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The Digital Markets Act: criticism and its potential negative impact on Small and Medium Enterprises (SMEs)

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1. Introduction

“My main worry is that all of a sudden we forget just to look each other in the eye, and have a normal dinner without the phone on the table, to talk, or take a walk in the forest without registering every step” (Margrethe Vestager)

In the context of the upcoming new European rules, in particular the entry into force of the **Digital Markets Act**, the European Union (EU) Commissioner, Margrethe Vestager, specifically tasked with the political priority of a “Europe Fit for the Digital Age”, gave an **interview** to the EUobserver magazine, where the sentence highlighted above was said.

As previously noted, digital platforms that act as “gatekeepers” in the digital world will have to comply with the Digital Markets Act. Gatekeepers are platforms that have a significant impact on the internal market, serve as an important gateway for business users to reach their end users (consumers), and which enjoy, or will foreseeably enjoy, an entrenched and durable position in the market. In practice, we’re speaking of Big-Tech companies such as GAMA (Google (Alphabet), Amazon, Facebook (Meta), and Apple), among others.

The main purpose of the Digital Markets Act is to protect enterprises and end users from unfair conditions imposed by gatekeepers and to guarantee the openness of digital services. This regulation intends to tackle the current digital challenges by imposing stricter rules, creating new bodies (such as the Digital Markets Advisory Committee and the High-level group), imposing significant fines (up to 20% of the global annual turnover for repeated offenses), imposing interoperability requirements,

prohibitions on self-preferencing and on restricting switching and creating obligations to allow app un-installing and changes to default settings, among othersⁱ.

Together with the **Digital Services Act**, the **Data Act**, the **Data Governance Act** and the **AI Act Proposal**, the Digital Markets Act intends to change the reality of digital markets and platforms.

There has been an ever-increasing speculation whether the new EU regulations will be sufficient to overcome the challenges brought by digital platforms, at the same time not baffling their potential and ensuring a level playing field for market players.

Regulation should not be so limiting that it eventually blocks innovation, and not so liberal that it fosters unbalanced situations. An equilibrium is desired.

2. The Digital Markets Act's criticism and potential impact on Small and Medium Enterprises

An aspect that the Digital Markets Act (DMA) has drawn criticism for is its rigid prohibition system. Articles 5, 6 and 7 contain a *numerus clausus* of *per se* rules. The *per se* rules do not require proving the actual harmful effects of a conduct but outlaw that conduct as such. On the one hand, this enhances legal certainty. On the other hand, the *per se* rules may prohibit a conduct that does not cause harmful effects ("false positive") and may fail to consider a harmful conduct as such ("false negatives"). As a consequence, these rules can be seen as imposing a rigid, one-size-fits-all approach on gatekeepers with different business modelsⁱⁱ.

Additionally, only core platform services provided to users established or located in the EU are subject to the DMA. Gatekeeper services offered to users established and based in other jurisdictions outside the EU are not governed by it. It is uncertain whether the "Brussels effect" will take place, resulting in gatekeepers complying with DMA's stricter requirements outside the EU, but gatekeepers will most likely aim to provide their services in areas with lower regulatory restrictions, while complying with the DMA only with respect to EU-established users.

Over the last two years, the European Union has produced a vast body of legislation that has to be analysed and grouped. Some of these legislations may be overly complicated, intrusive, and interventive. Complexity results in higher costs and barriers for new businesses who want to enter the market. The result could be paradoxical: by creating stricter regulations to challenge abusive dominant firms and promote market entry, legislators might end up protecting abusive Big-Tech companies.

Furthermore, a study from **Catalyst Research** recognised that the strangling of European Small and Medium Enterprises (SMEs) might be a consequence of the application of the DMA, even if unintended.

This is particularly alarming since small and medium-sized enterprises represent approximately 90% of all European enterprises and account for more than half of economic activity in Europe.

The **General Data Protection Regulation (GDPR)**, which entered into force in 2018, can be used as an example: the GDPR, besides creating value for small and medium-sized businesses who are still struggling to implement it, has created additional workload for lawyers, consultants and SMEs, adding cost and complexity.

SMEs, notably those that use technology less intensively and have adopted digital tools and channels provided by gatekeepers to acquire new customers will be at risk of losing the reach and efficiency of the instruments and channels they are using. Instead of developing their own solutions, these SMEs often adopt solutions developed by large market players. This means that for many SMEs, gatekeepers represent an opportunity for them to access the market as a service. Constraining gatekeepers' activities to protect smaller companies may, in this context, unnecessarily limit SMEs' access to the market.

Lastly, critics claim that the DMA will only be effective if there is adequate enforcement and compliance. There have been concerns, stressing that the EC will only be able to successfully implement the DMA if it has sufficient human and technical resources, including digital experts.

The success of the DMA will, to a great extent, depend on its effective application, meaning that the enforcement, timely decision-making, human and technical resources, as well as compliance will be key factorsⁱⁱⁱ.

3. Next Steps

After its entry into force, on November 1, 2022, the DMA now moved into its implementation phase and will begin to fully apply in May 2023. After that, if potential gatekeepers meet the DMA's thresholds, they must then notify the Commission of their core platform services within two months, but no later than July 3, 2023.

Once the Commission has received the complete notification, it will have 45 working days to make an assessment as to whether the undertaking in question meets the thresholds and to designate them as gatekeepers. Following their designation, gatekeepers will have six months to comply with the requirements in the DMA, at the latest by 6 March 2024.

ⁱ Sérvulo Publications (Máximo dos Santos, Miguel), "The Digital Markets Act will enter into force today: an overview", 2022.

ⁱⁱ Ibid.

ⁱⁱⁱ Sérvulo Publications (Máximo dos Santos, Miguel), "The Digital Markets Act will enter into force today: an overview", 2022.