*Journal of Antitrust Enforcement*, 2024, **12**, 195–200
https://doi.org/10.1093/jaenfo/jnae028
Advance access publication 7 May 2024
**EU Project Article**

OXFORD

# The new EU and UK regimes for regulating competition in digital markets: we finally see what's on the plate—but do we know how to eat it?

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**KEYWORDS:** DMA, DMCC, Digital Markets Act, Contestability, Role of third parties, Inter-ecosystem competition
**JEL CLASSIFICATIONS:** K21



## INTRODUCTION

The emotional momentum attracting the critical mass of enthusiasm to the ambitious reforms aiming to recalibrate competition in the European Union (EU) and UK digital markets (EU Digital Markets Act or the DMA and UK Digital Markets, Competition and Consumers Act or DMCCA) appears to be moving downhill. The attention of the epistemic community is gradually shifting to much more prosaic matters. Among the most topical are the following: how successful the challenges to the gatekeeper designations will be; how informatively and comprehensibly the summaries of their compliance reports have been drafted and how much meaningful changes do these compliance strategies entail; how the first non-compliance decisions will be drafted; how the complex balance of competences between the Commission, CJEU, national competent authorities, and national courts will be crystalized in practice; which aspects of digital markets will be prioritized within enforcers' limited resources; or how much room for private actions will the emerging regimes ultimately allow.

Having a privilege to contribute to consultations underpinning the adoption of both paradigmatic legislative initiatives and reflecting on each of the above decisive topics constituting indeed the foundations of the new regulatory systems in the EU and UK, the focus of this essay is placed on three further issues, which in my view receive relatively less attention in the

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literature. All three are of a dilemmatic nature, and all three are articulated as open, unanswered questions—not because the genre of the short contributions united by a broader theme (the genre that I find particularly rewarding for the discussions underpinning the new and rapidly evolving practical context) allows little room for engaging in deeper analysis. Rather because I fear there is no answer to these dilemmatic questions at all. They are unanswered because they are unanswerable.

This yet does not make them less relevant. The three subthemes are as follows: (i) what to do?, (ii) how to do?, and (iii) what to avoid?

## WHAT TO DO?

It is clear from the wording of both regimes (and in the case of the DMCCA also from its very structure) that in one way or the other they refer to two open-ended objectives: fairness and contestability. These goals appear to be very broad, and such indefinability of the goals appears to be the DMA/DMCCA feature, not bug—this flexibility and discretion should facilitate enforcement of the rules. Together with broad, interventionist and indeterminate obligations of designated undertakings underpinned and reinforced by the de facto reverse burden of proof, these two goals—and their variations in both laws—offer a wide linguistic scope for pleading of what precisely the DMA/DMCCA should aim at. The most obvious normative taxonomy is centred around the vertical/horizontal divide. The former concerns intra-, while the latter concerns inter-platform competition. Both vertical and horizontal dimensions envisage some elements of fairness and some of contestability.

The stakes and the overall situation with the vertical aspects of competition appear to be much clearer as both the letter of the obligations and the arguments of the most vocal vertical competitors refer mainly to the downstream duties of designated undertakings towards their business users. Undoubtedly, the largest business users know what they are being deprived by the designated undertakings and they see the DMA/DMCCA as an opportunity to restore some fairness and to trigger some contestability within gatekeepers' services.

As far as horizontal competition is concerned, it is on the contrary a complete terra incognita. The only exception appears to be the inter-ecosystem type of inter-platform competition. Under this modality, it is expected that the most plausible changes to horizontal competition in digital markets triggered by the DMA/DMCCA concerns those enabling BigTech companies entering each other's entrenched services (eg, Microsoft in the business of search or Google in the business of cloud computing). This is the most plausible but the least desirable—or to put it more accurately, the least ambitious—outcomes of the reforms.

Of course, one hand, the traditional 'neutral' perception of the competitive process is/supposed to be ignorant about the sources of competition. Under this rationale, if the DMA/DMCCA will spur the incentives of designated (or about to be designated) undertakings to enter each other's market, this would significantly improve the overall competitive dynamic by opening plethora of opportunities and bringing the host of positive outcomes to digital markets.

On the other hand, such competition within the BigTech 'superleague' would only reaffirm the exclusive status of this elite club, increase further the barriers to entry, circumscribing and predetermining the development of the EU/UK digital economies to the current—even if a little bit more intensified, fair, transparent, and non-discriminatory—modality. Such a scenario is even more plausible bearing in mind the prohibitively high investment costs for a genuinely new horizontal entry, the prohibitively narrow pool of those controlling artificial intelligence, computational, and all other indispensable technologies, skills, and capabilities, as well as the prohibitively demanding requirements of other legislative acts

adopted/considered by the EU/UK in the area of digital society. It is one thing to train your "digital muscles" when operating in the pre-regulated Wild-West-Wonderland—and it is yet another challenge to scale up in a completely transparent and accountable environment where all gatekeeping niches are being already occupied.

Another—and indeed in this case much less benign—unintended incarnation of horizontal competition potentially enabled by the DMA/DMCCA would be scaling up of other BigTech undertakings—and inter alia those with authoritarian pedigree or function. Of course, each case is different, and hopefully both the EU and UK have adopted various mechanisms minimizing the risk of uncontrolled increase of market presence of those problematic potential newcomers capable of offering to the EU/UK business and end users a meaningful alternative to the existing BigTech platforms. However, even if the increase of the presence of such undesirable alternative bottleneck intermediaries could be avoided or mitigated in the EU/UK markets themselves, the broader impact of the pioneering DMA/DMCCA legislations may change the global constellation of digital superpowers.

The least plausible—but in my view the most important—potential impact of the DMA/DMCCA on horizontal competition in digital markets concerns some form of facilitation of the emergence of EU/UK BigTech companies. Not only this is the least plausible scenario technologically and commercially—as there is indeed nothing meaningful in the EU/UK pipeline for really 'core' platform services—but this option is being seen simultaneously as ridiculously pathetic form of digital naivety/idealism and unacceptably paternalistic instance of micro-managing interference into the market processes. Both features are descriptively correct. And yet the necessity of the emerging of EU/UK BigTech is invisibly present not only in the electoral rhetoric of the political establishment but also in the overall architecture of the XXI century postmodern global digital landscape. However, all-inclusive and imprecise the metaphor of the fourth industrial revolution appears to be, it yet captures the emerging trend of the digitization of everything, which alongside well-described features of digital markets will—or at least may—imply that it is better to be a polity hosting domestic BigTech companies than a polity being present only in the second tier of the digital supply chain. This very plausible intuition requires further conceptualization, and it appears that most of the creative energy of the discussions underpinning the adoption of the DMA/DMCCA have been avoided at all costs even considering this dilemma, picking an easy and most plausible for competition circles answer of marginalization of this existential aspect of inter-platform competition.

## WHAT TO AVOID?

While the first challenge concerns the increase of contestability of the EU/UK digital markets—and ultimately EU/UK digital players—the second is directly related to the normative goal of fairness. Most of the obligations of both acts are being seen as those restoring fairness. Such a perception and such focus in my view is wrong. The mission of the DMA/DMCCA is not in—or at the very least should not be reduced to—merely enabling the most vocal business users to offer their products and services to their end users in a more transparent and accountable digital environment. The mission and the rationale are in mitigating the asymmetry of power, skills and information between the regulators and regulatees. Such a mission is not in assuring fair compensation for losses of the most entrepreneurial business users (particularly if underpinned by the business model of the conveyer of third-party-funded litigation).

Two camps in this conceptual discussion can be identified: Machiavellian cynics and Campanellian utopianists. For the former digital markets are entrenched and tipped by

definition. All malicious features of digital markets scrutinized so colourfully in various reports preceding the very adoption of the DMA/DMCCA are given and unavoidable. Only incremental changes on the margins are possible and while being worth pursuing, they should neither exhaust nor navigate the new pro-competition approach to digital markets. The wide catalogue of DMA/DMCCA obligations for such Machiavellian position serves the role of a reliable and diversified regulatory toolbox, which the enforcers can use selectively depending on the broader goal they aim to achieve when examining a specific instance of a specific non-compliance by a specific gatekeeper. Under such a vision, the obligations are never expected to be complied with comprehensively. Nor they are expected to be harmoniously integrated with each other. They are a selection of tools, which should be used selectively. Only selective enforcement can normatively justify such new proactive regulatory mechanism.

To put it less controversially—the entire catalogue of obligations is expected to be complied with. This is given. But the depth of the DMA/DMCCA flexibility allows to establish an instance of non-compliance at any moment, provided a specific obligation is examined by a specific optic under specific circumstances. The DMA/DMCCA, in other words, contain two or more layers, and the compliance-by-default constitutes only the first one. These instruments are designed for a selective—not comprehensive—enforcement. They are ipso facto punitive, not restorative. Only selective use of the DMA/DMCCA toolboxes of the second layer may explain the radical interventionist ethos underpinning these laws. It goes without saying that box-ticking compliance at the first level is expected by default.

Unlike ex-post competition rules, where 'the fewer cartels and abuses the better' formula is conventionally and consensually accepted, extrapolating it to the DMA/DMCCA is in my view a very harmful conceptual mistake. The mission of the new regimes is not in the revolution (though again, some incremental improvements are both very plausible and very welcome). The mission of the DMA/DMCCA is not in converting digital markets in the Campanellian utopia. The ultimate KPI of the effectiveness of these regimes should not be based on how many instances of vertical unfairness have been prevented, penalized or compensated. After all, both the EU and UK legal regimes offer a plethora of other means for pursuing this restorative routine—and yet the essence of digital markets remains the same. The ultimate KPI of their effectiveness should be evaluated based on the broader geo-economic metric alluded to in the previous section of this essay.

Regretfully, the majority of the DMA/DMCCA protagonists would position themselves much closer to the Campanellian endpoint of the operational continuum rather than to the Machiavellian one. The most enthusiastic ones even refer to end user well-being as the ultimate yardstick for assessing the effectiveness of the new regimes. Such a Campanellian vision, for obvious reasons is also being promoted by the most vocal and persuasive business users. They perceive obligations of designated undertakings not as being designed for shaping the broader EU/UK digital agendas but as a compensatory instrument allowing such business users to remedy continuous instances of unfairness. Indeed, the ambiguity and all-inclusiveness of the term as well as the predatory behaviour of BigTech allow such business users to be very vocal, consistent, and persuasive in coining this narrative.

Furthermore, the designated undertakings are also endorsing this modality as such a compensatory vision only adds quantitatively to the current antitrust rules and vision without yet undermining the status quo qualitatively. It is in their strategic interests to refocus the discussion at the most known for antitrust-trained optic instances of restorative fairness. Reducing the DMA/DMCCA rules to a mere extension of Article 102 TFEU implies that their strategic status as systemic bottlenecks of digital markets will remain unchanged and unchallenged. If the focus of the enforcement is placed on remedying the consequences of

what appears to be the natural structure of digital markets, then the gatekeepers of these structures will always be happy to engage: 'tell us what to do, and we'll try our best; prosecute and then sanction non-compliance if we don't meet the expected; don't ask us how we earned our first billion—we learned our lessons and happy to contribute; and we are even happy to become a little bit more European—as long as this restructuring of our investment portfolio concerns vertical synergies and complementarities'. This is not a bad scenario in itself, but giving the scarce resources and natural limitation of the DMA mission and potential, such a vision is likely to supersede the more strategic one—and as such in many respects, these two approaches are in a zero-sum relationship.

## HOW TO DO?

Evidently, the enforcement of new rules envisages a new regulatory philosophy and mindset. One of the problems with a recalibration of the patterns and attributes of good practices is that the wheels of the vehicle are being changed on the go. Another concerns the indeterminacy of the rules, the need of making priorities and the necessity of abandoning the deterministic box-ticking culture dominating the 'neutral', 'scientific', and 'positivistic' approach to competition policy nurtured within the previous Law & Economics epistemology of antitrust.

The new role of the EU/UK enforcers of digital competition rules entails a continuous regulatory dialogue with gatekeepers, third parties and newcomers. It also entails a new modality of the relationship with other horizontal societal values and interests and ultimately with the vertical geo-economic vision and strategy of both Polities. The prudent enforcement of the DMA/DMCCA should become a true policy-making—the actions requiring doing non-deterministic, subjective choices.

To make the choices right the enforcers should be informed and navigated by the broader strategic vision. Who should shape and communicate this vision, which elements should it consist of, how to pursue it in a way allowing to tick all the necessary procedural boxes—the cornerstones of due process and rule of law—how to meet these requirements in a way allowing the necessary prioritizations, selectivity and continuity, how to respect these fundamental values in a way not reducing the mission of digital competition rules to the blind formulaic obedience to them, how to learn from the right and the left, from the West and the East, how, when necessary to approach closer the redline dividing sophisticated liberal democratic governance from opportunistic authoritarianism—approaching closer without of course crossing it—these and host of concomitant topics are in need for a more systematic analysis.

## CONCLUSION

The goals of the DMA should neither be perceived as nor should they be reduced to a sum of gatekeeper obligations. The obligations are tools for achieving the goals, not the compartmentalized, atomistic embodiment of these goals.

The emerging epistemic community of the new ex-ante sui generic digital competition law & policy willy-nilly perceives and measures the DMA/DMCCA regimes through the prism of ex-post modality. Such an optic while indeed constituting the central part of the new regimes does not exhaust them, and should be ameliorated and enriched by the broader theme of the new pro-competition industrial policy—not the vulgar strawman totem envisaging blatant protectionism and interventionism; not the policy is based on pouring indiscriminately public money to the research, development and innovation projects the lion

share of which is being spent on learning opportunistically how to meet the diabolically complex bidding requirements and lion share of those yet succeeding searching immediately for the ways of being commercialized and scaled up in other parts of the world. A much more refined strategic policy is needed. The policy based on the understanding that digital markets require proper, smart regulatory treatment, the treatment synchronized with—or at least mindful of—other strategic EU/UK policies and interests. The formula envisaging the insulation of competition policy from the broader geo-economic agenda is not a good navigator for the DMA/DMCCA regimes.

The emerging approach has many toxic and hazardous elements, and it requires due care and the necessary precautionary safety measures. Being toxic and hazardous does not mean 'it is not for us'. The proper digital Europe is not exhausted by the conventional discourse of the human-centred Brussels effect. Europe's intention is to continue playing—and winning—in the global digital superleague, and this requires a symbiose of the idealistic vision of Campanella with the cynical pragmatism of Machiavelli. Tertium non datur.




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