INTERNET AND PLATFORM REGULATION UNDER DMA AND DSA

First Annual Conference of the European Commission Legal Service

Good morning everyone and thanks so much to Vittorio and the legal service for the presentation, for organising everything and for inviting the Spanish CNMC to attend, as well as to my good friend Daniel Calleja.

Given my perspective as the head of a National Competition Authority, I will focus on how the life of National Competition Authorities (NCAs) is going to change in the post-DMA world.

However, first, I would like to make a concise general assessment of the DMA, which is positive.

The CNMC welcomes the approval of the DMA, given its potential to improve the fairness and contestability of digital markets. We see the DMA as a key milestone for strengthening the EU single market in the specific case of digital services. We have said as much in a number of official documents since the discussions on the DMA started.

Firstly, in the public consultation in 2020, on the DSA and the New Competition Tool (NCT) which ultimately resulted in the DMA. Secondly, in our market study on online advertising, in July 2021. Furthermore, as a NCA within the EU, together with other EU NCAs, in June 2021, we endorsed the joint paper “How national competition agencies can strengthen the DMA”.

In these official statements by the CNMC, particularly the joint paper with the other EU NCAs, we raised the idea that the DMA should involve the NCAs as much as possible.

It goes without saying that the EU NCAs have accumulated vast and relevant experience in dealing with digital markets, platform practices and ecosystems. Leveraging the know-how and the expertise of NCAs is paramount to ensuring consistency between the DMA and competition law, as well as efficiency in the use of European Competition Network resources.

To this end, my contribution will focus on the role of NCAs in a post-DMA framework. I will touch on the following ideas: (i) the potential role of NCAs in launching their own investigations under the DMA; (ii) the necessary cooperation and coordination mechanisms between NCAs and the European Commission;

and (iii) the interplay between the DMA and competition law. In this point, I will expand on a national perspective, adding to what Olivier has explained about the interaction between the DMA and competition law (particularly Article 102).

The European Commission will be the sole enforcer of the DMA, but NCAs will have a very important role to play.

This is an enormous improvement relative to the initial DMA proposal set out in December 2020. The political negotiation was sensitive to the Joint Paper of the EU NCAs I mentioned before.

In our view, the most important mechanism for involving the NCAs in the DMA (included in its Article 38.7[1]) is the possibility of national authorities in charge of competition rules (which is our case as an NCA) being able to initiate their own investigations of non-compliance with Articles 5, 6 and 7 of the DMA within their territory.

To do this, in our case, we must first be empowered by national law. I hope that the Spanish Parliament does not take long to do this, as we feel that this will be a very powerful tool for both NCAs and the European Commission, and time is of the essence.

As Recital 91[2] of the DMA itself states, such NCA-led investigations of non-compliance are very useful in cases where it cannot be determined from the outset whether a gatekeeper's behaviour is infringing the DMA, competition rules, or both, therefore increasing scrutiny on gatekeepers.

Once the investigation has progressed, the NCA will hopefully have more information to enable it to see whether:

---

[1] *Where it has the competence and investigative powers to do so under national law, a national competent authority of the Member States enforcing the rules referred to in Article 1(6) may, on its own initiative, conduct an investigation into a case of possible non-compliance with Articles 5, 6 and 7 of this Regulation in its territory.*

[2] *The Commission is the sole authority empowered to enforce this Regulation. In order to support the Commission, it should be possible for Member States to empower their national competent authorities enforcing competition rules to conduct investigations into possible non-compliance by gatekeepers with certain obligations under this Regulation. This could, in particular, be relevant for cases where it cannot be determined from the outset whether a gatekeeper's behaviour is capable of infringing this Regulation, the competition rules which the national competent authority is empowered to enforce, or both.*

There are just grounds for claiming infringement of the DMA. In that event, the NCA has to communicate the results of its investigation to the European Commission as the sole enforcer of the DMA.

Or whether there are grounds of infringement of competition law. In this case, the NCA can move forward with its case (regardless of whether there is a potential infringement of the DMA or not, since the application of the DMA is without prejudice to the application of competition law, although this will imply coordination).

For NCAs, having two tools at hand (the DMA and competition policy investigations) provides a more comprehensive view of how to tackle certain challenges posed by digital markets, even if the European Commission will ultimately enforce these. A the very least, the process will enhance the learning-by-doing process, ensuring that the DMA becomes even more future-proof.

For the European Commission this mechanism is also very positive, as it will improve consistency (and also efficiency) through a number of ways.

Firstly, it is wise to leverage the resources of NCAs to start their own investigations within their national territory.

Given their track record of competition enforcement in digital markets, NCAs also have relevant know-how in terms of implementing the DMA. Involving NCAs in the DMA through their own national investigations will create the grounds for a common understanding between the NCA and the European Commission, leading to more consistent decisions.

It will also be more efficient from the resource-allocation perspective. Enforcing the DMA will be resource-heavy for the European Commission, especially at the very beginning, with investigations and proceedings to designate gatekeepers and to fine-tune how to comply with some of their obligations. Non-compliance investigations and proceedings (or market investigations) will be subject to tight deadlines. The subsequent monitoring of gatekeepers (including

interaction with businesses and the end users of the services) and enforcing and monitoring compliance with obligations and remedies may require a substantial additional effort.

Secondly, it is worth mentioning that there are many coordination mechanisms contemplated in the DMA. If an NCA, empowered to do so by national law, starts investigating a possible DMA infringement in its territory, it must inform the European Commission in writing.

If the European Commission opens a procedure, the NCA should stop its investigation. This will ensure that efforts are not duplicated and that all instruments and resources in our toolkit are used coherently and consistently.

We very much welcome these coordination mechanisms in order to ensure the consistency of these alternative approaches: competition policy and the DMA. Policy consistency is essential to strengthen the EU digital single market and generate legal certainty, which is key in digital markets (since long-term investment is very sensitive to these parameters).

In addition to the ability of NCAs (when empowered to do so by national law) to launch their own investigations, there are also other ways of involving NCAs in the DMA. The European Commission may ask the NCAs to support its market investigations. Specifically, the European Commission can leverage the resources of NCAs to facilitate information requests, interviews, dawn raids, the collection of information provided by third parties, and to monitor remedies and obligations.

Regarding the role of NCAs in enforcing competition law in the post-DMA environment, firstly, I would like to point out that there are many DMA and competition law coordination mechanisms (included in Articles 38.2 and 38.3 of the DMA).

If a NCA, applying competition rules, plans to launch an investigation on gatekeepers or to adopt interim measures, it must inform the European

Commission as soon as possible (ideally beforehand, or otherwise immediately afterwards).

Before imposing remedies on a gatekeeper, the NCA must communicate the draft decision to the European Commission, no later than 30 days before the formal adoption.

As I have said before, we truly welcome this coordination since it is essential for ensuring the consistent application of both the DMA and competition policy. However, setting aside coordination and cooperation, what about substantive issues?

Having already heard the major news on the interplay between the DMA and competition policy from Olivier, I will try to provide the perspective of a national competition authority.

The question is, will the life of an NCA in the EU change much after the implementation of the DMA?

In theory, no. The DMA states that its application is without prejudice to the enforcement of competition law. The DMA specifies that its objective[3] (to ensure that markets where gatekeepers are present are, and remain, contestable and fair) is different from the goals of competition policy (to protect undistorted competition in any given market).

For this reason, the same conduct can infringe both sectoral (digital) regulation and competition law.

---

[3] Recital 11
Articles 101 and 102 TFEU and the corresponding national competition rules concerning anticompetitive multilateral and unilateral conduct as well as merger control have as their objective the protection of undistorted competition in the market. This Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition in any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are, and remain, contestable and fair, independently of the actual, potential or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition in a given market. This Regulation therefore aims to protect a different legal interest from that protected by those rules and it should apply without prejudice to their application.

This may give rise to *non bis in idem* issues, although certain recent rulings (C-151/20, Nordzucker and C-117/20, Bpost) have shed light on the conditions under which Courts can impose two different penalties on the basis of the same conduct.

Ensuring resource efficiency gains, the consistency of the two instruments, and avoiding *non bis in idem* issues creates a strong rationale for increasing coordination between the DMA and competition policy.

The NCAs and European Commission already have robust cooperation and coordination expertise thanks to the ECN, so we all expect to continue in this same vein as regards the DMA. In fact, cooperation and coordination mechanisms between NCAs and the European Commission should improve in the post-DMA environment.

However, as I mentioned, rather than explaining the general framework of how the DMA will coexist with competition law (specifically, Article 102), I would like to add a very national perspective. In Spain, in addition to Articles 1 and 2 of the Spanish Competition Act (which are the national equivalents of Articles 101 and 102), we have Article 3, which has no parallel in EU law. This article prohibits acts of unfair competition that affect public interest by distorting effective competition.

This distinction is significant. While the DMA states (in its Article 1.6[4]) that it is without prejudice to Articles 101 and 102 and their national equivalents, it also states that it is without prejudice to national competition rules prohibiting other forms of unilateral conduct insofar as these amount to the imposition of further obligations on gatekeepers.

---

[4] Article 1.6
This Regulation is without prejudice to the application of Articles 101 and 102 TFEU. It is also without prejudice to the application of:
(a) national competition rules prohibiting anti-competitive agreements, decisions by associations of undertakings, concerted practices and abuses of dominant positions;
(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; and
(c) Council Regulation (EC) No 139/2004([23]) and national rules concerning merger control.

This is a restriction on the way we can use Article 3 in terms of gatekeepers, to the extent that we can apply it only insofar as we impose obligations that go further than those imposed by Articles 5, 6 or 7 of the DMA.

This is relevant because Article 3 of Spanish law can actually be applied to some conduct undertaken by digital platforms. I cannot share any specific details, because the case is in the investigative phase, but the CNMC opened a formal procedure against Booking, not only because of a potential infringement of Article 102 and Article 2 of the Spanish Competition Act, its national equivalent, but also due to a potential infringement of Article 3 of that same Act.

In summary, it is important to keep in mind these ideas:

NCAs will still be able to apply Articles 101 and 102 and national equivalents to digital gatekeepers, including digital services and conduct included in the DMA. Potential overlaps with the DMA will be addressed through enhanced coordination with the European Commission. As the Spanish National Competition Authority, we will keep coordinating with the European Commission as we have done in the past; but the harmonious implementation of the DMA and competition policy involves a greater degree of cooperation. And the CNMC, as the Spanish National Competition Authority, will remain committed to this coordination effort, using the mechanisms foreseen in the DMA.

NCAs will still be able to apply unilateral rules of conduct (not equivalent to Articles 101 and 102, like Article 3 of Spanish law relating to unfair competition) to digital gatekeepers in terms of digital services and conduct included in the DMA only insofar as these involve imposing further obligations on gatekeepers.

Certain conduct and services enacted by digital gatekeepers will not be tackled by the DMA; competition policy will be the only tool for addressing these.

In my opinion, it is essential that competition policy continues to be applied vigorously to digital markets and gatekeepers, both by the DGCOMP and NCAs. This is the best way to ensure that the DMA is future-proof. Competition policy

offers a flexible framework within which to assess potentially problematic conduct or market contexts (that could in the future be included within the scope of the DMA if warranted). As the June 2021 Joint paper from the NCAs suggested, without that application of competition law to digital markets (both by the DGCOMP and national authorities) the DMA would not exist, since we would not have grasped digital services from the perspective of market definition or remedy design. The best way to make the DMA future-proof is therefore by ensuring that competition policy is applied to digital markets, including by NCAs.

As I said in my introduction, we have made a positive assessment of how the DMA involves NCAs. In particular, this includes the possibility of them launching their own investigations of non-compliance with Articles 5, 6 and 7 of the DMA within their national territories. We hope that the Spanish Parliament takes this opportunity to empower us to do this very thing.

It will also strengthen the coordination between the European Commission and the NCAs, as well as between the DMA and competition policy.

Finally, it also ensures that the application of the DMA is without prejudice to competition law, so that NCAs will be able to continue applying competition law to digital markets and gatekeepers.