



*Joint paper of the heads of the national competition authorities of the European Union<sup>1</sup>*

**How national competition agencies can strengthen the DMA**

*Executive summary*

Competition agencies welcome the Digital Markets Act which, drawing on the successful decisional practice and the work conducted by the DG COMP and national competition agencies in the last twenty years, will be a powerful additional tool to effectively address some of the most harmful behaviours implemented by very large gatekeepers. Competition law is an effective means of maintaining the competitive dynamics also in the digital economy and has brought concrete and important changes for market players and consumers. However, the complexity and the fast-evolving nature of digital markets require enforcers to have a comprehensive set of tools at their disposal. Complementarity between competition law and the DMA will also be a guiding principle in the years to come, as competition law will eventually help future-proofing and updating the DMA.

Effective enforceability of the DMA from the start is essential. To reach this fundamental goal, the enforcement of the DMA would gain tremendously by making full use of the know-how and resources of the national competition agencies that have accumulated the highest level of expertise within the digital economy with respect to the practices of digital platforms which affect fair and open competition in their respective ecosystems.

Against this background, European national competition authorities believe that the way forward to ensure an effective and quick implementation of the DMA should include the primary application of the DMA by DG COMP at the European Commission, a complementary possibility of enforcement of the DMA by national competition authorities and the establishment of a mechanism for close coordination and cooperation between these agencies.

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<sup>1</sup> This paper was endorsed by national competition authorities at the ECN Directors General's meeting of 22 June 2021.

## The crucial role of competition law in the digital economy

1. Competition law is an effective means of maintaining the competitive dynamics of the digital economy. It can be applied across disciplines, without sectoral or technical limits. This makes it particularly suitable for addressing technological shifts or disruptions that challenge the boundaries between different sectors of the economy.
2. Over many years, competition authorities have demonstrated their ability to tackle the behaviors of digital players, by using innovative reasoning or by applying well-established solutions to new issues that are specific to the digital ecosystems.
3. The notion of abuse of a dominant position has proved to be well suited to apprehending the conduct of major platforms, as it makes it possible to address a wide range of behaviors. European competition authorities have addressed many of the issues raised by digital ecosystems and the substantial market power held by digital platforms<sup>2</sup>. Market studies and sector inquiries were also issued by competition agencies to deepen their understanding of the specificities of these markets and provide an analytical framework for the practices that may be implemented in the digital economy<sup>3</sup>.
4. In addressing these issues, competition agencies have access to a diversified spectrum of tools, among which interim measures, behavioral and structural remedies, commitments undertaken by the companies concerned and fines. These tools may be combined to rapidly and durably remove competition concerns.

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<sup>2</sup> The **combination of personal data** (e.g. the German (2019) Facebook case); **digital platforms' data advantage over competitors and business users** (e.g. the Google Search (Shopping) case by the European Commission (2017)); **the implementation of MFN clauses** (e.g. the e-book Amazon case by the European Commission (2017); the Booking cases by the French, Italian and Swedish competition authorities (2015); the Amazon Marketplace case by the British and the German competition authorities (2013); the German hotel booking cases against HRS (2012) and Booking (2015)); **tying-oriented practices** between different services offered by digital platforms (e.g. the Google Android case by the European Commission (2018); the Microsoft case by the European Commission (2004)); **self-preferencing behaviors** (e.g. the Google Search (Shopping) case by the European Commission (2017); the Italian ongoing investigation into Amazon's conduct granting benefits on its marketplace to retailers using its logistic services); **device neutrality and interoperability issues** (e.g. the Microsoft case by the European Commission (2004); the Italian Google Maps / Enel case (2021); European Commission's on-going investigation into Apple Pay; **other types of exclusionary and exploitative conducts** (e.g. the Google Search (AdSense) case by the European Commission (2019); the Apple / Spotify on-going investigation by the European Commission; the Apple / App store on-going investigation by the Netherlands competition authority; the ongoing Amazon/Apple case run by the Italian Competition Authority into brandgating practices; the Google / Gibmedia case by the French competition authority (2019) and the Amazon Marketplace case by the German competition authority (2019).

<sup>3</sup> Sector-specific investigations into online advertising by the Autorité de la concurrence (search advertisement in 2010 and display advertisement in 2018); sector-specific investigations into the fintech sector by the Autorité de la concurrence (2021), the Hellenic Competition Commission (2021) and the Spanish CNMC (2018); joint studies of the Autorité de la concurrence and the Bundeskartellamt on data and related issues for the implementation of competition law (2016) and on Algorithms and Competition (2019); the market studies of the Netherlands competition authority into App stores (2019), the influence of Big Tech on payment markets (2020), Internet interconnection and peering (2021) and the on-going study into cloud services (2021); the European Commission's E-commerce sector inquiry in 2017 and its ongoing sector inquiry into Consumer Internet of Things.

5. The ability to intervene quickly is recognised as an absolute necessity in digital markets. For most competition authorities, one key objective is that of being able to carry out their investigations within a timeframe that responds to the rapid changes in the market. Making a wider use of interim measures can contribute to this goal.
6. Recent cases have demonstrated the effectiveness of commitment decisions and interim measures in fast-moving markets. For instance, in the Amazon e-book case, the formal investigation run by the European Commission lasted less than two years and ended in 2017 with legally binding commitments by Amazon, which went even beyond the original scope of the investigation. Amazon effectively ended its contractual parity (most-favored-nation) clauses, which disincentivized publishers to sell on other platforms, thereby increasing competition in e-book markets. In June 2019, the European Commission initiated proceedings into an alleged abuse of dominance by chipsets manufacturer Broadcom. The Commission issued an interim decision ordering Broadcom to cease to apply the exclusivity and leveraging provisions contained in six agreements with its main manufacturers, thus serious and irreparable harm to competition could be prevented. Following the imposition of interim measures, the case has been rapidly and definitively resolved with Broadcom's commitments to suspend and cease to apply the problematic provisions identified by the Commission. This important step for a fast response of competition agencies has been confirmed by the Commission's commitment to make the best use possible of interim measures in the future.
7. In November 2019, the French Autorité de la concurrence initiated abuse of dominance proceedings against Google. The Autorité quickly imposed urgent interim measures that allowed publishers and news agencies to negotiate with Google the remuneration that was due to them in light of Google's re-use of their protected contents<sup>4</sup>. The Autorité also addressed for the first time Google Ads' operating rules that Google imposed on advertisers in a non-objective and inconsistent manner. Beyond a fine of 150 million euros, the Autorité required Google, in a series of injunctions, to clarify its advertising platform Google Ads' operating rules and account suspending procedures, thus allowing several business users and advertisers to develop their activity in a fairer and more secure environment<sup>5</sup>.
8. Commitments undertaken by digital platforms in the context of competition law proceedings substantially and rapidly lead to the modification of problematic behaviors. As early as in 2009, the European Commission adopted a first decision implementing a choice screen remedy in the Microsoft case, demonstrating that such remedies can be an effective way to restore competition on the merits for a tying abuse. About a decade later, the Commission intervened against Google, one of the main beneficiaries of the Microsoft case, in the Google Android case. Following the Commission's

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<sup>4</sup> See the Google / related rights case by the French competition authority (2020).

<sup>5</sup> See for instance the Google / Amadeus and the Google / Gibmedia case by the French competition authority (2019).

prohibition decision, Google agreed to roll out a choice screen on Android smart mobile devices, offering consumers the option to install a different general search service on key entry points on their smart mobile device. Following feedback from the Commission, Google modified the choice screen further in June 2021, making it free for rivals, and increasing the number of rivals that will be shown.

9. In 2015, the Bundeskartellamt found that narrow price parity clauses used in the terms and conditions for hotels on Booking.com's online hotel booking platform breached article 101 of the Treaty. According to these clauses, hotels were not allowed to offer more favourable conditions on their own websites<sup>6</sup>. The Bundeskartellamt's decision has been confirmed by the Federal Court of Justice in the meantime.
10. In November 2018, the Bundeskartellamt initiated abuse of dominance proceedings against Amazon. There were massive complaints about the terms of business and practices towards sellers on the German marketplace *amazon.de*. In the course of the Bundeskartellamt's proceedings, Amazon in particular committed to a 30-day notice for the termination of sellers' accounts, thus refraining from its original unlimited right to immediately terminate accounts without justification. Amazon also dropped a contractual clause granting itself unlimited exemption from liability towards sellers. Furthermore, the commitments prohibit Amazon from designating Luxembourg as the only court of jurisdiction for disputes, now allowing sellers to seek legal action in their respective local jurisdictions. The Bundeskartellamt obtained these commitments only a few months after initiating the proceeding and closed the case in 2019. Amazon agreed to apply the new terms and conditions not only in Germany and Europe but worldwide, a massive geographical spill-over effect.
11. In June 2021, Google was sanctioned 220 million euros for an abuse of its dominant position in online "display" advertising by the French Autorité de la concurrence for favoring its own advertising technologies and hindering interoperability<sup>7</sup>. The decision will restore a level playing field for all players, and the ability for publishers to make the most of their advertising space. It was the first time that the issues of programmatic advertising were tackled, and the decision provided quick and effective responses to businesses and publishers due to the commitments offered by Google, in the context of a settlement procedure, to implement effective changes on the way it operates display advertising. This decision will lead Google to implement some of the changes worldwide and will pave the way to damages claims from affected on-line advertising businesses and publishers.
12. Anyone - be they an individual, including consumers and undertakings, or a public authority - can benefit from the remedies implemented and claim compensation before national courts for the harm caused to them. This strengthens the practical and deterrent effect of the decisions issued by competition agencies.

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<sup>6</sup> See also the Booking cases by the French, Italian and Swedish competition authorities (2015).

<sup>7</sup> The Google / News Corp Inc. case by the French competition authority (2021).

For example, after the Bundeskartellamt's decision against Booking.com has been confirmed by the Federal Court of Justice, we now observe hotels initiating private actions against Booking.com, claiming damages for the platform's illegal behavior as previously established by the agency<sup>8</sup>.

### **Acknowledging the continuum between competition law and the DMA**

13. In addition to article 102 of the Treaty (including its national competition law equivalents), several jurisdictions such as Germany, Austria, Greece and Italy have recently introduced<sup>9</sup> or are considering legislative changes under their national competition law, with provisions applying specifically to the digital sector. The Bundeskartellamt has already initiated proceedings against Facebook, Amazon and Google on this basis.
14. Of course the complexity and the fast-evolving nature of digital markets require enforcers to have a comprehensive set of tools at their disposal. Therefore, competition agencies welcome the European Commission's initiative with respect to the Digital Markets Act (*DMA*), which, drawing on the decisional practice and the work conducted by the DG COMP and national competition agencies in the last twenty years, will be an additional powerful tool to effectively address *ex ante* some of the most harmful and most common behaviors by very large gatekeepers. This would strengthen the preventive effect of existing regulations and case law.
15. Since the DMA proposal is built on the evidence provided by competition law cases and sector inquiries of various European Competition Authorities including the Commission, the specific approach of the DMA should result in procedural gains and faster procedures. This stems from the fact that the enforcing authorities will not need to proceed to an individualized assessment of market positions and likely effects of the practices at stake. In particular, the enforcing authorities will not need to define the relevant markets in which the gatekeepers operate, demonstrate that the gatekeepers concerned are dominant in these markets, and prove the abusive nature of the practices at stake.
16. Complementarity between competition law and the DMA, which has been one of the inspiring forces for the drafting of the DMA, will also be a guiding principle in the years to come. In the future, competition law will remain at the forefront of open and fair digital markets, alongside the DMA; in addition, the flexible approach offered by competition law will eventually help future-proofing and updating the DMA, for instance with respect to new practices that have not yet been proven abusive under competition law.

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<sup>8</sup> See also for instance the judgment of the Paris Commercial Court of 22 February 2021 in the Google / Bureau Carte Grise case, in the wave of the Google / Gibmedia decision by the French competition authority (2019).

<sup>9</sup> In January 2021, the 10th Amendment to the German Competition Act labeled "digitalization of the Competition Act" entered into force. It includes several updates, in particular a new provision on "abusive conduct of undertakings of paramount significance for competition across markets".

## **Making the best use of the expertise needed for an effective enforcement of the DMA**

17. In order to maximize the expected benefits of the DMA, the following should be noted:
- On the merits, the proposal aims at introducing self-executing and directly applicable rules to designated gatekeepers. However, enforcement proceedings will undoubtedly arise from the implementation of the DMA and will pose a challenge for future enforcement. Also any enforcer in the DMA framework will have to determine whether a specific behaviour by a gatekeeper does in fact constitute a violation of one of the provisions of articles 5 and 6 of the DMA in complex and dynamic digital markets. Self-executing provisions and supposed compliance by gatekeepers with DMA obligations will in practice be complemented by investigations. For effective enforcement of the DMA from day 1 it is paramount that any enforcer has all the means at its disposal to tackle this important task.
  - From a procedural standpoint, a high level of expertise will be needed to conduct complex investigations into a potential violation of the DMA. The legal and practical aspects of collecting evidence from the market, conducting an investigation, potentially carrying out dawn raids in gatekeepers' premises, assessing the relevance of proposed commitments as well as defining appropriate behavioural and structural remedies need lots of experience.
18. Effective enforceability of the DMA from day 1 is essential. To reach this fundamental goal, the enforcement of the DMA would gain tremendously by making full use of the know-how of the agencies that have accumulated the highest level of expertise within the digital economy with respect to the harmful practices implemented by digital platforms in their respective ecosystems.

## **Ensuring a strong consistency and very close coordination in the enforcement of the DMA and competition law**

19. European national competition authorities believe that the way forward to ensure an effective and quick implementation of the DMA should be threefold: (i) the primary application of the DMA by DG COMP at the European Commission, (ii) a complementary possibility of enforcement of the DMA by national competition authorities<sup>10</sup> and (iii) the establishment of a mechanism for close coordination and cooperation between these agencies, as well as with national courts implementing both the DMA and EU (and national) competition law.
20. National competition authorities wish to emphasize that, in the absence thereof, there are multiple risks, including unreasonable inefficiencies due to underutilization of existing resources, thus causing an enforcement bottleneck, significant delays, in particular in establishing elsewhere the expertise that competition authorities have acquired over many years of dealing with digital platforms' behaviors and

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<sup>10</sup> National competition authorities implementing competition law in all sectors of the economy.

the way digital markets work, and potentially conflicting decisions undermining the effectiveness of both the DMA and competition law.

21. The Commission (DG COMP) should therefore be supported in every way possible by the expertise of national competition authorities in enforcing the DMA. Even under the recommended scenario where only a limited number of gatekeepers were concerned by the DMA, it will be difficult for the European Commission alone to provide sufficient resources to enforce all the obligations and prohibitions referred to in the DMA, towards all designated gatekeepers, with all their respective gateway core platform services, in each and every Member State, at all times. To address these challenges, national competition authorities and DG COMP should work together and act as part of an integrated ecosystem, therefore benefitting from the network effects that would most certainly arise.
22. National competition authorities have gathered unique experience in the digital economy and could therefore be an additional relay for the enforcement of the DMA, in order to ensure its full effectiveness and complementarity with competition enforcement. Their national proceedings have demonstrated that detrimental behaviors by large companies active worldwide, including gatekeepers as defined in the DMA, can in certain scenarios be very well addressed at a national level. This would make it possible to bring in more resources alongside those of the European Commission, exploit synergies with competition law enforcement and avoid enforcement bottlenecks and/or de-prioritization of certain cases.
23. It is reasonable to assume that national competition authorities will be well placed to enforce the DMA when a potential infringement has a substantial direct actual or foreseeable effect within a limited number of Member States. This is likely to occur with respect to some of the activities or services provided by gatekeepers. It emerged from several past examples that in those circumstances, national proceedings can have a very positive spill-over effect to other jurisdictions, without questioning the principle of territoriality<sup>11</sup>.
24. Additionally, national agencies have proven to be a valuable radar-screen for cases. They are perceived as more accessible for smaller market players in national markets, which may be reluctant to file a complaint against a gatekeeper with the European Commission. They also could serve as a primary filter for cases brought to the Commission, as resources are limited everywhere. This way the “radar-screen” is much wider and the quality of signals reaching the Commission will be higher.
25. Furthermore, as the DMA will be implemented alongside EU and national competition law, such cooperation and coordination mechanism will also ensure that the DMA, EU and national competition law will be applied in a coherent manner - in order to avoid the adoption of conflicting decisions or

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<sup>11</sup> Amazon Marketplace case by the German competition authority (2019) as well as Amazon MFN case (2013) by the British and the German competition authority; the Google / News Corp Inc. case by the French competition authority (2021).

remedies, and to preserve the integrity of the internal market. Beyond ensuring consistency and coherence, the cooperation mechanism will allow for the sharing of information that is collected in both areas, thus strengthening the effectiveness of both the DMA and competition enforcement. By providing more transparency on mergers and acquisitions by gatekeepers, the DMA will also strengthen the effectiveness of national competition authorities' powers in the merger control area, also by allowing making use of the referral mechanism under article 22 of the EU Merger Regulation.

26. Finally, in view of the direct effect of the regulation on national legal orders, national courts will also play a key role in enforcing the DMA. In this respect, it is important to ensure a strong connection between the public and private enforcement systems of the DMA. The accumulated experience of the enforcement mechanisms put in place for competition law should in this context benefit the DMA and serve as a meaningful example, with in particular the setting-up of the ECN, an existing system of cooperation with national courts, some well-established case law on the private enforcement of competition law and Directive 2014/104 harmonizing certain rules governing actions for damages for competition law infringements.

#### **How national competition agencies should be involved in the enforcement of the DMA**

27. To ensure the maximum efficiency of this new tool, the DMA should provide for an articulation of enforcement powers between the European Commission, which will be at the helm, and national competition authorities, which can help demultiplying the DMA's reach.
28. The center of gravity for the enforcement of the DMA should be at EU level and the European Commission should have sole jurisdiction on some of the powers outlined in the DMA, such as the power to designate gatekeepers or decide on exemptions. However, enforcement powers should in specific instances be shared with national competition authorities on a voluntary basis.
29. Joint application of the DMA by the European Commission and by national competition authorities would not put into question the harmonious and coherent application of the DMA throughout the European Union. Indeed, such an excellently working approach already exists under competition law, where national competition authorities have a long-standing experience in applying articles 101 and 102 of the Treaty at a national level, alongside the European Commission. European merger control rules and their referral mechanisms could also serve as a valuable example<sup>12</sup>.
30. Regulation 1/2003 and the European Competition Network (ECN) provide a well-established and successful model for cooperation and co-ordination, which continues to be deepened and strengthened. This system allows for early coordination between enforcement authorities and prevents contradictory

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<sup>12</sup> Referrals under article 4.5 of Regulation 139/2004 (i.e. case M.7217 Facebook/Whatsapp by the Spanish, British and Cypriot competition authorities) and under article 22 (i.e. case M.8788 Apple/Shazam by the national competition authorities of Austria, France, Iceland, Italy, Norway, Spain and Sweden).



decisions. Within the ECN, DG COMP enjoys a privileged position as it can take over enforcement at any time. Contrary to the GDPR, jurisdiction of national competition authorities does not hinge on the place of a company's establishment, but on the place(s) where a company's behavior has substantial effects; thus, there is no national authority having jurisdiction for specific companies due to their respective place of establishment. ECN members benefit from broad capacities for information exchange and support each other, for example in inspections. As the ECN procedures have been tried and tested for over 15 years now, a plethora of experience and best-practices have been developed.

31. In the DMA context, several safeguards could similarly be established in order to firmly ensure that the Commission, through DG COMP, has the lead on enforcement and can ensure the consistent application of the DMA throughout the EU, avoiding fragmentation of the internal market. But enforcement powers should also be shared, under the supervision of DG COMP, with national competition authorities when appropriate and with the agreement of the authority concerned. In such a case, a solid coordination and cooperation mechanism would need to be established on the basis of the ECN, to ensure far reaching mutual assistance and the possibility to provide each other with evidence and information on the implementation of the DMA.
32. More specifically, national competition authorities should be given the opportunity to initiate or enforce proceedings against gatekeepers on the basis of the DMA, or carry out certain investigative actions at the request of the Commission, when they are well placed to deal with the case. Where DG COMP is taking action, national competition authorities could intervene in support of the Commission's investigative, enforcement and monitoring powers, including by receiving complaints at the national level on behalf of the Commission or by supporting the investigations, dawn raids and requests for information.
33. In addition, national competition authorities should be able to request the Commission to open proceedings or market investigations; the systematic presence of national competition authorities in the Advisory Committee should also be ensured.
34. In the near future, the DMA will be a powerful additional tool to ensure that digital markets remain open and fair. In this respect, one must not forget that digital services and products encompass a very wide range of economic activities, including retail, financial activities, advertising, cultural activities, social networks, and many others. Hence, successful enforcement of the DMA requires it to be implemented through a much wider prism than a sector regulation.
35. Thus, the efficiency of the DMA will be strengthened if the Commission is allowed to benefit from the expertise and resources built up by national competition authorities. This does not mean however that the expertise of other regulators shall not be sought in the context of the implementation of the DMA. On the contrary, the DMA should expressly include the possibility for the Commission or national

competition authorities to involve such agencies, who could beneficially provide specific expertise and knowledge in their respective field of competence.

36. National competition authorities strongly encourage the legislators not to underestimate the workload and complexity of the future implementation of the DMA, be it on the merits or from a procedural standpoint. In this respect, consideration of the institutional framework in which the DMA will be applied is of utmost importance to ensure the effectiveness of such regulation; it is in the DMA's best interests to address this issue as soon as possible and in the regulation itself. Building on the existing and successful experience of DG COMP and national competition authorities in the context of the ECN is key in this respect.