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The EU Digital Markets Act: Assessing the Quality of Regulation

By Matthias Bauer, Fredrik Erixon, Oscar Guinea, Erik van der Marel, and Vanika Sharma

Brussels, Belgium, 23rd February 2022 - The proposed Digital Markets Act (DMA) is an opportunity to prevent and remedy anti-competitive conduct by large digital platforms. If the Act is designed in an adequate manner to target specific problems, it can improve the contestability of platform services markets and markets that rely substantially on digital services. However, the DMA takes a novel approach to regulation, and novelty in concepts and regulatory requirements can lead to outcomes that later have to be corrected. Fortunately, the EU is not alone in experimenting with new regulations that specifically target the market power of large digital platforms. There is a great scope for policymakers to learn from similar frameworks in Europe and the United States.

In this study, we compare key parts of the DMA proposal with similar legislation implemented or proposed in Germany, the United Kingdom and the United States — in light of established principles for good regulatory design. We analyse the structure and quality of these regulations, not if they go in a certain ideological, political or commercial direction. We find that there are some areas where the EU could learn from other proposals to make the DMA more fit for purpose, and avoid unintended consequences on Europe's economy.

In its current form, there are several ambiguities in its objectives, concepts, and structure that risk leading to an ineffective regulation and a rising number of legal disputes. Based on the analysis in this study, we recommend the following changes to the DMA:

1. The DMA's objectives should be narrowed. Clarity should be provided on how the regulatory objectives relate to well understood concepts in traditional competition law, particularly competition and contestability. Without a conceptual correspondence to established rules, it

becomes even more important that it is clear from the start how market dominance and abuses of market power operate in the DMA.

2. A functional definition of regulated “core platform services” would help the regulator to focus the DMA on the distinct problems of these services.
3. The designation criteria for gatekeepers should be clarified and extended by additional qualitative parameters coherent with the risk of harm. Inspiration for such a change can be found in Germany’s Act Against Restraints of Competition (“GWB10”) and the UK proposal.
4. Obligations put on the platforms should be clarified. Generally, more guidance should be given to companies on how they could comply with the DMA.
5. The DMA could provide better opportunities for regulatory dialogue and the right to defence — helping both the regulator and the regulated platforms to target the problems.

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Media Contact: info@ecipe.org at +32 2 289 13 50