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Can the EU set a global rulebook for Big Tech?

by Zach Meyers

The EU is angling to set a rulebook for digital markets which could be adopted around the world. To achieve this, its draft regulations need improvement.

The EU has a renowned ability to leverage its market size in order to influence regulatory standards beyond its borders – the so-called Brussels effect. For example, the US is now closer than ever to adopting a comprehensive federal privacy law, demonstrating the global influence of the EU's General Data Protection Regulation. The EU now wants to set global standards for digital platforms such as Facebook and Google, to make the markets they operate in fairer and more contestable. Digital markets may well be susceptible to the Brussels effect: many countries are considering new regulations, and the large technology firms that operate globally do not want regulatory fragmentation. But the Union's attempt to develop and export its digital rulebook will require refinement if it is to succeed.

Previous EU antitrust cases against American tech giants and its proposals for regulation caused transatlantic tension. The Obama administration viewed large American tech firms as national champions. President Trump was also critical of the EU's attempts to discipline them: "Your tax lady, she hates the US", he said of competition commissioner Margrethe Vestager. However, the academic and political consensus in the US has now shifted towards the European position. In 2019, an influential report by the US's Stigler Centre confirmed many of the EU's concerns. Since then, large technology firms have alienated both sides of US politics. Many Republicans were outraged by President Trump's ban from Twitter and Facebook; many Democrats believe that digital platforms have tolerated and even encouraged the dissemination of right-wing misinformation. These concerns have contributed to a growing belief that Big Tech is too powerful and unaccountable. In October 2020, the US House of Representatives' antitrust subcommittee proposed the potential break-up of some firms. Both Republican and Democratic subcommittee members agreed that tech giants had acted anti-competitively.

In the meantime, competition authorities and policy-makers elsewhere have taken up the case against Big Tech. Regulators in Australia, Japan, Mexico and India have conducted studies critical of large digital platforms. Chinese authorities have also begun taking action against the country's own large digital firms.

Despite the growing global consensus, few countries have yet formulated precise proposals to address the problem. President Biden has appointed antitrust scholars renowned for their criticisms of Big Tech to his administration, but a detailed policy is yet to emerge. Competition authorities around the world have launched antitrust proceedings, but these will be case-specific. The UK has well-developed thinking, but

not yet published draft legislation for its proposed regulatory framework.

The European Commission is therefore leading the world, having drafted a Digital Markets Act (DMA). The DMA would set a rulebook for the largest tech firms, requiring them to change their business models in various ways. The rules are intended to ensure fairness for businesses which rely on the largest tech firms, and also intend to give potential competitors more chance of success.

Several aspects of the DMA suggest the Commission wants to introduce it quickly, ensuring that the law is implemented before other jurisdictions have finalised their own proposals. First, the Commission wants the DMA to come into force in 2022 – an ambitious timetable by EU standards. Second, the Commission has designed a streamlined process for identifying the digital platforms (referred to as 'gatekeepers') which will need to follow the new rulebook. The process relies on simple criteria and tries to avoid detailed analysis. Third, the DMA bypasses the normal steps used in most models of economic regulation. For example, the DMA imposes an initial set of rules on all gatekeepers, without careful analysis and consultation about which are appropriate for each gatekeeper's particular business.

The desire for speed is understandable: the Brussels effect could deliver important benefits for Europe. If the EU's regulatory standards were adopted in other countries, or voluntarily adopted by large technology firms on a global basis, EU digital businesses could expand globally more easily. They would know they could rely on the same rights when dealing with large technology firms outside the EU as they enjoy inside the EU.

The EU cannot simply act quickly and unilaterally, however, if it wants its rules to be adopted elsewhere. The proposed rules must be comprehensive within Europe – the EU must dissuade member-states from 'supplementing' the DMA with their own national laws, as Germany has done. The rules need to produce visible benefits for European consumers or businesses – and avoid any obvious negative consequences – so that consumers and lawmakers elsewhere demand the same outcomes. Finally, the rules need to be cost-effective – so that large technology firms (and foreign law-makers) see sense in avoiding the costs of operating different business models in different regions. The EU has not always achieved these objectives. For example, the Union's requirement that payment card companies separate different parts of their businesses imposed large costs, provided little benefit to competition and failed to gain global traction. Card companies now operate one business model in Europe, and a different model in the rest of world.

The DMA is better than proposals – many, ironically, emanating from the US – which call for large technology firms to be 'broken up'. Under the DMA, the Commission could only break up a firm in extreme cases, after repeated non-compliance. This reasonable approach should make the DMA more acceptable to mainstream political thought in the US and elsewhere. Other parts of the DMA, however, could cause conspicuous harm to consumers and reduce competition. For example, many consumers value Apple's tight control over which apps run on iPhones, and consider that this control delivers greater security; consumers are free to choose a more 'open' ecosystem on Google's Android phones. The DMA could force Apple to relinquish this control. That would remove an important competitive differentiator between Google and Apple's businesses. Other countries might not accept a regulatory approach which limited consumer choice in that way. Apple would probably limit its compliance to Europe, rather than voluntarily changing its business model on a global scale. MEPs should therefore add more flexibility to the DMA's rules to avoid this.

Some MEPs are also proposing to restrict the DMA's application to just a handful of gatekeepers. This would be double-edged: such changes would make the DMA more targeted, but also risk ensuring that the only gatekeepers were American – an outcome which could reignite transatlantic tensions, and therefore make other countries less willing to follow the EU. The EU could more easily justify all gatekeepers being American if the DMA focused on one category of business, such as Facebook and Google's digital advertising; that would look more reasonable that regulating a larger number of firms which all happen to be American. That would also bring the DMA closer to the UK's approach, which would have other advantages: the UK has a significantly larger number of successful digital businesses than the EU, so if new regulation delivers benefits to digital businesses, those benefits might be readily observable in the UK. Foreign – especially American – lawmakers might be more easily persuaded to copy the EU's rulebook if the UK and EU were already aligned.

The Commission has the opportunity to set a global standard that works for Europe. But care, not just speed, is necessary to prepare a rulebook that other countries will follow.

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