ITIF | INFORMATION TECHNOLOGY & INNOVATION FOUNDATION
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COMMENTS OF ITIF

Before the

The Italian Competition Authority (Autorità Garante Della Concorrenza e Del Mercato, AGCM)

Rome, Italy

In the Matter of:	)	
Draft Regulation on the Forms of Collaboration and Cooperation Envisaged for the Implementation of the Digital Markets Act	)	Public Comment

July 12, 2024

COMMENTS ON ACGM'S DRAFT DMA ENFORCEMENT REGULATION

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INTRODUCTION

The European Union's (EU) Digital Markets Act (DMA) empowers the European Commission (Commission) to enforce competition rules against gatekeepers and calls for cooperation with National Competition Authorities (NCAs) within the European Competition Network (ECN).[1] Consistent with Article 38(7) of the DMA, on June 3, 2024, the Italian Competition Authority (AGCM) issued its draft harmonization regulation (draft regulation), which provides guidance on how the AGCM envisions its role with respect to DMA enforcement.[2]

The Information Technology and Innovation Foundation (ITIF), the world's leading think tank for science and technology, appreciates the opportunity to comment on Italy's draft regulation on the forms of collaboration and cooperation envisaged for the implementation of the DMA, and specifically to discuss how Italy must ensure that the AGCM does not inadvertently fragment DMA enforcement in a way that overly burdens gatekeepers and creates competence collisions between the Commission and NSAs. ITIF's comments proceed in five short parts.

First, the draft regulation grants the AGCM procedural powers that may exceed that which are contemplated for NCAs under the DMA. Second, the draft regulation appears to allow the AGCM to initiate an antitrust investigation under Italian competition law to address DMA related conduct, which implicates a number of fundamental legal concerns, such as *ne bis in idem* or double jeopardy. Third, in view of the above, the general silence of the draft regulation on several issues relating to coordination and collaboration with the Commission raises the specter of increased regulatory fragmentation and risks creating significant uncertainty for businesses in the Digital Single Market, as well as opens the door to competence collisions between the Commission and NCAs. Fourth, ITIF recommends that the AGCM consider issuing a revised draft regulation that addresses these issues in a way that is expressly consistent with the Commission's role as sole enforcer of the DMA. A brief conclusion follows.

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[1] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), Official Journal (OJ), L 265/1., L_2022265EN.01000101.xml (europa.eu) [*hereinafter* DMA].

[2] *See* Autorità Garante Della Concorrenza E Del Mercato, Consultazione pubblica sullo schema di Regolamneto sulle forme di collaborazione e cooperazione previste per l'attuazione del Digital Markets Act (2024) [*hereinafter* Draft Regulation].

The Draft Regulation Expands the AGCM's Powers

The draft regulation gives the AGCM powers to, among other things, carry out investigations, issue summons for hearings, and initiate requests for information—all in addition to applying the relevant sanctions provided for by national law.[3] As such, the draft regulation seems to bestow upon the AGCM procedural authority under Italy's national competition law (Law 287/1990) which is not expressly provided for by the DMA.[4] Indeed, Articles 18.3 and 18.4 of the Italian Annual Market and Competition Law (Law 214/2023) are limited to the investigation powers under the National Competition Law 287/1990 and do not appear to expressly include the other powers that the draft regulation would give to the AGCM.[5]

For this reason, the draft regulation suggests that the AGCM may have the room to engage in DMA related investigatory activities that go beyond those of the Commission, which raises the possibility of gatekeepers facing high compliance costs at the national level in addition to those incurred with the Commission. If replicated throughout the EU, such broad investigatory authority among NCAs would result in an extremely overburdensome process for gatekeepers and heavy administrative costs—both of which will ultimately get passed on to European consumers, such as through diminished investment and innovation.

Risks of Parallel Enforcement and *Ne Bis In Idem*

The draft regulation also suggests that the AGCM may engage in investigations into violations of the DMA under Article 14 of Law 287/1990. This raises the possibility of the AGCM not just enforcing Italian competition law to address behavior by gatekeepers not covered by the DMA, like cartel restraints, but enforcing Italian competition law to address conduct within the scope of the DMA. In other words, just as complementarity exists with respect to Commission level law enforcement, so could Italian competition law and the DMA be jointly used against the same gatekeeper conduct.[6]

This type of parallel system, with both the Commission enforcing the DMA and NCAs enforcing their national laws against the same conduct, would appear to be in tension with the principle that the Commission is the "sole enforcer" of the DMA.[7] Indeed, dual enforcement creates a serious risk of violating the fundamental legal principle of *ne bis in idem*, imposing conflicting remedies, and overdeterrence which chills procompetitive behavior. As such, it is crucial to prioritize DMA enforcement by the Commission as the only authority for addressing competition concerns associated with conduct within the DMA's scope.

Fragmentation of the Digital Single Market

In view of the additional powers given to the AGCM and the possibility of overlapping enforcement by both the Commission and NCAs to police exclusionary behavior by gatekeepers, the draft regulation calls out for a robust discussion of how the AGCM will engage in coordination and cooperation with the Commission. However, the draft regulation appears to be silent in several important areas with respect to the specifics of how it will do so. For example, issues like sharing information between the Commission and the AGCM, the Commission's power of intervention, and other matters relating to cooperation appear to go unaddressed.

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[3] Draft Regulation at Articles 4–9.

[4] Italian national competition law (Law 287/1990), Norme per la tutela della concorrenza e del mercato, https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1990;287.

[5] Italian Annual Market and Competition Law (Law n. 214/2023, IAMCL), Legge annuale per il mercato e la concorrenza 2022, https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2023;214.

[6] *See generally* Amazon.com Inc. and others v Commission, Case C-815/21 P (2023).

[7] DMA at Article 38.

For this reason, the draft regulation is conducive to bringing about a DMA enforcement environment mired by regulatory fragmentation, which in turn creates tremendous uncertainty and a lack of transparency for gatekeepers and other businesses. Such regulatory fragmentation could also fuel tensions between the Commission and NCAs, which may create broader and potentially more serious issues that hamper effective competition enforcement. Moreover, given the issues that have already materialized with respect to the Commission's DMA enforcement in the form of chilling innovation and effectively picking winners and losers, increased regulatory fragmentation would only exacerbate these harms.

RECOMMENDATIONS

ITIF recommends that the AGCM reflect upon its draft regulation and consider revisions in accordance with the following:

- **Keep the AGCM's powers within the DMA:** The AGCM should limit its DMA authority to the procedural powers defined for NCAs in the DMA. Doing so will mitigate issues associated with the imposition of burdensome compliance costs on gatekeepers as a result of overexpansive if not also duplicative investigations by NCAs.

- **Avoid a parallel enforcement regime:** Eliminating the possibility of parallel enforcement against the same conduct by the Commission under the DMA and NCAs under their national competition laws will avoid thorny issues associated with *ne bis in idem*, overdeterrence, and conflicting remedies.

- **Prevent regulatory fragmentation**: Rather than prioritize the AGCM's authority, the draft regulation should focus on cooperation and coordination with the Commission and other NCAs, which seems to be relatively unaddressed in the draft regulation.

CONCLUSION

The DMA is a special product of EU legislation, raising several unprecedented issues from both compliance and enforcement perspectives. While it aims for uniformity across the EU, uncertainties exist regarding the interaction between the Commission and NCAs. As such, through a sound implementation regulation, the AGCM has a unique opportunity to shape a healthy enforcement landscape for the DMA within the EU. By prioritizing collaboration with the Commission, the AGCM can help avoid further fragmentation of the Digital Single Market and ensure a more effective enforcement regime. Without strong coordination, the system of DMA enforcement involving both the Commission and the NCAs risks overdeterring innovation as well as creating unhelpful competence collisions between the Commission and the NCAs.

Thank you for your consideration.

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