

How can the DMA promote value creation in Europe's digital economy?



Event summary

May 2021

On 12 May 2021, Oxera hosted a virtual event at which Oxera Partner Felipe Flórez Duncan presented our new report titled '[How platforms create value for their users: implications for the Digital Markets Act](#)'. This was followed by a discussion of our findings and the Digital Markets Act (DMA) more broadly with a panel of experts. A general summary of the event is presented below and the full recording of the webinar is available on our website [here](#).

Background

In December 2020, the European Commission ('the Commission') tabled proposals for a DMA that would impose ex ante regulation on certain platforms operating in Europe.

Influenced by concerns raised in a series of recent studies and antitrust investigations, the DMA proposals impose a number of obligations and prohibitions on 'gatekeeper' platforms. While there are a large number of proposed obligations—18 in total—several of these relate to restrictions targeting practices that are common among both offline and online businesses.

In this context, the Computer and Communications Industry Association ('CCIA') asked Oxera to consider the extent to which these practices can create value for platform users and deliver benefits to consumers and society. Ultimately, the aim was to assess whether the obligations set out in the proposed DMA were likely to provide a proportionate and effective remedy to the concerns being raised in the digital economy.

Report summary

Recent studies and investigations in the digital economy have highlighted a wide range of theories of harm; however, they have paid significantly less attention to the theories of benefit and value creation. This is surprising, as many of the academic and policy reports on the subject stress the need for a better understanding of how platforms benefit users and society.

Our study aims to bridge the gap in the debate by explaining how three common practices—tying and bundling, self-preferencing, and leveraging—that may be restricted by the DMA can enable value creation, both online and offline. These practices are neither new nor unique to the digital sector.

Our research draws insights from a broad range of examples and academic literature—from economics, management science and information technology—

to shed new light on how platforms compete by creating value for consumers and business users. It outlines how, at their most basic level, platforms act as intermediaries, connecting one or more types of user to facilitate an interaction, and are often characterised by positive direct and/or indirect network effects. However, most modern-day platforms generate significant value over and above that offered by intermediation alone, playing active roles as:

- **aggregators:** helping to unlock scale economies for businesses while reducing transaction costs and increasing quality and trust for consumers ('value from aggregation');
- **innovators:** realising economies of scope as they extend their user offering by adding new features and services, thereby fostering innovation and dynamic competition both within and between ecosystems ('value from innovation and dynamic competition').

Value from aggregation is reflected in the bundling practices of supermarkets, car manufacturing or social networks; the self-preferencing practices of private labels, franchising agreements or desktop operating systems; and the leveraging data practices for online personalisation of services or credit reference agencies.

Google Maps illustrates how the three practices are used in combination to deliver a richer search and mapping experience to consumers and local businesses. The bundling of features into Google Maps—such as reviews, directions and photos—and the bundling of Google Maps into other services—such as mapping API into other apps—increases convenience for users, promotes a safer online environment and helps local businesses attract customers. Moreover, the bundling of Google Maps into Google Search is also an example of self-preferencing, which offers superior quality services and unlocks efficiencies from deeper cross-product integration. In the wider ecosystem, data and know-how is leveraged across services to provide personalised results, improved information and consistency to achieve productive efficiencies.

There are also many online and offline examples of value generation at the innovation layer. These include the bundling of new features to maintain user value and active engagement; supporting third-party innovators with ancillary services; and providing choice between more open and more

closed ecosystems through self-preferencing or the introduction of new products and services based on data leveraging.

The value of innovation and dynamic competition is exemplified by the Apple Silicon case study. Apple's decision to self-supply processors for its desktop and laptop computers has led to a closer integration of hardware and software, and illustrates how a platform can generate additional value for consumers and businesses by facilitating dynamic competition, both as an innovator and as an enabler of innovation by third parties. Using in-house Apple chips can be seen as a form of tying since users are unable to buy a Mac without Apple Silicon. This self-preferencing of Apple's own technology has the benefit of greater integration within the Apple ecosystem, allowing developers to write apps that work across iOS and macOS. Apple has also leveraged decades of technological developments building chips for mobile devices and can now share the benefits of this know-how with Mac users.

As these examples show, our report highlights the different ways in which digital platforms and their ecosystems can create value for users through bundling and tying, self-preferencing, and leveraging. While some of these practices may pose risks to competition in certain circumstances, our report has shown how they can also deliver substantial benefits to consumers and businesses.

The DMA therefore creates a risk of over-enforcement by restricting a series of common business practices, found offline as well as online, that can have net positive effects for society. In particular, the DMA's 'catch-all' and 'per se' approach to prohibiting a range of value-creating behaviours risks stifling the growth of Europe's digital economy.

At the heart of these shortcomings is the DMA's departure from the long-standing principles of ex post competition policy and best-practice ex ante economic regulation. This is manifested in proposals that do not include a requirement to undertake a formal analysis of dominance or market power, that provide no room for an effects-based assessment of the conduct and remedies to be imposed, and that do not provide a route to an appeal on the merits of any aspect of the process.

We therefore recommend that the Commission adopts a more flexible and tailored framework, drawing inspiration from the European telecoms regulatory framework, as well as the UK's digital regulatory framework and certain aspects of Germany's Section 19a Competition Act amendment.

Panel discussion

Chaired by Oxera Partner Dr Avantika Chowdhury, the panel consisted of:

- Morgane Taylor, EU Membership Manager, The App Association (ACT);
- Geert Moelker, Deputy Director of Competition and Consumer Policy, Netherlands Ministry of Economic Affairs and Climate Policy;
- David Nordström, Senior Economist, Swedish Competition Authority (Konkurrensverket);
- Professor Carmelo Cennamo, Professor at Copenhagen Business School and Director of the Digital Markets Competition Forum;
- Professor Jacques Crémer, Professor of Economics, Toulouse School of Economics.

A summary of the panellists' discussion is presented below.

Benefits delivered by platforms

One uncontested aspect of digital services is their prominent role in all aspects of day-to-day life and the many benefits they deliver to users.

David Nordström noted that in a [recent Swedish Competition Authority study](#) on competition on digital platform markets in Sweden, the Authority reached similar conclusions to Oxera's study on platform value creation. Mr Nordström reported that the study found several vertical and horizontal integration practices that could benefit users and stimulate investment. At the same time, the study identified that competition concerns could arise under certain conditions, with a key concern being the extent of market power of a firm—particularly in the case of digital markets benefiting from significant network effects and with an intermediation role. In such cases, the existing competition law might not effectively address the concerns.

Considering how the proposed interventions for regulation in digital (including the DMA) might affect value creation, Professor Cennamo outlined two different lines of thinking with potentially different results. One was the 'utility-style' form of regulation, which has as one of its prime objectives the opening-up of access to particular parts of the network in order to correct for the market failures arising from a gatekeeper's control of core services. This type of regulation follows the logic of creating fairness (through fair access to a bottleneck), which is then expected to result in greater market contestability, subsequently leading to innovation around the core platform services and unlocking value for users.

However, Professor Cennamo argued that this logic misses the fact that, unlike traditional utilities, many of the digital gatekeepers in question actually solved

pre-existing market failures when they launched their services, thereby 'creating' the markets they are active in and which are the subject of potential regulation.

In this regard, Professor Cennamo explained that the management science field views platforms as new collective organisations that address 'innovation failures', such as the lack of coordination of actors in the ecosystem, as well as addressing externalities and shaping consumption through various governance choices and market design decisions. As such, digital gatekeepers do not have a neutral intermediary role, as may be the case with utility networks. On the contrary, using their governing ability (which may include the right to exclude third parties from a platform) they make choices on how to design the interactions to optimise the value created and offer a superior consumption experience. At this point, Avantika Chowdhury, the Chair, noted that this is precisely where tension arises between Industrial Organisation (IO) economics literature and management science literature because the same practices that make the orchestration of the ecosystem possible are regarded as harmful and within scope of the DMA.

Professor Jacques Crémer, co-author of the report [Competition policy for the digital era](#), considered there to be more alignment between the IO literature and management science literature than was being recognised. However, given the importance of the digital services to users, he saw the need for some form of regulation. He considered that the comparison between digital services and utilities was not constructive because the GAFAs should not be regulated in the same way as electricity or telecoms. In his view, regulation in the finance industry is a more appropriate comparison, and while the latter is not perfect, it is an example of a regulated industry still characterised by innovation.

The potential impact of the DMA on innovation

The panel went on to discuss the likely impact of the DMA on innovation in Europe's digital economy.

Morgane Taylor from ACT raised a concern regarding the lack of data about the DMA's impact on the economy and the potential for a chilling effect on innovation. In particular, she highlighted that there is a risk that a number of well-intended provisions could actually end up reducing trust or increasing costs for smaller players, which would ultimately lead to a widening gap between them and the large players (see also ACT's position paper on the DMA [here](#)). For example, for small players and app developers, access to bundled services makes it possible to leverage consumer trust from established platforms, and hence, a change to the business models of gatekeepers in this regard might negatively affect the smaller actors. Morgane Taylor also highlighted how a similar risk could arise if large platforms are deterred from making new

acquisitions, and the chilling effect that this could have on investors' willingness to fund small startups, which are a significant source of innovation in the digital economy.

Rules-based versus case-by-case assessment

The discussion then turned to the question of which firms might be in scope of being regulated by the DMA. As noted in Oxera's study, the Commission seems to have opted for a more rules-based catch-all and per se approach to speed up the process and act quickly. Is this the right approach?

Geert Moelker noted that in its analysis of [competition policy and online platforms](#), the Netherlands Ministry of Economic Affairs and Climate Policy highlighted the importance of differences in business models and of not having regulation with broad applicability. The majority of panellists agreed that, ideally, the DMA should apply to only a subset of firms in order to deal with specific problems.

David Nordström noted that the study by the Swedish Competition Authority came out in favour of tailor-made interventions that follow a more detailed analysis of a case. Indeed, Avantika Chowdhury raised the point that other regulators and authorities in the UK, Germany or Sweden have proposed more tailored approaches to the regulation of digital services, which would indicate that this option was available for the DMA as well.

Professor Crémer noted that he would have liked the DMA to be more flexible and closer to the approach taken by the Digital Markets Unit in the UK. However, he considered that the DMA does not have broad applicability since the rules are going to cover fewer than ten platforms and apply to only some of their activities. Ultimately, how the DMA is implemented will be important, and he highlighted that more guidance is needed in this area. This view was echoed by Geert Moelker, who saw the DMA positioned between a rules-based and a case-by-case approach. He considered the DMA's current structure to be owing to the need to strike a balance between speed and legal certainty on the one hand, and flexibility and future improvement on the other.

Professor Cennamo pointed to the fact that while Articles 5 and 6 are intended to be 'self-enforcing', in practice, this is unlikely to be the case. Another issue with the DMA is the narrow definition of core platform services. When dealing with complex issues—for example when there is competition between ecosystems—more information is required to distinguish between beneficial and harmful practices. Professor Cennamo pointed to the fact that the concept of competition between ecosystems is totally absent from the DMA, even though it is closely related to contestability—for example the competition in mapping services between Google and Apple leading to positive spillovers for third

parties, an increase in innovation and more competition.

Morgane Taylor also supported a more flexible approach to strike the balance between rapid intervention and the needed analysis of complex negative and positive impacts for each case. She drew attention to the fact that there might be a tension between what is considered fair for consumers and for businesses. To mitigate for potential chilling effects on investment, the DMA needs to provide legal certainty —particularly for firms that intend to grow into large digital platforms.

Drawing parallels with the approach taken in telecoms regulation, Felipe Flórez Duncan pointed to how the lack of resources that the Commission envisages will be allocated to the implementation and monitoring of the DMA (compared with the hundreds of staff who often work in national regulatory authorities across member states) implicitly reveals how the DMA's approach is inherently a rules-based regime. This is somewhat at odds with the wide-reaching changes that the DMA will have on business models and product design, as well as revealing the lack of the necessary infrastructure to sustain regulation in such a complex area. On this point, Professor Crémer drew attention to the role that courts will ultimately also play in deciding how the DMA will be implemented through case law.

Where next?

There was also some discussion around ways in which the DMA could be made more effective and reduce unintended consequences. While there was no consensus on whether and to what extent the DMA needs to be changed, it was noted that it can be improved to better protect and promote innovation in Europe to the benefit of consumers and businesses. Recommendations included the need for: clarity around the objectives of fairness and contestability; reconsideration of the designation criteria and the application of some of the obligations in Articles 5 and 6; more guidance, accountability and transparency of the process; and dialogue with firms and other stakeholders such as national regulators.

In the words of one of the panellists: 'the architecture of the DMA's house has been established; what follows now is how to paint the walls.'

We would like to thank our esteemed panellists for the stimulating discussion and our attendees for joining us for the launch of the report. We look forward to the next steps in the DMA journey and to further discussions with experts and clients on the Act's impact on the economy.