

Application of EU Competition Law in the Digital Economy

Challenges to the EU Legal Method?

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Introduction

- Articles 101 and 102 TFEU
- Short provisions with open and vague legal terms
- Decision-making practice/case law
- Individual examinations
- Fair outcomes/ legal certainty (predictability)?
- Time consuming
- Guidelines?

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Changes of legal method in the past

- Merger regulation 1989
- C-6/72 Continental Can, C-142/84 and 156/84 BAT and Reynolds
- Ex post – Ex ante
- No need to apply Articles 101 and 102 in practice
- Regulatory approach – thresholds etc
- Legal certainty (predictability) increased, but less scope for case-by-case investigations/proceedings and fair outcomes.
- Legal review had to be conducted in accordance with the detailed provisions in the Regulation.

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DMA

• Similarities

- Broader regulatory approach – typical cases of market abuse in the digital economy (Articles 5 and 6)
- Thresholds = definition of Gatekeepers and core platform services (CPSs)
- Quantitative criteria
- Ex ante
- Lower enforcement costs

DMA Cases pending before the Union Courts

- T-1079/23 Apple (Market investigation opening / iMessage as NI-ICS)
- T-1080/23 Apple [Gatekeeper designation (iOS/App Store)]
- T-1078/23 Meta (Gatekeeper designation)
- T-214/24 Apple (Closure of iMessage market investigation)
- T-357/24 Opera Norway (Non-designation of Microsoft Edge)
- T-354/25 Apple [Specification decision — connected devices interoperability (Art. 6(7))]
- T-359/25 Apple [Specification decision — interoperability request process (Art. 6(7))]
- T-438/25 Apple [Non-compliance fine €500M — anti-steering (Art. 5(4))]
- T-435/25 Meta Platforms [Non-compliance fine €200M — consent or pay (Art. 5(2))]
- On appeal before the CJ (C-627/24 P) => T-1077/23 Bytedance (Gatekeeper designation)

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The purpose of DMA – a simple prohibition Bytedance (T-1077/23)

19. ... although Articles 101 and 102 TFEU remain applicable to the conduct of gatekeepers, the fact remains that the scope of those provisions is limited to certain instances of market power, for example dominance on specific markets and anticompetitive behaviour, enforcement of those provisions occurs only *ex post* and requires an extensive investigation of often very complex facts on a case-by-case basis. [...] DMA [pursues] an objective that is complementary to, but different from, that of protecting undistorted competition on any given market, as defined in competition law terms, which is to ensure **that markets where gatekeepers are present are and remain contestable and fair**, *independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by the DMA on competition on a given market* (see, to that effect, recital 11 of the DMA).

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A different legal method?

- What legal review can be expected from the Union Courts?
 - A detailed examination of the provisions of the regulation, where the wording of individual provisions is of major importance (literal interpretation).
 - Room for consideration of "fairness"?
 - It is quite clear that the leitmotif for introducing the DMA is "fairness", given that the present market structure has been considered "unfair".
 - According to the DMA: The EU legislature found that existing EU law did not address, or did not address effectively, the challenges to the effective functioning of the internal market posed by the conduct of gatekeepers that are not necessarily dominant in competition law terms (see, to that effect, recital 5 of the DMA).
 - Blunt inflexible tool in comparison with Article 102 TFEU (complementary/gap filling).
- **The legal interpretation is more concerned with the respect for legal certainty: the scope of the regulation and listed forbidden behaviors should not be made wider.**

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Does Article 102 TFEU matter when DMA applies?

- The DMA reduces the need to use Article 102 TFEU
- BUT Article 102 remains relevant also for infringements covered by the DMA
- The obligations under DMA continues to apply
- Parallel application is not excluded.

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Recent parallel cases - Apple

Article 102

- Commission's decision of **4 March 2024** on Appstor (anti-steering provisions relating to music streaming)
- Initiated in 2015
- Fine of EUR 1.85 billion
- T-260/24

(Parallel cases also in META platforms/FaceBook, both decisions appealed before the General Court, T-66/25 and T-435/25)

DMA

- Commission's decision of 23 April 2025, infringement of Article 5(4) of the DMA (anti-steering provisions in general on the Appstore)
- Initiated on **25 March 2024**
- Fine of EUR 500 million
- T-438/25

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Conclusions

- It seems like parallel application is likely ...
- BUT this can be explained by the fact that the Article 102 investigations were initiated long before the DMA was adopted.
- DMA is likely to take over ...
- The legal review by Courts will mainly be concerned with verifying compliance with legal certainty.
- BUT the Commission will probably have an interest in using Article 102 in well chosen cases also in the future (not only outside DMA).
- New Article 102 cases before the Union Courts may have an impact on the interpretation of some DMA provisions and/or influence a future revision of the DMA (cf. Article 19 of the DMA).
- The long-awaited new guidelines on exclusionary abuses of dominance seem however less significant than before the DMA.
- AND Yes, I consider the DMA to be **a branch of competition law** (see Crémer, J., Why you should think of the DMA as competition law, Concurrences 11-2025).