

VISTA Policy Paper

02/2022

July 2022



VISTA

EU SINGLE MARKET INTEGRATION

The Origins of the Digital Markets Act

Explaining Policy Change

Authors

Michelle Cini

School of Sociology, Politics and International Studies, University of Bristol, United Kingdom

Patryk Czulno

School of Sociology, Politics and International Studies, University of Bristol, United Kingdom



Co-funded by the
Erasmus+ Programme
of the European Union

VISTA EU Single Market Integration is a Jean Monnet Network co-funded by the Erasmus+ programme of the European Union.

Funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or the European Education and Culture Executive Agency (EACEA). Neither the European Union nor EACEA can be held responsible for them.



<https://fasos-research.nl/vista-jmn/>

VISTA-JMN Policy Papers (online) | ISSN:

<https://fasos-research.nl/vista-jmn/policy-papers/>

Editorial Team:

Prof. Sophie Vanhoonacker, Faculty of Arts & Social Sciences, Maastricht University

Dr. Aneta Spendzharova, Faculty of Arts & Social Sciences, Maastricht University

Dr. Anna Herranz-Surrallés, Faculty of Arts & Social Sciences, Maastricht University

Prof. Michelle Cini, School of Sociology, Politics and International Studies, University of Bristol

Prof. Ana E. Juncos, School of Sociology, Politics and International Studies, University of Bristol

Prof. Sandra Eckert, Friedrich-Alexander-Universität Erlangen-Nürnberg, Department of Social Sciences and Philosophy

Prof. Ringa Raudla, School of Business and Governance, Tallinn University of Technology

Prof. Robert Krimmer, School of Information Technologies, Tallinn University of Technology

Prof. Roman Petrov, Jean Monnet Centre of Excellence, National University of Kyiv-Mohyla Academy

Dr. Oksana Holovko-Havrysheva, Faculty of Law, National University of Kyiv-Mohyla Academy

Issued by:

Jean Monnet Network

Centre for European Policy Studies (CEPS)

Place du Congrès 1, 1000 Brussels

Tel: +32 (0) 2 229 39 11

Fax: +32 (0) 2 894 49 39

<https://www.ceps.eu>

Istituto Affari Internazionali

Via dei Montecatini, 17

00186 Roma

Tel: +39 066976831

iai@iai.it

P. IVA 02126711007

<https://www.iai.it/en>

The Origins of the Digital Markets Act

Explaining Policy Change

By Michelle Cini & Patryk Czulno¹

Executive Summary

Until very recently the regulation of digital platforms (or ‘Big Tech’) in the European Union (EU) relied solely on the enforcement of the EU’s well-established competition (anti-trust) policy. In December 2020 the European Commission sought to supplement its cartel, monopoly and merger policy instruments with a draft EU regulation, known as the Digital Markets Act (DMA). This policy brief explains the origins of this Commission proposal. We focus on four sets of factors that drove the Commission’s new approach to digital market regulation: (a) the technological and industrial policy context and response characterised by growing digitalisation and national reaction to the market power of digital platforms; (b) the Commission’s experience of dealing with ‘Big Tech’ using traditional using traditional competition instruments; (c) the near consensus of experts arguing for a new type of digital market regulation; and (d) the inability of ‘Big Tech’ lobbying to prevent the proposal. The brief concludes by arguing that while none of these factors alone was decisive, each was important in combination in explaining the Commission’s change of approach to the regulation of digital platforms.

Introduction

According to the European Commission the proliferation of digital technologies is driving a ‘new global industrial revolution’ [1]. This digital transformation of business practices is characterised by the emergence of large digital platforms, most notably Google, Amazon, Facebook (now Meta) and Apple, that are able to dominate their own platform ecosystems. In the case of the Single European Market (SEM), the concentration of market power in a small number of these digital giants has the potential to threaten free and fair competition, while the absence of effective EU-level regulation risks market fragmentation.

For much of the 2014-2019 period, European Commission leaders, most notably those linked to DG Competition, articulated a commitment to the use of traditional competition instruments to meet the needs of the new digital economy [2] [3]. Yet, by mid-2020 the Commission had proposed new rules on the regulation of digital platforms, asserting that: ‘competition alone cannot address all the systemic problems that may arise in the platform economy. Based on the

¹ The authors retain the copyright to this policy paper.

single market logic, additional rules may be needed to ensure contestability, fairness and innovation, and the possibility of market entry, as well as public interests that go beyond competition or economic considerations' [1]. This shift in approach became the basis for a legislative proposal, the Digital Markets Act (DMA), which was approved by the European Commission in December 2020. Why did the Commission shift from a competition-based approach to a mix of EU regulation and EU competition policy? We argue that this policy change arose from the interplay of various factors, which together shed light on Commission policy-making.

Introducing the Digital Markets Act (DMA)

Initially the Commission had sought to tighten up the regulation of digital platforms by exploring the option of a Digital Services package. This package, which focused on digital content, was originally intended to be supplemented by a New Competition Tool (NCT) which would strengthen competition policy both across-the-board and with reference to digital markets. When the NCT seemed unlikely to gain Member State support, the Digital Services package was extended to include a competition element. Acknowledging this policy change, the Digital Services package was subsequently split into two separate legislative acts, the Digital Markets Act (DMA) to promote competition and the Digital Services Act (DSA) designed to create a safe and responsible online environment for European citizens.

The rationale behind the DMA initiative, the focus of this Policy Brief, was the promotion of fair and contestable markets in the digital sector. It also sought to prevent anti-competitive practices by placing obligations on digital platforms and by introducing new sanction mechanisms. These platforms or 'gatekeepers' were to be defined by their role, size and durability in the market. The companies targeted by this new legislation would be large players acting as intermediaries between businesses and individual users operating across several member states.

The new Act covered three key areas of activity: (a) the use of data gathered from businesses hosted by the platforms; (b) interoperability, such as where additional services only work with the platforms' systems; and (c) self-preferencing, that is, the treatment of the platforms' own services more favourably than those of their competitors. It comprised a list of 'do's and don'ts' for digital platforms and established a mechanism for ongoing market analysis to cope with the fast-changing nature of this policy area. It also foresaw large fines and periodic penalty payments for firms failing to comply with these rules.

We now consider the factors that explain how the Commission's proposal came about.

Digitisation, Industrial Policy and the EU's Digital Agenda

The first set of factors are contextual. The growing importance of digitalisation itself is relevant here, as is the fact that European governments were beginning to regulate their own domestic digital markets and services. This led the European Commission to raise concerns as to the impact this might have on the SEM. The Commission response was the launch in 2014 of its initiative to create a Digital Single Market (DSM), an agenda revitalised when Ursula von der Leyen took over as Commission President in late 2019. At that time, Margrethe Vestager was able to expand her portfolio from competition alone (the position she held in the Juncker Commission) to both competition and digital economy and society, signalling the significance and interplay of these two policy areas. The theme of 'A Europe Fit for the

Digital Age’ became one of the priorities of the new Commission [5] and Vestager was appointed Executive Vice-President to lead on this theme, with a supporting role for the Single Market Commissioner, Thierry Breton. In February 2020 the Commission launched its Digital Strategy, and a month later it announced a new industrial policy to support the twin transition to a green and digital economy and society, and to help promote ‘open strategic autonomy’ in the EU. The latter sought to enable the EU to protect itself against unfair and abusive practices by non-EU states and companies. US commentators, by contrast, saw this initiative as a revival of European interventionism and protectionism, which is particularly pertinent from a digital market perspective given the dominance of the US/Silicon Valley within the platform economy.

Learning, Expertise and Lobbying

While these contextual factors are crucial, alone they do not explain the Commission’s change of policy. Several internal considerations matter too. First, the DMA was drafted after more than a decade of Commission competition enforcement in digital markets. Several of the largest cases to hit the headlines in that period were extremely controversial, especially those involving the American multi-national technology company, Google. Google is a company with diverse business interests, though most of its income comes from advertising. Typical of digital platforms, Google’s activities involve gate-keeping, which means it can ‘have a major impact on, [and] control the access to digital markets. It can impose take-it-or-leave-it conditions on both [...] business users and consumers’ [6]. These activities have been the target of several European Commission investigations and decisions.

Critics have nevertheless questioned the effectiveness of the Commission’s competition enforcement approach, its remedies, and the process by which dominance in the relevant market has been analysed. Moreover, decision-making, whether in the political/policy or judicial sphere, has often been very slow. The investigation in the Google Shopping case, which began in 2010, took five years before a Statement of Objections was issued, and even then, a final Decision was not forthcoming until June 2017, seven years after the opening of the case. Delays are perhaps understandable given both the technical complexity of these cases and the Commission’s limited experience in dealing with digital platforms. Yet, by the time cases such as these are concluded, a great deal of harm may already have been done.

To make matters worse, Commission Decisions may have little effect on the conduct of digital platforms, with the practices condemned (and prohibited) continuing with impunity, and appeals dragging on long after Decisions have been taken. Competitors have argued, for example, that Google continued to use its advertisements to favour its own service even after the case was formally resolved. Vestager acknowledged that conduct such as this, if left unchallenged, could undermine both the credibility of the Commission and of the Single Market [3].

The primary challenge for the Commission in addressing anti-competitive practices by digital platforms is that it is only able to respond after the fact (that is, ex-post). This is not so problematic where markets are ‘well-ordered’ [7] and businesses organise their activities to avoid breaching the competition rules. Perhaps because digital markets are relatively immature and the Commission has not yet had built up enough of a track record, digital platforms have tended to resist Commission control. Indeed, one of the functions of the new draft legislation is to help nudge gatekeepers into cooperating with the Commission.

In this regard, the Commission initially took inspiration from the UK Competition and Markets Authority's market investigation tool. The latter informed the proposed New Competition Tool (NCT). Subsequently, although there were few national examples to use as models, Vice-President Vestager was able to draw on the Commission's own experience of ex ante regulation in support of its competition policy in other sectors. As she put it: this is 'the same as we have been doing in banking, in telecoms, in energy – to realise that antitrust will have to work hand in hand with regulation. So that we have a complete set of tools' [8]. Thus, the presence of these earlier examples suggested to the Commission a reform option that had been tried and tested in other sectors, notwithstanding the distinctiveness of the digital sector in that it had not been subject to the kind of market failure found in these other sectors.

Second, with the window to reform open, the Commission was able to draw extensively on the advice of experts. Indeed, the Commission actively sought out expert advice, as in January 2019 when DG Competition hosted a full day conference: 'Shaping competition policy in the era of digitisation'. To signify its importance, the conference was introduced by Commissioner Vestager and concluded with a speech by DG Competition's Director-General, Johannes Laitenberger [2]. Out of around 100 written responses, '[t]he majority of the submissions laid out arguments for a pro-active competition enforcement and a competition-driven regulation' [9]. Alongside this event the Commission sponsored its own expert report, 'Competition policy for the digital era', to explore how digital policy should evolve to promote pro-consumer innovation [7]. As well as presenting a large number of technical recommendations, the report suggested that competition policy should develop a stronger enforcement regime to better serve European citizens. Their broad recommendation was that the Commission should devise new general legal rules to meet the new challenges of the digital economy; to forge a new kind of regulatory regime [7].

Third, the lobbying scene was also important. It should come as no surprise that lobbyists have been active on the issue of digital regulation. Civil society groups mainly argued a strongly pro-regulation line. By contrast, 'Big Tech' have sought to defend their interests with vigour. We know from unpacking the Commission's 4,342 lobby meetings between 2017 and 2021 that large corporations, particularly those from Silicon Valley, had become more dominant in lobbying on digital issues [10]. In a 12-month period from late 2019 and late 2020, 158 meetings 'were logged as including discussions on the DMA or DSA' [11], and 13 out of 103 organisations, mostly companies and lobby groups, held three or more meetings with the Commission. Digital content moderation and competition were the most common issues lobbied on by the Big Five tech companies in the Commission in 2020, ahead of COVID-19 and climate change [12].

While lobbying activity initially addressed both competition and content moderation often in the same meetings, by mid-2020 lobbyists were almost exclusively focused on competition [13]. Yet, beyond providing a richer information base for the Commission, there is no evidence that corporate lobbying affected the decision to introduce the ex-ante regulation of digital platforms. Nor did the Commission alter its position on the substance of regulation. This was the case even for the subjects about which the large digital platforms were most exercised, such the application of the new rules exclusively to larger platforms.

In any case, not all digital platforms were hostile to the Commission's proposals. Indeed, the business users of the large platforms understood how they might benefit from the proposed legislation. As digital platforms have different business models and antitrust priorities, they

quite often lobby against each other. This is especially the case for smaller platforms. However, even among ‘Big Tech’, Facebook was reported to have lobbied against ‘unfair trading practices’ by Apple’s app store [13], leading Facebook to state that the proposed legislation ‘was on the right track’ [14]. Smaller platforms also had different interests. For example, Booking.com’s CEO also distanced himself from Google, arguing that Booking.com have smaller market shares and should not be subject to the policy in the same way [13]. Indeed, the tech environment was far from homogeneous on digital market issues.

Conclusions

How, then, did the DMA come about? In sum we found that a policy change in this case resulted from the opening of an internal and external window of opportunity provoked by the Commission’s case experience and the emergence of a new policy context. This window highlighted a set of problems, the solution to which was found in a consensus in support of ex-ante regulation amongst external and in-house expert advisors and commentators. This consensus decisively altered the Commission’s thinking on the issue of digital market regulation and ultimately determined the approach taken by Commission decision-makers. The large digital platforms – despite their reputation as lobbying power-houses and their best efforts to defend their interests – were unable to prevent the proposed regulation.

This policy brief is a shortened version of the following journal article:

Cini, M. and Czulno, P. (2022) ‘Digital Single Market and the EU Competition Regime: An Explanation of Policy Change’. Journal of European Integration 44 (Special Issue 1: The European Single Market at Thirty: Renationalisation, Resilience, or Renewed Integration?): 41-57. DOI: <https://doi.org/10.1080/07036337.2021.2011260>.

References

- [1] European Commission (2021) Shaping Europe’s Digital Future’
https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/shaping-europe-digital-future_en [Accessed: 13 June 2021].
- [2] Laitenberger, J. (2019) ‘Closing remarks at the ‘Shaping competition policy in the era of digitisation’ conference, Brussels, 17 January.
- [3] Vestager, M. (2018) ‘Fair markets in a digital world’ Speech to the Danish Competition and Consumer Authority, Copenhagen, 9 March.
- [4] European Commission (2019) DG Competition conference ‘Shaping competition policy in the era of digitisation’ (Brussels, January 2019)
https://ec.europa.eu/competition/information/digitisation_2018/conference_en.html
[Accessed: 13 June 2021].
- [5] European Commission (2021) ‘European Commission’s Priorities’,
https://ec.europa.eu/info/strategy/priorities-2019-2024_en [Accessed: 13 June 2021].
- [6] European Commission (2021) ‘Europe fit for the Digital Age: new online rules for users’
https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment/europe-fit-digital-age-new-online-rules-users_en [Accessed: 13 June 2021].
- [7] Crémer, J., Y.-A. de Montjoye and H. Schweitzer (2019) ‘Competition policy for the digital era’, Final Report, Brussels: European Commission, at
<https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> [Accessed: 13 June 2021].
- [8] European Commission (2020), ‘Statement by the Executive Vice-President Vestager on the Commission proposal on new rules for digital platforms’, European Commission – Statement, Brussels, 15 December.
- [9] Laitenberger, J. (2019), ‘Competition enforcement in digital markets: using our tools well and a look at the future’, Speech, 14th Annual Conference of the GCLC “Remedies in EU Competition Law: Substance, Process and Policy”, Brussels, 31 January.
- [10] Kergueno, R. (2018) It’s always sunny in Silicon Valley: how big tech dominates digital lobbying. Transparency International, 12 December. Available at
<https://transparency.eu/sunny-silicon-valley/> [Accessed: 8 April 2021].
- [11] CEO (2020), Big Tech brings out the big guns in fight for future of EU tech regulation. 11 December. Available at <https://corporateeurope.org/en/2020/12/big-tech-brings-out-big-guns-fight-future-eu-tech-regulation>. [Accessed: 13 June 2021].
- [12] Clarke, L. (2021) Why the EU's new tech legislation could become the most lobbied in history. New Statesman, 19 February. Available at <https://www.newstatesman.com/science-tech/2021/02/why-eus-new-tech-legislation-could-become-most-lobbied-history> [Accessed: 13 June 2021].

[13] Scott, M. and L. Kayali (2020) Big guns and Zoom cliques: Inside Silicon Valley's digital lobbying playbook. Politico, 14 December. Available at <https://www.politico.eu/article/europe-digital-lobbying-platforms/> [accessed 8 April 2021]

[14] Kelion, L. (2020) 'EU reveals plan to regulate Big Tech'. BBC News, 15 December. Available at <https://www.bbc.co.uk/news/technology-55318225> [accessed 8 April 2021]