# BIG TECH IN THE EU: COMPETITION AND REGULATORY HARMONY

RESEARCH PAPER

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# Big Tech in the EU:
# Competition and Regulatory Harmony

**Summary**

- The regulatory sentiment around Big Tech in the EU has changed in recent years, paving the way for a Digital Markets Act (DMA), proposed by the Commission on 15 December 2020.
- The current proposal on the DMA presents a discrepancy between the scope of action and its objective. By targeting large digital gatekeeper platforms, the regulation relies on an unclear competition framework and on a legal basis that could jeopardise the authority's action.
- Regulatory actions in the digital markets should find a compromise between effective Big Tech regulation and preservation of competition dynamics in the Single Market, with the European Parliament and Member States playing a crucial role in this.

In recent years, the regulatory and political landscape around Big Tech companies, notably Google, Amazon, Facebook, Apple and Microsoft (also known with the acronym 'GAFAM') has radically changed. Jurisdictions and parliaments around the world, following the public's push, are bringing some problematic aspects of the behaviour of such platforms in their market to light, raising concerns of possible anti-competitive conduct. It has been argued that big digital companies tend to monopolise and distort the market, partly due to the enormous amounts of data they retain from their users at basically "zero-price", therefore making it difficult to assess whether there has been an abuse of dominant position with traditional instruments.

The European Union (EU) has a not-so-long history of clashes against Tech Giants: currently, the antitrust authority of the Union, the Directorate General for Competition (DG COMP) of the European Commission, has a number of open antitrust investigations against the GAFAM. This judicial record recently increased attention around the issue of big digital platforms, such as search engines or online marketplaces, acting as gatekeepers between businesses and consumers, paving the way for an EU-wide regulation tabled on 15 December of 2020, the Digital Markets Act.

## The proposal in a nutshell

The Digital Services package, in the form of a legislative proposal put forward by the Commission to the Council and the European Parliament, is the outcome of joint work from the competition and internal market units of the European Commission, respectively led by Executive Vice-President Margrethe Vestager and Commissioner Thierry Breton. The proposal consists of a Digital Services Act (DSA) and a Digital Markets Act (DMA), intended to cover all the aspects of the digital platforms' economy. The DSA is an update of the existing e-Commerce Directive (Directive 2000/31/EC), setting out basic regulation for digital platforms with regard to illegal online content, disinformation and counterfeiting.

The DMA is the leg of the proposed framework that is intended to regulate the market in which Big Tech companies operate. The Act introduces an ex-ante regulation regime for identified gatekeeper platforms – notably those functioning as a gateway between businesses and end-users, setting out a list of prohibited practices and obligations. This blacklist-whitelist includes – among others - the prohibition of misuse of third-party data to benefit one's own retailer; the prohibition to combine personal data from the core platform service with data from other services; and the obligation to allow

business users to set up prices and conditions for customers other than those offered by the gatekeeper. The DMA also sets a complementary 'grey list' of practices like self-preferencing and obligation to interoperability of services, intended to foster negotiations between the identified gatekeepers and the Commission in order to mitigate possible anti-competitive effects of such practices.

## Digital market and gatekeepers: a competition issue?

The regulatory authority of the EU assesses the scope for intervention with the assumption that a small number of big platforms with a high market share could increase anti-competitive behaviours when performing a "gatekeeper" role between businesses and consumers (European Commission, 2020).

Indeed, some peculiarities of this digital market – namely the multi-sided structure and network externalities - would make the case for regulatory intervention when combined. The digital platforms' market has a typical two-sided structure, with the platform – being a marketplace, a social media or a search engine – serving two different classes of users and hence two market demands, each one positively influenced by the volume of the adhesions to the other. This creates positive network externalities for the companies, which can lead to market concentration by favouring few companies to exploit their advantages beyond efficiency reasons (Rochet, 2003). Market players like social media – e.g., Facebook among the GAFAM – benefit from such a network effect: as a specific service becomes popular, it creates more value to a given consumer because the service can be used to communicate with more people (Besanko & Braeutigam, 2011). The same holds true for marketplaces (Amazon) and search engines (Google, Microsoft).

Nevertheless, digital markets are far from a textbook case for competition and regulation policies. The most striking example is the already mentioned zero-price policy. Because it is often impossible to actually pay for participation, the platform charges a zero-price to one of the two market demands it serves, notably that of end-users or consumers. In many cases there is also a subsidy, in the form of the provision of free services, search, music, video, games, etc: platforms typically subsidise the non-paying side by profits made on a different side of the platform - namely, business users. Neither from the viewpoint of the platform's profits, nor from that of social welfare, is there any reason for the prices charged to the two sides to reflect the respective costs of providing them with services. The side which is the most valuable to the other side will be "subsidised" in multi-sided markets (Caillaud & Jullien, 2003).

By using the service, the end-user provides data to the platform, which the platform uses both to provide a better service to consumers, but also to increase the benefits that the other (business) side derives from the platform. These forms of exchange have facilitated recognition that the zero-price side of a platform can be part of a market. While consumer attention and consumer data frequently serve as a non-monetary form of consideration and are of significant value for firms, their economics are very different from those of prices (Cremer et al., 2019).

## How are gatekeepers defined?

Not only has this increasing value of data challenged understandings of the economies of Big Tech, the definition of a 'gatekeeper' also raises issues. This is in part due to the lack of substantial jurisprudence and economic literature on the matter. The proposed regulation has attempted to improve this situation, however, by opting for a tripartite definition of "gatekeepers"

based on a company's impact on the Single Market, its role as a gateway between business and end-users, and the durability of this position over time. In quantitative terms, the Commission (EUR-Lex, 2020) will therefore consider a company to be a gatekeeper, falling under the scope of the regulation, when it has :

- A global turnover equal to or higher than €6.5 billion in the last three financial years or an average market capitalisation of €65 billion in the last financial year, along with the platform's service being considered as core in three or more Member States;
- More than 45 monthly active end-users and more than 10,000 yearly business users established in the EU.
- Accordingly, when the two criteria are fulfilled in each of the last three financial years, the platform will be identified as a gatekeeper.

The regulation therefore excludes a proper concept of competition law or the abuse of a dominant position from the gatekeeper's definition. To be identified as a gatekeeper, a company would not need to be proven as abusing of its high market share to the detriment of competitors. This is coherent with the chosen legal basis for the package, namely Art. 114 of the Treaty on the Functioning of the European Union (TFEU), which enables the EU to adopt measures having "as their object the establishment and functioning of the internal market". Therefore, it becomes clear that the scope of the article is not about preserving competition, but rather the harmonisation of national rules for the functioning of the internal market.

Indeed, given the intrinsic cross-border nature of the core platform services provided by gatekeepers, "regulatory fragmentation will seriously undermine the functioning of the Single Market for digital services as well as the functioning of digital markets at large. Therefore, harmonisation at EU level is necessary" (EUR-Lex, 2020).

The use of Art. 114 rather than Art. 101 and 102 TFEU – disciplining competition law in the EU – risks creating a discrepancy between the regulation's objective and its scope of action. Concretely, if the authority goes beyond its declared goal of preventing regulatory fragmentation across the internal market, companies designated as gatekeepers would have the ability to appeal to the Court of Justice of the EU either to delay investigations or to simply contest the decision. This in turn would create a bottleneck of cases and effectively impede the complete implementation of the regulatory measures.

## Conclusions

The Digital Markets Act will be an overhaul of the regulatory regime for digital platforms in Europe that will likely impact end-users too. On one side, the need for a sound legal framework relating to competition among online platforms has become clear in recent years. Misuse of large amounts of consumers' data from gatekeeper platforms has been proven to be anti-competitive conduct in multiple cases, especially detrimental to smaller competitors and SMEs that face higher barriers to enter the market.

On the other side, the shown discrepancy between the scope of action and the objective of the regulation, linked to the unclear nature of the problem, makes the Digital Markets Act vulnerable to fallacy. In this regard, effective enforcement of the new rules will be crucial for the Commission, as will the role of the European Parliament and the Council – therefore of Member States – in balancing the regulation's scope to find a compromise between effective Big Tech regulation and preservation of competition dynamics in the Single Market.

## References

Besanko D., Braeutigam R. R. (2011) *Microeconomics* (4th ed.). Hoboken, NJ: John Wiley & Sons, Inc.

Caillaud B., Jullien B. (2003) Chicken and Egg: Competition among Intermediation Service Providers, *The RAND Journal of Economics*, 34(2), pp. 309-328.

Cremer J., de Montjoye Y. A., Schweitzer H. (2019) *Competition policy for the digital era*. Luxembourg: Publication office of the European Union.

EUR-Lex. (2020) *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector* (Digital Markets Act). Brussels: European Commission.

European Commission (2020) *Inception Impact Assessment - Digital Services Act package: Ex ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union's internal market*. Brussels: European Commission.

Rochet J. (2003) The Theory of Interchange Fees: A Synthesis of Recent Contribution, *Review of Network Economics*, 2(2), pp. 97-124.

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