COMPETITION LAW IN THE DIGITAL AGE

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BONELLIEREDE
BREDIN PRAT
DE BRAUW
HENGELER MUELLER
SLAUGHTER AND MAY
URÍA MENÉNDEZ

QUICK LINKS

DIGITAL MARKETS ACT AND DIGITAL SERVICES ACT ENTER INTO FORCE

The EU's Digital Markets Act (DMA) and Digital Services Act (DSA), which were legislated in parallel as part of a revolutionary shake-up of Europe's digital legal landscape, both come into force in November.

Digital Markets Act

The DMA will enter into force on 1 November 2022. It will regulate a small number of large "gatekeeper" undertakings. The DMA's obligations include, among other things, providing information to advertisers and publishers, giving end users effective portability of their data free of charge, and providing fair, reasonable and non-discriminatory access to business users of software application stores, search engines and social networks. It also imposes prohibitions on combining and cross-using users' personal data between their services and between third party services and their own. Search engine discriminatory rankings and the use of certain price parity clauses are also prohibited for gatekeepers.

Unless a company submits substantiated arguments to demonstrate the contrary, a company is presumed to have gatekeeper status and fall under the scope of the DMA if it:

i. provides a core platform service serving as an important gateway for business users to reach end users;

ii. has an annual turnover of at least EUR 7.5 billion within the EU in each of the past three financial years or an average market valuation of at least EUR 75 billion in the past financial year, and it provides the same core platform service in at least three Member States; and

iii. has on average a minimum of 45 million monthly end users established or located in the EU and at least 10,000 yearly business users established in the EU in each of the previous three financial years.

The DMA will become applicable on 2 May 2023. From that date, companies must self-assess their "gatekeeper" status and inform the Commission of this fact, and make any submissions as to why gatekeeper status is not merited (a rebuttal submission). The Commission must then decide on the company's gatekeeper status within 45 working days and specify which of the gatekeeper's core platform services are designated services (e.g., advertising, social networking, app stores, search engines). The gatekeepers must comply with the applicable DMA obligations within six months of this decision.

The Commission may fine a gatekeeper up to 10% of its worldwide turnover (up to 20% in cases of recidivism and in case of systematic non-compliance; the Commission may also impose a ban on M&A activity). If a gatekeeper systematically fails to comply with the DMA, the Commission can open a market investigation and, if necessary, impose behavioural or structural remedies.

Digital Services Act

The DSA will enter into force on 16 November 2022. It will be directly applicable across the EU and will begin to apply fifteen months after entry into force.

The DSA aims to harmonise rules across the EU to provide better protection of citizen's fundamental rights and decrease internet users' exposure to illegal content. Many provisions nevertheless concern operational obligations that will have a significant impact on businesses active in the digital space. These obligations principally surround digital advertising, protection against harmful and illegal online content, transparency of information and co-operation with authorities. It applies to various categories of services from intermediary services (e.g., internet access providers and domain name registrars), hosting services (e.g., cloud and webhosting services) as well as online platforms (e.g., online marketplaces and social networks).

Moreover, the DSA imposes heightened obligations on a sub-category of online platforms it calls "very large online platforms" (VLOPs). These are platforms servicing 45 million or more monthly active recipients in the EU on average which the Commission designates based on figures that online platforms must now report once every six months.

Although the bulk of the DSA's obligations will not take effect until 2024, certain reporting obligations for online platforms will apply when the DSA enters into force. In addition, VLOPs must comply with their DSA obligations within four months of the Commission's designation, even if this is before 1 January 2024.

Member States will need to enact legislation implementing the DSA and lay down the rules on penalties applicable to infringements of the DSA. For VLOPs, the Commission will have direct supervision and enforcement powers and can, in the most serious cases, impose fines of up to 6% of the global turnover.

TURNING THE TIDE – GERMANY'S COMPETITION LAW REFORM

Only 20 months after the Federal Cartel Office (FCO) was equipped with new tools to impose preventive measures against large digital platforms, Germany's next competition law reform is just around the corner. The sweeping new changes on the horizon include:

- giving the FCO remedial powers following sector inquiries;
- setting out the enforcement of the DMA in Germany; and
- new measures to facilitate skimming off the benefits stemming from a competition law infringement.

The proposal – not clearly tied to the energy crisis, but which certainly helped to gain political momentum – seeks to give competition law the **"claws and teeth"** it supposedly lacks. In line with recent trends, it deviates from a more evidence-based approach requiring an actual infringement (e.g. abuse of dominance, cartel) and gives more importance to preserving market structures in case of perceived (or feared) distortions of competition. The proposal is now in intra-government consultation and is expected to be passed before the year's end.

Sector Inquiries – a New Competition Tool for the FCO?

Leaning on the experiences of the UK Competition and Markets Authority and the European discussion around a New Competition Tool (later abandoned in favour of the DMA), the draft bill introduces a new and non-sector specific intervention mechanism. Thereunder, the FCO can impose various remedies up to 18 months after a sector inquiry has been concluded:

- Order a merger control notification for below-threshold concentrations (in case of an objectively verifiable indication that it could significantly impede effective competition in one of markets identified in the sector inquiry report).

- In case of a significant, continuous or repeated disturbance of competition, the FCO can inter alia request companies to grant access to interfaces/data, a common standard setting or to supply competitors (e.g. IP rights).

- Under strict conditions and as ultima ratio, the FCO may also breakup undertakings.

DMA enforcement

The draft bill will equip the FCO with the power to investigate possible non-compliance of designated gatekeepers with the DMA rules. However, as the European Commission is the sole authority empowered to enforce the DMA, the investigation results will be only passed on and the FCO cannot impose any sanctions of its own. Nevertheless, it can be reasonably expected that the FCO will use any, even if small, room to continue to closely monitor the digital space and (Big Tech) companies already on its radar. The draft bill also foresees relevant provisions to ensure an effective private enforcement of the DMA before German courts.

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Skimming off benefits

The draft bill also aims at a more effective disgorgement of economic benefits stemming from a competition law infringement. To do so, the FCO (i) will no longer have to prove intention or negligence of the infringement and (ii) can rely on a (rebuttable) presumption that it caused a benefit of at least 1% of all domestic sales of the products/services connected to the infringement. The total amount subject to disgorgement will however be capped at 10% of the total annual global turnover in the preceding year.

PARIS COURT OF APPEAL SLASHES RECORD FRENCH ANTITRUST FINE AGAINST APPLE

On 6 October 2022, the Paris Court of Appeal handed down its judgment on Apple's appeal from the 16 March 2020 decision by the French Competition Authority (FCA), which had fined it a record EUR 1.1 billion in respect of several anti-competitive practices related to its distribution system in France[1]. These included (i) product and customer allocation; (ii) resale price maintenance (RPM); and (iii) abuse of economic dependence of its resellers – a rarely used specificity of French commercial law.

The judgment upholds the appeal in part, overturning in particular the FCA's infringement finding on the hotly-debated topic of RPM and slashing the overall fine by two-thirds, while at the same time upholding its findings in respect of the two other alleged infringements, though for a much shorter period.

Price transparency and RPM: guilty until proven innocent?

The case raises the issue of parallel behaviour in a highly transparent market and of proof of collusion in this context. It was undisputed that there was no contractual provision relating to the imposition of a fixed minimum price by Apple. However, in a context where Apple itself was very transparent with its own retail prices (through its website and through the communication of an Apple Price List to resellers) and where many resellers applied the same prices, the chicken and egg question for the Court became: did this transparency amount to an invitation to collude, and did the fact that most of Apple's resellers did not go below Apple's prices show their acceptance, or was this alignment merely the result of market forces and, therefore, competition at work?

The Court concluded the latter. At a minimum (no pun intended), resellers interpreted Apple's prices as a maximum, above which they could not realistically go. No harm there - and reasonably understandable where customers are well informed and shop around before purchasing.

As to whether they could have charged a lower price? In theory yes: there was nothing in the contracts limiting their pricing freedom, no policing of prices by Apple, and resellers were free to manage their promotional activities. The fact that they rarely did go below Apple's prices in practice was, rather, due to their already low margins and the result of effective competition.
This serves as a reminder that, even where facts point to a suspicion of anti-competitive behaviour, the principle remains that one must be innocent until proven guilty. In the context of parallel behaviour, where alternative explanations to collusion exist, the competition authority must establish this most basic yet fundamental element of an anti-competitive agreement, i.e. the concurrence of wills.

[1] The FCA also fined Apple's two wholesale distributors in France, Tech Data and Ingram Micro, EUR 76.1 million and EUR 62.9 million respectively, who also both appealed the decision and were largely successful. These appeals are not discussed in detail in this article.

"Big" Apple

Apple's other major win on appeal relates to the way the FCA calculated the fine and, in particular, the uplift of 90% it applied for deterrence, on account of Apple's size and financial strength. Such a move was wholly unprecedented and, in its appeal, Apple noted that at EU level, even Google had only had a 30% uplift in the **Google Shopping** case. The Court agreed. The principle of proportionality applies even to the biggest of behemoths and, while maintaining the principle of an uplift to give effect to the penalty, the Court considered that on the facts, an uplift of 50% was sufficient to meet the objective of deterrence.[2]

An apple a day is not enough: managing supply shortages in Apple's distribution system

Notwithstanding these wins for Apple, the Court upheld the FCA's findings in respect of two of the three alleged infringements: both relate to Apple's allocation of volumes to its various distribution channels, in the context of frequent product shortages and competition from Apple's own direct distribution channel, online and through the Apple Retail Store.

With respect to its wholesalers, Apple was found to have engaged in both customer allocation between its wholesalers and product allocation among resellers at the downstream level, which the FCA found was both a hard-core restriction under the Vertical Guidelines and, on the facts, a by-object restriction of competition. While Apple argued that it had only recommended an order of priority for deliveries, in order to ensure that its products were distributed evenly during regular periods of shortages, the FCA and the Court found that Apple's interventions in its wholesalers' client relationships went beyond mere recommendations. Further, they found that there could be nothing "fair" nor pro-competitive about this system which continued even in the absence of shortages which were, in any event, largely of Apple's own making.

With respect to its Premium Resellers, the supply shortages which they repeatedly faced, while products were readily available through Apple's direct distribution network, was held to be discriminatory and – exceptionally - an abuse of resellers' economic dependence. For these resellers, Apple was found to be an unavoidable trading partner by virtue of its brand, the overall proportion of Apple products in their turnover (close to 80% on average), and the unavailability of viable alternatives (given in particular, the investments made by these resellers into selling Apple products, and their customers' loyalty to the brand). Importantly, this seldom-used specificity of French commercial law does not require the company to be dominant.

Two down, two to go

Having won on two fronts and lost on two, Apple has announced it will appeal the judgment to the French Supreme Court. At stake for the company in particular is the novelty of its distribution system. Damningly, the Court noted that Apple's distribution system presented many of the characteristics of a selective distribution system or of franchising (i.e. with strict criteria that resellers must adhere to and important related point-of-sale investments), without offering any of the related protections and benefits.

For others watching, the case will be of relevance far beyond the sphere of tech companies and the ongoing debate around the DMA, as it shows that vertical agreements continue to be a hot topic of competition law.

[2] The Court similarly reduced the uplifts applied to the fines on Ingram Micro and Tech Data, to 10% and 8% respectively (down from an original 60% and 50%).

LAZIO COURT OVERTURNS COMPETITION FINES IMPOSED ON AMAZON AND APPLE

On 3 October 2022, the Lazio Regional Administrative Court overturned the approx. EUR 200 million fine imposed by the Italian Competition Authority (ICA) on Amazon and Apple. The ICA had imposed the fine on the companies for allegedly restricting unauthorised resellers of Apple and Beats products from accessing Amazon.it. More precisely, the overturned fine concerned a clause in a 2018 agreement between Apple and Amazon whereby the sale of Apple and Beats products via Amazon Marketplace was reserved to Apple Premium Resellers – i.e., the category of resellers that meet the highest quality and investment standards within Apple's distribution system – in order to limit counterfeiting.

The Lazio Regional Administrative Court's decision is particularly interesting because it places the two companies' right of defence at the heart of its reasoning. Indeed, after having ordered the joinder of the appeals, the court did not examine any of the substantive arguments put forward by the parties (e.g., the vertical nature of the agreement, benefits for consumers, and the definition of the relevant market) but rather concentrated its analysis on two procedural complaints.

Breach of the limitation period for initiating proceedings

Although the court considered the 90-day limitation period not to be directly applicable, it ruled that the ICA is required to initiate preliminary investigation phases "within a reasonable time, in relation to the complexity of the case concerned, under penalty of violating the principles of legality and good performance that must always distinguish its work." The degree of reasonableness of the time taken to initiate proceedings is determined in large part by the time needed "to acquire and analyse the elements necessary to have a full and legitimate picture of the dispute."

In this case, on 22 February 2019, Digitech notified the ICA that Amazon had removed from the Italian marketplace all resellers that – despite lawfully selling Apple products – did not belong to the official programme of authorised resellers. However, the ICA did not open its investigation until 21 July 2020.

Consequently, the Lazio Regional Administrative Court held that the parties' complaint alleging breach of the limitation period for initiating proceedings was well founded and stated that the ICA "could have acquired all the information necessary to outline the basic elements of the unlawful act – and thus decide whether to initiate the subsequent investigation phase – in a much shorter time than the time that actually elapsed, during which no activities were carried out."

Infringement of the parties' right of defence due to the excessively tight time limit for concluding observations

The ICA's preliminary findings were disclosed on 30 July 2021, and the parties were given the statutory 30-day time limit to respond. The parties immediately requested an extension and were granted an additional 15 days. However, the parties were not given access to the economic data in the notice of investigation findings until 24 August 2021, when the ICA set-up a special data room. The parties were therefore unable to obtain a complete picture of the situation until after a significant part of the time limit had elapsed.

The Lazio Regional Administrative Court ruled that this constituted a clear restriction of the parties' right of defence – especially in view of the complexity of the ICA's assessment, the amount of the fine imposed, and the very long duration of the preliminary investigation and investigation phases.

DUTCH COMPETITION AUTHORITY PUBLISHES MARKET STUDY ON CLOUD SERVICES

Cloud services are essentially IT services that are offered over the internet. These services are related to hiring flexible capacity in data centres for computational power, storage and software purposes. The "pay-as-you-use" model associated with cloud services enables users to scale up or down easily. Different cloud services are offered on different layers (e.g., Infrastructure-as-a-Service "IaaS", Software-as-a-Service "SaaS", Platform-as-a-Service "PaaS"). Considering the important role played by cloud services in the Dutch economy, the Dutch Authority for Consumers and Markets (ACM) launched the first phase of its cloud services market study in May 2021, focusing on gathering technical knowledge about the market. Now after this preliminary evaluation, the ACM has completed its **market study** and highlighted some potential competition concerns which require further review.

The ACM's identifies vendor lock-in, as a potential concern. Lock-in effects can be exacerbated by limitations on data portability (i.e. the ability of users to transfer data) and interoperability (i.e. the ability of different cloud services to work together). This may have an effect on the ability of users to switch cloud service providers or to multi-cloud by combining services of different providers. Such a lock-in effect is related to technical switching barriers (interconnectedness of services, lack of data portability) and financial switching barriers (complex tariff structure and cost of taking data out of the cloud, referred to as "egress" fees). According to the ACM, a lock-in effect is at times related to limited interoperability and users may have less freedom to combine services of different cloud service providers.

On the flipside, the ACM notes that selecting one specific cloud provider with an integrated offering can result in quality and price benefits for users. The ACM mentions quality benefits resulting from a single provider's services working together optimally. Price benefits such as volume discount are equally possible. For example, certain services are provided free of charge or at a discount if multiple services are purchased. According to the ACM, the current growth in the cloud services sector coupled with the importance of securing new users greatly reduces risks to key competition parameters such as price, quality or innovation. The ACM expects cloud service providers to continue providing high-quality services at competitive prices noting that providers are presently committed to the further improvement of their product and service offering.

Another potential issue identified by the ACM relates to possible leveraging by larger, vertically integrated cloud providers who may bundle services on different layers. ACM points out that the biggest integrated cloud providers can acquire a strong position across different cloud layers, possibly by leveraging their positions in certain layers onto other layers. However, where there is effective competition at the initial tendering stage for cloud services, the integration of services may be of a lesser concern. The ACM points out that at the first moment of choice, there is usually strong competition. For example, cloud providers offer credits and free trials allowing users to familiarize with different cloud services before making a choice.

The ACM is not alone in its quest to identify perceived imperfections in the market for cloud services. This rapidly growing sector is on the radar of other regulators, as well. For instance, the French **Autorité de la concurrence** commenced its market study into cloud services in January 2022 and later launched a **public consultation** seeking input on specific practices that it intends to investigate. Across the Channel, the United Kingdom's **Office of Communications** has very recently initiated a market study examining the position of Amazon, Microsoft and Google in the UK's £15bn cloud services market. The market power of the larger market participants was also the focus of one of the first market studies of cloud services, commissioned by **Japan's competition authority**. Elsewhere, the **Korean competition authority** is assessing competition issues as part of its own market inquiry into the cloud sector.

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There are also examples of specific investigations into cloud services: for example, the European Commission is examining complaints by **NextCloud** and **OVHcloud** concerning Microsoft's cloud services offerings. Consequently, Microsoft has proposed **remedies** to alleviate concerns raised by its competitors. In the realm of merger control, the UK's CMA has stressed that Microsoft's proposed acquisition of Activision may potentially harm competition in **cloud gaming**. Previously, in September 2020, the Italian Competition Authority ("AGCM") **announced** investigations against three of the leading cloud computing service providers, namely, Google (for Google Drive service), Apple (for iCloud service) and Dropbox.

Traditional competition enforcement in the market for cloud services will soon be complemented by the DMA and the proposed EU Data Act. Cloud computing services are categorized as a core platform service under the DMA and designated gatekeepers cannot impair effective end-user data portability or restrict the ability of end users to switch. Other than the DMA, the draft EU Data Act also provides for data portability obligations. Nonetheless, the ACM has proposed **amendments** to the Data Act explicitly requiring cloud providers to also make interoperability possible. 'The Digital Economy' is clearly on the ACM's agenda and business users should further take note of the ACM's **draft guidelines** regarding rules for online platforms and search engines in connection with the EU Platform to Business regulation.

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