competition regulation. In recent years, the EU has prioritized trade agreements and negotiations with other countries and regions to facilitate trade and investment. The EU-Canada Comprehensive Economic and Trade Agreement (CETA), for instance, entered into force in 2017. However, trade relations with the United States and China remain contentious, with ongoing economic disputes and legislative "sanctions" against Russia further complicating the landscape.

3. New dimensions of regulation

The extent of state intervention remains a perennial dilemma in economic and legal discourse. Historically, economic booms have often been associated with deregulation, while economic downturns trigger increased state intervention and regulatory measures. The 2008 financial crisis and subsequent regulatory responses exemplify this pattern. Prior to the crisis, the banking sector experienced significant deregulation, which contributed to global economic instability. The crisis then necessitated extensive financial regulations across the EU and its Member States.

The digital economy has introduced a new set of regulatory challenges. The dominance of digital giants (Big Tech) such as Microsoft, Apple, and Google has reshaped global economic dynamics. Five of the six largest digital companies worldwide have exhibited unprecedented growth rates (Ross 2021). According to a 2018 European Commission report, the largest digital companies experienced an average annual growth rate of 14% over the preceding seven years, compared to 0.2% for traditional multinational corporations (Commission Staff Working Document 2018). By 2019, the digital sector accounted for 10.1% of the US national GDP, valued at \$2.1 trillion—more than double its 2014 figure of \$966 billion (Hooton 2019).

The COVID-19 pandemic further accelerated the expansion of digital companies. Between 2020 and 2021, the peak year of the COVID-19 pandemic, Google's revenue increased by 41.14% (75.11 billion dollars), Apple's by 28.62% (84.18 billion dollars), Amazon's by 21.6% (83.76 billion dollars), and Microsoft's by 20.63% (31.633 billion dollars)³. These firms, predominantly US-based, wield immense economic power and innovation potential, often without significant competition within their domestic markets (Bak 2021). Their early access to the vast US market allowed them to amass unprecedented capital and data, establishing dominant global market positions. This "first-mover advantage" provides them with additional competitive benefits (Lieberman & Montgomery 1988).

The swift globalisation of digital services has facilitated their entry into the EU internal market, challenging EU regulatory mechanisms. The European Union ultimately recognized the need for new regulatory measures to safeguard market integrity, as existing directives governing traditional services proved inadequate for ensuring effective oversight. Historically, rapid technological advancements have often

³ <https://companiesmarketcap.com/tech/largest-tech-companies-by-revenue/>

outpaced regulatory frameworks. Despite the exponential growth of digital companies and their substantial influence on traditional economic sectors, regulatory measures remained insufficient. The outdated e-commerce framework (Directive 2000/31/EC) exemplifies the inadequacy of prior legislation in addressing the complexities of the digital economy.

4. The evolution of digital market regulation

Digital markets are characterized by distinctive economic and technological characteristics, including extreme network effects, vast economies of scale, and the abuse of intermediary roles. These factors, combined with the unilateral setting of commercial terms, have led to structural problems in digital markets. This section briefly outlines the economic and legal challenges that led to the introduction of the Digital Services Package (DMA and DSA), stemming from the specificities of the internal market and EU competition rules (Angyal 2020).

Initial competitive investigations revealed overwhelming market dominance by a few companies, which frequently abused their positions. Traditional competition rules, developed before the digital revolution, proved inadequate for addressing these challenges. One major difficulty for regulators was the lack of real-time access to platform activities. While information asymmetry is a known challenge in competition enforcement, digital markets exacerbate this issue, making it difficult to track and prove anti-competitive behavior.

The European Union was among the first to recognize the competition problems posed by US tech giants, initiating proceedings against digital companies as early as the late 1990s (e.g., Commission decision of COMP/C-3/37.792 Microsoft). However, enforcement efforts intensified in the 2010s under EU Competition Commissioner Margrethe Vestager (Francisc & Toma 2017). The Commission launched several high-profile antitrust cases against major digital corporations, including Google Search (Shopping) (2010), Google Android (2015), and Google AdSense (2016). In parallel, individual Member States sought to enforce tax obligations proportional to these companies' massive turnovers.

Between 2010 and 2017, key antitrust proceedings exposed significant regulatory gaps and highlighted the unique operational strategies of Big Tech, such as extreme data concentration and platform-based market control. These developments forced the EU to reconsider its regulatory approach, leading to debates on whether ex-ante sector-specific legislation was necessary or whether stricter enforcement of existing competition laws would suffice (Janka & Uhsler 2018).

EU competition law enforcement has traditionally been ex post and case-by-case, often requiring years to conclude investigations. For example, the Commission's case against Google Shopping lasted seven years, allowing the company to generate substantial profits before any penalties were imposed. Given this inefficiency, legislators recognized the need for preventive measures to curb unfair market practices proactively. Thus, the EU opted for an ex-ante regulatory approach, embodied in the DMA, which complements existing competition and data protection laws while preserving the possibility of ex-post enforcement (Pato 2020; DMA Chapter I, Article 1(6)).

5. The digital markets act and its scope

The DMA establishes both qualitative and quantitative criteria to define its scope, primarily targeting "gatekeepers". These are companies that play a dominant role in digital markets, wielding significant economic power and acting as intermediaries between businesses and consumers. Notably, the regulation almost exclusively applies to US-based, centrally managed companies.

To ensure that European firms are not unintentionally subjected to these regulations, the DMA sets clear thresholds: companies must have an average capital market value of at least €75 billion and operate a social platform or application with a minimum of 45 million monthly users. The Commission has the authority to designate gatekeepers and review these designations every two years (DMA Article 4(1)). On September 5, 2023, the Commission designated six companies as gatekeepers—Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft—covering 22 core platform services. These designations confirm that the DMA primarily aims to dismantle barriers to entry in markets dominated by GAFA (Google, Amazon, Facebook, Apple) and similar entities. Both Meta and ByteDance have appealed their designations, and legal proceedings are ongoing.

The DMA aims to curb unfair practices by gatekeepers by promoting data portability and interoperability, prohibiting data aggregation across services, opening closed platforms to third-party developers, and preventing self-preferencing. One of its most ambitious provisions mandates interoperability, requiring gatekeepers to grant service providers and hardware vendors access to core platform functionalities while maintaining system integrity (DMA Chapter II). Additionally, ranking algorithms must remain neutral, ensuring that gatekeepers cannot prioritize their own services unfairly (DMA Chapter II, Article 6 (5), (11)).

Furthermore, instant messaging applications must now provide interoperability for basic functions such as text messaging and multimedia sharing. These provisions reflect lessons from past cases, such as the Google Shopping investigation, which highlighted the competitive harm caused by self-preferential ranking.

6. Regulatory challenges and enforcement dilemmas

Despite its ambitious goals, the DMA faces significant enforcement challenges. Digital giants operate complex, opaque ecosystems, making it difficult for regulators to monitor their activities. Information asymmetry continues to be a key obstacle, as authorities lack access to real-time platform data and must rely on voluntary disclosures from the companies they regulate.

Additionally, while the DMA applies a uniform set of rules across different digital business models, the sheer diversity of services and revenue streams among gatekeepers complicates enforcement. Effective regulation requires interdisciplinary expertise in law, IT, and economics. This raises concerns regarding whether EU institutions, particularly DG-COMP, possess the necessary resources and capacity to effectively manage the volume and complexity of data involved. Member States also face challenges in enforcing these regulations due to varying institutional capacities and economic interests. The potential for parallel enforcement of competition rules under

the DMA and the Treaty on the Functioning of the European Union further complicates matters, necessitating close coordination between national and EU authorities.

7. Conclusion

The DMA marks a significant shift in the regulation of digital markets, reflecting both EU institutional priorities and broader lobbying efforts. While it is too early to assess its long-term impact, the regulation represents a crucial step in addressing market failures caused by digital development. The Commission holds primary responsibility for implementation, working in close cooperation with national competition authorities.

Notably, Member States now have greater flexibility in enforcing competition rules, including the ability to initiate national investigations into potential violations. Hungary, for instance, has already exercised this option. However, national authorities face similar enforcement challenges as EU regulators, raising questions about their capacity to implement these rules effectively.

Despite concerns about enforcement and potential conflicts with existing competition law, the DMA stands as one of the fastest-moving legislative initiatives in recent EU history. While it largely reacts to market failures rather than proactively shaping digital market dynamics, its adoption signals a shift toward more proactive digital regulation. Moving forward, the success of the DMA will depend on the EU's ability to ensure effective enforcement and adapt to the evolving landscape of digital competition.

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