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Restructuring the Digital Markets Act (DMA) 2022

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RESTRUCTURING THE DIGITAL MARKETS ACT, 2022

The Digital Markets Act (DMA) was formally adopted by the European Council (EC) on 19th July, 2022 and signed into law on 14th September. The new regulation aims to end unfair practices by companies that act as 'gatekeepers' or monopolizing forces in the digital platform economy by imposing certain regulatory restrictions on them. This policy whitepaper addresses some of the shortcomings of the DMA with reference to existing international anti-competitive legislation.

I. DMA- The Pitfalls

- **SEGREGATING DIGITAL MARKETS**- Anti-competition laws in jurisdictions across the globe have historically targeted the product market, rather than the platforms on which they are sold, be they "traditional" or digital. In various traditional sectors of the economy, firms compete to reach users and consumers through multiple business channels, including digital ones. Individual businesses are increasingly adopting digital tools to plan and produce goods, extract value from data, branch out into new markets and update their strategies. In short, business models are incorporating digital tools. For example, if Amazon was the only online bookstore and held one-fourth of the global market share, it would not be a monopolizer in the online book market, but simply a competitor in the product market, as the online and offline markets cannot be clearly separated, and antitrust laws should encompass both online and offline channels instead of making an unclear distinction.[1]

- **DISINCENTIVIZATION OF INNOVATION**- The DMA could potentially slow down digital innovation. Reducing digital businesses' competitiveness compared to their non-digital counterparts deters digital transformation, slowing down or even preventing digitalization. The obligation to share data with and grant access to rivals makes it cheaper, if not free, for firms to copy market leaders' moves. Imitation becomes more attractive than innovation. For example, the DMA states that the gatekeepers should ensure access under similar conditions to, and guarantee interoperability with, the same operating system, hardware or software features that are available or used in the provision of any ancillary services by the gatekeeper, to other businesses. This overlooks innovation resulting from the incentive to design an operating system with proprietary services attached to it.[2]

[1] Henrique Schneider, 'A critical look at the Digital Markets Act' (GIS Reports, 29 October 2021) <https://www.gisreportsonline.com/r/digital-markets-act/> accessed 16th December 2022.
[2] Ibid.

- **REPLACES EX-POST WITH EX-ANTE-** The DMA replaces economically sound, effects-driven antitrust law, part of the regulatory framework in most jurisdictions around the world with discriminatory regulation which jumps the gun with regard to punitive measures. Regulatory laws and mechanisms normally follow an ex-post approach. They are designed to take action after a market failure or a distortion. The DMA however, follows an ex-ante approach, i.e., the regulatory authorities can take action by identifying the problems before they occur.[3] This means that the DMA is predictive in nature, thereby making it susceptible to the biases of the regulatory authority, i.e., the European Council.

- **CONTESTABILITY**- The DMA creates a skewed playing field against digital channels and companies identified as gatekeepers, mainly US giants such as Google, Amazon, Facebook, Apple and Microsoft.[4] The key to understanding this is recognizing the DMA's focus on increasing the "contestability" of core platform services rather than digital markets. This focus suggests that the EC designed the regulation explicitly to uproot the gatekeepers' market positions in favour of other companies. Dealing such a blow to these companies would ultimately harm the consumer in cases where the gatekeeper's service may be technologically superior or the more efficient and economical alternative. It may also discourage gatekeeper companies from expanding their services to European consumers, and shift to jurisdictions with less discriminatory regulations.

- **BARRIERS TO ENTRY AND EXPANSION**- The increasing punitive costs imposed by the DMA, in some cases fines amounting to 10 percent of the company's total annual turnover, are likely to drive up barriers to entry, thereby reinforcing rigidity in the economy and in companies themselves.[5] The DMA will suppress incentives for small and medium-sized platforms to innovate and scale up. Companies that are close to meeting gatekeeper status may be discouraged from creating new services that would bring in additional users. Growth and success will be met with increased regulatory scrutiny, possible legal liability and an inability to claim the profits gained by innovation.

- **OPEN-ENDED WORDING LEADING TO OVERREGULATION**- The DMA pushes antitrust activity into the regulatory realm. Competition law assumes that market processes are self-regulating, and only steps in if they produce outcomes that are detrimental to competition. Article 16 of the DMA states that whenever the European Commission considers that a digital gatekeeper "has engaged in systematic non-compliance," the Commission may decide to "impose on such gatekeeper any behavioural or structural remedies which are proportionate to the infringement committed and necessary to ensure compliance with this Regulation."[6] This becomes more sinister a proposal when it appears that violations of the DMA's obligations can occur unconsciously. Article 5 of the DMA obliges gatekeepers to question their diversification strategies and give rivals access to their patented technologies.[7]

[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] Regulation (EU) 2022/1925 of the European Parliament and of the council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/43, art 16.
[7] Ibid., OJ L265/33, art 5.

Article 6 obligations are purportedly "susceptible of being further specified"[8]: In other words, Article 6 obligations are designed to be broad and indeterminate. Consequently, because of the indeterminacy of the DMA's obligations, violations of the generalized obligations of Articles 5 and 6 may occur more often than gatekeepers can envisage.

- **UNDERMINING CONSUMER PRIVACY AND IP NORMS**- Article 11.1 (b) of the DMA states that "The gatekeeper shall not engage in any behaviour discouraging interoperability by using technical protection measures, discriminatory terms of service, subjecting application programming interfaces to copyright or providing misleading information."[9] In conjunction with article 11.1a,[10] this article means that gatekeepers must not discourage maximal interoperability even in services which are not the "core platform services" identified by the DMA. In other words, gatekeepers, at all times and for all services, have to ensure interoperability of their services with any business users' services and devices irrespective of considerations related to intellectual property rights (i.e., copyright) or "technical protection measures" (i.e., cybersecurity). To illustrate, this "anti-circumvention" requirement may lead Amazon, for example, to interoperate its cloud services with any domestic or foreign cloud provider, and Amazon cloud services could not impose technical protection measures designed to prevent data leakages, nor could it impose confidential requirements related to the intellectual property rights ascribed to its cloud technology. The unintended consequences for end-users appear blatant—cybersecurity threats and lack of data protection.

[8] Ibid., OJ L265/34, art 6.
[9] Ibid., OJ L265/40, art 11.1(b).
[10] Ibid., OJ L265/40, art 11.1(a).

II. POLICY PROPOSAL

DEFINING GATEKEEPING IN WELFARE TERMS: South Africa's Competition Act, 1998 is a human rights based legislation centred primarily around the consumer's welfare, and the need for supporting the historically underprivileged black community post the apartheid regime.11 Unlike the DMA, it does not target the strong and attempt to cripple firms which have grown massive as a result of innovation and expansion, but rather protects the weak, providing them with additional benefits and a chance to innovate and compete alongside big names in the industry. The South Africa model of welfare antitrust legislation would serve a welfare state such as India well, especially in its support of deprived and backward communities such as Dalits, rural women, Scheduled Tribes, etc.

REPLACE BLANKET EX ANTE RULES, MAKE TRANSPARENT EXCEPTIONS- A few practices are prohibited *per se*, but in general finding a violation of South Africa's Competition Act, 1998, depends on a showing of net anticompetitive effect, that is, ex-post and not ex-ante.[12] The horizontal agreements that threaten the most serious anti-competitive effects—price fixing, market division, and collusive tendering—are prohibited *per se*, without requiring a showing of actual harmful effect or permitting a showing of net efficiency. However, the Act's system of prohibitions is balanced by a scheme for exemptions that incorporates policy considerations other than competition. Grounds for exemption include maintenance or promotion of exports, promotion of small businesses or firms controlled by historically disadvantaged persons to become competitive, changing capacity to stop decline in an industry and economic stability, as determined by the regulatory authority. The process for granting or revoking exemptions calls for investigation and an opportunity for public notice and comment. In concept, granting an exemption is not a matter of discretion. The Commission must grant an exemption if the conditions are met, and it must refuse if they are not (or if the conduct at issue would not have violated the Competition Act at all). The Commission's actions concerning exemptions may be appealed to the Tribunal.

A HOLISTIC APPROACH: As the world's second largest digital market economy, there is much to glean from China's swift crackdown on anti-competitive practices. On December 14, 2020, the State Administration for Market Regulation (SAMR) announced its decision to impose the maximum administrative penalty available on three illegal business concentration cases, including Alibaba's investment in acquiring equity in Yintai Commercial, Yuewen's acquisition of Xinli Media, and Fengchao's acquisition of Zhongyouzhidi.[13] This is the first time that China's antitrust authority imposed an administrative fine over the concentration of operators in the digital economy. In addition, according to the Antitrust Working Conference of the National Market Regulation System on March 17, 2022, 176 monopoly cases were investigated and resolved nationwide in 2021, and the court system reviewed 727 business concentration cases, conditionally approved four cases and enjoined one. The SAMR achieved remarkable results, along with significant law enforcement breakthroughs, especially new developments in the field of digital and platform economy. Article 11 of China's Revised Anti-

[11] Organisation for Economic Co-operation and Development, *Competition Law and Policy in South Africa* (OECD Peer Review, May 2003).
[12] Ibid.
[13] Bing Chen, 'Antitrust Regulation Insight: China's Digital Platforms' New Phase' (Competition Policy International, 20th September 2022) <https://www.competitionpolicyinternational.com/antitrust-regulation-insight-chinas-digital-platforms-new-phase/> accessed 13th December 2022.

Monopoly Law (RAML) adds the goal of "strengthening anti-monopoly law enforcement and judiciary, hearing monopoly cases fairly and efficiently in accordance with the law, and improving administrative law enforcement and judicial connection mechanisms." Specifically in the field of platform regulation, it is clear that antitrust is a part of platform regulation, but platform regulation cannot be equated with platform antitrust. At the same time, platform antitrust should not be understood as merely involving antitrust law enforcement, but should also include platform antitrust justice, as well as platform enterprises and other participants' compliance with the anti-monopoly law, such as platform enterprises' compliance and supervision of other participants.[14]

MONETARY COMPENSATION FOR COMPETITORS, APPEAL FOR VIOLATORS: The Competition and Consumer Commission of Singapore (CCS) bans agreements between undertakings whose cumulative share exceeds 20% of the concerned industry market and who indulge in "price-fixing, bid-rigging, market sharing or output limitations" that adversely impact the market. An undertaking if found guilty can be imposed a financial penalty of up to 10% of its total business turnover for each year of infringement, up to a maximum period of three years. In addition, business rivals who have suffered losses due to anti-competition action of that company can sue it for damages. However, these penalties can be enforced only after the CCS has ruled that a violation has occurred and the defendant's right to appeal has been exhausted.[15]

CONSUMER FOCUSED: The Australian Competition and Consumer Commission focuses on transparency and provides general information about businesses' obligations under competition law to the public.[16]

ROLE FOR NATIONAL AUTHORITIES- National authorities have a comparative advantage in certain areas of regulation compared to the EU. Whilst the Commission's proposal to centralise the enforcement of the DMA at the EU level is commendable, a role for national authorities in supporting the Commission through the knowledge of local conditions, proximity to businesses and expertise in designing remedies that they already possess, is recommended.[17] Establishing an EU network of independent national authorities on top of the Digital Markets Advisory Committee (DMAC) would also bear fruit in the long run.

[14] David Fleming and others, 'Anti-trust and Competition in China' (Global Compliance News) <https://www.globalcompliancenews.com/antitrust-and-competition/antitrust-and-competition-in-china/> accessed 15th December 2022.

[15] Ken Chia and others, 'Anti-trust and Competition in Singapore' (Global Compliance News) <https://www.globalcompliancenews.com/antitrust-and-competition/antitrust-and-competition-in-singapore/> accessed 15th December 2022.

[16] Australian Competition and Consumer Commission, 'Competition and anti-competitive behaviour' (ACCC) <https://www.accc.gov.au/business/competition/competition-and-anti-competitive-behaviour/> accessed 9th December 2022.

[17] Cerre,'Making the Digital markets Act more resilient and effective' (Centre on Regulation in Europe, 26 May 2021) <https://cerre.eu/publications/european-parliament-digital-markets-act-dma-resilient-effective/> accessed 17th December 2022.

ESTABLISHING SPECIFIC CRITERIA FOR VIOLATIONS- In 1890, the United States passed the Sherman Act, the world's first antitrust law prohibiting anti-competitive practices. The Sherman Act's broad and vague language, which seemed to make even simple business partnerships illegal in its statutory prevention of collusion.[18] Thereby, in 1914, the US Congress passed two legislative measures that provided support for the Sherman Act. One of these was the Clayton Antitrust Act[19], which elaborated on the general provisions of the Sherman Act and specified many illegal practices that either contributed to or resulted from monopolization. The other measure created the Federal Trade Commission, providing the government with an agency that had the power to investigate possible violations of antitrust legislation and issue orders forbidding unfair competition practices. Two sections of the Clayton Act were later amended by the Robinson-Patman Act, 1936 and the Celler-Kefauver Act, 1950 to fortify its provisions.

REASONABLE INTERPRETATION - In 1920, the U.S. Supreme Court applied the so-called "rule of reason" interpretation of the Sherman Act, which specifies that not every contract or combination restraining trade is unlawful. Only "unreasonable" restraint of trade through acquisitions, mergers, exclusionary tactics, and predatory pricing constitute a violation of the Sherman Act. This interpretation allowed large firms considerably more latitude. Liberal interpretation such as this which provides incentive to companies to grow and innovate and produce a host of benefits for end consumers is preferred to restrictive, discriminatory legislation.[20]

BALANCE- Time is of the essence when it comes to implementing the DMA, which is why 'administrability' is key. However, the digital economy is complex and dynamic, not to mention the number of evolving trade-offs and varied business models to consider when regulating the market.[21] Therefore, flexibility must be built into the framework and more flexibility than is put forward in the Commission's proposal.

GRIEVANCE REDRESSAL- In the event that a DMA-style gatekeeper approach is followed, when a company is considered to have infringed its obligations, a formal procedure could be set up by which business users and end users can make complaints. On top of this, a well-designed whistleblowing function would enable the enforcement and efficacy of the DMA to be monitored, facilitating learning. Given that business models in the digital economy are relatively new and fairly complex, the EC should be able to add, as well as remove, gatekeeper obligations if regulatory experience, market developments, or technological evolution deem current obligations out of date.

[18] The Editors of Encyclopaedia Britannica, 'Sherman Antitrust Act, United States [1980]' (Britannica, 2 November 2022) <https://www.britannica.com/event/Sherman-Antitrust-Act> accessed 14th December 2022.
[19] The Editors of Encyclopaedia Britannica, 'Clayton Antitrust Act, United States [1914]' (Britannica) <https://www.britannica.com/event/Clayton-Antitrust-Act> accessed 15th December 2022.
[19] Ibid.
[21] Ibid.

CONCLUSION

This policy whitepaper analyses the shortcomings of the Digital Markets Act of 2022 and by suggesting amendments to overcome them, aims to achieve the objectives of ensuring fair competition and promotion of innovation by adopting an approach that protects small companies in the digital sector without imposing stringent regulations on big tech companies classified as 'gatekeepers'. The measures suggested in this whitepaper, ensures that innovation by big tech firms is not discouraged by regulatory authorities and refutes the presumption underlying the DMA, that 'big is bad'.

By citing examples of anti-trust legislations in other jurisdictions such as the United States, Australia, China, South Africa, etc, the paper suggests plausible changes to the present form of the Digital Markets Act and thereby, puts forth a competition law framework that is unbiased towards both large-scale as well as small-scale digital tech companies.