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# The DMA's Governance: The Apple Never Falls Far From the Tree

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On 23 March 2023, the European Commission issued its Decision to set up the High-Level Group for the Digital Markets Act (the 'Decision'). In a previous blog post, the discussion of the DMA and the NCAs intervention in its monitoring and compliance was addressed (see here). Even though the first draft of the DMA issued in December 2020 only considered NCA intervention through the Digital Markets Advisory Committee (Article 50), during the trilogue an additional forum was added to the DMA's provisions to incorporate the NCA's experience and knowledge: the High-Level Group (Article 40).

The DMA pursues the objectives of contestability and fairness in the market according to its Recital 14. However, the regulatory instrument is much more than that, due to the fact that it is construed upon the existing case law and remedies that have been tested out and applied in the milieu of competition law proceedings by both the European Commission and national competition authorities. The overlap between the DMA's application and the application of Articles 101 and 102 TFEU to the gatekeepers is self-explanatory (for an overview of the possible implications of these overlaps, see here). Aside from the reference to those overlaps in Article 1(6) of the DMA which seeks to ensure the complementarity between antitrust and the DMA's effective implementation, the High-Level Group is also directed to ensure coherence and effective complementarity regarding the DMA's overlaps with other rules that may be applicable to the gatekeepers (whether that is competition law or sector regulations).

Against this background, the High-Level Group is a measured instrument in the DMA to balance the regulatory instrument's governance towards its effective implementation. Nonetheless, good governance will not be an easy target to achieve for the European Commission when implementing and monitoring the DMA.

### The Setting Up of the High-Level Group: Questions of Procedure and Organisation

According to Article 40(2) of the DMA, the High-Level Group is composed of a myriad of sector regulators and expert bodies to provide their own experience and knowledge to DG Comp and DG Connect when enforcing the DMA. The group will include up to thirty members coming from the European Competition Network (ECN), the Consumer Protection Cooperation Network, the

European Regulatory Group of Audiovisual Media Regulators, the Body of the European Regulators for Electronic Communications (BEREC) as well as the European Data Protection Supervisor and European Data Protection Board (EDPS and EDPB).

The DMA mandates that the High-Level Group shall meet, at least, once a year at the Commission's request and as many times as the majority requires to address the specific issues related to the DMA's implementation (Article 40(4) of the DMA). In line with the Decision, these meetings will be chaired by representatives of both DG Connect and DG Comp (Article 4 of the Decision). Moreover, Article 6 of the Decision establishes that the Commission may set up sub-groups within the High-Level Group for the purpose of examining specific questions on the DMA's implementation, which will then report back to the High-Level Group.

For the sake of transparency, Article 5(6) of the Decision allows the High-Level Group to make its meetings open to the public and Article 10 provides that all of the relevant documents of the High-Level Group will be made public through the Register of expert groups or via a link in a dedicated website. These documents will include, in particular, the agenda and other relevant background documents which will be referred to the High-Level Group ahead of their meetings, followed by the timely publication of the minutes of their meetings.

Furthermore, the tasks of the High-Level Group can be differentiated into three groups:

- The advice and expertise they can provide regarding topics within their bodies' competences regarding the DMA's implementation and its coherent integration with the rest of existing regulatory instruments (Article 40(5) of the DMA).
- The identification and assessment of the current and potential interactions between the DMA and the sector-specific rules applied at the national level by the bodies integrating the High-Level Group. To this aim, the High-Level Group may submit an annual report to the Commission presenting these potential trans-regulatory issues (Article 40(6) of the DMA).
- The provision of their expertise to the Commission on the need to amend, add or remove rules from the DMA, as long as the EC has triggered the market investigation mechanism into new services and practices contained in Articles 4(3) and 12(1) (Article 40(7 of the DMA).

Although the duties surrounding the coherent implementation of the DMA alongside the applicable sector regulation to the gatekeepers are quite similar in nature, they provide the High-Level Group with different instruments to communicate with the European Commission. In the case of the former, via meetings, whereas in the latter, via annual reporting of the overlaps caused by trans-regulatory issues. Article 2(2) of the Decision expressly forbids the High-Level Group from intervening or providing its advice to the EC in those cases where it has opened proceedings within its investigative, enforcement and monitoring powers pursuant to Article 20 of the DMA. Regarding their advisory role concerning the EC's update of the list of gatekeepers, core platform services and obligations under Articles 5 and 6 of the DMA, the High-Level Group's actions will only be developed in the midst of the rest of the findings that the Commission produces in its market investigation.

All in all, the Decision does not add much to the substance of the High-Level Group on top of the already applicable provisions set out by the DMA. The Decision is mainly concerned with the organisational and institutional aspects of the setting up of the High-Level Group and differentiates it from the Digital Markets Advisory Committee that assists the Commission in updating the list of gatekeepers and core platform services (Article 50(2) of the DMA).

**The DMA's Governance Spreads its Wings, and What Now?**

The High-Level Group is one of the instruments to ensure that the DMA is governed correctly. However, the regulatory instrument is framed according to a multi-level governance structure to ensure its effective application.

On one side, the DMA sets out a myriad of mechanisms to trigger its compliance starting from day one since the applicability of its provisions. First, the provisions of the DMA are to be considered by the gatekeeper as early as the technological design of its products and services (Recital 65). Second, the obligations set out in Articles 5 to 7 of the DMA follow a different governance structure. The obligations imposed on the gatekeeper in Article 5 are directly enforceable by the undertaking, whereas regarding the provisions in Articles 6 and 7, the gatekeeper may engage in a regulatory dialogue with the European Commission (EC) to specify the measures to ensure effective compliance (Article 8(3) of the DMA). Third, the gatekeeper bears the burden of demonstrating compliance with the DMA's provisions before the EC by reporting the detailed measures that it has implemented (Articles 8(1) and 11(1) of the DMA). In this regard, third parties to the regulatory instrument, such as business users and end-users are encouraged to provide comments to the EC regarding its preliminary findings on the DMA's compliance (Article 8(6) of the DMA).

On the other side, the looming risk of the DMA's circumvention is reinforced through two concurrent mechanisms. First, the anti-circumvention clause contained in Article 13 establishes that, even though the gatekeeper is compelled to comply with the substance of the DMA, it cannot engage in any behaviour to undermine its effective compliance, regardless of whether that behaviour is of a contractual, commercial, or technical nature (Article 13(4) of the DMA). Second, the gatekeeper is forced to incorporate a compliance function in-house to monitor that the governance agreements reached with the EC are abided by design and by principle (Article 28(1) and (8) of the DMA).

To ensure the DMA's effective implementation, the two sides of the coin point towards the European Commission ensuring good governance in the context of the DMA. This implies that the EC disposes of the multi-directional means to guide, steer and regulate the unintended consequences produced by the DMA to maximise the public interest.

However, governance is not a self-supporting and self-enhancing tool in the hands of an authority operating in a vacuum. Instead, trust is (at least in theory) a pre-requisite to securing a fully-fledged governance mechanism, insofar as when the processes to ensure an effective implementation are put into place, there must be certainty on whether the EC is competent and effective in delivering the goals of the DMA and its capacity to operate consistently with a set of values that reflect the public's expectations of integrity and fairness.

In practice, ensuring good governance and (at least) an increase from the side of end users regarding the gatekeeper's engagement concerning anti-competitive conduct is not a straightforward mission assigned to the European Commission nor it is easy to measure from the external perspective.

Governance is not measured against the yardstick of its impact on business and end users. Instead, it is measured against the normative implications of the DMA, i.e., ensuring fairness and

contestability in the digital arena. In this regard, governance is a stable metric which can be assessed externally relating to what purposes are placed prominently by the DMA, namely Recital 14.

Nonetheless, one cannot perform the same exercise to measure whether the DMA has, in practice, delivered on its promise to increase end user trust in line with the Union's mandate contained in the European Declaration on Digital Rights and Principles for the Digital Decade to secure the right of every citizen to access a trustworthy digital environment. End user trust is not defined by the state of things 'that ought to be' according to the DMA's provisions as opposed to the notion of governance, but according to the congruence between the end user's expectations and the European Commission's capacity to govern appropriately its monitoring and enforcement to pursue its intended purposes.

Given that end user trust is defined in line with expectations, it is not a static metric across Member States nor a linear expression of a psychological state of an individual or a group of individuals sharing the same preferences online. On top of that, trust can only be measured internally in line with the expectations and beliefs of these individuals surrounding the institution's efforts to satisfy not only the DMA's intended purposes but their common interests and expressed preferences.

An avid reader will have adverted that end user preferences manifested online may not be in line with the DMA's purported objectives. Thus, the exercise to measure the DMA's effective implementation with an appropriate metric relating to end users is complexified further (nearly) into oblivion. For instance, end users may be encouraged to use services online which are not as data-intensive as those that preceded and dominated the market in the last few years as a consequence of the prohibition of Article 5(2) DMA (the prohibition imposed upon gatekeeper to cross-use, combine and process personal data across their core platform services). This may lead end users to receive less personalised services as a consequence of their interaction with a DMA-compliant regulatory framework, which may not always coincide with their preferred preferences vis-à-vis their privacy concerns. Thus, end user trust may suffer as a consequence of the DMA's implementation, even though the regulatory instrument forbids gatekeepers from degrading the conditions or quality of any of its core platform services (Article 13(6) of the DMA). In this regard, the management of their expectations throughout the DMA's progressive implementation plays a key role to accommodate their preferences into a fair and contestable paradigm in the context of digital commoditisation.

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This entry was posted on Monday, April 3rd, 2023 at 9:00 am and is filed under Digital Markets Act, Governance, Privacy, Procedures
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