Aalto University
School of Business

New developments
Q & A

Agreement on the content of the Digital Markets Act

- The Digital Markets Act (DMA) will ban certain practices used by large platforms acting as “gatekeepers” and enable the Commission to carry out market investigations and sanction non-compliant behaviour.
- The text provisionally agreed by Parliament and Council negotiators targets large companies providing so-called “core platform services” most prone to unfair business practices, such as social networks or search engines, with a market capitalisation of at least 75 billion euro or an annual turnover of 7.5 billion.
- ’To be designated as “gatekeepers”, these companies must also provide certain services such as browsers, messengers or social media, which have at least 45 million monthly end users in the EU.and 10 000 annual business users.

Result of the trilogue

- During a close to 8-hour long trilogue (three-way talks between Parliament, Council and Commission), EU lawmakers agreed that the largest messaging services (such as Whatsapp, Facebook Messenger or iMessage) will have to open up and interoperate with smaller messaging platforms, if they so request. Users of small or big platforms would then be able to exchange messages, send files or make video calls across messaging apps, thus giving them more choice. As regards interoperability obligation for social networks, co-legislators agreed that such interoperability provisions will be assessed in the future.
- Parliament also ensured that combining personal data for targeted advertising will only be allowed with explicit consent to the gatekeeper. They also managed to include a requirement to allow users to freely choose their browser, virtual assistants or search engines.
- If a gatekeeper does not comply with the rules, the Commission can impose fines of up to 10% of its total worldwide turnover in the preceding financial year, and 20% in case of repeated infringements. In case of systematic infringements, the Commission may ban them from acquiring other companies for a certain time.

Political angle and effects

- "The agreement ushers in a new era of tech regulation worldwide. The Digital Markets Act puts an end to the ever-increasing dominance of Big Tech companies. From now on, they must show that they also allow for fair competition on the internet. The new rules will help enforce that basic principle. Europe is thus ensuring more competition, more innovation and more choice for users.

- With the Digital Markets Act (DMA), Europe is setting standards for how the digital economy of the future will function. It will now be up to the European Commission to implement the new rules quickly.

- As the European Parliament, we have made sure that the DMA will deliver tangible results immediately: consumers will get the choice to use the core services of Big Tech companies such as browsers, search engines or messaging, and all that without losing control over their data.

- Above all, the law avoids any form of overregulation for small businesses. App developers will get completely new opportunities, small businesses will get more access to business-relevant data and the online advertising market will become fairer."

Next steps

- After the legal text is finalised at technical level and checked by lawyer-linguists, it will need to be approved by both Parliament and Council. Once this process is completed, it will come into force 20 days after its publication in the EU Official Journal and the rules will apply six months after.8rtu

Main changes to Commission's proposal

- Raising the threshold to identify a company as a "gatekeeper" from the European Commission proposal of €6.5 billion in annual revenue and market capitalization of €65 billion to €7.5 billion in annual revenue and market capitalization of €75 billion. An organization also needs to have at least 45 million monthly end users and 10,000 yearly business users to be identified as a gatekeeper.
- Supporting the European Parliament's position to restrict gatekeepers from combining data across platform services, unless consent has been obtained in an explicit and clear manner in line with the EU General Data Protection Regulation ("GDPR"). The practical result of this change will be that combing data across platforms will not be able to take place through alternative legal bases for processing, such as where necessary to protect the vital interest of an individual or if necessary for the public interest.
- Restricting gatekeepers from requiring business users of their core platform services to make use of their payment service platforms, in addition to the European Commission's original obligation to prohibit gatekeepers to restrict business users to use gatekeepers' identification services.

Main changes 2

- Providing advertisers and publishers access to price-setting conditions and algorithms used by gatekeepers, in addition to the European Commission's original access obligation related to advertising portfolio.
- Removing the European Parliament's proposal to ban targeted advertising towards minors by noting that content moderation issues should be tackled by the Digital Services Act.
- In addition to the existing interoperability obligation (of the same operating system, hardware, or software features used by the gatekeeper of any ancillary services), requiring gatekeepers to enable interoperability between messaging services to a limited extent. In that regard, messaging platforms will have to provide interoperability with competitors for one-to-one conversations between users, but not for group chats at least for another four years.
- Increasing the maximum level of fines for non-compliance from 10% to 20% of the gatekeeper's worldwide revenue in cases of repeated infringements.

Main changes 3

- The trilogue discussion did not reach a common position on a proposed amendment to empower the European Commission with veto power, which would have enabled the European Commission to override any decision taken by national competition authorities and impose obligations on gatekeepers. Nevertheless, the European Commission still has the power to temporarily prevent acquisition by gatekeepers in cases of systematic non-compliance with DMA rules.
- Existing rules contain provisions aimed at ensuring the uniform application of Art 101 and 102, but …

Instant reaction

- The new regulation will greatly enhance the powers of the EU Commission
- Dominant platforms will have to adjust their behaviour within EU
- Will there be a “Brussels effect?”
- What will be the economic effects?
- What will be the role of Article 102 going forward?
- Focus on gatekeepers; there are other issues as well

New Fintech Regulation and Competition Law

- Fintech, big tech and hybrid models
- Dynamic efficiencies versus new shifts in power
- More competition versus risk of stability and consumer protection?

- Competition issues in the Area of Financial Technology (FinTech). STUDY Requested by the ECON committee of the EP(.2018) https://www.europarl.europa.eu/RegData/etudes/STUD/2018/619027/IPOL_STU(2018)619027_EN.pdf :

”Most of the potential competition issues in the FinTech sector described throughout the study have not occurred —or have not been detected by competition authorities— so far. Thus, the discussion about the competition problems is still **hypothetical**; however, it is necessary to analyse where competition concerns may arise and how they should be addressed, as they may materialise in the future.

The application of competition instruments to analyse potential anticompetitive behaviours in the FinTech sector faces several challenges, the most relevant being the **difficulty in applying these traditional instruments to the new market phenomena** such as market definition and assessment of market power. Traditional indicators such as market shares, prices or profit margins fail to explain the economic relationships between offer and demand in the provision of FinTech services. Missing a stable market, any analysis of competition is bound to be tentative, since competition challenges could unfold in different directions, depending on what turns out to be the decisive factor that provides a competitive advantage.”

Blockchain and competition law

- Blockchain is a decentralized, arguably more secure and transparent model for transactions and information sharing that operates on an encrypted peer-to-peer basis. This model challenges the need for trust between parties by instead placing trust in the underlying technological platform. This would effectively remove the need for intermediaries whose business has been to make up for the lack of trust; these include banks, brokers, governments, internet platforms, remburses in transportation law, enforcement in contract law etc.

When is blockchain used?

- The limits of blockchain's true potential are not yet entirely clear, but it seems that it is not the most suitable approach for all the numerous applications where it has been proposed. In short, key criteria in determining the utility of blockchains include the presence of multiple potential participants, each of which have both an interest and a lack of trust in one another.
- Reaching a decentralized consensus – blockchain's core functionality – requires wide distribution of information among blockchain members concerning their transactions (e.g. payments or goods delivery).

Article 101 and efficiency analysis

- Although essential to blockchain's effective functioning, a near-instant information distribution and resulting transparency may raise questions about collusion.
- Information exchange on blockchain can generate efficiencies by improving contracting (by reducing transaction costs) and its compatibility with Article 101 TFEU needs to be evaluated on a case-by-case basis.
- Direct competitors using shared blockchains or collaborating in blockchain consortia are particularly likely to be susceptible to antitrust scrutiny. One of the core determinants of legality to consider in this context is the nature and collusive potential of information visible on the ledger. It is therefore advisable that access to competitively sensitive information is restricted or that such information is stored in off-blockchain locations.

Abuse of dominant position

- Abuse of dominance, particularly by economic actors participating in private blockchains, is also possible once market dominance can be proven (but how to define the relevant markets?). Refusal to deal could be a potential problem as controlling access to private blockchains is an important element of the business case. The gatekeeping mechanism could take various forms (e.g. preventing a competitor from accessing blockchain information, proposing or registering new transactions, validating the blocks, etc.)and be managed by different types of actors, depending on the governance choices. In case permissioned blockchain gains the status of an essential infrastructure and refusal to give access to it is not objectively justified, gatekeepers' exclusionary efforts risk violating Art. 102 TFEU.

Hardcore cartels?

- Blockchain technology may also play a role in explicit collusion. If information distribution on blockchain enables monitoring and punishing deviations from collusive agreements, it can be treated as part of a cartel and hence restrictive of competition by object. A more sophisticated form of colluding can be codifying anti-competitive terms and conditions into a self-executing smart contract running on top of blockchain in order to automatically punish deviators. To avoid this, a possible auditability of blockchains can render cartel members hesitant to rely on smart contracts that leave traces of illegal conduct.
- Blockchain participants are not the only actors whose conduct may breach competition law. At least theoretically, also blockchain miners or even entire blockchains would find incentives to collude as technology develops and becomes more widely used.

Cryptocurrency litigation

- In the so called case (2021) a cryptocurrency developer and mining company sued Bitcoin Cash miners, developers, and exchange operators for violating of Section 1 of the Sherman Act and Section 4 of the Clayton Act. It accused them of manipulating a network upgrade to take control of the Bitcoin Cash blockchain.
- The Court dismissed the Amended Complaint twice (the last one with prejudice), for failing to plausibly show a conspiracy to hijack the network and centralize the market, an unreasonable restriction of trade, and antitrust injury.

Cryptocurrencies

- Cryptocurrency is a form of digital currency that trades in currency markets. The Satoshi Nakamoto whitepaper, published in October 2008, launched the idea of a “peer-to-peer” version of electronic cash that allows online payments from one party to another, independent of any financial institution. The Whitepaper coined the term “Bitcoin”, and today Bitcoin and Bitcoin Cash are different forms of cryptocurrency.
- Cryptocurrencies are a “permissionless” system that rely on a network of decentralized encrypted public ledgers that document all digital transactions, known as a “blockchain”. The blockchain is a series of blocks, which are units of accounting that record new transactions in cryptocurrency. Confidence and trust in the accuracy of the transactions in the blockchain is possible because the decentralized ledgers are identical and continuously updated and compared.

Cryptocurrencies 2

- The system has mechanisms that allow for consensus on the validity of the blockchain. One is “Proof-of-Work”, which is designed to eliminate the insertion of fraudulent transactions in the blockchain. Also, the “main chain” (normally, the longest chain) at any given time, is whichever valid chain of blocks has the most cumulative “Proofs-of-Work” associated with it. A consensus being reached on the longest blockchain is essential to the integrity of the network.
- New cryptocurrency is created through a process called “mining”. Miners compete to “mine” virtual currencies by using computing power that solves complex math puzzles. The computer servers that first solve the puzzles are rewarded with new cryptocurrency, and the solutions to those puzzles are used to encrypt and secure the currency. The awarded currency is then stored in a digital wallet associated with the computing device that solved the puzzle.

Bitmain case

- The case is about how certain mining pools, protocol developers and crypto-exchange defendants allegedly colluded to manipulate a network upgrade by creating a new hard fork, taking control of the Bitcoin Cash cryptocurrency. In the end, however, the court concluded that the plaintiff —a protocol developer of blockchain transactions and mining cryptocurrencies—, failed to (i) show a plausible conspiracy, (ii) define any relevant product market to prove an unreasonable restriction of trade, and (iii) show any antitrust injury.

BCH

- Bitcoin Cash (or “BCH”) emerged as a cryptocurrency from the original Bitcoin Core (or “BTC”) on August 1, 2017, as a result of a “hard fork”. A hard fork is a change to the protocol of a blockchain network whereby nodes that mine the newest version of the blockchain follow a new set of rules, while nodes that mine the older version continue to follow the previous rules. Because the two rule-sets are incompatible, two different blockchains are formed, with the new version branching off.

UAC's complaint

- In December 2018, UAC sued defendants alleging a decline in the value of its cryptocurrency and a deterioration in the quality of BCH. UAC alleged the following:

- Miners Ver and Bitcoin.com colluded with Wu and Bitmain Technologies to reallocate pools of Bitmain Technologies servers from the BTC network to Bitcoin.com's pools in the BCH network minutes before the implementation of the BCH network upgrade. That had the effect of "increasing Bitcoin.com's hashing power by over 4,000%, diluting the 'vote' being exercised by other nodes, and ensuring the Bitcoin ABC rules set survived the "hash war."
- Protocol Developers Shammah Chancellor, Amaury Sechet, and Jason Cox implemented what is called "a software checkpoint" that locked down the new ABC blockchain after BCH bifurcated. The main effect of a checkpoint is to ensure that only the proponents of the resulting blockchain dictate any future software upgrades on that cryptocurrency network. Combining this checkpoint with the hashing power of Bitcoin ABC backers above allegedly amounted to centralization and control over the cryptocurrency network. As a result, the decentralized process whereby competing participants in the BCH network could propose software changes to improve upon the quality of Bitcoin Cash is now centralized and controlled by those who had dominated the hash war that caused the hard fork.
- Crypto Exchanges Kraken and its CEO Jesse Powell released public statements in favor of the ABC implementation and against the SV implementation.

Courts decision

- FUAC did not provide the Court with a clear explanation of UAC's role(s) and activities in the crypto market(s), nor did it include a definition of the relevant product market(s) for the purpose of an antitrust analysis. Therefore the Court wasn't able to determine whether the alleged conspiracy was (i) entirely horizontal—only the mining defendants Ver and Wu through his company Bitmain Technologies directly competed; (ii) vertical—there was no suggestion that defendants operated at different levels of either the production or distribution chain of Bitcoin Cash; or (iii) was a hub-and-spoke agreement—no evidence that one defendant is common to all others.

- Second, the Court held that the complaint lacked factual assertions that all defendants entered into a shared agreement. Even though UAC alleged that defendants, in fact, agreed to a two-part scheme, the Court concluded that the complaint lacked the necessary factual support under the Twombly standard to plausibly show a conspiracy.

- Third, the Court stated that the only truly parallel behaviour was that of the miners. Ver, owner of non-defendant Bitcoin.com, and Defendant Bitmain Technologies and its CEO and founder Wu, were competitors to one another, as well as to UAC, as they all mined Bitcoin Cash at the relevant time. As alleged, defendants engaged in the similar conduct of pooling servers to mine Bitcoin ABC shortly before the hard fork.