

# **The European Digital Markets Act and the Crucial Differences Between Legal Frameworks**

The European Digital Markets Act (DMA) stands as a paradigmatic shift in the regulatory landscape of digital markets, aiming to foster innovation, fair competition, and consumer protection in the digital age. Through its comprehensive set of rules and obligations, the DMA directly confronts the monopolistic tendencies of big tech companies, as an attempt to ensure that the digital markets remain vibrant, competitive, and innovative. The Act's implications extend beyond mere regulation, touching upon the fundamental differences between Common Law and Civil Law traditions, and how these differences shape our understanding of regulation, innovation, and market dynamics. This article tries to unpack its multifaceted impact on innovation and explore its relationship with the different legal philosophies of Common Law and Civil Law.

Let's start by trying to contextualize the DMA: proposed by the European Commission, seeks to address the digital economy's challenges, particularly the dominance of certain large platforms referred to as "gatekeepers." These entities, due to their size, user base, and market power, have the capability to act as private regulators within their ecosystems, potentially stifling competition and innovation. The DMA introduces a set of ex-ante regulations that preemptively restrict certain behaviors by these gatekeepers, aiming to ensure open digital markets where new and innovative services can compete on a level playing field.

Innovation, as a key driver of economic growth and societal progress, tends to thrive in environments where barriers to entry are low, and competitive pressures are high. The DMA endeavors to create such an environment by prohibiting anti-competitive practices like self-preferencing, data monopolization, and unfair conditions for business users. By doing so, it opens up spaces for startups and smaller companies to innovate, challenge incumbents, and offer novel solutions to consumers. This regulatory approach recognizes that innovation is not just about the next technological breakthrough, but also about applying existing technologies in new, creative ways that add value to society.

The DMA's proactive and prescriptive regulatory approach highlights the differences between Common Law and Civil Law traditions. Common Law, with its roots in English jurisprudence, relies heavily on judicial decisions and precedent, favoring a case-by-case approach to regulation. This tradition values the adaptability and specificity of judicial rulings, which can evolve with the market and technology, potentially providing a more nuanced response to the complexities of digital markets.

In contrast, Civil Law, predominant in continental Europe, emphasizes codified statutes and regulations, seeking to cover every possible scenario with comprehensive rules. This system's predictability and uniformity align well with the DMA's objectives, offering a clear, stable regulatory framework that entities can navigate and comply with. The DMA embodies the Civil Law tradition's preference for preemptive regulation, setting out explicit do's and don'ts for digital gatekeepers and aiming to prevent anti-competitive behavior before it occurs.

The dichotomy between Common Law and Civil Law traditions extends significantly into the realm of innovation, influencing the creation and growth of startups, patent registrations, and overall innovative output. Countries adhering to the Common Law tradition, such as the United States and the United Kingdom, often exhibit a more dynamic innovation landscape, evidenced by the higher number of startups created and patents filed. This can be attributed to the Common Law's flexible, precedent-based system, which allows for a more adaptable legal environment. Innovators and entrepreneurs in these jurisdictions enjoy a degree of freedom to explore and develop new ideas without the immediate constraints of detailed regulatory frameworks. This flexibility can accelerate the pace of innovation, making it easier for new technologies and business models to emerge and thrive.

However, this same flexibility that fosters innovation in Common Law countries can also lead to delays in addressing potential abuses and scandals. Since Common Law systems typically react to problems rather than preempt them, there can be a lag in regulating new technologies or business practices, during which abuses can occur. This reactionary nature sometimes allows for regulatory loopholes and grey areas to be exploited, leading to high-profile scandals and abuses that only become apparent after significant damage has occurred. As an example, the regulatory philosophy adopted during the Reagan administration, heavily influenced by Robert Bork's teachings, played a crucial role in shaping the current landscape of the tech industry: while it facilitated rapid growth and the rise of Big Tech, it also sowed the seeds for many contemporary debates over market power, antitrust enforcement, and the need for a reevaluation of anti-competitive regulation in the digital age.

Conversely, countries rooted in the Civil Law tradition, with their comprehensive and preemptive regulatory approaches, often create more tightly regulated environments. This can indeed make innovation more challenging, as entrepreneurs and innovators must navigate a complex and sometimes restrictive set of rules from the outset. The detailed regulatory frameworks characteristic of Civil Law countries aim to mitigate abuses and

ensure consumer protection by anticipating and addressing potential issues before they arise. While this proactive stance can lead to a safer and more stable market environment, it may also slow down the innovation process. The need to comply with extensive regulations can deter startups, stifle creativity, and reduce the overall rate of innovation.

This contrast underscores a fundamental trade-off between fostering a free-wheeling environment conducive to rapid innovation and ensuring a well-regulated market that minimizes abuses but may inadvertently hamper entrepreneurial ventures. Both legal traditions offer valuable lessons in balancing innovation with regulation, suggesting that the most effective approach may lie in blending the strengths of each system to create a flexible yet responsible innovation ecosystem.

In this sense, the DMA's approach to digital market regulation can be seen and understood as an attempt to bridge the gap between these two legal traditions. By setting out clear rules, it provides the predictability and stability characteristic of Civil Law. Yet, the DMA also leaves room for interpretation and enforcement that adapts to the market's evolution, a nod to the Common Law's flexible, precedent-based reasoning. This hybrid approach recognizes that in the fast-moving digital economy, regulation must be both stable enough to provide clear guidance and adaptable enough to respond to new developments.

The DMA's impact on innovation extends beyond the simple binary of more regulation versus less. By targeting specific anti-competitive practices of gatekeepers, it aims to prevent the entrenchment of monopolies that can stifle innovation. At the same time, it recognizes that innovation is not the sole domain of small startups or new market entrants: large companies, too, contribute significantly to innovation, often possessing the resources for significant R&D investments. The challenge, then, is to ensure that regulation does not stifle innovation across the board but instead fosters a competitive ecosystem where companies of all sizes can innovate.

Consequently, the DMA attempts to encourage innovation by ensuring that gatekeepers cannot abuse their market position to stifle competition. By doing so, it opens up opportunities for new entrants and allows for a more dynamic market where innovation can flourish. This competitive ecosystem should benefit consumers, offering them more choices, better services, and innovative products. It should also challenge existing companies to continue innovating, ensuring that they cannot rest on their laurels but must constantly seek to improve and adapt.

However, the DMA's implementation and its long-term effects on innovation will depend on several factors. These include the specificity of the regulations, the ability to define properly which companies are the so-called gatekeepers and which are not, the agility of regulatory bodies in enforcing them, and the ability of the market to adapt to these new rules. There is a delicate balance to be struck between preventing anti-competitive behavior and ensuring that regulation does not become a barrier to innovation itself.

The European Digital Markets Act represents a significant step forward in the regulation of digital markets, with profound implications for innovation, competition, and consumer protection. By seeking to level the playing field for all market participants, the DMA aims to foster an environment where innovation can thrive, benefiting the economy and society as a whole. Its approach, rooted in the Civil Law tradition but incorporating aspects of Common Law flexibility, could offer a promising model for regulating complex and fast-evolving digital markets. As the digital economy continues to grow and evolve, the DMA could provide a valuable framework for balancing the interests of gatekeepers,

competitors, and consumers, ensuring that innovation remains at the heart of the digital marketplace.

As we navigate the complex interplay between innovation, regulation, and market dynamics, it becomes clear that crafting policies that foster growth while preventing abuses is no small feat; indeed, the devil will lie in the details.

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