The Digital Markets Act and the interplay with antitrust enforcement

Florence Competition Summer Conference

June 14, 2022

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I would like to congratulate the Florence Competition Programme for the comprehensive program set on the topic of digital markets competition and regulation.

Grounds for *per se* prohibitions

Let me first address the grounds for *per se* prohibitions on some specific conducts in the Digital Markets Act (DMA).

And for that we need to start with some context.

It is a fact that many of the obligations in the DMA relate to practices that could fall under articles 101 or 102 TFEU. The obligations prohibiting specific tying strategies involving core services are one example.

So, why was the option taken in the DMA to establish such *per se* prohibitions?

The main ground for these *per se* prohibitions is that the DMA builds on what enforcers have witnessed in practice.

It is the result of the experience on digital markets, accumulated in the last few years, by the European Commission and national competition authorities. This experience was obtained through several investigations, market studies, but also complaints by firms who strive to enter - and stay in - the market.

The debate of the past decade or more has highlighted the challenges that come with the fast pace and dynamic nature of digital markets.

This means timing may be crucial for entry, expansion or investment decisions.

Probably the strongest driver in favor of a regulatory solution was precisely related to the issue of timeliness of intervention.

Regulatory action should allow for swifter intervention. And this is expected to complement ex-post competition enforcement in fostering competitive conditions and contestability in such markets.

This need for regulation working in tandem with antitrust stems from the inherent characteristics of digital markets – they are fast-movers, and they are prone to market-tipping.

After a whole decade or more of market observation and investigation, it was deemed more useful to have a combination of regulatory obligations and antitrust enforcement in order to be more effective in dealing with competition issues in digital markets.

This approach entails presumptions regarding the negative effects to competition of specific conduct.

Of course, presumptions need a reason to exist.

They must be based on a prior pattern of behavior and effects.

In the case of the DMA, these presumptions are rooted: (1) in antitrust cases; and (2) from several reports on digital markets by competition authorities and experts, including much debate around these.

The prohibitions on tying are illustrative of this experience-based approach. The DMA is cautious not to propose a general ban on tying by gatekeepers. It applies to tying in specific services with a high reach among customers.

As we know, the prohibitions are largely based on the experience of the Google Android case, on ongoing investigations and probes, as well as on market studies.

For example, pre-installation and default settings are singled out in the Google Android case.

This case is directly related to two obligations in the DMA:

- It involves the tying of several core platform services between each other [Article 5.8]
- And it involves limitations for users to uninstall default applications or change default settings [Article 6.3].

Likewise, there is an ongoing investigation involving the tying of app stores and payment services: the Apple App Store case that saw an statement of objections by the European Commission in May this year.

Whenever we discuss the merits of an ex-ante approach, one that in general antitrust specialist would rather not have, we must be mindful of this accumulated knowledge and experience.

This is a new approach indeed for digital markets, but not for other markets, such as energy or telecoms.

So, on the ex-ante regulation and the justification for the prohibition on tying, the main points that policymakers kept in mind were:

- digital markets were becoming less contestable and antitrust enforcement was heavily requested;
- digital markets show characteristics that have historically justified regulation for other sectors, i.e. scale and network effects;
- The DMA is a step towards some level of regulation. And regulation always carries presumptions built on experience in the sector.

This is where we are and as we have seen more recently, the perception of the need for some regulation is shared worldwide, beyond Europe.

Implementation: cooperation and interplay between the DMA and antitrust enforcement

Let me also make a few points on what lies ahead, i.e. on the interplay between the DMA and antitrust enforcement, and on cooperation.

First, regarding the interplay between the DMA and antitrust enforcement,

I believe we all agree that the DMA is not necessarily a panacea.

Instead, it is a tool that must be integrated and used without prejudice to the implementation of competition rules, both from the EU and national.

This framework is enshrined, word by word, in article 1 of the DMA.

This means that competition rules will continue to be enforced by the European Commission and by National Competition Authorities (NCAs).

The point that digital markets, and strategies that companies develop, are evolving at a fast pace remains.

So, it is my opinion that for novel products and strategies, or in other unanticipated scenarios, ex-post antitrust enforcement will continue to play an important role.

Secondly, I would also like to make a few remarks about coordination between the Commission and NCAs.

The Council and the European Parliament were aligned in ensuring that there is coordination between the European Commission and NCAs.

One overarching objective of the DMA is to harmonize rules at EU level, so as to avoid the fragmentation of the internal market.

From a regulatory point of view, this means that Member States cannot impose on gatekeepers obligations which have the same purpose of the DMA.

From an antitrust point of view, this means that competition law enforcement is not precluded, or at least that we could call it a “lender of last resort”. Antitrust law may always address issues that go beyond those of the DMA.

These sets of rules are complementary and competition rules will continue to be applied after the DMA enters into force.

The recent changes introduced to competition policy through the ECN+ Directive are relevant even more so in the case of digital markets: enforcers must have the adequate means to investigate. This must include the power to seize evidence irrespective of the medium on which it is stored. They must remain effective in their enforcement action.

Also, it will be crucial that the Commission and NCAs cooperate to ensure that there are no divergent remedies.

In particular, the DMA includes a set of rules aimed at coordinating proceedings.

These are based on the coordination of antitrust proceedings in 1the European Competition Network.

It is a type of regular coordination mechanism – with information exchange and consultation procedures before taking decisions – which has worked well before.

And as an NCA we look forward to working with the Commission to ensure the system works in practice.

So, while we all are aware of the limitations of each of the different tools alone, I believe we have reached a mix that is an important step towards combating anticompetitive conduct in digital markets.

I look forward to your questions during this panel's debate.