SCALES
Strathclyde Centre for Antitrust Law and Empirical Study

University of Strathclyde
Humanities & Social Sciences

Competition Law for the Digital Economy: *The Key Features of the Emerging Subdiscipline*

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I

PRECONDITIONS

Methodological

From natural- to social sciences
From mono- to polyvalence
From L&E to plurality of methods
De-axiomatisation

Normative

From consumer- to polycentricity
From insulation to openness
Multilogue with other digital laws
From benefits- to structure

Decline of global antitrust

Universality requires consensus
But not all play by the rules
Digital is not always democratic

New digital period

From Optimism to Pragmatism
Big Tech do not need preferences
Levelling the playing field

Digital sovereignty

Public → Corporate
EU → the World
EU → some of its MSs

4th Industrial revolution

Data qua resources
Gatekeepers qua infrastructure
Global zero-sum game

Features of the digital markets

Network effects & market tipping
Consumers & privacy paradox
10 years regulatory lag

Disciplinary shortcomings

Few instances of infringement
Excessive proceduralism & timing
Ineffective remedies

The problem is systemic

Omnipresent market failures
System has to be redesigned
Turning weaknesses into strengths

II

ASYMMETRIC RESPONSE

New *modus vivendi*

More contextual, communicative, participatory, interpretative and flexible competition law

Choosing priorities

Intra-platform competition?
Inter-platform competition?
Inter-ecosystem competition?

DMA as a *sui generis* law

Proactive rather than just protective
Intellectual tradition of competition
Goes (far) beyond L&E constraints

Key features:

1) Opacity by design
2) All-inclusiveness
3) Future proof regulation
4) Can apply *ex-tunc* or *ex-nunc*

1) Why opacity by design?

To allow flexibility & selectivity
To get a tactical advantage
Impossibility to meet all 19

2) Why all-inclusiveness?

Shift the burden of proof
Obligations with many adjectives
To allow individualisation

3) Why future proof regulation?

Competence gap between the trend- and rule-setters
Dealing only with current problems = looking backward

4) Why not having *ex-nunc* only*?*

For avoiding vexatious litigation

III

COMPLIANCE WITH ART 6 DMA

Regulatory dialogue

Art 7(2): No effective compliance with Art 6 – the Commission *may* specify the scope of compliance

Art 7(7): Gatekeeper *may* request such specification

But Art 25 non-compliance

With *any* obligation of Art 6 Art 7(3): Art 7(2) is without prejudice to Art 25.

In other words

Obligations of Art 6 have the same effect as obligations of Art 5

But

If the dialogue is successful – obligations become binding *ex nunc.*

IV

DESIGNATING GATEKEEPERS

Designating gatekeepers

1) Binary vs. pyramidal structure
2) Qualitative & quantitative parts
3) Three cumulative criteria
4) Surgical precision is needed

1) Binary structure

‘Either/or’ (akin to Art 102)
Beneficial for newcomers
DSA uses pyramidal structure

2) Qualitative/quantitative

Art 3(1) DMA – qualitative
Art 3(2) DMA – quantitative
Commission can refine the latter

3) Three cumulative criteria

Strong impact on Internal Market
Gateway to reach end users
Entrenched (or likely to be)

Designation criteria

1) Turnover (capitalisation)
2) Control of users
3) Durability

1) Turnover/capitalisation

EUR 6.5 billion annual turnover
(for at least 3 years (!))
Or market capitalisation
(EUR 65 billion in the last year)

2) Control of users

Core platform service with 45 million active monthly end users and 10 million annual business users

3) Durability

Such strong gateway for business users to access their end users must last for at least 3 years

Draft Parliamentary Report

Proposes to increase 2 criteria:
From 6,5 & 65 to 10 & 100 billion
And from 1 to 2+ CPSs with 45+10

From ≈ 20 to ≈ 5?

Relief for some newcomers
But also for some gatekeepers
Good? For what? Bad? For what?

V

POTENTIAL CHALLENGES

Arbitrariness

The room for discretion in interpreting Art 6(1) DMA may indeed be too big.

Efficiency defence

On one hand it is a part of an effective regulatory dialogue.
On the other – this creates *stare decisis*, reducing discretion.

Legal certainty, Rule of Law

Law is not monovalent
The notion of certainty embraces some elements of indeterminacy.

Gatekeepers as King Midas

e.g. inter-platform interoperability may cement rather than shift *status quo.*
Or excessive rules of DSA!

International context

Accusation of protectionism and dirigisme.
Helpful blame-shifting proxy to justify real protectionism.

Understaffing

Circa 80 people.
This is clearly not enough for shaping the new faze (and face) of EU digital markets rules.

DMA Enforcement

DG COMP only?
Special Commission's Unit?
Commission (primary) + NCAs?

VI

SOME ART 6 OBLIGATIONS

Art 6(1)(a)

Operationalisation of business-users' data downstream is rarely an established practice activity (of course, YouTube – but being marketplace is always more important than private labelling).

Art 6(1)(a)

+ The requirement prohibits only using business-user's own data in competition with such business-user. Is it okay to use the data of other business-users?

Art 6(1)(d)

Self-preferencing in search ranking is prohibited. Any instance. How search engines can operate at all?

Art 6(1)(d)

‘any form of differentiated or preferential treatment in ranking on the core platform service, whether through legal, commercial or technical means, in favour of products or services it offers itself or through a business user which it controls’.

Art 6(1)(d)

In the same time, nothing is said about the limitation of such preferential treatment offered by gatekeepers or their businesses **to** their various partners and clients.

Art(6)(1)(f)

1) Interoperability only downstream.
2) Only concerning ancillary services (not e.g. FB –>WA).
3) Wording: ‘allow’ (i.e. potentially with many conditions).

Art 6(1)(j)

Horizontal data sharing for search engines. The requirement is very broad, much broader than the EFD. The wording is blatantly proactive.

Art 6(1)(j)

To provide access to ‘ranking, query, click and view data […] to other providers of such services, so that these third-party providers can optimise their services and contest the relevant core platform services’.

Art 6(1)(j)

+ Requirement to clear from any GDPR-related limitation without degrading the usefulness of the data.

VII

CONCLUSION

“Competition is not an end

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but a means to promote …