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An Inverse Analysis of the DMA: Amazon's Proposed Commitments to the European Commission

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The final text of the DMA, after the Council's final approval last 18th July, opened up, yet again, speculation on its enforcement. Although the Commissioner for the Internal Market Thierry Breton promptly confirmed that DG Connect would be the Directorate to apply and oversee the compliance of the DMA's rules and obligations, several questions still stand with regards to the overlaps between the virtuality of articles 5, 6 and 7 vis-à-vis the public enforcement of competition law, both from the DG Competition and National Competition Authority's (NCA) perspective[1].

DG Connect vs. DG Comp: overlaps on remedies and duplication of proceedings

Ranging from the DMA's entry into force, the same 13 digital players could be subject to up to four types of overlapping sanctioning proceedings stemming from regulation to antitrust, multiplied by the twenty-seven Member States and their corresponding NCA's[2].

First of all, DG Connect will ensure compliance of the DMA, specially through the opening of proceedings pursuant to article 20 as well as by virtue of article 18 when systematic non-compliance is given. In addition, the mandates ordered by articles 5, 6 and 7 will, all by their own, trigger specific internal procedures to adjust possible irregularities to the new regulatory framework[3]. Furthermore, DG Comp will culminate its already initiated proceedings against the major digital platforms, pursuant to infringements of articles 101 and 102 TFEU. In addition, it will expectedly continue to act on any further infringements of competition law it detects at the EU level, be that digital or else. At the time being, six sanctioning proceedings are pending before the European Commission concerning conducts in digital markets, against Google[4], Apple[5], Meta[6] and Amazon[7].

From the NCA perspective, two types of proceedings could be triggered at the national level. First, those Member States which have passed their own national rules to speed up antitrust enforcement over digital markets, will apply these special rules, alongside articles 101 and 102 TFEU as well as their own national competition rules. Following the *ex-ante* approach, the amendment of the German Act against Restraints of Competition introduces Section 19(a)(1) to the German Competition Act to make enforcement against digital platforms more effective and efficient. Up

until this moment, Google[8], Facebook, and Amazon have been designated by the Bundeskartellamt as operators of a 'paramount significance for competition', and the Bundeskartellamt is examining Apple's own significance. From the *ex-post* perspective, both the Austrian[9] and Greek[10] competition law national regimes have been amended to tackle the dominance of digital platforms.

On the other hand, the rest of NCA's which have opted-out from enhancing their enforcement in this way, will continue to apply the Treaty's provisions as well as their own national regimes onto the digital provision of services. For instance, the Polish competition authority (UOKiK) has yet to decide on its proceedings against Apple's App Tracking Transparency prompt, whereas both the French and German authorities also are analysing the same conduct within their own proceedings.

DMA-wise, not much is said about the feasible duplication of proceedings and sanctions that will be produced as a consequence of the simultaneous and coexistent imposition of the same obligations, in the form of regulatory mandates, commitments and antitrust remedies to the same (and only) dominant digital platforms. The ambiguity from the text is addressed through Recital 86. It provides that the principles of proportionality and ne bis in idem must be observed when non-compliance is detected by DG Connect, to impose an appropriate level of fines and periodic penalty payments. In addition, appropriate coordination between the relevant national authorities throughout their corresponding proceedings must be ensured so that the penalties imposed by virtue of the DMA correspond to their overall seriousness within the market.

However, not one provision of the DMA anticipates the duplication of proceedings and remedies that will be caused because of the mere applicability of the self-executing obligations of article 5 of the DMA. For instance, the obligation imposed by virtue of article 5(9) on the online advertising sector which compels gatekeepers to provide each advertiser with daily and free information concerning each advertisement they place, could have been a feasible solution to the anticompetitive problems scrutinised through the European Commission's DG Comp case AT.40670 on Google's data-related practices. The same applies for those mandates imposed on gatekeepers pursuant to articles 6 and 7 of the DMA.

Although the DMA incorporates the discretional power of the European Commission to enter into regulatory dialogue with the gatekeeper with regards to these mandates, they do not escape the overreaching overlap with competition law. Following the example of online advertising, article 6(8) of the DMA establishes, on top of the self-executing article 5(9) that the gatekeeper must provide advertisers and publishers with access to their own performance measuring tools so that they can verify their inventory of advertisements. In this particular case, it seems that the same solutions, i.e., article 5(9) and 6(8) of the DMA, will be out of DG Comp's hands. The Competition Directorate cannot consider these same remedies, regardless they are inspired in the practice and experience of competition law, even if that would be the most reasonable approach. To ensure a consistent application of the regulatory instrument, DG Connect is called to occupy the first seat with regards to the enforcement of its mandates, whereas DG Comp is left with a narrow enforcement gap in relation to digital markets, despite the declared complementarity of both instruments.

However, is complementarity even possible? The European Commission's case against Amazon, both over its Prime Programme and Marketplace, may be a clear indicative of the solutions to expect from competition law enforcement by DG Comp.

The first palpable consequences on duplication: Amazon's proposed commitments to the European Commission

On 14 July 2022, Amazon offered commitments to the European Commission on its use of non-public data from independent retailers selling in its marketplace, produced through Amazon Marketplace as well as from the terms and performance of third-party carriers within its Prime Amazon programme[11]. The Commitment Proposal put forward by Amazon comes short of being anything but a run to the bottom for compliance, stemming from the list of dos and don'ts established by the DMA, namely in article 6.

First of all, Amazon commits to refrain from using non-public data relating to, or derived from, the activities of independent sellers on its marketplace, for its retail business that competes with those sellers. This first commitment, in form and substance, brings nothing new to the table, other than a replicate of the prohibition set out in article 6(2) of the DMA. In addition, Amazon commits to apply equal treatment to all of its sellers through its marketplace when ranking their offers for the purposes of the selection of the winner of the Buy Box, in the light of article 6(5) of the DMA. Instead of waiting for the DMA's publication and entry into force, the commitments advance their virtuality in time, to the benefit of Amazon's business users.

However, from the institutional perspective, if the particular commitments are accepted and made binding, they may cause more problems than not over time. Amazon falls right into the definition of a core platform service, given it is an online intermediation service between end users and sellers (third-party and proprietary), in the terms of article 2(2) of the DMA. In principle, there is an overlap on the scope of application of the proposed commitments as opposed to the regulatory scope of the DMA. On top of that, the commitments replicate in full the content of the DMA, starting from their implementation and for a period of five years. Hence, there will be a clear duplication of remedies between the procedure triggered as a consequence of the commitments, i.e., their monitoring, and the application of articles 6(2) and (5) with regards to Amazon. Furthermore, a monitoring trustee will be appointed by Amazon to monitor compliance with the commitments, given that the European Commission approves the designation and mandate[12].

Following our line of thought, DG Connect will not have the power to intervene within the monitoring and compliance of commitments due to two main reasons. First, Amazon's commitments are presented by virtue of 9(1) of Regulation (No) 1/2003 and fall out of DG Connect's regulatory scope and conferred overarching powers by virtue of article 114 TFEU. And second, practicality is key to understand and ensure that competitive conditions are restored within Amazon's ecosystem: DG Connect has not yet taken over and employed its taskforce to oversee the DMA's compliance. Thus, it is only reasonable to assume that DG Comp will give the green light (or not) to the monitoring trustee appointed by Amazon and will make sure that an advanced form of articles 6(2) and (5) are properly guaranteed within Amazon's current and future marketplaces in the European Economic Area, with the exception of the Italian market.

Whether DG Connect will take over from here once the prohibitions of article 6 are enforceable and applicable to Amazon pursuant to the DMA, is hard to tell. The contrary would be incoherent, insofar as there would be two parallel lines of action over the same service, the same facts, the same digital platform and to solve the same problem: correcting the imbalance between the gatekeeper and the business users to counteract the disproportionate advantage caused due to the

former's business decisions[13]. However, this shift does not come without a fight either: to recognise that DG Connect can assume the monitoring of committees offered in the midst of a competition law sanctioning proceeding is the same as establishing that the virtuality of Regulation (No) 1/2003 can get easily overridden by the superior interest of regulation, irrespective of the value of articles 101 and 102 as EU primary law.

The DMA has entered the set of rules to address enforcement within digital markets, for good. However, a fine and close interpretation of the mandate conferred to DG Connect as opposed to the powers of DG Comp must be performed so that duplication of proceedings, sanctions and remedies are not the rule to an inconsistent and uneven compliance of the regulatory instrument.

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[1] Recitals 9 and 10 of the DMA reiterate the overarching idea that both instruments are, indeed, complementary.

[2] Based on the assessment of Mario Mariniello and Catarina Martins, 'Which platforms will be caught by the Digital Markets Act? The 'gatekeeper' dilemma' (*Bruegel*, 14 December 2021) <https://www.bruegel.org/blog-post/which-platforms-will-be-caught-digital-markets-act-gatekeeper-dilemma> accessed 22 June 2022, as well as on the final criteria of article 3(2) of the DMA, i.e., i) turnover equal to or above EUR 7,5 billion in each of the last three financial years, or where its average market capitalisation or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year; and ii) it provides a core platform service that in the last financial year has at least 45 million monthly active end users established or located in the Union and at least 10 000 yearly active business users established in the Union.

[3] As far as the obligations of articles 6 and 7 are concerned, even an additional process can be given between the gatekeeper and the Commission to ensure compliance.

[4] Case AT.40670 *Google – AdTech and Data-related practices*.

[5] Case AT.40437 *Apple – App Store Practices (music streaming)* and Case AT.40452 *Apple – Mobile payments*.

[6] Case AT.40684 *Facebook leveraging*.

[7] Case AT.40462 *Amazon Marketplace* and Case AT.40703 *Amazon – Buy Box*.

[8] Following designation, the Federal Cartel Office (FCO) has initiated proceedings with regards to Google Maps Platform, as well as Google News Showcase.

[9] The amendment of the Austrian Cartel Act tailored the national competition law regime to capture dominance within digital platforms, stemming from the criteria to determine dominance and market power in multi-sided digital market markets. It also provided the procedure for the declaration of digital companies as dominant for potential subsequent proceedings.

[10] The new draft of the Greek Competition Bill amended the Greek Competition Law (L. 3959/2011) provided flexible rules and enhanced powers to the Hellenic Competition Authority to

consider dominance within digital ecosystems.

[11] An extensive analysis of the conduct; Vladya M.K. Reverdin, 'Abuse of Dominance in Digital Markets: Can Amazon's Collection and Use of Third-Party Sellers' Data Constitute an Abuse of a Dominant Position Under the Legal Standards Developed by the European Courts for Article 102 TFEU?' 12(3) Journal of European Competition Law & Practice 181-199.

[12] *Amazon's Commitment Proposal*, paras 25- 27 and 29.

[13] Recital 33 of the DMA defines one of the regulation's objectives, i.e., unfairness, in these same terms.

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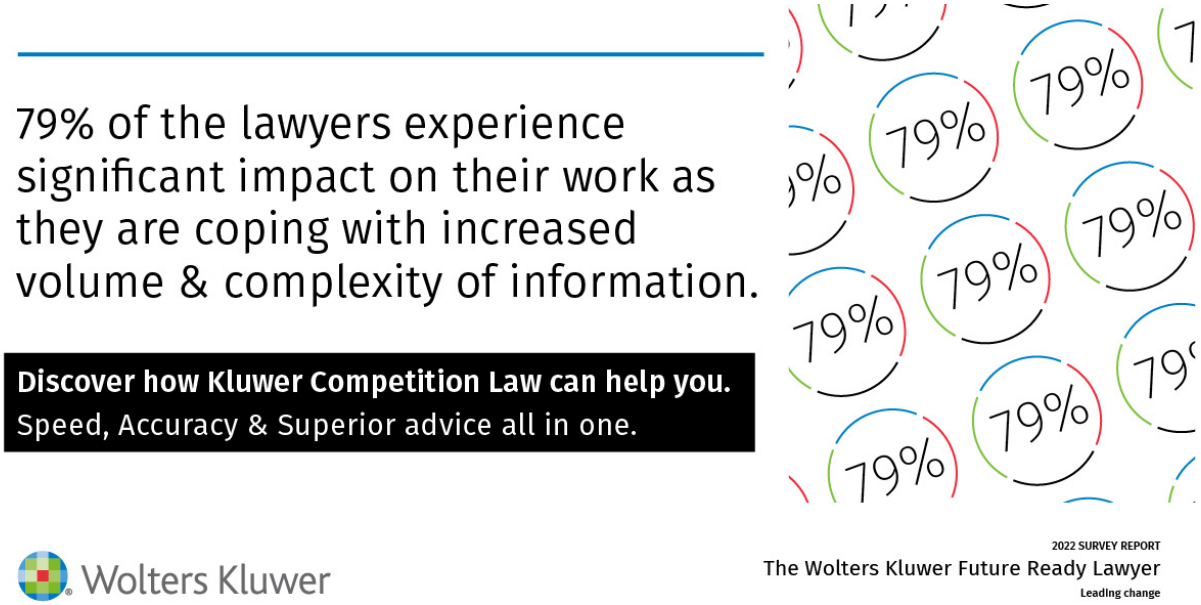

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