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"Reinforcing the Digital Markets Act: Merger control and structural remedies"

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+ Foreword

"Reinforcing the Digital Markets Act: Merger control and structural remedies*"

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Around the globe, there is growing discomfort about the market position of some large digital players that serve as matchmakers and gatekeepers, controlling entire ecosystems. In Europe and the U.S., "Big Tech" is associated with the names of Google (Alphabet), Amazon, Facebook (Meta), Apple, and Microsoft—now widely famous under the acronym "GAFAM"—and possibly a few others. Those Big Tech players are accused of, among other things, foreclosing or absorbing potential competitors, erecting barriers to entry, leveraging their entrenched market positions, and exploiting users. While the immediate effect of their actions on consumers is often difficult to assess, the claim is that there is long-term harm to innovation and consumers.

The European Commission has proposed the Digital Markets Act (DMA, COM(2020) 842 final) as a regulatory tool that is meant to complement EU competition law to guarantee contestable digital markets. However, from a policy point of view, self-restriction to behavioural remedies in competition law and merger control, as well as the focus on behavioural *ex ante* regulation via the DMA, is at best a half-hearted and at worst a misguided way to effectively address the Big Tech challenge.

We argue in favour of a competition law toolkit with extended options to use structural measures to tackle entrenched market dysfunctionalities: expanded and strengthened merger control; extended possibilities to respond to infringements of competition law and equivalent provisions with structural remedies; and the availability of forced divestiture, possibly after a market investigation.

The digital gatekeeper challenge

An increasing part of economic and social activity is facilitated by digital players and channelled through the internet, and a small number of firms have taken key "gatekeeper" positions. GAFAM have become private regulators dictating terms and conditions to participants in their ecosystems. Even if users are uncomfortable with those terms, there are often few viable alternatives to some of the services offered. Increasingly, GAFAM's position looks to have become entrenched for several services. Strong network effects increase the value of a digital service for consumers and business users, and because of coordination problems and inertia, switching to newcomers is unattractive. It might seem like Daniel Markovits's "Meritocracy Trap" (Penguin Press, 2019): Big Tech firms make more attractive value propositions and become more sophisticated in extracting rents, and challengers must overcome more and more hurdles.

The EU's regulatory response

What to do with firms enjoying a consolidated position of power relative to other businesses in a vertical relationship or entrenched market power? Regulation is a

*An earlier version of this opinion piece appeared as a blog entry on verfassungsblog.de. Jens-Uwe Franck has advised the German Federal Ministry for Economic Affairs on issues related to the DMA.

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natural response and is indeed the EU's approach to ensure the functioning of digital markets. The EU lawmaker has established across-the-board transparency rules in its Platform-to-Business Regulation (EU) 2019/1150. These are meant to improve business users' position vis-à-vis the digital platforms. Through the DMA proposal, the EU lawmaker targets a small number of particularly powerful players with an entrenched market position and prohibits certain business practices when adopted by them. This approach is broadly suitable if the risks and economic harms of exploitation and foreclosure increase with the scope of operations and market entrenchment.

The proposed DMA specifically addresses gatekeeper platforms and seeks remedies that aim at keeping markets open or opening them up—both at the platform level and business user level—and prohibits certain business practices, but only for firms addressed by the DMA. For instance, a platform may oblige its business users not to offer lower prices elsewhere. Then, business users cannot divert consumers through price. This limits platforms' incentives to compete on fees or other conditions they offer to their business users. End users may suffer from higher prices or lower quality. This concern goes beyond Big Tech and applies to other platforms in strong positions with respect to specific user groups, such as hotel booking platforms vis-à-vis independent hotels or event ticketing platforms vis-à-vis concert organisers. Thus, the rationale for singling out a few firms is not obvious in the case of some of the obligations and prohibitions in the proposed DMA, unless a convincing case can be made that traditional competition tools are often insufficient to deal with certain business practices of the targeted gatekeeper platforms, while they tend to be adequate for other firms.

Behavioural remedies and their shortcomings

At the EU level, we see, first of all, fines and behavioural remedies by the Commission based on findings of an infringement of Article 102 TFEU against Google (Alphabet) (*Google Shopping* – AT.39740, *Android* – AT.40099, and *AdSense* – AT.40411), as well as pending investigations against Apple (*App Store Practices (music streaming)* – AT.40437, *App Store Practices* – AT.40716, and *Apple Mobile Payments* – AT.40452), Amazon (*Amazon Marketplace* – AT.40462 and *Amazon – Buy Box* – AT.40703) and—again—Google (*Adtech and Data-related practices* – AT.40670). Moreover, merger control may give the option to regulate market conduct via behavioural remedies so that combined resources (data) may not readily be used to erect new market barriers. In the *Google/Fitbit* merger proceedings (M.9660), the Commission made extensive use of this. For instance, Google had to commit to not using the health and wellness data collected from Fitbit devices for Google Ads (including search advertising and display advertising).

Lawyers tend to consider structural remedies—as opposed to behavioural remedies—to be the more intrusive measure. They may be seen as surgery instead of permanent drug treatment. Yet, structural remedies appear to be more in line with the idea that the state trusts market forces within an economic order it has formed, to guarantee the functioning of markets. Thus, in aggregate, "surgery" may be regarded as preferable, as it ultimately amounts to more economic freedom for all market players—including those that are subject to regulation due to their economic power.

The effectiveness of behavioural rules and remedies imposed on the large digital gatekeepers will always remain limited. Their drafting, monitoring, and sanctioning are (very) costly. The targeted gatekeepers will routinely find other ways to implement strategies that are meant to be prevented: For instance, there are many means by which Google can incentivize Android device manufacturers to prioritize Google Search.

One structural remedy that is hotly debated in the U.S. is the "breakup" of conglomerate digital structures. This is reflected by the Ending Platform Monopolies Act of 2021, which has been put forward by the House Judiciary Committee. According to this proposal, certain gatekeeper platforms will not be allowed to own or operate tied or vertically related activities to their core platform services. These activities will have to be stopped or divested. Sometimes, such forced divestitures simply correct a merger that has turned out to be problematic. While reinforced merger proceedings at the EU level could not repair the shortcomings of the past, they may avoid future competition problems. Thus, a discussion of structural remedies should start with *ex ante* merger control.

On 20 April 2021, the British Competition and Markets Authority (CMA), the Australian Competition and Consumer Commission (ACCC) and the Bundeskartellamt issued a Joint statement on merger control enforcement, stating that the "*increasing complexity of dynamic markets and the need to undertake forward-looking assessments require competition agencies to favour structural over behavioural remedies*." The CMA turned words into deeds: On 30 November 2021, rejecting the behavioural remedies offered by Meta (Facebook), the authority ordered the firm to reverse its acquisition of Giphy.

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EU merger policy for Big Tech

Big Tech has acquired many start-ups over the last decade. In digital markets, it is difficult to foresee how these start-ups would have developed if they had stayed independent or had been acquired by some other firm. Currently, to block a merger, the Commission must argue a case showing that the notified concentration will have anticompetitive effects. Given the uncertainties and the competition authorities' lack of information, this is often an almost impossible mission.

Strengthening competition authorities' power to prohibit mergers could mean lowering the required standard of proof or giving them the power to reverse the burden of proof regarding the expected effects on competition in clearly specified scenarios—for instance, if one of the merging firms has a powerful entrenched position. Such a position may be identified by a market investigation or by applying criteria as established in the proposed DMA or Section 19a of the German Competition Act. Furthermore, as pointed out, for instance, in the Furman report, merger assessment in digital markets—and in fact in all scenarios where potential competition and harm to innovation are of particular importance for merger analysis—must not solely focus on the likelihood that a certain harm to competition will occur, but also on the scale of this harm.

Various reform approaches point in this direction. In France, the Senate has approved a legislative initiative (Proposition de loi visant à garantir le libre choix du consommateur dans le cyberespace), currently pending in the National Assembly, that would shift the burden of proof in merger cases involving (designated) large digital gatekeepers ("*entreprises structurantes*"): When the competition authority initiates an in-depth examination of a notified transaction, it is the undertaking that must provide evidence that the transaction is not likely to harm competition. Likewise, in the U.S., the House Judiciary Committee approved a bill (the Platform Competition and Opportunity Act of 2021) that would ban acquisitions by (designated) large digital platforms unless they can prove that the merger will not harm actual or potential competition. On 5 November 2021, U.S. Senators Klobuchar and Cotton introduced corresponding bipartisan legislation as a companion Senate bill.

In May 2021, the French, German, and Dutch governments (Friends of an Effective Digital Markets Act) have lamented that Article 12 of the DMA proposal lacked ambition. They demanded that the existing EU merger framework be modified for DMA gatekeepers: Acquisitions of low-turnover but high-value targets should be captured, and the substantive test should be adapted to more effectively address cases of "*potentially predatory acquisitions*." While this is water to our mill, the initiative did not command a majority within the EU Council. In November 2021, when setting their position for upcoming negotiations with the Commission and Parliament, the ministers did not endorse any proposal for tighter merger control under the DMA.

Market structure in digital

Ultimately, the choice over whether we live in an environment with a few firms controlling large ecosystems or a more fragmented digital world is political. Since innovations yet unknown will benefit unforeseen digital activities, our working hypothesis is that a more fragmented world is likely to deliver more innovation than a world with few ecosystems, controlled by heavily regulated firms.

Absent the ability to impose divestiture obligations and run a stricter merger policy, the DMA and its envisaged regulatory approach toward Big Tech may still help in opening space for new and independent digital players. By analogy, this happened in several regulated industries, for example telecommunications, in which privatized incumbent firms were subject to more stringent regulation than newcomers were.

Regulation via the DMA or, possibly, via behavioural remedies imposed on the occasion of merger proceedings, seems, at best, to be a very indirect way of achieving this outcome. Enabling the European Commission to impose divestiture obligations as the result of a market investigation and, looking forward, to block digital conglomerate mergers more easily is a more direct path to a healthier digital world. Considering institutional constraints, this may be wishful thinking, but at least an open discussion in the Member States would be helpful. The option of stricter merger control and forced divestiture should not be taken off the table.

Divestiture initiatives

Forced divestitures are not unheard of in Europe. In West Germany, after World War II, mandated unbundling, such as that of IG Farben, was a powerful beacon to herald the new paradigm of guaranteeing competition by means of regulatory intervention—if necessary, also by intervention in the market structure. This post-war period of competition law in West Germany was based on Allied decartelization laws inspired by U.S. antitrust law.

In the U.S., divestiture obligations are accepted as a legitimate remedy in the competition toolbox and its availability under Section 2 of the Sherman Act

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has been recognized by the U.S. Supreme Court. Certainly, this remedy is not exactly routinely used, but it is an option. In its complaint filed against Google on 20 October 2020 (case 1:20-cv-03010), the U.S. Department of Justice requested that the court "*[e]nter structural relief as needed to cure any anticompetitive harm*." Moreover, politically, "unbundling Big Tech" is not seen as a far-fetched objective of competition policy. Rather, after recent debates in the House on a package of five tech-focused bills (including the Ending Platform Monopolies Act mentioned before), Dan Bishop, a Republican U.S. Representative for North Carolina, remarked, "*I will tell you, I'm not 100% there to break up Big Tech, but I'm close*." (L. Feiner, House committee passes sweeping tech antitrust reforms, but their future remains murky, CNBC, 24 June 2021)?

Under German law, similar to EU law, structural remedies are hardly ever used, as they can only be imposed in case of competition infringements "*if there is no behavioural remedy which would be equally effective, or if the behavioural remedy would entail a greater burden for the undertakings concerned than the structural remedies*" (Section 32 of the Competition Act). Neither in the EU nor in Germany can divestiture be ordered as an (objective) instrument of market regulation. The last attempt to add such an instrument to the competition toolbox—initiated by the Federal Ministry of Economic Affairs and supported by the Monopoly Commission—got bogged down in 2010. The debate at the time focused on conceivable targets (remarkably, Big Tech was not really on the radar yet), on fundamental questions of competition policy, and on uncertainties about what leeway EU law and fundamental rights left to the German legislature.

Since 2010, however, the rise of the digital platform economy and of concentration within it has continued. With this ongoing fundamental transformation of our economy, it would seem careless not to have an open mind to reconsidering structural instruments that were previously rejected as being too harsh for the addressees or too burdensome for the authorities to be implemented.

What can we ultimately expect from the DMA?

In response to structural competition problems, it is only natural and indeed consistent to consider a serious strengthening of merger control, as well as structural remedies, including breakups of digital conglomerates. But who in the EU is willing to invest political capital to initiate a serious debate on strengthened merger control and forced divestitures as a regulatory instrument?

Hopes now rest on the European Parliament (EP). In its position adopted on 15 December 2021, it has endorsed three amendments that would make it easier to impose structural remedies as foreseen in Article 16 of the DMA proposal in case of systematic non-compliance: First, the standard for the imposition of a remedy should not be whether it is "*proportionate to the infringement committed*," but whether it is "*effective and necessary to ensure compliance*" with the DMA (Amendment 166). Secondly, the EP wants to eliminate that for structural remedies to be imposed, it would need to be shown that an "*equally effective behavioural remedy*" is either not available or "*more burdensome for the gatekeeper concerned*" (Amendment 168). Thirdly, the threshold for "*systematic non-compliance*" should be lowered from three to two non-compliance or fining decisions that must have been issued within a period of ten (instead of five) years.

These are certainly reasonable (albeit still cautious) moves to facilitate structural remedies. More startling is that, in the case of systematic non-compliance, the EP proposes to restrict gatekeepers for a certain period of time "*from making acquisitions in areas relevant to this Regulation*," which would include digital and data-related sectors. Thus, the Commission should have the option to impose such a ban either where it considers it proportionate and necessary to remedy damages caused by repeated infringements or "*to prevent further damage to the contestability and fairness of the internal market*" (Amendments 44 and 167). The logic behind the latter alternative could be: A digital firm that is not to be trusted to respect behavioural rules and remedies must be prevented from any step which could further strengthen its position as a gatekeeper.

While these proposals facilitate structural remedies, their effectiveness should not be overestimated. Also, the availability of an "acquisition ban" in response to non-compliance does certainly not make a reform of EU merger law and policy dispensable. In any case, at this point, it is unclear which of these proposals will become reality. That is why we fear that the EU will, in the end, continue to restrict itself to playing games of behavioural remedies and regulation.

Yet, some EU Member States may push for more. The new German coalition government announced in its programme that it will plead at the European level for an adjustment of merger control that prevents innovation-inhibiting acquisitions of potential competitors. This appears to us a much more promising initiative than opening doors for wannabe European champions. ■

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