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An effects-based approach to the DMA?

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Abstract: The EU’s Digital Markets Act (DMA) uses per se prohibitions to regulate “gatekeepers,” prioritising rapid enforcement over case-specific effects analysis. This article assesses whether, despite the absence of a formal efficiency defence, certain efficiencies—particularly those enhancing contestability—can influence DMA procedures. We identify limited entry points, such as proportionality in compliance measures, remedy design, enforcement priorities, and updates to obligations, and situate the DMA within the wider rules-versus-standards debate in competition law.

The Digital Markets Act (DMA) is meant to ensure effective enforcement in the digital sector. Antitrust enforcement was criticised by various legislators, authorities, and scholars for being too slow in practice and thus not able to address the antitrust issues in this sector. The DMA seeks to close this gap. It intends to ensure contestable and fair markets.

In order to achieve this goal, the European legislator opted for per se rules. That means that gatekeepers are prohibited from engaging in any behaviour that is listed in Articles 5 to 7 of the DMA without taking their individual circumstances into account. But is it really that simple? This article provides a critical analysis of the DMA’s approach and explores possible avenues for introducing efficiency arguments in DMA procedures. We examine the legislative process, indications in the DMA, and points of entry for efficiency considerations, including objective justification, non-compliance decisions, remedies in case of systematic non-compliance, discretion to intervene, and fines.

1. Per se rules and efficiency offence

During the legislative process, various voices (even including some member states) called for the introduction of an efficiency defence into the DMA. They argued that the approach taken would destroy efficiencies and harm innovation (Monopolkommission, 2021). However, in the end, the wish to ensure timely enforcement prevailed. Several recitals in the DMA make this clear. The DMA complements national competition rules “which provide for the possibility of undertakings to make efficiency (...) arguments for the behaviour in question” (recital 10); i.e., there is no such rule. The DMA is designed to ensure contestability and fairness on digital markets “independently from the actual, potential or presumed effects of the conduct” (recital 11). Rather, the DMA – and in particular Art. 5 DMA – is meant to address behaviour that is so harmful to competition that analysing the effects in a particular case is unnecessary. With the adoption of per se rules, the European legislator accepted over-enforcement to a certain extent (Kerber, 2021) and even forbade gatekeepers in specific settings to realise efficiencies (Podszun et al, 2022).

Especially Art. 5(2)(b) DMA and Art. 6(2) DMA entail an efficiency offence. Art. 5(2)(b) DMA prevents gatekeepers from combining data from different core platform services even though it could be used to identify new markets or develop new products (Commission Competition Law 4.0, 2019). Art. 6(2) DMA prevents gatekeepers from using data that was generated while third parties sell products via the platform of a gatekeeper, although it enables them to test new products.

At the same time, the European legislator tried to put the obligations laid down in the DMA in such a way that they are proportionate. Thus, the wording of specific provisions allows gatekeepers to justify their behaviour in some circumstances (e.g., in order to guarantee the integrity of the operating system, see e.g. Art. 6(3), 6(4), 6(7), 7(9) DMA).

2. Efficiency Considerations

The omission of a general efficiency defence, as well as the context-specific options to justify certain practices, does, however, not mean that the European Commission is precluded from taking efficiency considerations into account under any (other) circumstances. While the clear wording of the DMA and its goals does not allow for an explicit efficiency defence (different view: Horn/Schmalenberger, 2022), the gatekeeper and the European Commission can take efficiencies into account where the DMA gives them leeway, and it is not to the detriment of the goals of the DMA. This follows from the principle of proportionality.

2.1 Ensuring Compliance with the DMA

First, it is necessary to bear in mind that the DMA prohibits gatekeepers from engaging in specific behaviour but does not specify how the gatekeeper has to ensure compliance. Under normal circumstances, it is the responsibility of the gatekeeper to act in a way that is DMA compliant, Art. 8(1), 11(1) DMA. This enables gatekeepers to adjust their behaviour in a way that does not harm efficiencies (or – at the very least – minimises any efficiency losses).

The same is true whenever the European Commission applies the DMA and has some leeway. While doing so, the European Commission must comply with the principle of proportionality (Art. 5(1)(2), (4) TEU), which prevents it from taking measures that harm the business model of a gatekeeper more than necessary. An important limitation is that the DMA is meant to be an efficiency offence in certain cases. Then, efficiencies associated with a certain business model cannot play a role.

a) Specification Proceedings

When applying Art. 6 and 7 DMA, the European Commission can enter into a regulatory dialogue with a gatekeeper and adopt an implementing act that specifies what kind of behaviour the gatekeeper has to adopt in order to effectively comply with the DMA. Art. 8(7) DMA even expressly states that the measures shall be “proportionate in the specific circumstances of the gatekeeper and the relevant service.” However, it is necessary to point out that the measures still have to be “effective in achieving the objectives of this Regulation and the relevant obligation”, Art. 8(7) DMA. This limits the possibility of the European Commission taking efficiencies into account if there is any ambiguity in the wording of the DMA. In particular, the European Commission is not allowed to soften the obligations or weigh up any advantages and disadvantages of the behaviour in question (Westermann, 2022). Due to the technical and economic complexity of the questions that are going to arise in this context, it is plausible to assume that the Court of Justice is granting the European Commission a wide margin of appreciation (cf. Fritzsche, 2008). This gives the European Commission some leeway. The European Commission published its first specification decisions under Art. 8(2) DMA on 19 March 2025 (here). Whether or not efficiencies played a role in this case remains unclear.

b) Non-compliance decisions

Before the European Commission can issue a non-compliance decision, it has to communicate its preliminary findings to the gatekeeper, Art. 29(3) DMA. While the European Commission is not obliged to suggest or even devise remedies that the gatekeeper might take in order to comply with the DMA, it seems expedient to give

the gatekeeper some guidance as to what the European Commission thinks would be a good way to comply with the DMA. This is in line with the practice of the European Commission under Regulation 17/62, where it did not have the power to order remedies.

In addition, if the European Commission adopts a non-compliance decision, it might find that the wording of Articles 5 to 7 of the DMA is ambiguous. In such a case, the principle of proportionality might lead the European Commission to an interpretation of the obligation that enables the gatekeeper to realise certain efficiencies.

Furthermore, the European Commission can issue a cease-and-desist order, Art. 29(5) DMA. While the European Commission cannot take efficiencies into account at this stage of the procedure, it might (also) open proceedings under Art. 8(2) in case Art. 6 or 7 DMA are suspected to be breached, Art. 8(4), 20(1) DMA. The extent to which efficiencies can be taken into account here has already been described.

c) Remedies in case of systematic non-compliance

If the European Commission finds that a gatekeeper systematically infringed the DMA and thus cemented its position, the European Commission can issue behavioural as well as structural remedies, Art. 18(1) DMA. Structural remedies are particularly harmful when it comes to economies of scale and scope (i.e. efficiencies). The European Commission has to take this into account when deciding whether or not to implement structural remedies. The same is true when the European Commission devises remedies.

2.2 Discretion to intervene

The European Commission has limited resources and is the sole public enforcer of the DMA. Thus, it has to decide which cases to pursue. However, the European Commission cannot decide to refrain from enforcement because of efficiencies. This would contradict the legislative intent to ensure timely intervention and would undermine the DMA's per-se approach. This is especially true when considering how difficult it can be to verify efficiencies.

However, it does not follow that the European Commission cannot take efficiencies into account when setting its enforcement priorities. The European Commission has to act in line with the goals of the DMA – ensuring contestability and fairness to the benefit of business users and end users, Art 1(1) DMA. This has to be reflected in its enforcement priorities. If a behaviour produces certain efficiencies that benefit business and/or end users and thus makes the behaviour less harmful for contestability and/or fairness (the latter requires that these efficiencies are passed on to users), it would not be expedient for the European Commission to pursue this case

as one of its priorities if there are other cases where a lack of contestability harms users more and/or where users are treated more unfairly. A similar approach is taken by the European Commission when setting its priorities regarding the enforcement of Art. 101 and 102 TFEU (‘lack of European interest’, Commission Notices on best practices). However, it is necessary to point out that this approach has its limits and cannot lead to an effects-based enforcement of the DMA. Only efficiencies that contribute to fairness and/or contestability can be taken into account. Another practical limitation to this line of reasoning is that efficiencies are difficult to prove, and the European Commission is prioritising its cases based on a preliminary assessment.

2.3 Fines

The European Commission cannot refrain from setting a fine pursuant to Art. 30(1) DMA due to efficiencies. Any other interpretation would contradict the per-se approach the European legislator chose. However, the European Commission might take efficiencies into account when assessing the gravity of the infringement (Art. 30(4) DMA), which is one of the determinants when setting the amount of the fine. In line with the considerations made regarding the discretion to intervene, the European Commission can only take efficiencies into account that benefit fairness and/or contestability.

2.4 Contestability and Efficiencies

The DMA is meant to ensure contestability, Art. 1(1) DMA. Markets shall be open, and competitors shall be able to compete effectively with gatekeepers. Contestability is thus linked to a certain extent to structural efficiencies, i.e. efficiencies that have a positive effect on the structure of the market. Such efficiencies are especially known from the balancing clause in Section 36(1), sentence 2 no. 1 of the German Act against Restraints of Competition. According to this provision, a merger that significantly impedes competition might be cleared because it improves the structure of the market and creates competition. The same argument could be brought forward in certain DMA procedures: If the behaviour in question leads to an improvement of competition and the structure of the market, it is not to the detriment of contestability.

Possible areas of application of this line of reasoning are (1) the circumvention provision in Art. 13(4) DMA and (2) the possibility of the European Commission to update the obligations laid down in the DMA, Art. 12, 49 DMA. First, gatekeepers might argue that their behaviour does not undermine effective compliance with the DMA, since it does not contradict its objectives if the behaviour in question brings about structural efficiencies and thus is not to the detriment of contestability. An important limitation of this approach is that the DMA entails an efficiency offence

in certain provisions. In particular, the DMA seems to try to prevent gatekeepers from realising efficiencies that do not result from the mere usage of the service of the gatekeeper (e.g. network effects), but that the gatekeeper creates by taking additional steps. Second, this argumentation might be brought forward in cases where the European Commission engages in a public consultation which aims at updating the obligations laid down in the DMA. Gatekeepers might argue that the behaviour in question promotes competition between gatekeepers and thus should not be prohibited under the DMA.

Eckart Bueren and Marcel Zober

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