

THE IMPLEMENTATION OF THE DIGITAL MARKETS ACT WITH NATIONAL ANTITRUST LAWS



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By Diana L. Moss



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By Dirk Auer & Lazar Radic



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By Alexander White



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By Maria Andrea Latapie Aldana & Natalia Patricia Patiño Espinosa



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The December 2020 Commission proposal for a Digital Markets Act ("DMA") reached a compromised text with the Council and the Parliament on March 24, 2022. While the text that will impose obligations and prohibition rules on large online platforms acting as "gatekeepers" before any wrongdoing ex-ante is due to enter into force in October 2022, the same platforms are already under investigation in Germany under a DMA-like competition law that also imposes prohibition rules *ex ante*. Other countries in Europe, including Italy, are considering following Germany and implementing new competition rules to adapt to the digital economy. How should the DMA implement with national competition laws? This question is crucial because inconsistency will inevitably hamper the effectiveness of both the DMA and national competition laws. The paper addresses this question by studying the DMA and German implementation framework. Section I explains how legislators envisage the implementation of the DMA with national competition laws. Section II then considers the implementation of the DMA-like national competition rules by focusing the analysis on Germany, which already enforced its new legislation in January 2022 against Google. Section III designs a cooperation model between the DMA and national competition laws. Section IV concludes.

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I. INTRODUCTION

The December 2020 Commission's proposal for a Digital Markets Act ("DMA") reached a compromised text with the Council and the Parliament on March 24, 2022.² While the text that will impose obligations and prohibition rules on large online platforms acting as "*gatekeepers*" before any wrongdoing *ex ante* is due to enter into force in October 2022, the same platforms are already under investigation in Germany under a DMA-like competition law that also imposes prohibition rules *ex ante*. Other countries in Europe, including Italy, are considering following Germany and implementing new competition rules to adapt to the digital economy. How should the DMA implement with national competition laws? This question is crucial because inconsistency will inevitably hamper the effectiveness of both the DMA and national competition laws. The paper addresses this question by studying the DMA and German implementation framework.

Section II explains how legislators envisage the implementation of the DMA with national competition laws. It underlines the complementary enforcement approach of both rules through the European Competition Network. Section III then considers the implementation of the DMA-like national competition rules by focusing the analysis on Germany, which already enforced its new legislation in January 2022 against Alphabet Google and in May 2022 against Meta Facebook. The legislation is likely to be effective after the DMA enters into force and could enable more enforcement actions. Section IV designs a cooperation model between the DMA and national competition laws. An implementation act should replicate the current cooperation model of the EU merger regulation between European competition laws and national competition laws. Section V concludes.

II. IMPLEMENTATION OF THE DMA WITH NATIONAL COMPETITION LAWS

The DMA is an asymmetric regulation that will dictate how some large online platforms acting as "*gatekeepers*" should behave in some digital markets before implementing a practice to ensure fair and contestable digital markets.³ The draft compromise text defines contestability as the ability of firms to effectively overcome entry barriers and expansion, such as network effects, and challenges gatekeepers on the merits of their products and services (recital 32 COREPER DMA text). It defines unfairness, not fairness, as the imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage (recital 33).

A gatekeeper is an unavoidable firm that sets how businesses and end-users can access and participate in its products and services. The draft COREPER text presumes that a firm is a gatekeeper if it fulfills the following three cumulative rebuttable criteria: (i) it provides the same core platform service in at least three Member States — namely providers of online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communication services, operating systems, web browsers, virtual assistants, cloud computing, and online advertising services; (ii) it has an annual Union turnover of at least €7.5 billion in each of the last three financial year or a market capitalization of at least €75 billion in the last financial year; and (iii) it has on average at least 45 million monthly active end users and at least 10 000 yearly active business users in the Union in each of the last three financial years (art. 3). The Commission considers some gatekeepers' rules unfair and unduly favors them in a way that harms both competition and consumers, such as the preference of its own services over rivals.

Based on current and pending cases, the COREPER text thus imposes 22 *ex ante* rules. They will oblige or prevent the gatekeeper from behaving in a specific way without the need to proceed after the practice *ex-post* to the formal antitrust steps of defining a market definition, a market power, an anticompetitive practice, and a remedy (arts. 5, 6, and 7). The regulation will do all these steps in one, as the regulator would only need to demonstrate non-compliance with the rules to intervene. The proposed regulation thus addresses critics against slow and selective competition enforcement that impedes its effectiveness in digital markets.⁴

The Commission will be the sole enforcer (art. 38). The national competition authorities ("NCAs") will only support the Commission in enforcing and monitoring the DMA, including collecting complaints (art. 27), supporting market investigations (art. 16) and conducting market investigations into cases of possible non-compliance (art. Art. 38). Yet, the Member States will be able to implement their own national competition rules, including DMA-like legislations, insofar they pursue other public interest objectives than ensuring contestability and fair markets (art. 1 and recital 9).

2 Press release, Council, Digital Markets Act (DMA): Agreement Between the Council and the European Parliament (March 24, 2022) (accessed March 28, 2022). <https://presidence-francaise.consilium.europa.eu/en/news/digital-markets-act-dma-agreement-between-the-council-and-the-european-parliament/>.

3 Proposal For a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act).

4 Furman, J., et al., Unlocking Digital Competition, Report of the Digital Competition Expert Panel, March 2019.

National authorities, including national courts, could not adopt decisions that run counter to a Commission's decision and have a duty to cooperate and coordinate their enforcement with the Commission to ensure consistency (arts. 1, 37, 38, and 39). Furthermore, the Commission and NCAs could share information only for the purpose of enforcement coordination, including confidential ones, to ensure effectiveness (art. 38). In this context, they will have to inform the Commission of the opening of an investigation and their intent to impose obligations on gatekeepers, including interim measures, without the possibility for the Commission to veto the NCAs in its action (art. 38). Lastly, the Commission might consult the national authorities on the application of the DMA (art. 37). The compromised text thus contemplates complementary enforcement of the DMA and national competition rules.

The Commission and the NCAs will cooperate and coordinate within the European Competition Network (ECN) (art. 38). The network is a cooperation forum between the Commission and the NCAs to enforce consistently European competition laws. In Europe, the Commission shares its enforcement power of European competition laws with the Member States through a system of parallel competencies. After several years of practice, the network proves to be effective. Between 2004 and 2020, the Commission and the NCAs dealt respectively with 410 and 2394 antitrust cases.⁵ While in most cases, the Commission and the NCAs follow a similar approach, in some cases, they do not.

For instance, the Member States diverge with the anticompetitive wide and narrow Most-favored Nation (“MFN”) clauses.⁶ Wide MFNs impose on suppliers of a retailer, such as an online marketplace, the same or better price and conditions on any other retailer. Narrow MFNs impose similar terms only on the supplier's own website. France, Italy, and Sweden, in cooperation with the Commission, found in the 2015 *Online Hotel Booking* antitrust case that wide MFNs are illegal, but narrow MFNs are legal.⁷ By contrast, Germany found both clauses unlawful in the same 2015 *Online Hotel Booking* case.⁸ This is problematic because Booking committed with France, Italy, and Sweden to replace wide MFN with narrow MFN. The inconsistency thus creates a situation where businesses must apply different conditions in different markets, thus fragmenting the goal of achieving a single market with one set of rules.

More recently, Italy opened in April 2019 an investigation against Amazon based on European competition law for allegedly favoring offers of third-party merchants that use Amazon's logistics and delivery services in the Italian market.⁹ A year later, the Commission opened in November 2020 an investigation against *Amazon* on a similar competition issue.¹⁰ The Commission's investigation covers the whole European market, except Italy due to the Italian's investigation. Amazon challenged in January 2021 before the General Court the Commission's decision to exclude Italy from its investigation to ensure a single decision rather than two. The October 2021 Court's ruling clarified the system of parallel competencies between the Commission and the NCAs that the 2003 antitrust regulation and the 2004 Commission's notice on cooperation within the ECN provide.¹¹ The regulation prevents the Member States from opening an investigation if the Commission opened an investigation against the same undertakings, the same allegedly anticompetitive practices, on the same product and geographic markets, during the same periods (art. 11(6) antitrust regulation). However, the Court stated that this provision does not imply a right for the undertaking to have a case dealt with in its entirety by the Commission.¹²

Interestingly, while the Commission notice defines an allocation system of competencies between the Commission and the NCAs, the Court noted that the notice does not lay down a rule on the allocation.¹³ It follows that an NCA can pursue a similar investigation and that the Commission can exclude a Member State from its territorial scope. The Court thus rejected Amazon's request. A few months later, Italy found in

5 European Competition Network, statistics, Aggregate figures on antitrust cases (accessed February 16, 2022). https://ec.europa.eu/competition-policy/european-competition-network/statistics_fr.

6 Chappatte, P., and O'Connell, K., *European Union – E-commerce: Most Favoured Nation Clauses*, GLOBAL COMPETITION REVIEW (December 3, 2020) (accessed February 16, 2022). <https://globalcompetitionreview.com/guide/e-commerce-competition-enforcement-guide/third-edition/article/european-union-e-commerce-most-favoured-nation-clauses>.

7 , Press release, Autorité de la concurrence, 21 April 2015: Online Hotel Booking Sector (April 23, 2015) (accessed February 16, 2022). <https://www.autoritedelaconcurrence.fr/en/communiqués-de-presse/21-april-2015-online-hotel-booking-sector>.

8 Press release, Bundeskartellamt, Narrow 'Best Price' Clauses of Booking also Anticompetitive (December 23, 2015) (accessed February 16, 2022). https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/23_12_2015_Booking.com.html.

9 Press release, Autorità Garante della Concorrenza e del Mercato, A528 - Amazon: Investigation Launched on Possible Abuse of a Dominant Position in Online Marketplaces and Logistic Services (April 19, 2019) (accessed February 16, 2022). <https://en.agcm.it/en/media/press-releases/2019/4/A528>.

10 Press release, European Commission, Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-Public Independent Seller Data and Opens Second Investigation into its E-Commerce Business Practices (November 10, 2020) (accessed February 16, 2022). https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077.

11 Case T-19/21, *Amazon.com, Inc. and Others v. European Commission*, ECLI:EU:T:2021:730.

12 *Id.* para. 45.

13 *Id.* para. 46.

December 2021 that Amazon abused its dominant position while the Commission's investigation is still ongoing.¹⁴ Amazon argued before the Court that the situation could lead to diverging rulings that could undermine the European approach to its activities.¹⁵ While the Court noted that it is a likely outcome, it stated that Amazon could only challenge the Italian and European decisions at the end of their proceedings.¹⁶ Therefore, even though the antitrust regulation aims to ensure the effective application of European competition law, Amazon could face a diverging ruling on the same practice because the territorial scope is different.

The *Online hotel Booking* and *Amazon* examples do not mean that the ECN does not work, but that in some instances, it fails to achieve its goal of ensuring a common approach in enforcing European competition law. The ECN is thus the well-placed network of cooperation between the Commission and the Member States in enforcing the DMA and European and national competition laws consistently.

III. IMPLEMENTATION OF DMA-LIKE NATIONAL COMPETITION LAWS

In Europe, the Member States can apply their own national competition laws in parallel with European competition laws. The Member States have national laws to satisfy their preferences. While national laws cannot run counter to European laws, they can complement them.¹⁷ For instance, France, Belgium, Germany, Austria, and Italy have provisions against abuse of economic dependence that enables a competition authority to find an infringement in a bilateral relationship between two firms, whereas this provision is absent in European competition laws.¹⁸

Several Member States, including Germany in 2019,¹⁹ Italy in 2021,²⁰ and Greece in 2021,²¹ thus proposed modernizing their national competition laws to the digital economy. While the Member States want the tools to deal with digital cases, these initiatives will likely lead to a patchwork of DMA-like national competition laws with the associated risk of inconsistency, compliance, and transaction costs.

Germany is the first country in the world to enact rules against large online platforms to promote fair and competitive digital markets, following experts' call to modernize German competition laws for the digital economy.²² Germany thus prepared the 10th amendment to the German national antitrust law long before the publication of the Commission's proposal for a DMA.²³ The German Parliament passed it in January 2021, and it came into force the same month.²⁴ It modernizes the national antitrust laws in abuse control, abuse of economic dependence, and merger notification. It also adds a new provision to firms designated by the German competition authority as "*paramount significance for competition across markets*" in digital markets.

The latter imposes similar DMA prohibition rules *ex ante*, even though the provision is under competition law, not regulation. The new German rule thus requires two steps: the designation of a firm as "*paramount significance for competition across markets*" and then the imposition of prohibitions. The German competition authority *Bundeskartellamt* quickly opened several investigations against *Meta Facebook* in

14 Press release, Autorità Garante della Concorrenza e del Mercato, A528 - Italian Competition Authority: Amazon Fined Over € 1,128 Billion For Abusing Its Dominant Position (December 9, 2021) (accessed February 16, 2022). <https://en.agcm.it/en/media/press-releases/2021/12/A528>.

15 Case T-19/21, *supra* note 11, para. 35.

16 *Id.* para. 36.

17 Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty (Text with EEA relevance), recital 8.

18 Tombal, T., *Economic Dependence and Data Access*, INTERNATIONAL REVIEW OF INTELLECTUAL PROPERTY AND COMPETITION LAW (IIC), ISSUE 51(1) (2020).

19 Weck, T., *The New Abuse Rules in the German Competition Act – What's in it for the EU?*, COMPETITION POLICY INTERNATIONAL (April 14, 2020) (accessed February 16, 2022). <https://www.competitionpolicyinternational.com/the-new-abuse-rules-in-the-german-competition-act-whats-in-it-for-the-eu/>.

20 Zampa, G. L. et al., *Italian Antitrust Authority's Proposed Reform of the National Antitrust Rulebook: What's in It for Digital Players?*, FRESHFIELDS BRUCKHAUS DERINGER LLP (March 29, 2021) (accessed February 16, 2022). <https://digital.freshfields.com/post/102guan/italian-antitrust-authoritys-proposed-reform-of-the-national-antitrust-rulebook>.

21 Omran, O., et al., *Special Competition Rules on Digital Ecosystems: Greece Joins the Club*, LEXOLOGY (September 7, 2021) (accessed February 16, 2021). <https://www.lexology.com/library/detail.aspx?g=75527f4b-11fd-4922-9be0-cbee540b80bd>.

22 Schallbruch M., et al., *A New Competition Framework for the Digital Economy*, Report By The Commission "Competition Law 4.0," September 2019.

23 Weck, T., *supra* note 19. According to the author, the draft bill dated at least from July 10, 2019.

24 Press release, Bundeskartellamt, Amendment of the German Act against Restraints of Competition (January 19, 2021) (accessed February 16, 2022). https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html.

January 2021,²⁵ *Amazon* in May 2021,²⁶ *Alphabet Google* in May and June 2021,²⁷ and *Apple* in June 2021,²⁸ to determine whether they fulfill the condition of the first step and fall within the scope of the new provision. The authority concluded in January 2022 that Alphabet Google, and in May 2022 Meta Facebook falls within the scope. Google and Facebook Meta did not contest the decision and will have to comply with the prohibitions imposed by the new act.²⁹ Following the decision, Google even proposed commitments in the German *Google News Showcase* case based on the new German rule that examines whether Google might favor its own services over competing services and impose unreasonable and discriminatory terms and conditions.³⁰

Germany has thus already enforced its DMA-like national competition law. It is still too early to conclude whether the act is efficient and effective at addressing competition issues in digital markets. However, one might wonder whether the act will be effective after the DMA's adoption as the Member States could not adopt a measure that would run counter to a Commission's decision. The antitrust regulation provides a similar provision that prevents NCAs applying European competition laws from taking decisions that would run counter to a Commission's adopted decision to ensure consistency. This means that if the Commission does not adopt a decision, the Member States can decide at their discretion. The act is thus likely to be effective after the DMA's adoption, thus requiring defining a cooperation model between the DMA and national competition laws.

IV. COOPERATION MODEL BETWEEN THE DMA AND NATIONAL COMPETITION LAWS

The COREPER text mandates that the Commission and the NCAs establish principles of cooperation and coordination in an implementing act to ensure consistency, effectiveness, and complementary enforcement of the DMA and national antitrust laws (recital 99).

In Europe, a similar situation arises in merger control between European competition law and national competition laws. The 2004 EU merger regulation ("EUMR") states that the Commission has exclusive jurisdiction to review mergers falling within the Community thresholds and NCAs to review mergers falling below it (art. 1 EUMR). In addition, the EUMR provides a referral system for efficiently allocating competencies between the Commission and the NCAs. The parties or NCAs can request a referral from NCAs to the Commission (arts. 4(5) and 22(1) EUMR), and vice versa, they can request a referral from the Commission to NCAs (arts. 4(4) and 9 EUMR) to review a concentration under certain conditions.³¹ In practice, the EUMR enables an efficient allocation of resources and a consistent merger review. In the digital sector, the Commission reviewed some important mergers that did not fall within the Community threshold thanks to the referral mechanism, such as *Facebook/WhatsApp* or *Apple/Shazam*.³²

25 Press release, Bundeskartellamt, First Proceeding Based on New Rules for Digital Companies – Bundeskartellamt also Assesses New Section 19a GWB in its Facebook/Oculus Case (January 28, 2021) (accessed February 16, 2021).

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/28_01_2021_Facebook_Oculus.html.

26 Press release, Proceedings Against Amazon Based on New Rules for Large Digital Companies (Section 19a GWB) (May 18, 2021) (accessed February 16, 2022).

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/18_05_2021_Amazon_19a.html.

27 Press release, Bundeskartellamt, Proceeding Against Google Based on New Rules for Large Digital Players (Section 19a GWB) – Bundeskartellamt Examines Google's Significance for Competition Across Markets and its Data Processing Terms (May 25, 2021) (accessed February 16, 2021).

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/25_05_2021_Google_19a.html; Press release, Bundeskartellamt, Bundeskartellamt

Examines Google News Showcase (June 4, 2021) (accessed February 16, 2021).

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/04_06_2021_Google_Showcase.html.

28 Press release, Bundeskartellamt, Proceeding Against Apple Based on New Rules for Large Digital Companies (Section 19a(1) GWB) – Bundeskartellamt Examines Apple's Significance for Competition Across Markets (June 21, 2021) (accessed February 16, 2021).

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/21_06_2021_Apple.html.

29 Press release, Bundeskartellamt, Alphabet/Google Subject to New Abuse Control Applicable to Large Digital Companies – Bundeskartellamt Determines "Paramount Significance Across Markets" (January 5, 2022) (accessed February 16, 2022).

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/05_01_2022_Google_19a.html.

Press release, Bundeskartellamt, New rules apply to Meta (formerly Facebook) – Bundeskartellamt determines its "paramount significance for competition across markets" (May 4, 2022) (accessed May 31, 2022).

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/04_05_2022_Facebook_19a.html.

30 Press release, Bundeskartellamt, Google News Showcase – Bundeskartellamt Holds Consultations on Google's Proposals for Dispelling Competition Concerns (January 12, 2021) (accessed February 16, 2022). https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/12_01_2022_Google_News_Showcase.html.

31 Carugati, C., *Reforming Merger Control Notification Thresholds*, *CONCURRENCES N° 2-2019*, ART. N° 89868 (2019).

32 *Id.*

An implementing act to the DMA should replicate the EUMR. The Commission should have exclusive jurisdiction to review practices falling within the DMA threshold and the NCAs to review practices falling below it. In addition, the act should also provide a referral mechanism where the NCAs could request a referral from NCAs to the Commission, and vice versa from the Commission to NCAs, to review a practice under certain conditions.

To refer a practice from the NCAs to the Commission, the act should use the two criteria of article 22 EUMR. First, the practice affects trade between the Member States. Second, the practice threatens to significantly affect competition within the territory of the Member State or States making the request. In that case, the Commission should review the practice under European competition law, not the DMA, because the practice is outside the DMA threshold.

To refer a practice from the Commission to the NCAs, the act should use two criteria. First, the practice falls within the national thresholds of the Member State making the request on its own initiative or upon the invitation of the Commission. Second, the Member State should prove that it has the expertise and resources to deal with the case, including prior actions in enforcement and advocacy, experience in local platforms and conditions, and investment in technological tools. Moreover, the Commission should supervise the NCAs' enforcement actions through similar mandatory information and guidance powers that the European antitrust regulation provides to the Commission to ensure the single market.³³ The Commission should thus guide the Member State on how it can apply its national competition law consistently with the DMA. It is worth noting that Germany, France, and the Netherlands proposed a similar model in a September 2021 amendment paper. The Commission would have shared its enforcement power based on a delegation mechanism within the ECN, but the Council did not retain the amendment.³⁴

V. CONCLUSION

The implementation of the DMA with national antitrust laws will be an important factor in the effectiveness of the regulation, thanks to an efficient allocation of resources and consistent decisions. A cooperation mechanism with clear rules on case allocation would avoid the risk of inconsistency that would undermine the single market.

³³ Council Regulation (EC) No 1/2003, *supra* note 17, art. 11.

³⁴ German, French, and Dutch Ministers for Economic Affairs, *Strengthening the Digital Markets Act and its Enforcement*, September 2021.



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