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Avantika Chowdhury
Partner
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Miguel de la Mano
Executive Vice President
Compass Lexecon
Brussels

Thomas Kramler
Head of Unit – Antitrust:
E-commerce and data economy
DG COMP
Brussels

Ingrid Vandenborre
Partner
Skadden
Brussels

Moderator

Richard Whish QC (Hon)
Emeritus Professor
King's College London

5th Innovation Economics Conference for Antitrust Lawyers

#1 The DMA: A Radical Change in the EU

Webinar - 27 April 2021*

> "It is […] not unprecedented for a legislator to enshrine rules that can be distilled from competition law cases and remedies."
>
> Thomas Kramler

Richard Whish QC (Hon)

Richard Whish began by highlighting that, contrary to the first four editions of the Innovation Economics Conference, there is now a piece of legislation to examine. Focusing on the DMA, he explains that the panel will be discussing whether it is a competition law project or rather a regulation initiative. In doing so, taking a good look at the gatekeeper's designation process, the defences that companies may put forward and the market investigation tools will prove useful.

Thomas Kramler

Thomas Kramler chose to focus on the question of whether the DMA indeed represents a radical change. What kind of legislation are we talking about? Economists and lawyers would probably disagree on it. Going back to its legal basis, the DMA is based on Article 114 TFEU which is the Article that allows the Commission and then the legislator to propose and set rules in relation to the harmonization of practices in the internal market. That legal base has been used

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before for banking regulation, telecom regulation and energy regulation *inter alia*. Regarding its goals, it is to ensure fairness of business relationships and markets contestability. Although it pursues different goals, the DMA stands complementary to competition law. Is it revolutionary that a regulation is inspired by competition law experience without being a competition law disposition? Mr. Kramler does not think so. Regulation on computerized reservation systems for airlines has been designed in Europe based on much inspiration and reflection from antitrust litigation in the US. One of its goals is to ensure display neutrality, just like the DMA. Interchange fees provide another example: it has been the object of antitrust cases *Visa* and *Mastercard*. These cases have been a vital input to the Interchange Fee Regulation and its Article 11 about anti-steering – Article 5(c) of the DMA is also about anti-steering. The Roaming Regulation also drew inspiration from antitrust experience. It is therefore not unprecedented for a legislator to enshrine rules that can be distilled from competition law cases and remedies. About the goals of the DMA, fairness is indeed among them. Prohibition of unfair behaviour is not unheard of either: we already have a Directive on unfair trading practices in agriculture and food which lists several unfair practices and rules them to be illegal as such. Member states have their own dispositions aiming at ensuring fairness in business: the German law on unfair trading is much older than its competition law. It aims at ensuring balanced negotiations and fair outcomes to these. Another goal is contestability: in the context of the DMA, it is much about data access. The Special Advisers' Report confirms that regulation on data access would be more appropriate than a sometimes lengthy, case-by-case competition enforcement. The steps taken in the DMA compare with what has been done with Payment Services Directive II. Based on all these examples, one can see that the Commission's approach is not new. The DMA will complement competition law dispositions, as it draws the lessons of their experience – the Court has and will provide guidance on the way to combine regulation and competition (see *Deutsche Telekom* and pending *bPost*).

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Miguel de la Mano followed up stating that regulation should target critical economic activities where there is no potential for competition, but at the same time it should allow for competition in other parts of the value chain. Economic regulation should also serve as a surrogate for competition. Finally, the potential for competition should be assessed over a sufficiently long timeframe with milestones established to remove regulation and attract new entrants as soon as materially possible. This ensures that direct regulation is not self-perpetuating. Benefits of regulation from correcting market failures should be weighed against the costs. For example, when investment is subject to significant *ex ante* risk, it may be necessary to refrain from regulating. Competition law as it stands today is flexible, as it allows firms the freedom to set terms and conditions within a potentially wide range of acceptable behaviour. Going the opposite direction, with a “one size fits all” approach to regulation is highly problematic. It risks restricting dynamic competition and deterring innovation in the digital sector, not only from the established platforms, those labelled as “gatekeepers,” but also from new entrants that need confidence that they will be able to recoup their sunk and their risk investments if they become successful.

It is of, course, correct to say that digital markets have some inherent traits which may raise competition concerns, especially with respect to the presence of network effects and markets that could be prone to tipping – but the burden should remain on regulators to demonstrate theories of harm. The DMA, as it considerably lightens this burden, seems to have important flaws. First, gatekeeper status is not related to the concept of market dominance and is, therefore, not the result of a market-by-market assessment. Levelling the playing field is anticompetitive when the reason for its situation is that firms have invested and succeeded while taking risks. Second, whereas EU antitrust rules are anchored on a consumer welfare standard, the proposed legislation sets no requirements, or analytical criteria for that matter, to determine how or to what extent the conduct at issue harms consumers, harms competition, or society. This brings the risk of type 1 and type 2 mistakes which could be severe. Third and finally, many of the conducts and scope addressed by the DMA are already covered by existing competition rules. However, the number and the duration of the investigations in this area under Article 102 already suggest that the conducts that are being addressed are not necessarily harmful to competition or consumers and, due to their rigidity, the obligations might become outdated relatively quickly. To conclude, regulation should not make it illegal to acquire dominance unless one engages in restrictive behaviours and consumer harm. Balancing procompetitive and anticompetitive effects is the cornerstone of competition law, but this balance is not properly provided for by the DMA. The Commission should make sure its efforts on digital markets does not pave the way for poor enforcement.

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Avantika Chowdhury

Avantika Chowdhury chose to examine the question: if *ex ante* regulation is the way forward, then is the DMA the best that could be done? She starts by questioning the notion of contestability wondering whether existing or potential competition is enough to achieve it. The criteria used in the DMA are quantitative but fail to put forward any relative element such as market shares; this creates the risk of arbitrary thresholds. Multi-homing versus single homing also seems to be a distinction that is overlooked by the DMA, although the Swedish competition authority has concluded that it is the most important factor for a market to be considered tipping. German and British authorities have also underlined the importance of market power as a relative factor. Even if quantitative criteria are preferred over qualitative ones for the sake of simplicity, this creates the risk of over-inclusion in an absolutist style.

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Ingrid Vandenborre

Ingrid Vandenborre seconded the comments by Avantika Chowdhury. She added that the concept of a gatekeeper remains unclear, and one can wonder whether it provides an appropriate framework for regulation as there are certain aspects of the definition that seem less relevant to the stated purpose of the regulation. For example, it is unclear why one of the gatekeeper conditions in Article 3 is the provision of "*a core platform service in at least three Member States*" for the designation. A platform could be a gatekeeper in less than three Member States because of cultural preferences or language. It is also unclear as to what the basis is for referring to gateway services as the relevant aspect. The DMA targets several of the gatekeepers' services that would be considered "important gateway" services but the notion of "important gateway" services is not defined. Much remains to be defined as to the scope and the basis of the process of gatekeeper designation, as well as the types of substantiated arguments required to demonstrate that a provider does not qualify as a gatekeeper, in the circumstances in which it operates.

There is also a lack of criteria that allow one to demonstrate benefits or effects. Failing that, the framework will be very rigid. On procedural aspects of the DMA, some judges have denounced the Commission's level of discretion in the process of gatekeeper designation, as well as the limited rights for companies to comment, object or contest some of the findings to be made under the DMA as an *ex ante* regime. The fact that DMA enforcement will be an exclusive competence of the Commission also creates the risk of inconsistent enforcement by national authorities of their competition rules to the same actors and behaviours. The question of private enforcement and whether DMA-based cases can be used to support a claim for damages also remains unclear.

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Follow-up discussion

Going back to the comments by Ms. Chowdhury, Mr. Whish felt that market shares would not be a reliable proxy for analysis in digital markets, as he believes there is much experience to demonstrate that digital markets are very hard to define using traditional competition metrics. Reflecting on the question of quantitative criteria, Mr. Kramler pointed out that these thresholds act as a filter – they do not create obligations *per se* but rather install a rebuttable presumption that can be taken out using all qualitative criteria such as barriers to entry and network effects.

On Articles 5 and 6 of the DMA, and the list of obligations that they create for gatekeepers, Mr. Whish feared that they may be too prescriptive and mechanical, as they perhaps would miss on effects and efficiencies analysis. Mr. de la Mano first explained that rebuttable presumptions such as the one used in Article 3 are a traditional tool that is a basis for vertical agreements assessment. However, previous cases have demonstrated how difficult it is to rebut such presumptions. That is why a contradictory, casuistic market study could be examined as a more balanced way to achieve desired outcomes. Ms. Vandenborre concurred, saying that the great level of rigidity that is being imposed, without the identification of a set of criteria that will support the assessment of conduct as well as efficiencies, is particularly problematic as it does not support a cooperative process between agencies and companies that could

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benefit all stakeholders. For example, certain obligations and prohibitions may be relevant to certain business models and irrelevant to others. It will be important for the regulator to go up the learning curve, but the framework, as it is, seems to make it hard for agencies to effectively cooperate and consult business actors in the process. In this respect. Ms. Vandenborre noted that the DMA does not impose a split between an Article 7 dialogue procedure and an Article 25 infringement procedure, allowing the Commission to switch from one to the other at its discretion. There is no indication that such a dialogue procedure provides for a suspensory effect or what legal value is attributed to the outcome of such a dialogue. Absent a more robust framework for effective consultation, companies will have to self-assess without a lot of guidance. A document that would be a DMA equivalent to the Guidance on the Application of Article 102 would help companies foresee what factors may result in anticompetitive behaviour in the eyes of the Commission. Ms. Chowdhury complemented, pointing that regulation should be limited to market failures situation and be proportionate. The quantitative criteria will leave a number of platforms wondering whether they fall within the scope of Article 3 – the necessity to face regulatory pressure comes with costs and energy, and these might be heavy for some startups or even medium-size companies. In the end, self-assessment such as the one that companies have to carry out under the Telecoms Regulation (the threshold being Significant Market Power) always come with risks in terms of the size of the scope. ■

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