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The DMA on Steroids: The Hungarian Government's Approach to Undertakings of Fundamental Importance

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The Digital Markets Act (DMA) is set out as a complementary and separate regulatory instrument to EU competition law as well as to the application of national competition law provisions at the Member State level. In parallel, the regulation's legal basis is Article 114 of the TFEU. Fragmentation in digital rulemaking was to be detached from the internal market. In early April, the Hungarian Ministry of Justice proved the EU legislator wrong, once again.

Within an omnibus act proposing to reform several Hungarian laws, the Hungarian Ministry of Justice proposes to introduce Sections 22/A and 76/A to its national competition law regime (find the proposal in Hungarian here). Harmless, in appearance. However, the Hungarian amendments to its national competition law regime, if finally made into law, would vest powers upon the Hungarian national competition authority (the NCA) to designate undertakings according to their fundamental importance. This post explores the amendments proposed by the Hungarian Ministry of Justice and their wider impact on the configuration of national DMA-like instruments vis-à-vis the regulation's objective to harmonise the internal market.

The regime for undertakings of fundamental (paramount?) importance (significance?)

The Hungarian amendments to the national competition law regarding the regime applicable to undertakings of fundamental importance revolve around two provisions: Sections 31 and 40 of the omnibus law (and Sections 22/A and 76/A of the Hungarian Competition Act). Section 31 sets out the elements that may influence a firm being designated as an undertaking of fundamental importance. Section 40 introduces the potential consequences the designation may entail in practice, both in terms of the enforcement powers conferred upon the NCA as well as the remedies that may apply to these undertakings after their designation.

Section 31: Designation as an undertaking of fundamental importance

Section 31 formulates a designation-like procedure to classify undertakings of fundamental importance. It is, however, nothing like the quantitative and qualitative thresholds set out under Articles 3(2) and 3(8) DMA. The designation process is not necessarily limited to a list of core

platform services (CPSs). Instead, Section 31 would, theoretically, apply to all sectors of the economy which bear fundamental importance from the point of view of competition and consumers.

The characterisation of that fundamental importance would lie in the hands of the NCA based on both quantitative and qualitative criteria. Section 31 lists the elements that can go into the mix. In a post published a couple of weeks back, Petrányi, Szendr? and Angyal stressed the list of elements which the NCA may consider to designate a firm as an undertaking of fundamental importance is non-exhaustive. The NCA may consider aspects such as the undertaking's market share, its financial strength, or its access with respect to services, its vertical integration, and the activities it exerts on related markets, its access to data relevant to competition, the service's relevance from the point of view of consumers as well as from the perspective of third parties. In other words, the NCA can consider a wide list of features belonging to an undertaking's operations to determine it holds fundamental importance in the market. In principle, the amendments lie closer to the DMA's qualitative approach toward designating undertakings. As recognised by the Hungarian Ministry of Justice, the 'fundamental importance' of an undertaking is a quality linked to the presence of dominance.

On top of that, the reform operated under Section 31 of the omnibus law is extremely wide in scope. It encompasses all sectors of the economy and the NCA can, basically, put forward any type of argument to sustain a service's fundamental importance. Reasons of public interest may be, for instance, considered in the matrix.

Furthermore, reasons relating to data in all its manifestations would play a role in the analysis. Section 31 establishes the undertaking's access to data relevant to the competition is an aspect to consider in the analysis. One would imagine, then, that any type of data (personal and non-personal) may be considered. As a consequence of the fact the designation is not operated at the service level, then the access of data concerned by the analysis is not necessarily limited to the market where the conduct takes place (or, for that, to a related market).

The Hungarian amendment's elements for the undertaking's designation are nothing similar to the qualitative elements the European Commission may factor into its designation exercise under Article 3(8) DMA. Despite the European Commission may consider data-driven advantages, in relation to the undertaking's access to, and collection of, personal data and non-personal data or analytics capabilities pursuant to Article 3(8)(c) DMA, Section 31 does not present an equivalent provision. Data access is, by itself, considered as a key factor with sufficient *gravitas* to sustain the undertaking's designation as an undertaking of fundamental importance, irrespective of the fact the firm does not, actually, use those same data in any fundamental manner.

Section 40: Obligations and prohibitions deriving from designation

Stemming from the undertaking's designation under Section 31, Section 40 of the omnibus law establishes three sets of impacts the designation may cause upon the undertaking. First, a list of prohibitions the NCA may impose on the undertaking as a consequence of its designation. Second, a range of powers that the NCA will enjoy under the DMA-like procedure. Third, the consequences the undertaking may face in case there is an immediate risk it may not comply with its obligations in the previous two instances.

The list of prohibitions set out under Section 40 resembles the mandates contained under Articles 5(2), 6(5), 6(2), 6(7) and 6(9) DMA. Following the designation as an undertaking of fundamental importance, the NCA may prohibit it from treating its own services more favourably than the offers of its business partners. This is a clear reference to the self-preferencing prohibition engrained under Article 6(5) DMA which has caused much unrest, and that the European Commission is currently addressing with respect to Google's conduct in a non-compliance procedure under the DMA pursuant to Article 20 DMA.

In a similar vein, Section 40 prohibits undertakings of fundamental importance to make it difficult for products and services to work together with their own services, both in the form of data portability and interoperability. One can interpret the prohibition would not require the designated undertakings to act as a consequence of its application, but to refrain from performing conduct that hinders the capacity for business and end users to exercise their rights to data portability and interoperability.

Furthermore, the NCA may also prohibit the undertaking from using and combining without appropriate consent from those directly concerned with the processing. The provision may be read in up to three distinct ways. It may prohibit data uses and combinations in the fashion of Article 6(2), since business users may be concerned by the use and combination of their own data by the undertaking of fundamental importance in its proprietary services. As opposed to Article 6(2) DMA, which purports the gatekeeper to silo the data from business users from the data generated by its own services so it does not use the former data in competition with business users, Section 40 would only prohibit the use and combination, whereas the siloing would not immediately derive from the mandate. Alternatively, it may propose a prohibition similar to Article 5(2) DMA given it remarks on the consent granted by those subjects concerned by the data use and combinations of data. Contrary to the DMA prohibition, Section 40 does not condition how consent should take place in this context, whether influenced by the GDPR's criteria or not. By contrast, the provision may introduce a bit of both. That is to say, the prohibition is explicitly wide in scope to comprise scenarios lying under the same scope as Articles 5(2) and 6(2).

Regarding the second provision contained under Section 40, the amendments would confer upon the NCA the capacity to request information from the designated undertakings on the performance, quality, or success of its services as provided to its business partners. Contrary to Article 21 DMA, the NCA may request information on any aspect of the undertaking's services. Given Section 40 does not set out a procedure to find a breach of the obligations, then the NCA is not limited by the scope of its enquiries in the information it requests from the designated undertakings.

Finally, the most intrusive set of rules introduced under Section 40 relates to the NCA's powers to maintain or restore the competitive conditions of the market when compliance with the substantive obligations is mandated by the public authority. In those cases where the NCA determines the undertaking is at an immediate risk of not being able to meet its obligations, it can order six types of enforcement actions relating to the firm's organisational structure. First, it can order the undertaking's divesture within a given market or its complete sale to a competitor. Second, it may force to provide access to a competitor to one of its essential inputs (be that equipment or data) for the exercise of its same activity. Third, it may trigger the election or the appointment of some of the senior management positions within the undertaking's organisational structure. Fourth, it can suspend the voting rights associated with shares within the company. Fifth, it can require some of the shareholders to transfer their shares to other shareholders within the firm. Finally, it can force the board of directors to convene the general assembly and draw its attention to the need to discuss

specific agenda items and make specific decisions.

The DMA's critics stress the regulatory instrument's stringent remedies in case the European Commission finds a gatekeeper liable for systemic non-compliance. The Hungarian amendment works on a whole other level. The remedies the NCA can seek to impose to restore and ensure the 'security of supply' stand away from the antitrust tradition of keeping regulators at arm's length from intervening in the internal operations and decisions of economic operators. Instead, the Hungarian NCA, if the amendments were to enter into force in their current configuration, would have the prominent capacity to force undertakings to make strategic decisions or to order them to sell their assets without backing their decisions on any given violation with a particular antitrust provision (not that does it allow such an intervention to take place, either!).

Articles 1(5) and 1(6) DMA: we've got you covered!

Stemming from the configuration of the Hungarian DMA-like provisions under Sections 31 and 40 of the omnibus law, the amendment confronts once again the test of the complementary nature of the DMA vis-à-vis the application of EU competition law. As the Hungarian Ministry of Justice puts forth in the explanatory memorandum to the amendments, the development of this type of provision is not unprecedented in the EU, notably via the German introduction of its Section 19a GWB tool. For the moment being, the German DMA-like proceedings the German competition authority may trigger against undertakings with paramount significance across markets have stood the test of time. Nothing points to the fact the Hungarian amendments may not face the same fate.

In principle, Article 1(5) prohibits the Member States to not further imposing obligations on gatekeepers aimed at ensuring contestable and fair markets. Nothing precludes the Member States from imposing obligations on undertakings for matters falling outside the scope of the DMA, if they are compatible with Union law and do not result from the fact the relevant undertakings have the status of gatekeepers.

The proposal does not directly pursue the objectives of contestability and fairness. In fact, as set out under the explanatory memorandum to the amendment, the changes to the national competition law regime ensure the existence of conditions of fair economic competition and a healthy market structure to promote competition and the protection of consumers' rights. Thus, the proposal aims to promote fair competition but not fairness in the sense of Recital 33 of the DMA. In this sense, the Hungarian amendment would fall outside of the scope of the prohibition set out under Article 1(5). In fact, if one looks at the Hungarian proposal it imposes obligations on undertakings for matters falling outside the scope of the DMA. In this case, every single sector of the economy is comprised and, thus, the overlap with digital regulation is not all so evident, aside from the fact the criteria for designation clearly mimic some of the elements contained in the DMA's qualitative designation process. On all the counts set out by Article 1(5), the Hungarian amendment would remain exonerated.

To the same extent that Article 1(5) does not hinder the Hungarian amendment, Article 1(6) DMA provides it a clear path going forward. Just as the explanatory memorandum establishes, the Hungarian intervention is made possible by Article 3(2) of Regulation 1/2003, according to which a derogation of the transversal and unified interpretation of Article 102 TFEU does not apply for the case of unilateral conduct. Translating the statement to DMA terms, the Hungarian Ministry of

Justice fundamentally argues it falls within the exception under Article 1(6)(b) which enables NCAs to apply national competition rules prohibiting other forms of unilateral conduct to gatekeepers.

The conclusion is, formally, correct if one analyses the DMA's institutional design and instruments to ensure fragmentation is detached from the internal market. However, the proposal's all-encompassing obligations defeat any existing logic that prevailed following the German's introduction of Section 19a GWB. Although the DMA remains separate and complementary to digital rule-making at the Member State level targeting different legal interests to those of contestability and fairness, the digital regulation is currently providing the scope for leeway for interventionist policy-making that stands away from the error-cost framework EU competition law has long applied (irrespective it now seems more than a matter of faith, than legal nuance and interpretation). Fragmentation, no more? The DMA responds, no more! The Member States whisper, harmonisation no more?

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