Initial Reflections on the Draft Digital Markets Act

Timothy Lamb[1]

Introduction

The proposal for a Digital Markets Act (***DMA***) signals a new approach to the regulation of digital services in the European Union.

In the best case scenario, the DMA could establish targeted obligations for true bottlenecks in the digital economy that will help to preserve and re-distribute value for consumers and business users. That is a scenario that could be welcomed and for that to materialise the new regulation would need to pay particular attention to core virtual infrastructure, such as app stores, operating systems or productivity software.

The DMA will unquestionably apply to Facebook, Google, Microsoft, Apple, Amazon and could potentially to others such as Booking.com, SAP, Zalando, Deutsche Telekom, Schibsted and Orange in one form or another. These companies have to accept that and understand the implications for their respective consumer and business offerings and products. Critically, for companies to be able to understand the potential implications of the DMA, the proposal will need to ensure that it contains understandable and actionable obligations.

As it stands right now, the draft DMA is the crystallization of a growing drumbeat over the past few years pressing for new rules to address perceived concerns expressed in many conferences, regulator reports and academic papers[2]. The drumbeat and the draft DMA itself contain an underlying assumption that the extensive powers already conferred on authorities under existing competition laws are insufficient to address a range of perceived harms.

While there are frequent debates as to whether the European Commission (the ***Commission***) has the right tools to exercise its competition functions, there may be something different this time around. A central tenet of the current debate is the desire for a lower threshold for regulatory intervention and a material lowering of the evidentiary standards.

As a result, the draft DMA is advancing a form of quasi-competition regulation which is untethered from traditional competition law concepts such as dominance, detailed case by case

---

[1] The author is Director for Competition at Facebook. The author is writing in his personal capacity and this blog does not claim to represent the views of Facebook. The author would particularly like to thank Stephen Kinsella OBE for all the discussions and comments on the draft.

[2] See, for example, *Unlocking Digital Competition*, Report of the UK Digital Competition Expert Panel, March 2019 (the ***Furman Report***); Competition Policy for the Digital Era, European Commission, April 2019; *Digital Platforms Inquiry*, Final Report, Australian Competition and Consumer Commission, July 2019; *Stigler Committee on Digital Platforms*, Final Report, September 2019; *Market Study into Online platforms and digital advertising*, Final Report, the UK Competition and Markets Authority, July 2020.

assessments, economic analysis and an assessment of efficiencies. That untethering gives rise to three key implications that I wish to explore here.

- *First*, while competition law is generally concerned with market power and business conduct, the draft DMA has a keen desire to intervene in core product design. Yet that should call for a sharp focus on the consumer experience of those products which appears lacking in the draft DMA.
- *Second*, the prohibitions in the draft DMA have very few meaningful or identifiable limiting principles and risk capturing conduct that is both pro-consumer and pro-competitive. Such an outcome would be undesirable and careful thought should be given as to how to mitigate such risks.
- *Third*, innovation is a key driver of long-term economic growth. Yet the draft DMA's proposals will very likely reduce, not increase, the ability and incentive for firms to develop innovative products for consumers.

The suggestions contained in the article are designed to strengthen the draft DMA.

1: Regulatory intervention in core product design: the forgotten consumer

The draft DMA contains 18 obligations in Articles 5 and 6. These obligations apply equally to Core Platform Services of all platforms that are designated as gatekeepers, irrespective of the business model. While there have been attempts at a form of DMA bingo at which we guess which companies are targeted by individual provisions, that does little to understand the purpose and impact of any given provision. And while on their face the obligations may appear to be addressing specific business behaviours, the reality is that they reveal a keen interest for regulatory intervention in core product design.

To take just a couple of examples, Article 5(a) (restrictions on data combination) and Article 5(f) (provision which calls into question the value of single sign-in ecosystems) appear to introduce friction in the consumer experience without a clear distillation as to how that might add value for the user or remove the perceived harm that these provisions are seeking to address.

There are often worthwhile reasons for introducing consumer friction at times (e.g. cooling off periods in a property purchase or payment security checks to prevent fraud with bank transfers or a withdrawal period when signing up to a lengthy broadband contract). Yet as the draft DMA does not foresee any impact assessment or claims of countervailing consumer benefits or efficiencies, there is no opportunity to determine whether the friction is warranted. Moreover, it is not possible to assess the specific harm that is being addressed here because it remains unclear which compelling rationale underpins each of these provisions.

To take two simplified examples that demand articulation of the policy concerns that are driving these provisions.

Example 1: If a consumer signs in to a smartphone and the integrated app store (potentially, a core platform service) and the mobile OS (potentially, a separate core platform service), Article 5(f) seems to require the service provider to offer new account flows for the user to access a built-in messaging app (potentially, also a separate core platform service)? Moreover, under Article 5(a) would the user have to consent to each and every personal data transfer between the messaging app, the OS and the app store? How much more complicated does this become if that same service provider also has other integrated services such as a video streaming service?

Example 2: If a consumer uses a social media service (potentially, a core platform service) and wants to use the fully integrated e-commerce marketplace surface of that social media service (potentially, a separate core platform service), would the social media service be required to offer the user a separate login flow for the e-commerce offering? And if the user then wants to use an integrated video-sharing service, would the user then have to be offered a separate login for that service alongside the possibility to continue with either his or her existing social media account and / or with the separate e-commerce account? This creates obvious confusion but the key question remains: what is the tangible and evidenced consumer benefit?

These are simple examples but the draft DMA seems to set up many complexities and further friction for the consumer. Specifically, how many banners, full screen pop-ups, interstitials and / or dialog boxes will the consumer have to encounter before she or he can actually use the desired service? The ease of use is a feature of many of the consumer-facing products that the draft DMA wants to regulate and it is unclear why introducing considerable friction in that experience will improve the outcome for EU users. It is also highly unlikely that there is consumer demand for these additional hurdles to be introduced into the experience.

Suggestion. If the desire is to develop regulatory oversight of product design decisions, there should be a strong focus on permitting companies to optimise those products and services for the best possible consumer experience. That focus should include an emphasis on offering increased product choice at lower prices for consumers and eschew confused claims that paying a higher price for an online experience is an optimal consumer outcome.[3] It seems that best possible consumer experience should be a primary and explicit concern in the draft DMA. At a minimum, any obligations that bear on product design should be included in Article 6 where they can be the subject of a clarificatory dialogue, rather than in the immediately self-executing and inflexible list of obligations in Article 5 and where there is currently no obvious avenue for any dialogue.

2: Value preservation rather than weakening of positive feedback loops: optimizing for innovation and the consumer experience

[3] See, for example, C. Caffarra, Fiona Scott Morton et. al, "*Designing regulation for digital platforms: Why economists need to work on business models*", (4 June 2020), available here (last accessed on 13 May 2021).

People use online services in varied and constantly evolving ways. The most innovative companies strive to facilitate those interactions and enhance people's experiences through their services. A major factor that can contribute to identifying and meeting those preferences is the ability to pool and learn from data regarding a range of activities.

The ability to use data across different services allows companies to engage in data-driven innovation which helps them to better understand customers' demands, habits and needs. Companies are able to improve existing products and offer new services and features that users will find valuable. Empirical studies have shown that companies that use data-driven innovation, experience between 5% and 10% faster productivity growth than companies that do not (see the Furman Report, at paragraph 1.40).

It is widely accepted that data-driven insights generate considerable value for consumers. For instance, Facebook Marketplace was developed to address and enhance buy-and-sell interactions between people that were already taking place organically on Facebook. Facebook observed that users were increasingly using Facebook to buy and sell items and decided to offer a dedicated Marketplace surface. Marketplace offers a tailored surface dedicated to offering a smoother experience to users, including those users which had already decided to buy and sell items on Facebook. This development has improved the user experience and further facilitated these existing, organic interactions where people seek to either buy or sell items. Moreover, such innovation provides users greater choice in their online services. Indeed, the entry of Marketplace has been output enhancing as it has grown the "*addressable market*".[4]

Consumers can continue to benefit from such innovation if the companies that drive that innovation are not atomized into arbitrary silos which might be created by the application of, for example, Articles 5(a) and / or 5(f). Accordingly, the draft DMA should proceed with caution in introducing provisions which weaken the positive feedback loops that encourage and lay the ground for many of the innovative services that we see today.

Suggestion. If there is a belief that new entrants are unable to match service levels of "gatekeepers" due to a lack of data access, the response might be a focus on provisions in the draft DMA which aim at a re-distribution of consumer efficiencies and value preservation. While the explosive entry of apps such as TikTok and Zoom suggest the underlying belief requires further examination, provisions that preserve and re-distribute value could be prioritised over provisions which threaten to fundamentally undermine the feedback loops that promote innovation and increase output for consumers. Could we perhaps explore further some of the data sharing provisions in the draft DMA and understand how these could be made actionable?

3: Absence of effects analysis and limiting principles in many DMA obligations could undermine consumer benefits - the "self-preferencing" provision

[4] See, *eBay / Adevinta*, CMA decision on reference under section 33(1) of the Enterprise Act 2002 (16 February 2021), at para 226.

In many of the draft DMA provisions, there are no clear limiting principles to the obligations which might be imposed on "gatekeepers". The absence of limiting principles does introduce considerable legal uncertainty and raises concerns as the draft DMA provides for very high fines, sweeping remedies and is of a quasi-criminal nature. In light of the general principles of legal certainty and proportionality, there is a need for administrable and predictable rules.

To take one example, Article 6(1)(d) contains a prohibition "*from treating more favourably in ranking services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third party and apply fair and non-discriminatory conditions to such ranking*". This is commonly referred to as the "*self-preferencing*" rule in the draft DMA.

Article 6(1)(d) itself contains very few discernible limiting principles and - based on the current drafting - could apply to almost any ordering of content by a designated "*gatekeeper*". Ranking is defined in Article 2(18) as the "*relative prominence given to goods or services [...]*". However, it does little to clarify the scope of the obligation. As a result, it is wholly unclear precisely what acts or product design may fall foul of this prohibition. Specifically, it is unclear whether "*ranking*" in Article 6(1)(d) is intended to extend to *any* digital display of different products or services such that it could capture "navigational tools". By way of example, navigational tools would include the links at the top of the Amazon home page to Alexa, Prime, Prime Video or Prime Music which are optimal for helping consumers to quickly navigate around the Amazon app or website. An interpretation of Article 6(1)(d) which brings such features within scope would result in a much poorer consumer experience of the online world in Europe.

In any event, the current drafting in Article 6(1)(d) is so broad that it runs the risk of capturing a very wide range of typically pro-competitive business conduct. As companies enjoy success, they branch out to other markets or offer new complementary products and services. This is not only an important parameter of competition, it is fundamental to competition itself. We see virtually all businesses engage in some form of "*self-preferencing*" every day.

- Streaming services and TV-channels attract viewers by reserving content for themselves either absolutely or in terms of release dates and / or prominently promoting their original content separately from all other content.
- Banks, investment houses, and other financial institutions seek to market and sell their own proprietary products to their customers over the products of other banks and institutions and indeed are often prohibited from selling each other's products.
- Supermarkets will sell their own brand products often in direct competition to the branded products and with favoured shelf placement or venturing into delivery services.

There is no real dispute as to the myriad of benefits for consumers and efficiencies for the businesses engaging in such practices (lower prices, better quality products, a wider choice of new or improved goods and services, and increasing the ease with which a range of different

services are accessed). And conduct that results in such benefits should not be the subject of sweeping prohibitions.

That's not to say that there may not be certain circumstances in which self-preferencing may give rise to competition concerns. But at present there do not seem to be any limiting principles around the discussion and one would hope that the draft DMA would set out clearly what types of self-preferencing are permissible and which types are not and would have some concept of impact and at least a *de minimis* threshold. The current approach is over-inclusive and risks capturing conduct that is both pro-consumer and pro-competitive or has no real world impact.

Suggestion: Recital 33 of the draft DMA states that '*it is necessary to provide for the possibility of a regulatory dialogue with gatekeepers to tailor those obligations that are likely to require specific implementing measures in order to ensure their effectiveness and proportionality*'. The possibility of a regulatory dialogue is a tacit recognition that many of the obligations in Article 6 are wholly unclear as to what they would require in practice. As currently designed, the Commission retains the ability to open non-compliance proceedings (and impose financial penalties) prior to, or in tandem with, any regulatory dialogue with respect to the Article 6 obligations. It would be highly desirable to establish a meaningful forum for regulatory dialogue before the entry into force of the draft DMA to assist with ensuring it is both understandable and actionable.

4: There needs to be consideration as to the efficiencies and consumer benefits that the draft DMA cuts across

Many of the provisions in the draft DMA can be mapped across to individual competition enforcement cases where there is very limited precedent or where the matter remains subject to appeal or where the investigations are still running and perhaps even at the preliminary phase. Against that background, many of the obligations included in the draft DMA are thus a result of anecdotal evidence or of preliminary experience from antitrust proceedings where the authorities have not yet established harm to competition - and in any case, where the companies at stake have not yet been able to exert their fundamental right to a judicial review.

One of the clearest examples of this approach in the draft DMA is Article 6(1)(d) which is discussed above and which seems to be inspired by the Commission's Google Search (Shopping) decision.[5] The Google Shopping case focused on very specific factual concerns which shaped the Commission's decision and where the Commission stated that there was a need for, "*a case-specific analysis to account for the specific characteristics of each market.*"[6]

Yet the draft DMA sets aside the highly fact-specific findings in the Google Search (Shopping) case which were central to the Commission's decision. Article 6(1)(d) draft DMA is not fact

[5] See, Case AT.39740, *Google Search (Shopping)*, Commission decision of 27 June 2017. The Commission decision remains under appeal (Case T-612/17, *Google LLC and Alphabet Inc. v. European Commission*, case pending).
[6] See, *Google Search Shopping*, Press Release, Commission (27 June 2017). Available here.

specific. As a result, it is simply not possible to discern what conduct is intended to be regulated by such a provision. That gives rise to a high degree of uncertainty which is compounded by the absence of any requirement in the draft DMA to establish any competitive effect or harm.

Given the provision appears to drive at the very notion of vertical integration or the ability to offer a seamless complementary suite of products, it will almost inevitably inhibit conduct that is efficiency enhancing. And while the draft DMA impact assessment briefly considers the compliance costs imposed on designated gatekeepers, it does not consider the potential for the sweeping prohibitions to give rise to consumer harm if gatekeepers (or potential gatekeepers) are inhibited in their ability to launch new and improved services.

The concern is heightened given that the draft DMA does not expressly foresee the ability for the Commission to take into account that a given practice generates consumer benefits and efficiencies. That concern is not addressed by the potential exemptions set out in Articles 8 and 9(2) draft DMA which are unduly narrow and limited to circumstances that endanger the economic viability of the gatekeeper or matters of public morality, public health or security.

Suggestion. In the absence of meaningful limiting principles on the obligations in Articles 5 and 6, could we consider an express provision which requires the taking into account of efficiencies or an exemption from the draft DMA obligations where the conduct in question is likely to be pro-competitive and in the best interest of consumers? At a minimum, a "*regulatory dialogue*" should be mandatory rather than optional for such provisions.

5: The draft DMA and the Digital Single Market: Recent calls for national enforcement

For a regulation which may seek to intervene in core product design, there will be concerns at recent calls for greater involvement of national competition authorities. The interaction between the draft DMA and existing national competition laws is already the subject of much discussion and Article 1(6) draft DMA does little to address the significant questions being raised as to how the 10th amendment of the German Competition Act will operate in harmony alongside the eventual DMA.

Different national interpretations of core draft DMA obligations or substantive national equivalents (whether in existing competition laws or otherwise) would lead to undue burden on companies to design products which comply with those different national interpretations. It would also be challenging to square such an outcome with the desire to promote a digital single market and the notion that the draft DMA is a harmonisation measure.

This concern is not theoretical. A number of draft DMA provisions are pegged to "GDPR consent"[7] - certain types of data use or data sharing in the draft DMA (e.g. Article 5(a), Article 6(1)(i)) are subject to such consent. The articulation of such consent - or indeed whether it is the appropriate legal basis in respect of personal data processing - was intended to be the

[7] See, *EU General Data Protection Regulation (GDPR)*, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, OJ 2016 L 119/1, Article 7.

preserve of the competent authorities under the GDPR. However the inclusion of "*GDPR consent*" within the draft DMA raises the possibility that an additional set of authorities will also be involved in determining the contours of such consent. If that additional set of authorities includes national competition authorities, there must be a real possibility of a number of different national interpretations of the contours of GDPR consent across the EU. Whilst such an outcome would seemingly undermine the "*one-stop-shop*" principle established under the GDPR, it would also create considerable complexities for companies in terms of navigating the regulatory landscape from a product design perspective.

There are early signs of the potential complexities that lie ahead in relation to the draft DMA. In the context of national competition proceedings against Facebook, the Düsseldorf Higher Regional Court recently felt compelled to refer to the European Court of Justice a series of detailed questions that pertain to the interpretation of the GDPR.[8] Strikingly, among other questions, the Düsseldorf Higher Regional Court has asked whether a national competition authority can determine whether there has been a breach of the GDPR or whether such a determination is in conflict with the carefully laid out GDPR jurisdictional framework.

Suggestion: The interaction between the draft DMA as a harmonisation measure and the desire for national regulatory authorities to have their own parallel enforcement powers must be carefully considered, especially if the role of national regulatory authorities were to extend to competence in respect of product design decisions such as product consent flows. To avoid a patchwork quilt of overlapping and conflicting obligations, the suggestion would be to preserve and reinforce the vision of a digital single market.

Conclusion: A plea for an understandable, actionable and proportionate DMA

We are at an inflection point. The proposed regulatory framework could provide clarity and guidance as to which business practices are to be proscribed and balance the legitimate interests of all stakeholders involved. Such a regulatory framework might then provide true foundations for a swift economic recovery. However, there is a material risk that the DMA (based on the current draft) will introduce an indiscriminate list of sweeping and ill-defined prohibitions that cut across undoubted consumer benefits. Such an outcome would do little to promote the competitive process, and in some cases, would actively harm competition and innovation.

The hope is clearly that this ambitious regulatory proposal can establish targeted obligations that preserve and re-distribute value for consumers. To fulfill that hope, regulators and companies should be placed in a position to understand and implement those obligations; the "*regulatory dialogue*" called for in recital 33 of the draft DMA cannot wait for the entry into force of the DMA.

[8] See, VI-Kart 2/19 (V), Düsseldorf Higher Regional Court, Referral questions, 24 March 2021 (available at: https://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2021/Kart_2_19_V_Beschluss_20210324.html)