

The DMA and Antitrust: Complementary Tools?



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Complementarity in the DMA



1. Background to complementarity
2. DMA and EU antitrust rules
3. DMA and national competition rules
4. Ne bis in idem



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Picture: European Union



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1. Background to complementarity



Recital 10 Digital Markets Act
[...] this Regulation aims to complement the enforcement of competition law [...]

Article 1 Digital Markets Act
Subject matter and scope
6. This Regulation is without prejudice to the application of Articles 101 and 102 TFEU. [...]

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1. Background to complementarity



Article 38 Digital Markets Act
Cooperation and coordination with national competent authorities enforcing competition rules
1. The Commission and the national competent authorities of the Member States enforcing the rules referred to in Article 1(6) shall cooperate with each other and inform each other about their respective enforcement actions through the European Competition Network (ECN). [...]

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2. DMA and EU antitrust rules



- DMA and antitrust – a shared history
- Antitrust rules or DMA?
 - European Commission
 - NCAs
 - Risks of over- and under-enforcement



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2. DMA and EU antitrust rules



Articles 101 and 102 TFEU	DMA
✓ Competition law → consumer welfare	➤ Regulation → contestability and fairness (Art 114 TFEU)
✓ Direct application by COM, NCAs and national courts	➤ Application after gatekeeper designation, by COM
✓ Objective justification	➤ No objective justification
✓ Market effects	➤ Application irrespective of effects
✓ Ex post	➤ Ex ante
✓ Inherent flexibility	➤ Catalogue of obligations
✓ Market definition, dominance	➤ CPS, gatekeeper position
✓ Private enforcement → Directive 2014/104/EU	➤ National rules for private enforcement required

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3. DMA and national competition rules

Article 1 Digital Markets Act Subject matter and scope

6. This Regulation [...] is also without prejudice to the application of: [...]

(b) national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to the imposition of further obligations on gatekeepers;
[...]

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4. *Ne bis in idem*

- '[P]ublic authorities can legitimately choose complementary legal responses to certain conduct that is harmful to society through different procedures forming a **coherent whole** so as to address different aspects of the social problem involved.' *bpost* (C-117/20, para 49)
- *bpost* (C-117/20) & *Nordzucker* (C-151/20)
 - (i) Parallel proceedings provided for by the law,
 - (ii) legislation in question pursues complementary aims, and
 - (iii) the principle of proportionality is safeguarded.
 - (a) Clear and precise rules make it possible to predict which conduct may be subject to a duplication of proceedings and penalties.
 - (b) The parallel proceedings are sufficiently coordinated and within a proximate timeframe.
 - (c) The penalty imposed in the earlier proceedings must be taken into account in the later proceedings.

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