



IP&Law Assignment 1

Supervision

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1 Articles 5 and 6 of the DMA

Question:

Regarding the list of obligations laid out by articles 5 and 6 of the DMA, what case-law examples and concerns towards digital platforms were source of inspiration according to you?

In my opinion, these regulations [1] have been inspired by several cases in which dominant digital companies have been found to engage in anticompetitive conduct. The European Commission has noted that the DMA draws on the experience gained from past enforcement in the digital sector, as well as on the input received from stakeholders and experts.

The case-law examples that have inspired Article 5 and 6 of the DMA include several investigations and fines against major tech companies for abusing their dominant positions. One such example is the Google Shopping case, in which the European Commission fined Google €2.42 billion for abusing its dominance as a search engine by favoring its own shopping comparison service over others. This case highlighted the need for greater competition in the online market and the potential for dominant companies to use their market power to unfairly promote their own products or services. [2]

Another example is the investigation into Apple's App Store practices, which led to the company being fined €371.6 million for abusing its dominant position by imposing unfair and anti-competitive terms on app developers. This case demonstrated the importance of ensuring a level playing field for all businesses in the digital market and preventing dominant companies from using their power to stifle competition and innovation. [3]

In light of these cases and the increasing concerns about the power of dominant digital companies, along with others, these have provided the basis for Article 5 and 6 of the DMA, which aims to prevent gatekeepers from engaging in anti-competitive practices that harm consumers, other businesses, or the wider market, and to ensure a level playing field for all businesses operating in the EU digital single market. The articles outlines specific prohibitions against self-preferencing, discriminatory practices, forced bundling, tie-in practices, and other harmful behaviors that can harm competition and innovation in the digital market.

2 Amazon Antitrust case

Question:

Perform an analysis of the Amazon anti-trust case found in [4]

The European Commission's decision to accept Amazon's commitments to end anti-competitive practices is a significant development in the regulation of online marketplaces. Amazon's dual role as a platform and retailer has given it access to vast amounts of data about independent sellers on its platform, which it has used to make strategic decisions that have given it an unfair advantage over its competitors. The article can be found in [4].

The investigation found that Amazon's use of non-public data from its marketplace sellers to calibrate its retail decisions was an abuse of its dominant position in the French and German markets. This abuse of dominance was found to have distorted fair competition on its platform and prevented effective competition. Additionally, the rules and criteria for the Buy Box and Prime programme were found to unduly favour its own retail business and marketplace sellers that use Amazon's logistics and delivery services.

These practices possibly violated Article 102 of the Treaty on the Functioning of the European Union, which prohibits the abuse of a dominant position that may affect trade within the EU and prevent or restrict competition.

Article 5 and Article 6 of the DMA [1] specifically target gatekeeper platforms such as Amazon and aim to prevent them from engaging in practices that can lead to unfair competition, such as self-preferencing and leveraging their market power. In this case, Amazon's use of non-public data of its marketplace sellers to calibrate its retail decisions, distorted fair competition on its platform and prevented effective competition, which could be seen as a violation of Article 5. Furthermore, the criteria that Amazon sets to select the winner of the Buy Box and to enable sellers to offer products under its Prime programme, which lead to preferential treatment of Amazon's retail business or of the sellers that use Amazon's logistics and delivery services, could be seen as a violation of Article 6. Since the DMA was not implemented at the time, Amazon was not designated as a gatekeeper and was not in violation of these new laws.

Amazon's commitments mark a significant milestone in the EU's efforts to ensure fair competition within the digital marketplace. By acknowledging and addressing the raised concerns, Amazon has taken an important step towards promoting a more level playing field for independent sellers and carriers, and giving consumers greater choice. The changes to the data-handling policies, as well as the requirement for equal access to the Buy Box and more transparent criteria for accessing the Prime programme, are particularly noteworthy. Basically, the company is acknowledging its responsibility to operate in a manner that does not violate Article 102 of the Treaty on the Functioning of the European Union, which prohibits abuse of a dominant position that may affect trade within the EU and prevent or restrict competition.

Ultimately, the Commission's decision highlights the need for robust regulation of online marketplaces, particularly in cases where dominant players like Amazon are using their power to undermine competition. By enforcing the provisions of Article 102 and other

relevant EU competition laws, the Commission is helping to ensure that the benefits of the digital economy are shared fairly and equitably among all market participants.

3 My take on these regulations

The digital world is constantly evolving, and laws need to keep up with the pace of technological progress. While laws like the DMA are important to regulate anti-competitive practices, they are not a one-size-fits-all solution. These laws may be too generalised, and as a result, may not be able to account for the nuances and complexities of the digital environment. Furthermore, it is often the case that laws can take years to be implemented, while technology moves at a much faster pace. This gap in time can create a situation where technology companies can exploit loopholes and engage in anti-competitive practices, while regulators struggle to keep up. Case in point, Google's whole business model from 2005 onward...

One solution to this issue could be a more collaborative approach between technology companies and regulators. Instead of waiting for laws to be passed, technology companies could work with regulators to create guidelines and standards for ethical and fair practices. These guidelines could be reviewed and updated on a regular basis to ensure they remain relevant and effective. Additionally, technology companies could be incentivised to comply with these guidelines through tax breaks or other benefits.

Another solution could be the use of technology itself to monitor and regulate anti-competitive practices. AI algorithms in law enforcement and regulation is a relatively new field, but it has shown promise in other areas such as fraud detection and cybersecurity. Implementing AI technology in antitrust enforcement could have several benefits. For one, it would help to overcome the lag between technological development and the law by allowing regulators to keep up with new forms of anti-competitive behavior i.e. this would allow them to be more proactive in their approach to anti-competitive practices, rather than reactive. Additionally, AI could provide more objective and data-driven analysis of large amounts of data, which would make antitrust enforcement more efficient and effective. I believe there is potential for AI to revolutionize antitrust enforcement and regulation. However, it is important that AI is to be used as a tool to assist human regulators, not as a replacement for them. Essentially, the key to successful antitrust regulation in the digital age will be a combination of traditional legal frameworks, such as Article 5 and 6 of the DMA, and cutting-edge technology such as AI.

References

- [1] “Digital markets act.” <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925>.
- [2] “Alphabet v. comission.” <https://curia.europa.eu/juris/document/document.jsf?text=&docid=249001&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=6281662>.
- [3] “Apple v. commision.” https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073.
- [4] “Amazon v. commision.” https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777.