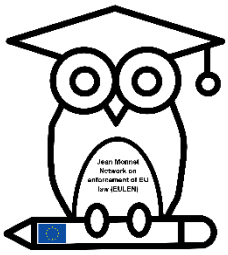

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The Role of National Authorities in the Digital Markets Act

Competition law and economics

Dr. Christophe Carugati[1*]

Abstract: The European Commission (the Commission) unveiled in December 2020 the Digital Markets Act (DMA) to restore contestability and fairness online. In only fifteen months, the co-legislators, the Parliament and the Council, agreed on a compromised text in March 2022. The DMA will impose a list of 21 obligations and interdictions to some large online platforms considered as "gatekeepers" in some core platform services. The Commission will be the sole enforcer despite several calls by some Member States, national competition authorities (NCAs), and scholars for a greater role of national authorities in enforcing the DMA. The Member States will be able to help the Commission in enforcing the regulation and their own national competition rules, including by enforcing DMA-like competition cases against gatekeepers. *When* and *how* should NCAs enforce DMA-like competition cases? The paper defines the role of national authorities in the DMA in helping European policymakers understand when and how NCAs should enforce DMA-like competition cases. Section II examines when NCAs should apply DMA-like competition cases. By analyzing their actions from 2010 to 2021 and their staff, it argues that NCAs have the skills and resources and proposes three recommendations on when they should enforce them. Section III explores how NCAs should implement the DMA-like competition cases. By studying the institutional framework proposed by the DMA and the systems of parallel competences between the Commission and the NCAs in enforcing competition laws, it argues that NCAs and the Commission can enforce together the regulation and DMA-like competition cases with other national competent authorities and suggests two recommendations on how they should enforce it. Section IV concludes.

Keywords: Competition Law and Economics, Digital Regulation, Competition Enforcement, NCAs, DMA.

[1]* Dr. Christophe Carugati, Doctor in Law and Economics on Big Data and Competition Law, Paris Center for Law and Economics (CRED), Paris II Panthéon-Assas University. For correspondence: Christophe.carugati@bruegel.org. Dr. Carugati is an affiliate fellow at the economic think tank Bruegel working on competition and digital policies. The author thanks the national competition authorities for their time in sharing public data. An early version of this paper has been published on Concurrences.

I. Introduction

The European Commission (the Commission) unveiled in December 2020 the Digital Markets Act (DMA) to restore contestability and fairness online.[2] In only fifteen months, the co-legislators, the Parliament and the Council, agreed on a compromised text in March 2022.[3] The DMA will impose a list of 21 obligations and interdictions to some large online platforms considered as "gatekeepers" in some core platform services. The DMA presumes that a firm is a gatekeeper if it fulfills the following three cumulative rebuttable criteria: (i) it provides the same core platform service in at least three Member States—namely providers of online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communication services, operating systems, web browsers, virtual assistants, cloud computing, and online advertising services—; (ii) it has an annual Union turnover of at least €7.5 billion in each of the last three financial year or a market capitalization of at least €75 billion in the last financial year; and (iii) it has at least 45 million monthly active users and at least 10 000 yearly active business users in the Union in each of the last three financial years (art. 3 draft compromised text). It follows that 14 firms are likely to fulfill the conditions, including Airbnb, Alphabet (Google), Amazon, Apple, Booking Holdings, Meta (Facebook), Microsoft, Oracle, PayPal, Salesforce, SAP, Uber, Verizon (Yahoo), and Zoom. The Commission will be the sole enforcer despite several calls by some Member States, national competition authorities (NCAs), and scholars for a greater role of national authorities in enforcing the DMA. The Member States will be able to help the Commission in enforcing the regulation and their own national competition rules, including by enforcing DMA-like competition cases against gatekeepers. *When* and *how* should NCAs enforce DMA-like competition cases?

The questions are crucial for cost-effective enforcement. Indeed, with an envisaged 80 employees and a budget of 81 million euros for 2021–2027, the European regulator would probably have fewer resources than the estimated 14 companies it would regulate because it would have to monitor and enforce 294 obligations with 0,3 employees per obligation. Moreover, with substantial deep pockets, the regulated have the ability and incentive to mobilize the best in-house and external lawyers, economists, and policy experts to fight the regulation. As a result, a suboptimal enforcement is likely to occur with potential slow enforcement and/or enforcement selection, thereby raising the same critics regarding slow and selective competition enforcement.[4]

In this context, the regulator has to find a way to expand its workforce without increasing its resources. In Europe, the Commission can effectively rely on a network of NCAs by delegating some non-EU-wide antitrust and merger cases to them. It follows a decentralized enforcement of European competition laws with its benefits and drawbacks. On the positive side, NCAs better know local conditions, such as market structure and legal requirements, to monitor and enforce competition rules. On the negative side, they might take a different approach. For instance, France, Italy, and Sweden found that Most-Favored Nation (MFN) clauses that impose to suppliers of a retailer, such as an online marketplace, the same or better price and conditions on any other retailer (wide MFN) are illegal but considered legal the same clause on the supplier's own website (narrow MFN) in the 2015 *Booking* case. By contrast, Germany found that both wide and narrow MFN clauses are

[2] Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act).

[3] Council, "Digital Markets Act (DMA): Agreement Between the Council and the European Parliament" (*Council*, 25 March 2022) <https://www.consilium.europa.eu/fr/press/press-releases/2022/03/25/council-and-european-parliament-reach-agreement-on-the-digital-markets-act/> accessed 1st May 2022.

[4] Jason Furman et al., "Unlocking Digital Competition Report of the Digital Competition Expert Panel", March 2019. In Europe, a formal EC antitrust case took on average four years (and more in complex digital cases), from the registration of the case to the termination of a formal investigation. European Court of Auditors, "The Commission's EU Merger Control and Antitrust Proceedings: A Need to Scale Up Market Oversight", *Special Report*, 2020, p. 27.

illegal in the same case.[5] Furthermore, NCAs can only rule on their territory. However, the 2015 French, Italian, and Swedish *Booking* antitrust case illustrates that the regulated can decide to extend the decision across the European Union (EU).[6]

However, in borderless digital markets where large online platforms implement the same conduct in each Member State, it is questionable whether NCAs should enforce DMA-like competition cases. Do NCAs have the skills and resources in the digital economy? How to allocate cases between the Commission and NCAs? Should other national competent authorities play a role?

The paper defines the role of national authorities in the DMA to help European policymakers understand when and how NCAs should enforce the DMA-like competition cases. Section II examines when NCAs should apply DMA-like competition cases. By analyzing their actions from 2010 to 2021 and their staff, it argues that NCAs have the skills and resources and proposes three recommendations on when they should enforce them. Section III explores how NCAs should implement the DMA-like competition cases. By studying the institutional framework proposed by the DMA and the systems of parallel competences between the Commission and the NCAs in enforcing competition laws, it argues that NCAs and the Commission can enforce together the regulation and DMA-like competition cases with other national competent authorities and suggests two recommendations on how they should enforce it. Section IV concludes.

II. When should NCAs enforce the DMA-like competition cases?

The 27 NCAs of the European Competition Network (ECN) wished to enforce the DMA at the national level rather than a centralized implementation by the Commission alone.[7] The co-legislators did not respond favorably to the call. The Commission will be the sole DMA enforcer. However, the NCAs could still implement their own national competition rules in the digital sector. Should they do so? To answer this question, the paper studies public data from the 27 NCAs of the ECN on their actions in the digital economy from 2010 to 2021 by focusing on their skills (I) and resources (II). Finally, it concludes with three recommendations for European policymakers on when NCAs should enforce the DMA-like competition cases (III).

Skills

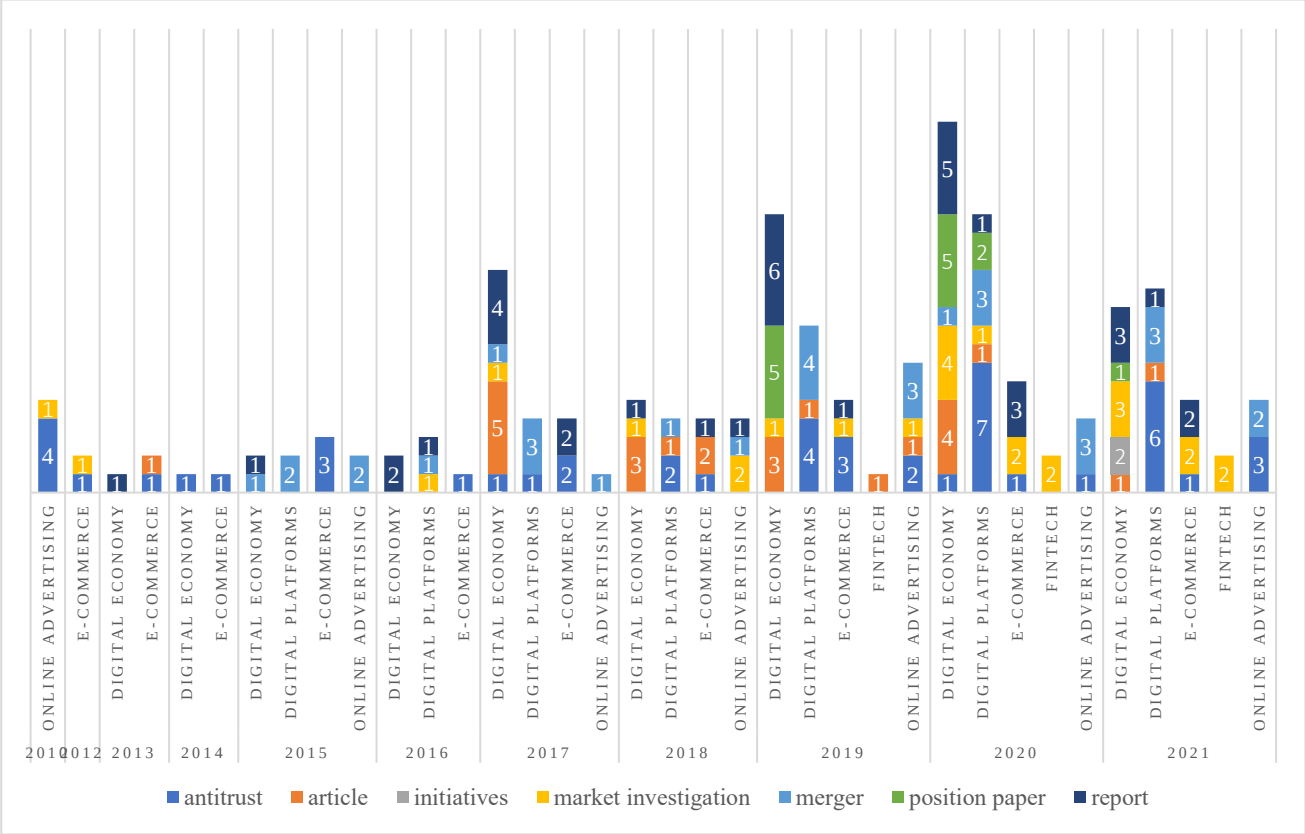
Do NCAs have the skills in the digital economy? The paper studies their actions by focusing on three factors: the type of work, the type of topic, and the competition authorities leading the work. To do so, the paper collects all public data from 2010 to October 2021 to have the most accurate picture from the English website of each NCA and by requesting NCAs to complete and verify data, but some data might not be available due to search and language issues. Upshot? Figure 1 below shows that they are very active in the digital sector. Since 2010, they have done 182 actions at the enforcement level—with 48 antitrust and 32 merger cases—and advocacy level—with 25 articles, 2 initiatives, 26 market investigations, 13 position papers, and 36 reports.

[5] Philippe Chappatte and Kerry O'Connell., "European Union – E-commerce: Most Favoured Nation Clauses" (*Global Competition Review*, 3 December 2020) <https://globalcompetitionreview.com/guide/e-commerce-competition-enforcement-guide/third-edition/article/european-union-e-commerce-most-favoured-nation-clauses> accessed 1st May 2022.

[6] Ibid.

[7] European Competition Network, "Joint Paper of the Heads of the National Competition Authorities of the European Union–How National Competition Agencies Can Strengthen the DMA", June 2021.

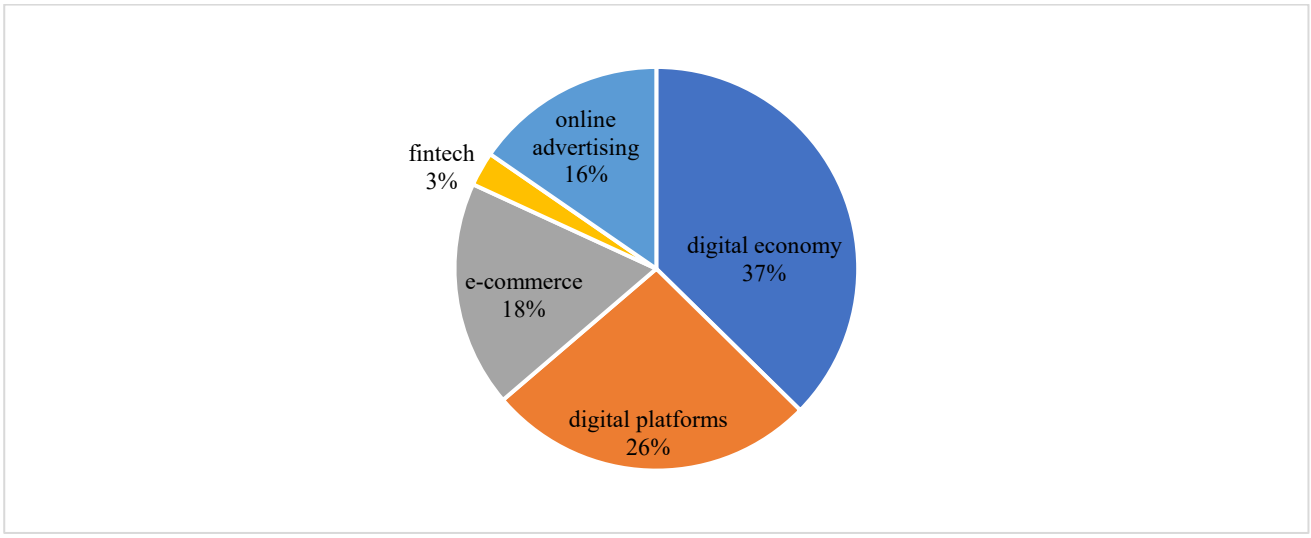
Figure 1: Actions of the NCAs in the digital economy between 2010 and 2021 by work and topic



Furthermore, the paper classifies the type of topics into five categories: 1) Digital economy refers to actions dealing with digital issues in general, such as the 2016 French and German joint report on competition law and data; 2) Digital platforms refers to actions dealing with the behaviors of digital platforms such as the 2019 Polish *Allegro self-preferencing* antitrust case; 3) E-commerce refers to actions dealing with business terms and conditions and the study of the e-commerce sector, such as the 2020 French report on e-commerce or the 2015 French *Booking MFN* antitrust case; 4) Online advertising refers to actions dealing with online advertising issues and the study of the sector, such as the 2018 French market investigation of the online advertising sector; and 5) Fintech refers to actions dealing with Fintech issues and the study of the sector, such as the 2020 Greek sector inquiry on fintech.

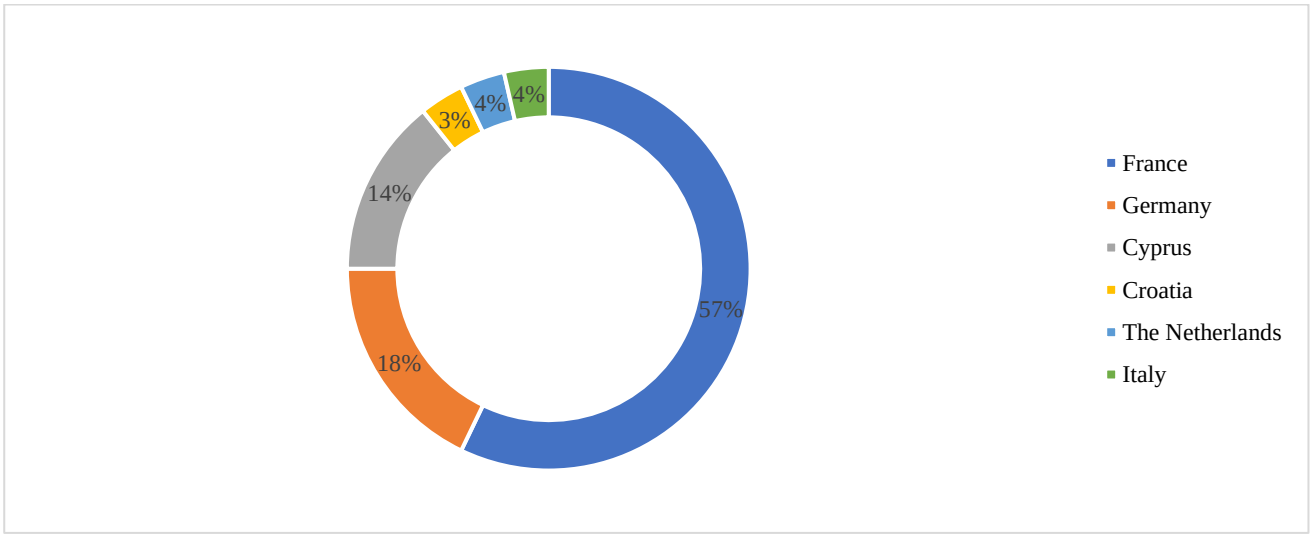
In detail, figure 2 underscores that their works focus on the digital economy in general (37%), digital platforms (26%), e-commerce (18%), online advertising (16%), and fintech (3%).

Figure 2: Actions of the NCAs in the digital economy between 2010 and 2021 by topic



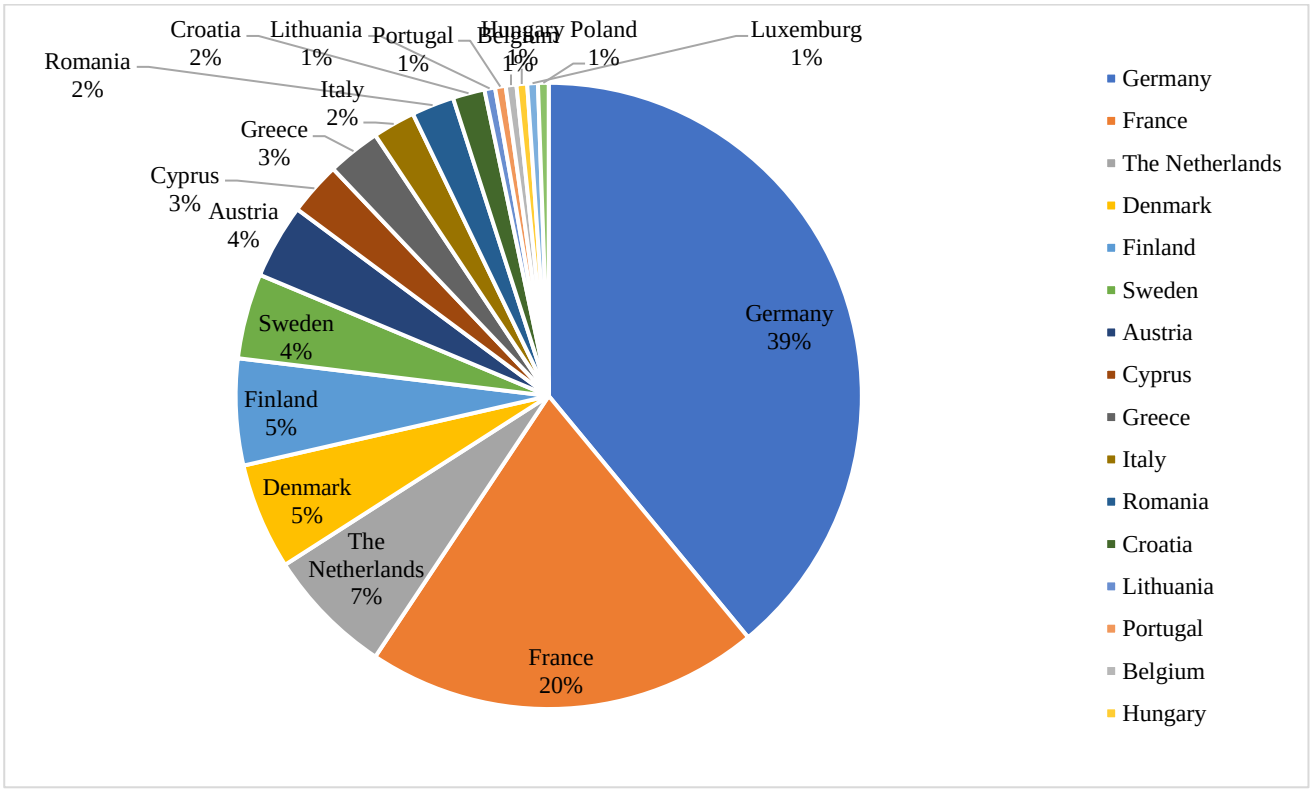
Moreover, some NCAs are leaders in some topics. For instance, figure 3 illustrates that the French competition authority has an in-depth know-how of the online advertising market, with 16 actions representing 57% of the total actions by NCAs on this topic.

Figure 3: Actions of the NCAs on online advertising between 2010 and 2021



However, only a few NCAs have strong expertise in the digital economy. Figure 4 outlines that Germany (39%), France (20%), the Netherlands (7%), Denmark (5%), and Finland (5%) conduct most of the actions.

Figure 4: Actions of the NCAs in the digital economy between 2010 and 2021 by country



Last but not least, some actions concern local platforms. For instance, the Polish *Allegro* antitrust case investigates whether the leading e-commerce marketplace in Poland Allegro promotes its own products over its third-party rivals on its marketplace by manipulating its algorithms and accessing non-public data.[8] The other actions concern global platforms. For example, the Dutch *Apple App Store* antitrust case examined whether Apple abuses its dominant position by imposing unfair terms and conditions to developers of its App Store.[9]

The data shows that not all NCAs have equal skills. Indeed, only a few NCAs led by Germany and France have strong expertise in the digital economy by conducting numerous works in several topics ranging from the digital economy in general to fintech. The latter have been very active at both the enforcement and advocacy levels, often by being frontrunners in complex and new digital issues. For instance, the German competition authority was the first to study the intersection of data protection and competition law in the *Facebook* antitrust case.[10] Do the other NCAs have competence in the digital economy? Yes, in two respects. First, they investigate practices by local platforms that impact the local economy. For instance, the Danish *FK Distribution* antitrust case found that the leading distributor of print circulars in Denmark abused its dominant position by tying its sale of distribution of print circulars with its sale of viewing of circulars on its digital platform.[11] Second, they undertake actions that are significant for other competition authorities. For instance,

[8] Office of Competition and Consumer Protection, "Procedure Against Allegro. A New Platform for Whistle-Blowers" (*Office of Competition and Consumer Protection*, 10 December 2019) <https://www.uokik.gov.pl/news.php?news_id=16014> accessed 30 September 2021.

[9] Authority for Consumers & Markets, "ACM Launches Investigation into Abuse of Dominance by Apple in its App Store" (*Authority for Consumers & Markets*, 11 April 2019) <https://www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store> accessed 4 October 4, 2021.

[10] Bundeskartellamt, "Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources" (*Bundeskartellamt*, 7 February 2019) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html> accessed 30 September 2021.

[11] Danish Competition and Consumer Authority, "FK Distribution Has Abused its Dominant Position" (*Danish Competition and Consumer Authority*, 30 June 2020) <https://www.en.kfst.dk/nyheder/kfst/english/decisions/202003630-fk-distribution-has-abused-its-dominant-position/> accessed 4 October 2021.

the Greek competition authority headed by Professor Ioannis Lianos leads two initiatives to enforce better and faster competition law based on Big Data and artificial intelligence (AI) technologies.[12]

Resources

1.

Do NCAs have the resources to deal with digital cases? The paper studies the organizational chart of the 27 NCAs of the ECN. It found that only five competition authorities, including Denmark, France, Germany, Luxemburg, and Portugal, have a dedicated digital economy unit composed of economists, lawyers, and data scientists in charge of supervising digital cases.

However, the absence of a digital economy unit does not mean that NCAs do not have the resources. Indeed, NCAs—even those before the creation of the digital economy unit—use the antitrust or merger staff to conduct investigations in the digital sector. While it is impossible to know the exact number of staff working on digital cases, the data shows that NCAs spread know-how to the NCAs' staff when required. This is the right approach as the digital economy impacts all economic sectors, including media, agriculture, automotive, health, bank, and insurance. Accordingly, a sectoral approach to the digital economy will be inefficient soon. The consequence is that NCAs will need to adapt their staff quickly to the digital economy with more lawyers and economists specialized in the digital economy and Information Technology (IT) specialists in data and AI.

Recommendations

This section showed that NCAs have the necessary skills and resources to deal with digital cases. From these observations, the paper has three recommendations for European policymakers on when an NCA should enforce the DMA-like competition cases.

First, *when an NCA has strong expertise in one specific topic*. The French expertise in online advertising illustrates that some NCAs have strong know-how of a specific topic. As the digital economy is complex and fast-moving, it is vital to mobilize experts quickly. Delegating the enforcement of DMA-like cases to a specialized enforcer will ensure a fast and efficient outcome.

Second, *when an NCA has the expertise of local platforms and local conditions.* The Danish *FK Distribution* antitrust case demonstrates that some practices might result from national platforms that impact the local economy. In these cases, the national competition authority better knows local market conditions.

Third, *when an NCA develops technological tools*. The challenges in the digital economy are not only legal and economical but also technological. Indeed, the Polish *Allegro* antitrust investigation shows that some digital cases involve Big Data and AI technologies requiring solid expertise in IT to understand them. However, only a few NCAs have the IT skills and technological tools. Mobilizing these authorities as a central hub for investigations is thus critical for timely and efficient enforcement.

The question of how they should mobilize these skills and resources and enforce the DMA-like competition cases is the subject of the next section.

[12] Hellenic Competition Commission (HCC), "Presentation of the HCC Data Analytics and Economic Intelligence Platform" (*Hellenic Competition Commission*, 13 April 2021) <https://www.epant.gr/en/enimerosi/press-releases/item/1373-press-release-presentation-of-the-hcc-data-analytics-and-economic-intelligence-platform.html> accessed 30 September 2021.
Hellenic Competition Commission, "Computational Competition Law and Economics" (*Hellenic Competition Commission*, 2021) <https://www.epant.gr/en/enimerosi/computational-competition-law-and-economics.html> accessed 30 September 2021.

III. How should NCAs enforce the DMA-like competition cases?

The DMA will only concern a few large online platforms implementing the same business practices globally, including Alphabet (Google), Apple, Meta (Facebook), and Amazon. So how should NCAs enforce DMA-like cases against these platforms if their practices do not only concern the national market? To answer this question, the paper studies the institutional framework proposed in the DMA (I) and the systems of parallel competences between the Commission and the NCAs in enforcing competition laws (II). Finally, it concludes with two recommendations for European policymakers on how NCAs should enforce the DMA-like competition cases (IIII).

The DMA

2.

The March 2022 DMA draft compromised text states that the Commission is the sole DMA enforcer (art. 31b). The NCAs could only support the Commission in enforcing and monitoring the DMA, including collecting complaints (art. 24a) and conducting market investigations into cases of possible non-compliance (art. 31b). Yet, the Member States could implement their own national competition rules against gatekeepers, including DMA-like legislations, insofar they pursue other public interest objectives than ensuring contestability and fair markets (art. 1). The text defines contestability as the ability of firms to effectively overcome entry barriers and expansion, such as network effects, and challenges gatekeepers on the merits of their products and services (recital 33). It defines unfairness, not fairness, as the imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage (recital 34).

National authorities, including national courts, could not adopt decisions that run counter to a Commission's decision and have a duty to cooperate and coordinate their enforcement with the Commission to ensure consistency (arts. 1, 31a, and 31c). In particular, the Commission and the NCAs will cooperate and coordinate within the ECN (art. 31b). Furthermore, the Commission and NCAs could share information only for the purpose of enforcement coordination, including confidential ones, to ensure effectiveness. In this context, they will have to inform the Commission of the opening of an investigation and their intent to impose obligations on gatekeepers, including interim measures, without the possibility for the Commission to veto the NCAs in its action (art. 31b). The Commission might also consult the national authorities on the application of the DMA (art. 31).

Lastly, a high-level group composed of several European bodies dealing with digital issues, including telecommunication, data protection, competition, consumer protection, and audiovisual media, may advise and provide expertise to the Commission in enforcing and implementing the regulation, including updating it to new practices and services, and ensuring a consistent regulatory approach across various legal regimes (art. 31d). In this regard, the high-level group draws from the UK Digital Regulatory Cooperation Forum (DRCF). The latter ensures cooperation, coordination, and a coherent regulatory approach in digital markets between the competition, the data protection, the telecommunication, and the financial authorities by setting joint projects, approaches, and teams.[13] In the digital economy, cooperation between competition and non-competition regulators is primordial as digital issues involve various legal regimes, such as competition, data protection, and competition laws.[14] For instance, the French *Apple App Tracking Transparency* antitrust case in which Apple imposes a choice screen to developers requiring users to allow or not allow applications to

13 Competition and Markets Authority, "A Joined-Up Approach to Digital Regulation" (*Competition and Markets Authority*, 10 March 2021) <https://www.gov.uk/government/news/a-joined-up-approach-to-digital-regulation> accessed May 1st 2022.

14 Francisco Costa-Cabral and Orla Lynskey, "Family Ties: The Intersection Between Data Protection and Competition in EU Law" [2017] Common Market Law Review. Marco Botta and Klaus Wiedemann, "The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey" [2019] The Antitrust Bulletin.

track their data and device data is at the crossroads of competition and privacy.[15] Therefore, these legal regimes should not work in isolation but rather in close coordination to ensure efficient and effective law enforcement.

The compromised text thus contemplates complementary enforcement of the DMA and national competition rules. However, the text did not define how they should complement each other. Rather, it mandates that the Commission and the NCAs establish principles of cooperation and coordination in an implementing act to ensure consistency, effectiveness, and complementary enforcement of the DMA and national antitrust laws. Against this background, it is worth studying how the Commission and NCAs implement competition laws together.

The systems of parallel competences between the Commission and NCAs

3.

The Commission and the NCAs cooperate to enforce European antitrust laws thanks to a system of parallel competences within the ECN. The Commission notice on cooperation within the ECN defines the objectives as to ensure efficient division of labor between the NCAs and the Commission and effective and consistent enforcement.[16] The principle is that the authority who receives a complaint or opens a proceeding is in charge of the case. However, case re-allocation to the well-placed authority is possible but not mandatory to ensure effective competition enforcement. The authority well-placed is: 1) one NCA when the practice impacts its territory and it can bring the infringement to an end entirely, possibly with the assistance of other NCAs; 2) several NCAs when the practice impacts two or three territories, and one NCA cannot bring the infringement to an end entirely; or 3) the Commission when the practice impacts more than three territories.

However, the Court noted in *Amazon.com, Inc. and Others v European Commission*, that the notice does not lay down a rule on the allocation.[17] It follows that an NCA and the Commission can pursue a similar investigation insofar the investigation is not identical; namely, the investigation is against the same undertakings, the same allegedly anticompetitive practices, on the same product and geographic markets, during the same periods (art. 11(6) antitrust regulation). Furthermore, the Commission has full discretion to exclude a Member State from its territorial scope and can thus reject the undertaking's request to have a case dealt with in its entirety by the Commission.[18]

In practice, NCAs enforce most of the cases. Between 2004 and 2020, the Commission and the NCAs dealt respectively with 410 and 2394 antitrust cases.[19] Can the DMA implementing act replicate this system? It could replicate it, but the Commission will be the well-placed authority. Indeed, the practice is likely to impact more than three Member States because large online platforms implement the same practice globally.

Does this mean that NCAs cannot play a role in antitrust in case of allocation to the Commission? No, in three respects. First, the Commission could create a leading case with one national market, and other NCAs could deal with the other national markets to consider local conditions.[20] However, such allocation between the Commission and the NCAs might not be efficient in the digital economy due to its borderless nature where

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15 Autorité de la concurrence," Targeted Advertising / Apple's Implementation of the ATT Framework. The Autorité Does Not Issue Urgent Interim Measures Against Apple but Continues to Investigate into the Merits of the Case" (*Autorité de la concurrence*, 21 March 2021) <https://www.autoritedelaconcurrence.fr/en/article/targeted-advertising-no-urgent-interim-measures-against-apple-autorite-continues> accessed 10 October 2021.

16 Commission Notice on Cooperation within the Network of Competition Authorities [2004] OJ C 101/43, para. 3. See also, Council Regulation (EC) 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 And 82 of The Treaty [2002] OJ L 1/1.

17 Case T—19/21, *Amazon.com, Inc. and Others v European Commission* [2021], ECLI:EU:T:2021:730, para. 46.

18 Ibid, para. 45.

19 European Competition Network, "Statistics Aggregate Figures on Antitrust Cases" (*European Competition Network*) <https://ec.europa.eu/competition-policy/european-competition-network/statistics_fr> accessed 5 October 2021.

20 Commission Notice on Cooperation within the Network of Competition Authorities [2004] OJ C 101/43, para. 14.

national conditions matter only marginally. Second, the Commission could exclude a Member State from its territorial scope as it did in the 2020 *Amazon* investigation because the Italian competition investigated a similar practice against Amazon.[21] However, such allocation is not cost-effective as it duplicates staff to the same practice against the same undertaking and might lead to inconsistency. Third, NCAs can exchange information with the Commission and carry out an investigation on its behalf.[22] However, they cannot play an enforcement role. Indeed, once the Commission opens a proceeding, NCAs cannot deal with the same case—they can only do so after a Commission decision in a consistent manner.[23]

The Commission and the NCAs also cooperate in merger control with a clear separation of competences between them. The Commission has exclusive jurisdiction to review mergers falling within the Community thresholds under European merger control law and NCAs to review mergers falling below it under national merger control laws (art. 1 EUMR). In addition, the EC Merger Regulation (EUMR) provides a referral system for efficiently allocating competences between the Commission and NCAs. The parties or NCAs can request a referral from NCAs to the Commission (arts. 4(5) and 22(1) EUMR), and vice versa, they can request a referral from the Commission to NCAs (arts. 4(4) and 9 EUMR) to review a concentration under certain conditions.[24]

In practice, the EUMR enables an efficient allocation of resources and a consistent merger review. In particular, in the digital economy, the notifying parties and NCAs use the referral mechanism to request a review by the Commission when the merger does not meet the Community dimension but might affect competition in several Member States.[25] Can the DMA implementing act replicate this system? The DMA could replicate it, but it will need some adjustments to ensure a proper delegation mechanism from the Commission to the NCAs.

Recommendations

4.

This section showed how the Commission and the NCAs could enforce the DMA and DMA-like competition cases. From these observations, the paper has two recommendations for European policymakers on how NCAs should enforce DMA-like competition cases through principles of cooperation and coordination in an implementing act to ensure consistency, effectiveness, and complementary enforcement of the DMA and DMA-like competition cases.

First, *the Commission and NCAs should work on a case allocation mechanism similar to the EUMR*. The EUMR efficiently allocates resources and competences between the Commission and NCAs. The act should state that the Commission has exclusive jurisdiction to review practices falling within the DMA threshold and the NCAs to review practices falling below it. In addition, the act should provide a referral mechanism where the NCAs could request a referral from NCAs to the Commission, and vice versa from the Commission to NCAs, to review a practice under certain conditions.

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21 European Commission, "Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-Public Independent Seller Data and Opens Second Investigation into its E-Commerce Business Practices" (*European Commission*, 10 November 2020) <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2077> accessed 16 February 2022.
Autorità Garante della Concorrenza e del Mercato, "A528 - Amazon: Investigation Launched on Possible Abuse of a Dominant Position in Online Marketplaces and Logistic Services" (*Autorità Garante della Concorrenza e del Mercato*, 19 April 2019) <https://en.agcm.it/en/media/press-releases/2019/4/A528> accessed 16 February 2022.

22 Commission Notice on Cooperation within the Network of Competition Authorities [2004] OJ C 101/43, paras. 26-30.

23 Ibid, paras. 43-57.

24 Council Regulation (EC) 139/2004 on the Control of Concentrations between Undertakings (EC Merger Regulation) [2004] OJ L24/1.

25 Christophe Carugati,,"Reforming Merger Control Notification Thresholds" [2019] Concurrences.

To refer a practice from the NCAs to the Commission, the act should use the two criteria of article 22 EUMR. First, the practice affects trade between the Member States. Second, the practice threatens to significantly affect competition within the territory of the Member State or States making the request. In that case, the Commission should review the practice under European competition law, not the DMA, because the practice is outside the DMA threshold.

To refer a practice from the Commission to the NCAs, the act should use two criteria. First, the practice falls within the national thresholds of the Member State making the request on its own initiative or upon the invitation of the Commission. Second, the Member State should prove that it has the expertise and resources to deal with the case, including prior actions in enforcement and advocacy, experience in local platforms and conditions, and investment in technological tools. Moreover, the Commission should supervise the NCAs' enforcement actions through similar mandatory information and guidance powers that the European antitrust regulation provides to the Commission to ensure the single market.[26] The Commission should thus guide the Member State on how it can apply its national competition law consistently with the DMA. It is worth noting that Germany, France, and the Netherlands proposed a similar model in a September 2021 amendment paper. The Commission would have shared its enforcement power based on a delegation mechanism within the ECN, but the Council did not retain the amendment.[27]

Once the lead authority opens an investigation, other authorities, including the Commission, would not be able to deal with the same case, and the territorial scope would be EU-wide, to avoid inconsistency and duplicative works.

Second, *the Commission and NCAs should enforce the DMA and DMA-like competition cases with other non-competition enforcers with the assistance of the high-level group.* The French *Apple App Tracking Transparency* antitrust case illustrates that the digital economy involves various legal regimes. Competition enforcers should thus cooperate with other non-competition enforcers when an issue involves related concerns to ensure efficient and effective law enforcement with the assistance of the high-level group through information and enforcement-sharing. It should thus seek to solve issues and bring an infringement to an end entirely in all the various legal regimes to ensure consistency and efficient division of labor.

IV. Conclusion

Competition enforcers need to move fast and break things.[28] In complex and fast-moving digital markets with new emerging issues involving various legal regimes in all sectors, European policymakers should break European centralization and isolated competition enforcement. They should reap the benefits of decentralization and mutual enforcement with the support of NCAs and other non-competition regulators' skills and resources. The Commission and NCAs should thus enforce together the DMA and DMA-like competition cases with other national authorities through a proper cooperation mechanism. In this mechanism, the Commission would be able to delegate DMA cases to NCAs and share information and enforcement with other national authorities.

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26 Council Regulation (EC) 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 And 82 of The Treaty [2002] OJ L 1/1, art. 11.

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