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French National Assembly's report on ex ante regulation: objectives and difficulties of the DMA

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Resume: *On the eve of the French Presidency in the Council of the European Union in January 2022, the European Affairs Committee of the National French Assembly presented an information report on the Digital Market Act on 23 July 2021, introduced by Mrs. Christine Hennon, deputy. This committee, composed of deputies, examined this text, the issues it raises and made criticisms and recommendations to improve its drafting and its understanding.*

The Digital Market Act (DMA) is a European regulation of the European Parliament and Council on contestable and fair markets in the digital sector. This regulation, according to the National Assembly's information report[1], aims to remedy structural market failures in the digital economy. In order to do this, this text proposes an asymmetric regulation and an ex ante approach to deal with the issues of competition law (I). Although these objectives are justified by the importance to regulate digital platforms, the Rapporteur and more generally, the European Affairs Committee pointed out difficulties to implement this text (II).

[1] National Ass., Information Report on the Digital Market Act, 23 July 2021

I – Digital Market Act and its *ex ante* regulation: a solution to the inefficiency of competition law towards platform's regulation?

In this part, we will expose the aim of the DMA, its objectives and purpose: to regulate digital platforms and especially the GAFAMs (A). Then, we'll see that this ex ante regulation, provided by the text, is there to fill the gaps in competition law, which only intervenes ex post, often when it is too late (B).

A) Necessity to regulate GAFAMs behavior

The aim of the DMA is to solve the structural problems caused by the large platforms (inter-platforms competition) – for instance the GAFAMs: Google, Amazon, Facebook (now META), Apple and Microsoft – to lead to a fairness market. In order to do this, this regulation stipulates obligations imposed to platforms like GAFAMS due to their statute of gatekeepers.

This text shows a profound evolution of European digital regulation, until now, platform regulation only existed through ex post control. The main goal is to solve structural problems caused by the biggest digital platforms like the GAFAMs which have acquired a quasi-monopoly on a global scale and an inordinate amount of market power.

This text benefits to other companies but is very detrimental to the GAFAMs - it's discriminatory but it's necessary to prevent anti-competitive behaviors thanks to an *ex ante* regulation.

The aim of the DMA is to solve the structural problems caused by the large platforms (inter-platforms competition) - for instance the GAFAMs - to lead to a fairness market.

The *ex ante* regulation permits European's authorities to impose to these companies, called by the text « gatekeepers » - obligations.

Therefore, this regulation, insofar as it proposes an *ex ante* regulation of practices, provides many solutions:

Due to the provisions, obligations can be imposed on GAFAM without necessarily finding an actual violation of competition law (however, on this point, it is highly questionable as no fault could be imputed to the company)

Moreover, the report explains us that there is a presumption of abuse of a dominant position (there is no need to prove any abuse, nor to demonstrate the dominant position of

the entity that is presumed)[2]. Certain behaviors are, therefore, prohibited even before they are put in place and the authorities will thus be able to react more quickly and effectively in the event of a breach

On the other hand, this text is highly criticized by a part of the doctrine and by the GAFAM because it would be discriminatory - an « asymmetric regulation ». Indeed, only certain companies, mainly American, would be concerned by these obligations. Although, this asymmetrical regulation is necessary to prevent anti-competitive behaviors that these companies had made (in line with the latest decisions on GAFAM since 2010)[3].

B) <u>Ex ante regulation as a solution to the inefficiency of competition law</u>

As Euro-deputy Andreas Schab said, the *« current competition rules are insufficient »*, he coordinates the writing of the text in European Parliament[4]. He adds that *"the Digital Markets Act will rule out these practices, sending a strong signal to all consumers and businesses in the Single Market: rules are set by the co-legislators, not private companies!"*

This new text is beneficial in several ways, it addresses the shortcomings of "classical" competition law and its slowness (as seen in the latest decisions concerning digital platforms). There are important issues regarding competition law and French Competition's authority (Autorité de la Concurrence) decisions - for instance sanctions aren't very dissuasive, new practices occurs in the meantime of the procedure, the possibility for the author of abusive practices to make a transaction…

Besides, competition law, concerning anti-competitive practices, can only intervene afterwards (ex post), especially as the distortions created by the large platforms are not necessarily assimilated or correctly understood (network effects, barriers to entry…). The DMA will, therefore, be able to fill these gaps by proposing an *ex ante* regulation.

Is this ex ante regulation intended to replace competition law? Can there be cumulation between the rules laid down in the TFEU and the DMA?

There is no clear answers to these questions, but it is possible to provide some elements of response. Firstly, competition law will remain useful to control and punish, ex post, anti-

[2] Article 102 TFEU for abuse of a dominant position
[3] Article by Laurence Daziano, « Digital Market Act: for effective digital regulation in Europe », La Tribune.

[4] European Parliamant News, "Digital Markets Act: ending unfair practices of big online platforms", Andreas Schab,

competitive behaviors of the entities concerned. As to the second question, there can be no cumulation of these two tools in view of the *"ne bis in idem"* principle. It is, therefore, more than necessary to ensure the proper articulation of these two bases, and of the other regulations in force (especially the Platform to Business regulation, but also GDRP)[5].

II – Difficulties to implement the DMA

Although the objectives of the DMA are noble (the control of digital platforms is important to regulate the market) - this text nevertheless encounters certain difficulties regarding its drafting. Firstly, there are drafting problems (obscure terms, poorly defined obligations, etc.) (A). But it is also important, in the Rapporteur's view, for the drafters to specify how this text is to be linked to other European and national texts to guarantee its full effectiveness (B).

A) A difficult understanding of the text

The obligations indicated in the DMA regarding platforms like the GAFAMs are neither clear nor sufficiently precise, leading to a lack of visibility for the companies concerned and to a significant degree of legal insecurity, as underlined by the National Assembly's Business Committee in the report.

This legal insecurity results from the substance of the text - in its writing. Indeed, the lack of precision - the absence of clarity on the definition of the terms (for instance the term "gatekeeper" or "user company" …) makes reading and understanding the text more difficult.

Some services do not fit into the definition of « platform » in the text (for instance the Cloud, publicity services or message services). There is no precision about search engines (like Siri for example) as for the web navigators.

The Rapporteur, in order to provide solutions and fill these drafting gaps, makes recommendations throughout the text. It is important to specify such information to ensure that it is enforceable against the debtors of the obligations (companies concerned by the thresholds mentioned in the text). Moreover, this text is a regulation, which therefore has a general scope and is fully binding on all members of the European Union (binding scope). Finally, and in accordance with the principle of *"leges ab omnibus intelligi deben"*, it is important, as the Committee underlines, to ensure the clarity of

[5] See the discussion in II.B) below.

the definitions and terms of the text in order to guarantee its comprehension by all.

B) The necessary articulation of the DMA with other European and national competition instruments.

First of all, and as mentioned supra, the DMA is not intended to replace traditional competition law rules but simply to fill in the gaps. It is therefore quite conceivable that these two instruments would intervene in two stages: first, the platforms concerned by the regulation would have to comply with their obligations and, failing that, if afterwards these same platforms were guilty of anti-competitive acts (such as a cartel, for instance), they would be held liable under articles 101 and 102 TFEU. These two instruments are therefore complementary.

Secondly, there are some incoherencies with other texts, for instance with the Platform to Business's regulation text[6]. This regulation, for the fairness and transparency for business users of online intermediation services, mentions only two of the eight platform services designated by the DMA: search engines and online intermediation services. The Rapporteur has indicated in his recommendations the importance of ensuring the complementarity of these two regulations.

This new instrument, the DMA, is intended to be complementary to other European regulations such as the Platform to Business mentioned above, but also to the RGPD (General Data Protection Regulation) to guarantee the protection of platform users' data[7], or to the DSA (Digital Service Act) and ePrivacy (ongoing projects).

Finally, the provisions of the DMA may be supplemented by national legislation, in particular the rules on restrictive competition practices (Articles L442-1 and following of the French Commercial Code)[8], which punish the brutal termination of commercial relations between two partners, significant imbalances between the rights and obligations of the parties, the prohibition on resale outside the network, or resale at a loss or the resale price imposed by a party to the distribution, production or service contract).

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[6] Regulation for the fairness and transparency for business users of online intermediation services, 20 June 2019.

[7] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals regarding the processing of personal data and on the free movement of such data

[8] Articles L442-1 and following of the French Commercial Code about restrictive competition practices