Insight

The Digital Markets Act: A Primer

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Executive Summary

- The European Union (EU)'s Digital Markets Act (DMA) would classify certain tech companies such as Google, Apple, Facebook, and Amazon as "gatekeepers" and subject them to additional regulations in an effort to enable increased competition in these markets.
- By focusing on competitors' experience of the market rather than the impact of concentration and anti-competitive practices on consumers, the DMA would likely diminish the benefits to consumers by eliminating choices in the market and potentially raising costs of certain products.
- The DMA, along with other recent EU regulatory proposals including the Digital Services Act and Digital Services Taxes, is part of an increasing protectionist policy on the part of European regulators that appears intentionally designed to punish U.S.-based tech companies.

Introduction

The European Parliament is currently considering the Digital Markets Act (DMA), which would reclassify certain technology companies as "gatekeepers" and place additional regulatory obligations on some of their business actions. The DMA is part of a larger technology policy agenda currently under consideration in the EU to update its technology regulatory regime and impose further regulations on the technology sector. As with the EU's proposed Digital Services Act (DSA) and Digital Services Taxes (DSTs), the DMA would likely target U.S.-based tech giants including Google, Apple, Facebook, and Amazon. While the DMA may be targeted at tech giants, it would shift the focus of competition policy away from consumers and diminish the benefits to consumers by changing the way that products work and increasing the friction consumers experience in using these services.

An Overview of the Digital Markets Act

The DMA seeks to establish *ex ante*, i.e. prior to harm or violation occurring, requirements on certain large tech players that advocates argue will diminish concentration and improve competition. The DMA would reclassify certain technology companies as gatekeepers if they have a certain number of users in Europe. To be classified as a gatekeeper, a tech company must have a large size in the EU market, be important in businesses' attempts to reach end-users, and have entrenched and durable control of these gateways. The DMA creates a regulatory presumption that a company is a gatekeeper and subject to the DMA's regulations if for three consecutive years it reaches a threshold in turnover or market capitalization, provides its service in at least three EU countries, and has 10 percent of the EU population as monthly active users and at least 10,000 active annual business users. Companies can present evidence to EU regulators to attempt to prove they are not gatekeepers, and EU regulators would also be able to label platforms gatekeepers that they felt had the necessary market power even if they did not meet all of the outlined requirements.

If designated as a gatekeeper, a service would be subject to numerous restrictions and requirements on various business practices. These regulations include restrictions on sharing data between the core platform and other services and bans on self-preferencing (for example, when Google lists Google reviews or Amazon lists AmazonBasics products before other results). These requirements would also require platforms that have been labeled as gatekeepers to undertake certain actions to increase interoperability and data portability. Further, platforms would be expected to notify regulators of mergers that would normally be below the threshold for review, and these mergers would be subject to greater scrutiny in the form of audits or reporting requirements. Violations of the proposed act could result in fines up to 10 percent of global annual revenue.

These requirements do not replace the existing antitrust tools that EU regulators have if violations occur. Instead, they place additional requirements on designated platforms even prior to any allegations of anti-competitive behavior. A similar proposal is also likely in the United Kingdom, but the restrictions on a company would be more directly linked to the actions of each gatekeeper. The idea of *ex ante* restrictions on large platforms is not limited to the far side of the Atlantic: some policymakers in the United States are proposing similar regulatory elements as an option in debates around the future of antitrust and the appropriate regulation of Big Tech.

Potential Impact of the DMA on Consumers and Companies

While the DMA may be a European legislative proposal, it would have a significant impact

on many tech companies in the United States. The impact of the proposal could limit choice and beneficial business practices such as an easier-to-navigate service, shared logins, or low-priced generic products that consumers currently enjoy potentially beyond the European market.

The DMA, like the DSA and DST, seems designed to have the greatest impact on American tech companies while limiting the impact on the few successful European competitors; in other words, it appears to be a protectionist policy. For example, as the International Center for Law and Economics's Dirk Auer points out, the elements to be considered a gatekeeper company seem purposefully designed to exclude EU-based company Spotify. But these requirements also discourage success from local firms who may find that success brings with it greater regulatory scrutiny and compliance costs. As a result, companies will have to make very calculated decisions about whether to continue to grow and expand as they approach the presumed gatekeeper standards.

What's more, the obligations imposed on gatekeepers are focused on the operations of competitors and not on the experience of consumers. A focus on consumers can constrain regulators by limiting actions to behaviors that affect the end user rather than other metrics that are beyond what consumers experiences, such as size or reach. Under the DMA, regulators would have significant powers to impose additional obligations on gatekeepers to ensure these markets remain fair and contestable for competitors rather than focusing on the experience of consumers as a result of the competition and market dynamics. Competitors may often feel that certain actions are unfair, but this shift in regulatory focus means that a successful company could be penalized for popularity that occurs from its superior product rather than for purposefully engaging in behavior that harms consumers. Because these terms are not narrowly defined, regulators could abuse this authority to favor certain industries or competitors by determining the impact of gatekeepers' actions on competitors rather than consumers.

The result of such a shift is that the DMA would have a negative impact on consumers and in some cases eliminate beneficial choices. For example, the DMA requires platforms to allow sideloading. Such a requirement may benefit some service providers by expanding their distribution options, but it would eliminate a more security-sensitive option for consumers in the operating system market. Thus, this change would not improve consumer welfare. Similarly, DMA requirements around self-preferencing could harm consumers by ultimately eliminating or reducing the availability of options consumers enjoy from generic products. Furthermore, the limitation of the DMA could mean that innovative services are not accessible by consumers as large companies are hesitant to be seen "copying" competitors and small companies lack the distribution channels available to larger ones.

These limitations will impact not only the central elements of a company but also many ancillary services that often face different competition. For example, designating Google as a gatekeeper would impact not only search products but also other services such as advertising, directions, and shopping where it faces additional and distinct competition.advertising, directions, and shopping where it faces additional and distinct competition.

While the DMA may be designed to target large "gatekeepers," its harm would ultimately be felt by consumers and smaller providers. The direct cost of compliance may result in higher prices, but it would also limit the services that could be offered to consumers. The result of such regulation would not be a more diverse and competitive market, but one with more limited choices.

Conclusion

Europe has long engaged in greater regulation of technology with a more precautionary approach. The impact of this approach can be seen in the EU's rather small number of successful players in the industry. The EU's latest proposals could have a concerning impact well beyond its borders and ultimately harm consumers by removing beneficial services and limiting the dispersion of future innovation. Not only do such proposals appear to have a protectionist intention, but they also risk a broader shift in the global policy landscape from the more light-touch U.S.-led approach that has resulted in a flourishing internet economy to a more heavy-handed, bureaucratic approach with Europe as the standards setter. Policymakers should be particularly hesitant of calls to engage in similar heavy-handed policies in the United States and instead should provide policies that embrace innovation and provide regulatory clarity only when necessary.