COMPETITION LAW
IN THE DIGITAL AGE

JANUARY 2022

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UPDATE ON PASSAGE OF THE DIGITAL MARKETS ACT (DMA): LEGISLATIVE PROCESS AND ROLE OF NCAS IN ENFORCING THE DMA

As a quick recap, on December 15, 2020, the European Commission published a proposal for a regulation on contestable and fair markets in the digital sector, otherwise referred to as the Digital Markets Act (DMA). The proposed legislation lays down new harmonised rules aimed at regulating the behaviour of digital platforms acting as "gatekeepers" between business users and their customers in the European Union (EU).

Gatekeepers are large players who channel a lot of traffic through their platforms and control key channels of distribution on the Internet, *e.g.* Amazon, Google, Facebook, Apple or Microsoft. Due to their strong network effects, their intermediary role and their ability to access and collect large amounts of data, these gatekeepers operate significant control over access to digital markets upon which numerous businesses rely.

The new approach adopted by the Commission entails a shift from ex-post antitrust intervention to ex-ante regulation. It would enshrine a set of ex-ante rules within EU law that would radically change how large digital platforms operate in the EU. The DMA establishes a set of obligations that gatekeepers must implement in their day-to-day operations to ensure fair and open digital markets. Companies that do not follow the rules would incur fines of up to 10% of their worldwide turnover.

While there seems to be strong support for this approach in the EU, a number of issues regarding the material definition of gatekeepers, the design of ex-ante obligations and enforcement mechanisms have already been raised by national competition authorities (NCAs) and Member States.

The role of NCAs in enforcing the DMA

In May 2021, France, Germany and the Netherlands published a common position paper with proposals to strengthen the DMA and its enforcement. One month later, the NCAs published their own joint paper within the framework of the European Competition Network (ECN) and asked for more involvement in the enforcement of upcoming competition rules. In September 2021, France, Germany and the Netherlands published a second joint paper that comprised concrete draft amendments for two key elements, one of which deals with **the stronger role for NCAs in the enforcement of the DMA**.

Both Member States and NCAs propose fairly similar changes and support the primary application of the DMA by the Commission and a complementary possibility of enforcement of the DMA by NCAs.

- NCAs consider that, when they are better placed to deal with the case, they should be given the opportunity to **initiate or enforce proceedings against gatekeepers** on the basis of the DMA, or carry out or contribute to certain investigative actions at the request of the Commission (e.g. by receiving complaints, contributing to dawn raids, or gathering information);

- Member States, especially France, Germany and the Netherlands, argue that the relationship between the DMA and European competition law should be further specified and consider that all available resources to enforce the DMA should be used to avoid an enforcement bottleneck. According to their draft amendments to the Commission's proposal, NCAs would be allowed – on their own initiative – to make use of investigative and monitoring powers under the DMA. The Commission should also have the option to **involve a NCA in the enforcement of the DMA and refer the enforcement of obligations to the NCA**.

Implication of the European Competition Network (ECN)

The ECN was not given any role in the Commission's initial proposal. Both Member States and NCAs propose the establishment of a solid coordination and cooperation mechanism between the Commission and NCAs, as well as with national courts implementing both the DMA and EU (and national) competition law. Against this background, the ECN would be responsible for cooperation regarding the DMA.

Digital Markets Advisory Committee

According to its proposal, the Commission would be the competent regulatory body to implement and enforce the DMA. The proposal foresees only a very limited involvement of Member States, through an advisory committee (the Digital Markets Advisory Committee-composed of representatives of EU Member States), which would assist the Commission in its decisions by issuing opinions.

The Member States propose two changes:

- Cosmetically, the "Digital Markets Advisory Committee" should be replaced by the "*Digital Markets Advisory Group*"; and

- More substantially, this Digital Markets Advisory Group should – on a permanent basis – "provide the Commission with expertise" for the purpose of enforcing the regulation and have greater powers and tasks (*e.g.* promoting exchange of information, making recommendations to the Commission, providing the Commission with relevant information, or examining reports from third parties).

Future steps

The DMA is a preliminary draft text of the European Commission and now has to be adopted according to the ordinary legislative procedure. Initially scheduled for adoption in 2022, the text still needs to be approved by the European Council and the European Parliament, and both institutions can still make extensive changes.

At this stage:

- **Legislative process at European Council level**: in May 2021, the Portuguese Presidency issued a first progress report. More recently, in November 2021, the European Council published a paper setting out its approach to the draft DMA and recommended – contrary to the views of NCAs – that the Commission be the sole authority responsible for enforcing the DMA. It stated that Member States may empower competent NCAs to conduct investigations into alleged DMA infringements and report these findings to the Commission, but without being able to police the law itself;

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- **Legislative process at European Parliament level**: in June 2021, the Committee on the internal market and consumer protection within the European Parliament presented its draft report. Since then, several other Committees within the European Parliament released draft opinions. Discussions are still ongoing.

Further rounds of negotiations are therefore expected, ad more particularly the so-called ‘trilogue’ talks between the European Council, the European Parliament and the Commission.

GERMANY'S PROPOSALS FOR MERGER CONTROL REFORM UNDER THE DMA

The much-anticipated Digital Markets Act (DMA) is in the last stages of the adoption procedure, following a vote in the European Parliament's Internal Market and Consumer Protection Committee on 23 November. Going forward, the text adopted in the Parliament's plenary will become the Parliament's mandate for negotiations with EU governments starting in the first semester of 2022. However, voices from Germany propose more far-reaching changes that would have the DMA broaden the types of transactions that are reportable to the Commission under the current EU merger control regime. Building on its latest merger control reforms, Germany has developed its proposal through an academic research paper exploring four possible options.

German Regulators' Attempts to Get a Hold on "Killer Acquisitions"

At a national level, Austria and Germany have already introduced measures designed to bring so-called "killer acquisitions" within the scope of merger control. Both countries introduced transaction value tests to their merger control regimes in 2017. In addition to the countries' previous turnover thresholds, mergers must also be notified if the transaction value exceeds EUR 200 million in Austria or EUR 400 million in Germany and the target has significant domestic operations. While the interpretation and application of these new thresholds continues to carry significant uncertainty, the move heralded renewed global focus on ensuring that merger rules capture "killer acquisitions", particularly those involving "Big Tech". In 2021, Germany also amended its wider competition rules to introduce a special regime applying to certain digital platforms. Germany's incoming government (bringing together social democrats, greens and liberals) has also agreed to support a further amendment of the merger control rules to prevent "killer acquisitions".

What the Current Draft DMA has in Store for Mergers

The current DMA draft does contain a proposal as far as mergers are concerned. Article 12 of the draft institutes an obligation for gatekeepers to inform the Commission of any intended concentration involving another provider of core platform services or of any other services provided in the digital sector, irrespective of whether it is notifiable under the EU Merger Regulation (EUMR) or to a national competition authority (NCA). The concentration in question must be notified to the Commission prior to implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

However, these light-touch measures were quickly criticized in some quarters as not being suited to the realities of digital markets, triggering debate over possible improvements.

Three Professors, Four Opinions

A team of three international academics – Jens-Uwe Franck, Giorgio Monti and Alexandre de Streel - was tasked by the German Federal Ministry for Economic Affairs and Energy to draft a legal opinion concerning the use of Article 114 TFEU as a legal basis for strengthened control of acquisitions by digital gatekeepers. The report details how merger control provisions could be included in the DMA.

The report concludes that many Member States are currently reforming their merger control rules, but these divergent systems could "severely undermine" the digital single market. Also, some Member States are planning to use the specificities of their national legislation to close the perceived enforcement gap. For that reason, it is "necessary" for the EU to include merger control provisions in the DMA to prevent the fragmentation of the internal market.

The team then reviews four possible options for preventing this phenomenon.

First, they look at the Commission's current weapon of choice – encouraging referrals from the Member States to the Commission under Article 22 of the EUMR. Although this option does not require a change of the current legislation, it was criticized for not being robust enough, in light of the most recent cases (in particular *Illumina / Grail*). Although not a point raised by the professors, the Commission's guidance paper is widely perceived as threatening the EUMR's "one-stop-shop" system and adding to a heterogeneous enforcement environment with NCAs taking diverging views as to whether or not mergers that they have no power to review under their own rules should be referred to the Commission.

Second, the paper considers the establishment, through the DMA, of new notification thresholds for digital gatekeepers that would complement the existing thresholds of the EUMR. This option relies on Article 1(5) EUMR which provides that the Council "acting by a qualified majority, may revise the thresholds and criteria mentioned in paragraph 3". While this provision has now expired, it remains an indicator that the notification thresholds are not based on substantial normative choices by the EUMR's original legislature. In the team's view, once the new thresholds are met, the acquisition would be reviewed by the Commission under an unchanged EUMR, i.e. according to the existing theories of harm and the current burden of proof. This option was deemed legally feasible under Article 114 TFEU because it would prevent the fragmentation of the internal market. Also, it would be possible to establish a new notification threshold without amending the EUMR, which would (at least in theory) require unanimity.

Thirdly, there would be the option of amending the EUMR itself to establish new notification thresholds in a way that would require the notification of mergers involving nascent competitors but also adapt the "Significant Impediment to Effective Competition" test used to assess concentrations as well as the rules on proof. The team considered that basing the reform of the EUMR on Article 114 TFEU would be legally feasible, since the legislature is not bound to retain the original basis when amending EU secondary law.

The last option is to establish through the DMA a new and separate regime to review acquisitions by digital gatekeepers, which would either replace or complement the existing EUMR. This could also be based on Article 114 TFEU, similarly to the previous option.

In conclusion, the team considered that the first option (the use of Article 22, which is the Commission's current preference) is the weakest and should not be taken into account. The other three options would offer a one-stop-shop solution, and could be implemented sequentially. For instance, the second option could be implemented immediately in the context of the DMA negotiations. Then, the third and the fourth options could be implemented later in the context of a more comprehensive review of the EU merger control regime, once the lessons learned from applying merger control to the acquisition of nascent competitors by digital gatekeepers have provided helpful experience that could be broadened to a wider range of concentrations.

The paper does not propose concrete thresholds under either option 2 or 3, which leaves room for interpretation and speculation. Going forward, we could see, for example, thresholds similar to the German and Austrian transaction value tests, or perhaps a two-step assessment similar to that of Germany's newly-introduced "gatekeeper amendment". More broadly, it remains to be seen whether Germany's position on merger control gains traction with other Member States during the final stages of the DMA's legislative process.

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THE GOOGLE SHOPPING JUDGMENT

On 10 November 2021, the General Court issued its long-awaited **ruling** on the Google Shopping case, whereby it largely dismissed Google's action for annulment of the European Commission decision finding that Google abused its dominant position by favouring its own comparison shopping service to the detriment of competing comparison shopping services. While the General Court does not set out a novel legal test for assessing self-preferencing, it does provide useful clarification on certain key concepts which are relevant for the application of Article 102 TFEU.

Competition on the merits

Not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may lead to the departure from the market or the marginalisation of competitors that are less attractive to consumers from the point of view of price, choice, quality or innovation. Therefore, Article 102 TFEU is not aimed at preventing dominant undertaking from engaging in competition on the merits.

One of the main arguments brought by Google was that the European Commission failed to identify anything in its conduct, which it considers to be "*making quality improvements in its online search service*", that would represent a departure from competition on the merits.

The conduct specifically identified by the European Commission as the source of Google's abuse is, in essence, the fact that it displayed its comparison shopping service on its general results pages in a prominent and eye-catching manner in dedicated 'boxes', without that comparison service being subject to the adjustment algorithms used for general searches, whereas, at the same time, competing comparison shopping services could appear on those pages only as general search results (blue links) that tended to be given a low ranking.

The General Court sets at the outset that the mere extension of an undertaking's dominant position (here, the market for general search services) to a neighbouring market (here, the market for comparison shopping services) cannot in itself constitute proof of a conduct departing from competition on the merits. In other words, 'leveraging' a dominant market position is not per se abusive, but only if an actual weakening of competition in the lights of each specific case has been established. In this case, the General Court considered that leveraging departed from competition on the merits due to three specific circumstances:
(i) the importance of traffic generated by Google's general search engine for comparison shopping services and the associated network effects;
(ii) user behaviour, as typically users pay attention to the first three to five results, while paying little to no attention to the remaining ones; and
(iii) lack of credible alternative sources of traffic.

In addition to that, the General Court adds that the conduct involves "a certain form of abnormality". This "abnormality" is grounded on the fact that Google's general search engine initially had a universal vocation and is designed to index results containing any possible content. Against this background, the promotion of Google's own services over the rest would not be necessarily rational, according to the General Court, save in a situation where the dominance and barriers to entry are such that no market entry within a sufficiently short period of time is possible in response to that limitation of internet users' choice.

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Inapplicability of the essential facilities doctrine

Google argued that the Decision in fact imposed on Google a duty to supply, consisting on providing competing comparison shopping services with access to its improved services without satisfying the conditions identified in the case-law and, in particular, those applicable to infrastructure qualifying as an essential facility. The essential facility doctrine set out in the Bronner case notes that a refusal to supply may be considered abusive solely with regard to infrastructure that is indispensable for carrying out a business on the market where there is no actual or potential substitute, so that refusing access may lead to the elimination of all competition. This qualified test is aimed at ensuring that a duty to supply is only abusive in very limited cases, as otherwise a duty to supply would ultimately impede competition by reducing a dominant undertaking's incentive to build such infrastructure in the first place.

As a preliminary point, the General Court accepts that Google's general results page has "characteristics akin to those of an essential facility" for the three reason stated above. Yet, it does not accept that the practice at stake amounted to a refusal to supply which required to comply with the essential facility doctrine. It recalls that most exclusionary abuses are liable to constitute implicit refusals to supply, since they tend to make access to market more difficult. The General Court notes that Google did not refuse to supply, but rather did supply but under discriminatory conditions between competitors and its own downstream service, and therefore the essential facility doctrine would not be applicable.

Finally, the General Court clarified that just because the remedy against Google's conduct can be equivalent to the one applied in essential facilities cases, this does not mean that the abuse has to be of the same nature. There can be no automatic link between the criteria for the legal classification of the abuse and the corrective measures enabling it to be remedied.

Proof of anticompetitive effects: counterfactual analysis and as-efficient competitor test are not needed

Google argued that the European Commission had not established any causal link between the practices at issue and the (undisputed) fact that there was a correlative decrease in generic search traffic to almost all comparison shopping services on a lasting basis. In particular, Google contended that the European Commission should have conducted a counterfactual analysis to show how the market would have developed absent the investigated practices.

The General Court concludes that in Article 102 TFEU cases there is no need for the European Commission to systematically run a counterfactual analysis to establish actual exclusionary effects, not even in response to a counterfactual analysis put forward by the undertaking being investigated. In its judgment, the General Court explains that this would oblige the European Commission to demonstrate that the conduct at issue had *actual* effects, which is not required in the case of an abuse of dominant position, where it is sufficient to establish that there are *potential* effects.

Despite this lowered requisite standard of proof, this argument by Google was actually upheld by the General Court as regards the market for general search services. The General Court noted that the European Commission merely argued too imprecise considerations to show that there existed (even potential) foreclosure effects in this market, in which the regulator simply stated that Google was protecting the revenue from its general result pages that was generated by its own comparison shopping service, revenue which, in turn, financed its general search service. However, the at least potential exclusionary effects were appropriately established, in turn, in the market for comparison shopping services.

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Finally, the General Court ruled out the need to establish that the exclusionary conduct affected as efficient competitors as Google. The use of the as-efficient-competitor test is required in case of pricing practices, but does not make sense in cases in which the competition issue was not one of pricing.

Outcome and next steps

Despite the limited annulment of the contested decision, the General Court did not amend the amount of the fine imposed. Now the parties may lodge an appeal to the Court of Justice within two months and ten days as of the notification of this judgment. If Google decides to appeal, it will be interesting to see how the points in law identified above, partially dealing with the case-law of the Court of Justice such as the essential facilities doctrine, will be dealt with.

CMA CONSULTS ON REVISED COMMITMENTS FOR GOOGLE'S PRIVACY SANDBOX PROJECT

On 26 November 2021 the UK Competition and Markets Authority (CMA) **announced** that it had secured "*improved commitments*" from Google on its proposal to remove third-party cookies and other functionalities from Google's Chrome browser. This removal forms part of Google's Privacy Sandbox initiative, which the company says will develop new digital advertising tools to protect user privacy and prevent tracking. The CMA opened its investigation into the Privacy Sandbox project in January 2021 in response to complaints of alleged anticompetitive behaviour and user data privacy concerns (for more detail, please see a **previous edition** of this newsletter).

In June 2021 the CMA consulted on initial commitments offered by Google, which sought to address the CMA's concern that the proposed changes could further entrench the company's dominance in the digital advertising market. The **initial commitments** provided the CMA with a key oversight role in the design and development of the Privacy Sandbox proposals, with Google also pledging to: (i) publicly disclose the results of tests of the effectiveness of alternative technologies; (ii) impose substantial limits on how it will use and combine individual user data for the purposes of digital advertising after the removal of third-party cookies; and (iii) to not discriminate against its rivals in favour of its own advertising and ad-tech businesses when designing or operating the alternatives to third-party cookies. Google announced that if the CMA accepted these commitments, Google would apply them globally.

During its consultation on the initial commitments the CMA heard from over 40 third parties. Most responses welcomed Google's offer but "*almost all raised certain concerns about, or suggested adding, certain aspects*". In view of such the CMA concluded that there was a need to strengthen or revise the commitments in a number of areas. These areas included increasing Google's transparency and engagement with the industry, requiring that certain functionality should not be removed before third-party cookies, and improving the provisions on Google self-preferencing its own advertising products and services.

Google offered modified commitments to the CMA on 19 November 2021. The company has now promised to mention the CMA's role and the investigatory process in key public announcements about the Privacy Sandbox project. It will instruct staff not to make claims to customers which contradict the commitments and will report regularly to the CMA on how Google has taken account of third-party views.

Google has also offered to address concerns about the removal of functionality or information before the Privacy Sandbox changes take full effect, to clarify the internal limits on the data that Google can use and to provide greater certainty to third parties developing alternative technologies. Compliance with these commitments is to be improved by, inter alia, the appointment of a CMA-approved monitoring trustee and Google will abide by the commitments for at least six years, one more than the five years proposed in the company's initial commitments. The CMA will consult on these new commitments until 17 December 2021.

Just prior to the publication of the revised commitments, the UK Information Commissioner's Office (ICO) published an **opinion** setting out data protection standards that companies must meet to safeguard people's privacy online when developing new advertising technologies. In this the ICO refers to its cooperation with the CMA whilst not ruling out the possibility of providing its own detailed critique of specific Privacy Sandbox proposals as these reached a more advanced stage.

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ITALIAN DIGITAL PAYMENTS TIE-UP APPROVED WITH STRUCTURAL AND BEHAVIOURAL REMEDIES

On 12 October, the Italian Competition Authority (ICA) – following an investigation that started on 31 August – conditionally authorised the merger by incorporation of SIA S.p.A. into Nexi S.p.A.

As SIA and Nexi are two of the most important payment services operators in Italy, the merger is expected to significantly affect the markets for merchant acquiring, payment processing, payment card issuance, retail payment clearing, interbank data transmission, and corporate digital banking.

The ICA noted that the payment services sector is characterised by a complex supply chain, with several services offered – often by a single operator. The sector is thus also characterised by vertical integration, and economies of scale and scope play a significant role. Additionally, consolidation – and more broadly, the growth of operators – has been favoured both by technological developments and various legislative acts adopted at European level (e.g., the Payment Services Directives and Interchange Fee Regulation) to create the Single European Payments Area (SEPA). Indeed, this legislative effort eliminated the regulatory barriers that blocked operators from entering other EU national markets, and the two factors combined have enabled operators to boost growth significantly. Thus, even though the affected markets are national in scope, in its assessment the ICA took into consideration also the supranational competitive environment.

More precisely, the ICA found that the combined entity will hold a dominant position in the following markets:
- payment processing on the Bancomat circuit, with the combined entity holding a market share of approx. 75%;
- payment clearing of non-SEPA products, with the combined entity holding a market share of approx. 90%.

According to the ICA, both markets are currently national in scope, but they are going to face important developments: a new international Bancomat circuit is expected to become operational in the next 18 months, replacing the current national circuit; and a new player, equensWorldline, is expected to enter the market on 1 January 2022 for the provision of services for the clearing of payments of non-SEPA products. Therefore, the ICA held that the combined entity will have a dominant position in these markets following the merger but that it expected the situation to be temporary.

The ICA raised two major concerns during its investigation. First, equensWorldline plays a significant role in both markets mentioned above: indeed, Nexi offers payment processing and payment clearing services through equensWorldline, not directly. At the same time, however, equensWorldline cannot currently provide those services directly to customers because of specific exclusivity clauses in agreements with Nexi. Second, the ICA held that the merger could raise some vertical anticompetitive effects, as the combined entity could leverage its dominant position in the upstream market of processing services on the Bancomat circuit in the downstream market of merchant acquiring services. Merchant acquiring services allow sellers to accept card payments, and the ICA highlighted that the combined entity could adopt a foreclosure strategy against its competitors in the downstream market.

SIA and Nexi thus proposed both behavioural and structural remedies to address the ICA's concerns, namely:

- Nexi will: (a) waive the exclusivity clauses in its contracts with equensWorldline; and (b) sell the non-SEPA clearing contracts it currently has with client banks; and
- SIA and Nexi will prepare: (c) a clear, transparent and non-discriminating offer relating to payment processing services on the Bancomat circuit until the new circuit becomes operational; and (d) a clear and transparent offer relating to clearing services for non-SEPA products for a three-year period.

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