

Unctad, Geneva,

The European Commission has prepared a new ex-ante regulation for digital platforms, namely the Digital Markets Act. Could you please tell us about what the new regulation will bring and how it will contribute to achieving open and accessible digital markets? Have you engaged with other relevant Directorates General within the Commission in the preparation process of the new regulation? Can you please tell us more on that?

The new regulation is broken down into two acts: the DMA and the DSA. In a nutshell, the DSA aims to improve online safety, protect fundamental rights and increase transparency. By contrast the DMA is mostly concerned with the competitiveness of digital markets. This does not mean that the regulation *seeks* to directly affect the structure of digital markets. The goal is more to ensure a level playing field so that emerging competitors do not get quashed and set up rules of conducts so that users (especially business users) of large digital platforms are treated fairly.

The DMA and Competition Policy are supposed to be complementary. As an ex ante regulation, the DMA sets ground rules on what is acceptable behaviour and what is not. Of course, the DMA also involves the power to investigate such behaviour and impose corrective remedies. In order to provide sufficient legal certainty, the rules must be well-defined. By contrast, Competition policy enforces general principles of competition as defined by the Treaty and the Law. There is often quite a distance between these principles and the way in which they apply to specific conducts. Moreover, while guidelines and jurisprudence limit the degree of uncertainty, they still leave significant doubt as to how a specific case might be assessed.

Because of this complementarity, it is important to set up some dividing line between the two, but also to specify how they might interact.

The first, essential, difference is that Competition Policy deals with undertaking with market power (indeed, often, with *dominant* undertakings), while the DMA applies to *gatekeepers*. Essentially, dominance refers to the fact that an undertaking does not face much competition. While dominance is not generally a problem in itself, the concern is that it can facilitate conducts aimed at *preserving* or increasing the dominance by harming competition. In other words, competition policy targets behaviour which is not “competition on the merits).

By contrast, the DMA targets digital companies which are big enough *in absolute terms* and are “tentacular” in the sense that they have a pervasive influence on the economy (often across sectors. For example, there are national EU markets where Amazon could not be found dominant, but it might still qualify as a gatekeeper. Conversely, a platform does not need to be dominant to be a gatekeeper.

A related difference is that competition policy examines behaviour in specific product/geographic *markets*, while the DMA looks at the firms' importance for the EU economy as a whole.

The second important difference is that the DMA should, in principle, deal with a limited set of well-identified and specified conducts. This set can change over time of course. Competition policy has the freedom to look at any behaviour that might adversely affect the competitive process in the confines of a specific case.

Competition Policy and the DMA are somewhat similar in that they distinguish between "black" and "grey" zones. Competition Policy has "per object" restrictions. While these are not officially black-listed, the burden of proof to justify such conducts is very high. For the DMA, black-listed conducts are simply banned (example broad parity clauses). On the other hand, competition policy does not have a true equivalent for the DMA's "grey list" of conducts that are undesirable but for which the behavioural requirements can be negotiated/tailored to specific businesses, business models or even, potentially specific undertakings. The issue of how far such tailoring should go is still controversial,

Overall then, the DMA has two main goals. The first one is to increase legal certainty for (business) *users* of digital gatekeepers and ensure that they receive fair treatment. The second (less prominent) goal is to limit the gatekeeper's ability to unfairly handicap potential rivals. Importantly, there are no measures in the DMA meant to, or with the effect of, favouring potential European competitors.

The DMA is a joint project of DG COMP, DG CNECT and DG GROW. The Legal Service and SEC GEN were also involved at an early stage. Before the publication of the proposal, there was Inter Services Consultations. Most comments were received from DG FISMA, DG MOVE, DG ENER, DG TRADE and DG JUST.

While this was a cooperative undertaking, DG COMP clearly had some specific concerns:

- As an ex ante regulation tool, the DMA should remain simple, setting up clear rules, which apply to all companies in similar situations. The more "tailoring there is, the closer one gets to the domain of case by case analysis and the less legal certainty there is.
- Ensure that certain types of conducts are banned only if there is substantial evidence that they are undesirable in the vast majority of cases.
- Leave typical antitrust concerns, such as complex foreclosure or tying issue, to the realm of competition policy. For such cases, the presumption of harm is just not strong enough.
- Provide a mechanism for interaction between the DMA and competition policy. In particular, it makes sense for the DMA to start with a limited number of rules and to add/change rules over time based on the evidence of market studies and/or competition policy cases.