

# The EU's digital package and the role of national competition authorities

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The European Union has targeted large online platforms as potential threats to competition in the digital world. According to the Commission's Vice President and Competition Commissioner, Margrethe Vestager, "many gatekeepers play a dual role, as both player and referee. They control a platform that businesses rely on to connect with their customers – and at the same time, they also compete with those same businesses". (European Commission 2021)

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## Overview

The European Union has targeted large online platforms as potential threats to competition in the digital world. According to the Commission's Vice President and Competition Commissioner, Margrethe Vestager, "many gatekeepers play a dual role, as both player and referee. They control a platform that businesses rely on to connect with their customers – and at the same time, they also compete with those same businesses".<sup>1</sup> The Commission has opened several investigations into the behaviour of such companies as Google, Amazon, Apple, and Facebook. More recently, new regulations have been proposed – the so-called Digital Package, encompassing the Digital Markets Act (DMA), the Digital Services Act (DSA), and the Data Governance Act (DGA).

National Competition Authorities (NCAs) could play a key role in their implementation considering their experience in regulating previous technology markets (such as telcos, audio-visual services, and digital advertising, among others).

DMA aims to regulate the market power of large online platforms by an ex-ante method (ex-ante regulation of gatekeepers) using some reviewed concepts from the traditional competition regulation ('New Competition Tool' consultation). It is far from obvious that this kind of ex ante regulation will solve the existing competition distortions or will create a more favourable environment for digital innovation in Europe. (Manne & Auer 2020).

NCAs should have an important position in the transition period from the old competition rules to the new regulatory framework, collaborating with DG COMP giving it their experience of years regulating technological companies. NCAs could intervene more quickly than the Commission in the temporary period until the Digital Single Market becomes fully effective. Moreover, as long as the traditional ex post antitrust regulation proves effective at national or EU level, the proposed ex ante regulations should be considered carefully and perhaps be subject to potential adjustments as they are gradually phased in.

Hence, it is necessary to establish some basic concepts from the classical vision of competition rules in order to clarify the scope of regulation, and the consequences of the set-up mechanisms.

## Specific questions about the role of NCAs in the application of DMA

The analysis and regulation practice should start defining three critical concepts:

### *1. The criteria to define market power in determined digital services (the definition of relevant market)*

NCAs could be useful in helping to define with DG COMP a list of relevant digital markets. That list should be periodically reviewed attending the changes in technology and market developments. Also, NCAs could define other possible relevant digital services. Knowing *ex ante* how the relevant market is defined and why would provide online companies with guidance in order to avoid potentially harmful, or illicit, behaviours, therefore reducing the uncertainties regarding the actual application of the new rules (which is large).

### *2. How to identify market failures*

After a more precise market definition and especially situations of market power concentration, the mechanisms of avoiding market failures and abuses can start working. The most simple and transparent method is the creation of general market analysis guidelines by the Commission to apply in such cases like market dominance, the block of access to the market for

new competitors, business trust, unfair and unilateral T&C, self-preferencing, restricting content/service interoperability or limited data portability, and killer acquisitions, among others.

### 3. *The method to calculate supply, demand, and prices in relevant digital markets*

There is an evident deficit of economic calculation in DMA. There is no clear theory of harm, especially in fields like free digital services in exchange for free personal data. Zero-price services should be a priority to ensure an adequate performance of regulation, avoiding a double abuse from large platforms and regulators (Santacruz 2021).

Thus, there is a place for NCAs when applying specific rules for large digital platforms, at least in the transitional period before the new rules are fully rolled out and the EU Commission fully takes charge of their enforcement. Concretely, they can help DG COMP to define ex-ante framework for a small number of digital markets and their corresponding 'gatekeepers', in the same line that outlined DG CNECT. The Current Competition Law framework is still valid, but it needs a review in order to adapt the current tools to the Digital Economy before the implementation of a new competition toolbox.

NCAs can also act quickly, giving the experience of dilated decisions during years in DG COMP. Especially, the capacity to impose emergency measures where there is a reasonable market harm presumption, obviously in a legal security basis framework. At the same time, actions against the gatekeepers should always be coordinated, or agreed upon, at EU level in order to prevent a proliferation of unequal measures or pieces of legislation (such as the regulations against price parity clauses in hotel booking in Italy and France) that would ultimately disrupt the Digital Single Market.

However, not all NCAs are fully able to act with an advanced knowledge about the most complicated cases of possible market failures or abuses like self-preferencing or interoperability of data. These cases need a deep analysis of algorithms, data concentration, collection of data, and other technical aspects. For instance, a convenient job is preparing, and providing assistance to, NCAs to deal with complicated cases in 'intersection places' in which everything is mixed in, and a high level of technical knowledge is required.

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In all cases, national authorities would act as auxiliary and coordinated regulators under the playing field designed by DG COMP (European Competition Network). Given that most DMA tools are borrowed from actual competition laws, NCAs can develop proper decisions that could help DG COMP to define those aspects that now are not always clear. Specifically, considering DMA is practically focused on ex-ante regulation of gatekeepers, NCAs could act in several cases of collusion, market abuses or predatory pricing practices that could be out of DMA/DSA scope.

In addition, it would be useful for both parts (DG COMP and NCAs) to share information, specifically in fields like mergers and acquisitions in digital markets. Exchanging this type of information lets NCAs ask DG COMP in critical cases of acquisitions that could block competition. The outcomes of these information exchanges should also be periodically communicated to the markets, in order to keep online companies well informed about which behaviours may fall outside of the rules.

Likewise, it is necessary to be sure the action of NCAs will not cause fragmentation in the European Digital Single Market. Platform to Business Regulation (P2B) could create a risk that divergent authorities without an effective coordination mechanism will create fragmentation. So, the key question is how to achieve a reasonable degree of coordination among member states regulators. Again, coordination is more easily achieved in ex post, rather than ex ante, regulation. Moreover, the enforcement of competition rules in the digital world should be rooted in the existing European and national legislations, rather than in a plethora of national regulations that are often proposed as a complement to the Digital Package, but that would, in fact, undermine it.

In essence, NCAs may be a powerful ally in ensuring competition in digital markets if their powers are properly used and their information and practices become shared. On the contrary national reforms – providing them with additional powers, potentially overlapping with the forthcoming DMA, DSA, and DGA – would be inconsistent with the aim of promoting lively competition in, and a full integration of, Europe's digital markets.

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