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Big changes for Big Tech regulation: EU institutions reach agreement on the DMA

On 25 March 2022, after more than a year of negotiation and discussion, the European Parliament and Council reached provisional political agreement on the text of the Digital Markets Act (DMA). We provided an overview of the proposals set out in the DMA in a client briefing in 2021. The recent political agreement builds on these proposals. While the full agreed text is yet to be published, we can already read the portents. In summary, the DMA marks a shift towards *ex ante* regulation of Big Tech. It will ban certain conduct *per se* based on the assumed market power of designated 'gatekeepers', without an assessment of competitive harm or efficiencies generated by the conduct. This will be quite the departure from the way current competition rules operate.

Commissioner Vestager's recent statement emphasises the DMA's direction of travel: "*(l)arge gatekeeper platforms have prevented businesses and consumers from the benefits of competitive digital markets. The gatekeepers will now have to comply with a well-defined set of obligations and prohibitions. This regulation, together with strong competition law enforcement, will bring fairer conditions to consumers and businesses for many digital services across the EU*". Understandably, the industry has started to react. Google is "*worried that some of these rules could reduce innovation and the choice available to Europeans*" while Apple "*remains concerned that some provisions of the DMA will create unnecessary privacy and security vulnerabilities for our users, while others will prohibit us from charging for intellectual property in which we invest a great deal*".[1]

HOW TO IDENTIFY A 'GATEKEEPER'?

The precise thresholds have been the subject of significant debate. A 'core platform service' will be designated a gatekeeper if it meets the following cumulative thresholds:[2]

- It has a significant market impact: This will be presumed if the company has either an annual turnover of at least €7.5 billion within the EU in the last three years, or a market valuation of at least €75 billion and provides services in at least three Member States;
- It serves as "an important gateway for business users and end users to reach other end users": This will be presumed if the platform has more than 45 million monthly end users and at least 10,000 business users established in the EU; and
- It "enjoys, or will foreseeably enjoy in the near future, an entrenched and durable position".

The agreed text extends the list of 'core platform services' to voice assistants and web browsers, in addition to marketplaces, app stores, search engines, social networking, cloud services, operating systems, communications platforms, and advertising services.

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[1] *Apple and Google criticize the new EU Digital Markets Act that will radically change the way they have operated for the past 20 years*, Fortune Magazine, 25 March 2022.

[2] *Digital Markets Act (DMA): agreement between the Council and the European Parliament* (2022).

The DMA will also enable the European Commission (Commission) to designate 'emerging gatekeepers' who meet the quantitative criteria mentioned above but do not yet have an entrenched and durable position in the market. The Commission would be able to impose on these 'emerging gatekeepers' limited obligations that are necessary and appropriate to prevent them from achieving an entrenched and durable position.

WHAT DOES IT MEAN TO BE A 'GATEKEEPER'?

It means *ex ante* rules will apply to guide market conduct. In particular, 'gatekeeper' platforms will need to ensure interoperability, data portability and refraining from collecting user data across platforms (see our previous summary). The provisional agreement reached by the EU institutions gives further colour to these obligations. Specifically, 'gatekeeper' platforms will have to:

- ensure users can unsubscribe from services under similar conditions to subscription;
- not require default installation of certain important software like web browsers on operating systems;
- not require app developers to rely on the use of certain services, such as a platform's own payment systems, in order to be listed on app stores;
- allow app developers fair access to the supplementary functionalities of smartphones (e.g. NFC chip);
- ensure the interoperability of instant messaging services' basic functionalities;
- refrain from applying both narrow and wide parity clauses; and
- give sellers access to their marketing or advertising performance data on the platform.

Interestingly, Microsoft recently announced adoption of principles such as allowing app developers to use alternative payment methods, offer better terms to other app stores and communicate directly with users so that "*regulators and the public know that as a company, Microsoft is committed to adapting to these new [competition] laws*".[3]

While some of the above conduct has been, or could be, the subject of abuse of dominance investigations under traditional competition rules (e.g. self-preferencing[4], tying), there are certainly new frontiers touched by the DMA. For instance, narrow parity clauses are not automatically considered problematic under the Vertical Block Exemption Regulation (current or the proposed draft due to come into force in June 2022) and have in fact been implicitly accepted by national competition authorities as generating significant efficiencies.[5]

WHAT CAN WE EXPECT NEXT?

The DMA brings with it a period of uncertainty over the next few years. It outlines *per se* rules but parties will need to bottom out how they are meant to apply in practice when balancing different considerations (e.g. interoperability with security and privacy concerns).

The Commission will need to take a number of 'decisions' under the DMA starting with designation of 'gatekeepers', all of which could be susceptible to legal challenge.[6] Further, the DMA obligations will apply in addition to EU and national antitrust rules as well as national legislation covering similar ground (UK, Germany) all of which differ in substance on the margins at least and differ certainly in compliance assessment approach.

[3] *Adapting ahead of regulation: a principled approach to app stores*, Microsoft blog, 9 February 2022.

[4] Case T-612/17 *Google and Alphabet v Commission (Google Shopping)*.

[5] French Competition Authority, Decision 15-D-06 dated 21 April 2015; Italian Competition Authority, Decision dated 21 April 2015; Swedish Competition Authority Decision 596/2013 dated 15 April 2015; UK CMA investigation in to private motor insurance (PMI) market.

[6] Andreas Mundt, president of the German Bundeskartellamt, stated that "*there will be litigation around the DMA. The companies will dispute the gatekeeper designation. They will dispute the interpretation of the DMA obligations to a large extent. Of course, they will claim that the obligations in certain cases are disproportionate*". Marc van der Woude, president of the EU General Court, reiterated this statement, noting that several aspects of the DMA were open to legal challenge. *Digital Brief: DSA fourth trilogue, DMA diverging views, France's fine for Google*, EURACTIV, 1 April 2022.

The evolving landscape also makes it difficult to assess the impact on traditional competition law enforcement. It would be interesting to see if over the next few months (while the DMA is still under process of adoption) enforcement authorities will be tempted to adopt a lower evidentiary standard in their ongoing Big Tech investigations as they look to the DMA as a declaration of how certain companies ought to behave.

The merger control landscape for 'gatekeepers' will also change significantly. They will be obliged to make the Commission aware of any intended M&A where the target also provides core platform services, or services that enable the collection of digital data or other services in the digital sector. This obligation would apply whether or not the transaction triggers merger control thresholds at the EU or national level.[7] Member states can then rely on this information to request an Article 22 review by the Commission i.e. ask the Commission to undertake a full-fledged merger control assessment despite the EU or national jurisdictional thresholds not being met.

The European Commission will be able to fine 'gatekeepers' found to be violating the new rules with fines of up to 10 per cent of total worldwide turnover, and up to 20 per cent of total worldwide turnover for repeat offenders. Where a 'gatekeeper' systematically fails to comply with the DMA, i.e. it violates the rules at least three times in eight years, the European Commission will be able to open a market investigation and, if necessary, impose behavioural or structural remedies, which may also include prohibiting merger and acquisition activity for a limited period of time.

WATCH THIS SPACE

The provisional agreement reached on the DMA is now subject to approval by the European Parliament and Council before it can be adopted. Reportedly, the Council aims to submit the agreement for endorsement shortly. Once adopted, the regulation must be implemented across the EU in six months. Platforms who are designated gatekeepers will have a period of time to take any necessary action to comply with the provisions of the DMA once so designated. We will follow-up with the detail on the gatekeeper obligations and processes under the DMA once the final agreed text is published.

International divergence – CMA prohibits Cargotec / Konecranes merger

On 29 March 2022 the Competition and Markets Authority (CMA) prohibited the planned merger between Cargotec Corporation and Konecranes Plc after its in-depth Phase 2 investigation identified substantial competition concerns. The CMA's decision represents a significant divergence from the European Commission who had already approved the merger subject to conditions.

BACKGROUND

Cargotec and Konecranes are both Finnish listed companies. Cargotec offers equipment and services for cargo handling in ports, terminals and for ship and road transport worldwide, including in the UK. Similarly, Konecranes offers equipment and services for lifting and cargo handling in shipyards, ports and terminals worldwide, including in the UK. In October 2020 the companies agreed to a $5 billion merger, with the shareholders of each company holding a 50 per cent shareholding in the new merged entity.

The CMA referred the anticipated merger for an in-depth Phase 2 investigation under its fast track procedure at the parties' request on 13 July 2021. The CMA published its final report on the Phase 2 investigation on 31 March 2022.

[7] It is expected that the information will need to be provided by way of a 'mini- notification' describing the target, its activities, the transaction value, and rationale for the transaction.

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Meanwhile, on 24 February 2022 the Commission conditionally approved the merger following its own in-depth investigation. The Commission announced that the remedies offered by the parties fully addressed the competition concerns it had identified.

CMA'S FINAL REPORT

The CMA found that the merger may be expected to result in a substantial lessening of competition as a result of horizontal unilateral effects in the supply of a number of categories of container handling equipment in Europe, including in the UK. Within these markets, the CMA found that Cargotec and Konecranes compete closely for business in the UK and UK customers would have limited alternative suppliers after the merger unless sufficient remedies were provided.

The CMA also emphasised that container handling equipment plays a key role in the smooth running of UK ports, ensuring that goods safely reach British consumers and that British businesses are able to supply their customers overseas. The CMA noted that had the merger been approved without an effective remedy, port terminals and other customers of container handling equipment could have faced lower quality products and services, and also higher prices. This could have adverse knock-on effects for consumers and businesses across the UK.

Although Cargotec and Konecranes submitted that they are unable to compete against state-sponsored Chinese manufacturers, and that Chinese suppliers would be an increasing competitive threat across all markets going forward, the CMA found that this would not be sufficient to reduce the significant loss of competition from the merger of the two industry-leading suppliers, and that the parties are independently able to effectively compete against Chinese suppliers.

The parties' remedy proposal comprised two partial divestiture packages, one from each of Cargotec and Konecranes, which would be sold to a single purchaser. The CMA found that the proposal lacked important capabilities, meaning that a purchaser would not be able to compete as strongly as the merging parties. It also identified significant risks regarding the complexity of the proposed asset carve-outs, which could impair the competitive capabilities of the divested businesses. The parties declined to consider alternative remedies which would have involved the sale of one of their existing container handling equipment divisions. Consequently, the CMA concluded that the only effective remedy to address their wide-ranging concerns was to prohibit the merger.

MERGER PARTIES' RESPONSE

Following the CMA's report, the parties abandoned the merger, noting that it was in the best interest of the two companies and their respective shareholders to do so.

DIVERGENCE

In total, more than ten jurisdictions had already approved the planned merger, including the Commission and China's State Administration for Market Regulation. The deal remained subject to clearances in at least the US and Australia (where it faced opposition from the regulators) as well as New Zealand and Singapore.

The Commission had conditionally approved the planned merger on the basis of the same remedy package as rejected by the CMA. The Commission gave a conditional greenlight to the deal following multiple market tests which confirmed that the divested assets constituted viable businesses and would enable suitable buyers to compete effectively with the merged entity.

On 29 March the US Department of Justice sided with the CMA and rejected the parties' settlement proposal, noting that it amounted to the parties "*selling off the least desirable assets*" and that "*[the] department will not accept patchwork settlements that do not replace the competition that is lost by a merger*".

CONCLUSION

In a previous briefing looking back at the first 12 months of parallel Commission and CMA merger reviews, we discussed other cases in which the authorities' conclusions have diverged. We also noted that, even before

Brexit, the CMA was signalling its conceptual divergence with the Commission's approach to remedies. This case is the latest example of that divergence and shows that, even where the remedy packages offered are the same, the regulators - and the market - in each jurisdiction may reach different conclusions.

OTHER DEVELOPMENTS

ANTITRUST

EUROPEAN GENERAL COURT RULES ON AIR CARGO CARTEL DECISION

On 30 March 2022 the European General Court handed down its judgment in respect of the appeals brought by 11 airlines against a European Commission decision fining them €776m for participating in a price fixing cartel in the air cargo sector.

The Court reduced the penalties that had been imposed on Japan Airlines, Air Canada, British Airways, Cathay Pacific Airways, SAS Cargo Group and Latam Airlines as it found that either not all of the infringements were proven or some conduct was time-barred. However, the appeals by Martinair Holland, KLM, Cargolux Airlines, Air France-KLM, Air France, Lufthansa and Singapore Airlines were dismissed.

The Commission had originally fined the airlines in 2010 for participating in a cartel in relation to cargo flights to and from the EEA. This decision was annulled by the Court in 2015 due to an inconsistency between the 'grounds' of the Commission's decision and its 'operative part'. On 17 March 2017 the Commission re-adopted its infringement decision, finding that the airlines had coordinated their behaviour in respect of fuel and security surcharges and commission on those surcharges.

The airlines appealed, seeking annulment or substantial reduction in the levels of fines imposed. Their claims included that the Commission had erred in not sending a new statement of objections before the re-adopted decision, that it lacked jurisdiction in relation to EEA-inbound flights and that errors were made in the finding of a single and continuous infringement against them. Whilst most of the grounds of appeal were dismissed, the Court did reduce the fines for certain airlines.

The Court held that the Commission had failed to prove that Air Canada, British Airways, SAS Cargo Group or Latam Airlines had participated in the refusal to pay commission on the surcharges to customers. The Court also held that the Commission had not proved Latam Airlines' participation in the security surcharge element of the infringement nor its participation in the fuel surcharge element prior to 22 July 2005.

The non-European airlines also contested liability for intra-EEA and EU-Switzerland flights. Whilst the Court held that, in principle, these airlines could be liable for infringements relating to these flights, it concluded that the limitation period for imposing a fine on Japan Airlines, Cathay Pacific Airways and Latam Airlines for these routes had expired.

CMA CONSULTS ON GUIDANCE FOR NEW VERTICAL RULES

On 31 March 2022 the CMA launched a consultation on draft guidance on the application of the new Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (VABEO), which will replace the retained EU Vertical Agreements Block Exemption Regulation when it expires on 31 May 2022.

Under Chapter I of the Competition Act 1998, agreements between businesses that restrict competition in the UK are prohibited unless they fall within an exemption or exclusion (the Chapter I prohibition). One way in which an agreement may be exempt from the Chapter I prohibition is if it is captured by the VABEO. The draft guidance sets out how the CMA will apply the VABEO to vertical agreements with the intention of providing legal certainty to businesses in helping them self-assess whether their vertical agreements fall within the scope of the new exemption.

The CMA has stated that the draft guidance "*broadly reflects the guidance set out in the EU Guidelines on Vertical Restraints*" that have previously been relied upon, which will be a comfort for businesses which operate

in both the UK and the EU. However, there are divergences in certain areas such as parity obligations, dual distribution and territorial and customer restrictions to reflect the differences between the VABEO and the equivalent EU rules. The CMA has also said that some amendments have been proposed in order to take account of the differences between the UK and the EU. For further details on the amendments the VABEO will make to the existing regime see a previous newsletter edition.

The UK Government's Department of Business, Energy and Industrial Strategy (BEIS) previously launched a consultation on the proposed drafting of the VABEO in February 2022 following the CMA's recommendation to BEIS in October 2021 to adopt new vertical rules that are "*tailored to the needs of businesses operating in the UK and UK consumers*".

The CMA is inviting responses to the consultation on the VABEO guidance to be submitted by 5 May 2022.

HONG KONG COMPETITION COMMISSION MAY ISSUE ITS FIRST WARNING NOTICES IN PENDING INVESTIGATIONS

It has been reported by news service Parr that on 6 April 2022 a Hong Kong Competition Commission (HKCC) spokesperson indicated that the authority was considering issuing warning notices in some pending investigations. The HKCC has never previously issued a warning notice but, pursuant to section 82 of the Competition Ordinance (CO), the HKCC is obliged to issue them for conduct that does not constitute "*serious anti-competitive conduct*" (as defined in the CO and which generally relates to price-fixing, market allocation, output restriction and bid-rigging) but nonetheless contravenes the First Conduct Rule, before the HKCC can bring proceedings in the Competition Tribunal. Warning notices should set out the contravening conduct and the period within which the undertaking must cease such conduct.

The spokesperson also stressed that conduct not constituting serious anti-competitive conduct "*generally represent[s] a smaller proportion of the Commission's investigation portfolio*", which may explain why no warning notices have been issued so far. We have seen the HKCC employ a range of enforcement powers in recent years, including infringement notices in the Nintex case, various settlement options as evidenced by the travel services sector case and the mail inserter case, and the referral of an alleged obstruction of investigation case to the Hong Kong Police. It will be interesting to see how the HKCC uses warning notices in the future and whether they will be valuable enforcement tools.

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