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QUICK LINKS

Main Article
Other Developments
Antitrust
General competition

European Commission designates Booking as a gatekeeper under DMA and opens market investigation into X

Introduction

On 13 May 2024, the European Commission announced that it has designated Booking as a gatekeeper under the Digital Markets Act (DMA), for its online intermediation service Booking.com.

The Commission also announced that it has opened a market investigation to assess whether X should be designated as a gatekeeper. These decisions follow a review process conducted by the Commission after receiving notifications from the companies earlier this year.

Background

Under Article 3(3) of the DMA, undertakings providing "core platform services" that meet certain thresholds set out in Article 3(2) are required to notify the Commission within two months of those thresholds being met. Companies which exceed the thresholds in Article 3(2) can nevertheless present arguments to the Commission as to why they should not be designated as gatekeepers.

Booking, ByteDance and X notified their potential gatekeeper status to the Commission on 1 March 2024, triggering the 45 working day timeline for the Commission to decide whether to designate the companies as gatekeepers, as well as to assess any arguments put forward by the companies to rebut the presumption that they should be designated as gatekeepers.

Booking designated as gatekeeper

On 13 May 2024, the Commission announced that it has established that Booking's online intermediation service Booking.com is a core platform service which constitutes an important gateway between businesses and consumers. It has therefore designated Booking as a gatekeeper.

Certain obligations under the DMA now apply to Booking with immediate effect, such as the obligation to inform the Commission of any intended concentration in the digital sector. Booking has six months to comply with the other relevant obligations under the DMA, and to submit a detailed compliance report outlining how it will do so.

Booking is the seventh gatekeeper to be designated under the DMA. It joins Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft, who were designated as gatekeepers on 6 September 2023 in respect of 22 core platform services (as reported in a previous edition of this newsletter).

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Main Article
Other Developments
Antitrust
General competition

Market investigation into X

Along with notifications of their potential gatekeeper status, on 1 March 2024 X and ByteDance submitted rebuttals in respect of X, X Ads and TikTok Ads, explaining why they do not consider they should be designated as gatekeepers.

The Commission decided that, although X Ads and TikTok Ads meet the quantitative thresholds for designation, they do not qualify as an important gateway – the Commission has therefore decided not to designate them as gatekeepers.

In respect of online social networking service X, the Commission has opened a market investigation to further assess the rebuttal – this investigation should be completed within five months. The Commission has previously conducted such market investigations in respect of Apple's iMessage and Microsoft's Bing, Edge and Microsoft Advertising, ultimately finding that Apple and Microsoft should not be designated as gatekeepers in respect of these services (as reported in a previous edition of this newsletter). A market investigation to assess whether Apple's iPadOS should be designated as a gatekeeper despite not meeting the quantitative thresholds is ongoing.

Conclusion

The full impact of the DMA remains to be seen. Many will be following with interest how the – now seven – gatekeepers comply with their obligations, in particular given the significant financial consequences of non-compliance. Non-compliance investigations into a number of the designated gatekeepers are currently ongoing.

OTHER DEVELOPMENTS

ANTITRUST

European Commission publishes competition policy brief on labour markets

The European Commission this month published a policy brief focusing on how labour market agreements should be dealt with under European competition law.

The brief explains that enforcement against restrictive labour market agreements has become a priority for many competition authorities around the world, with two forms of restrictive agreement being the focus of the brief – wage-fixing and no-poach agreements. Wage-fixing occurs where "*employers agree to fix wages or other types of compensation or benefits*"; whereas under no-poach agreements, "*employers agree not to 'steal' employees from each other*", which includes "no hire" agreements (employers agreeing not to hire the counterparty's employees) and "non-solicit" agreements (where employers agree not to approach the counterparty's employees actively with job opportunities). The brief notes that the Commission is investigating such cases and has recently carried out unannounced inspections in the online delivery sector relating to a suspected no-poach agreement.

The brief discusses the economic harm caused by these two types of agreements. According to the brief, wage-fixing agreements allow employers to profit from setting wages equal to the "*monopsony wage level via a reduction of labour demand, with the side effect of reducing output and increasing downstream prices to the detriment of consumers*". As regards no-poach agreements, the brief indicates that the detrimental effects include reduced labour market dynamism with resulting negative effects on employee compensation, firm productivity and innovation. Such agreements have been found to reduce wages as firms are no longer incentivised to offer higher salaries to incentivise employees. They also preclude the "*efficient allocation of productive employees to productive firms*".

The brief concludes that both wage-fixing and no-poach agreements generally qualify as "*restrictions of competition by object*" under Article 101(1) of the TFEU (by way of purchase price fixing and supply market sharing). In its analysis, the brief first discusses the applicable principles in case law, and then looks at how these may be applied to a particular set of facts – indicating that even if the restriction has legitimate commercial objectives, this will likely not exclude it from qualifying as a restriction by object. The brief then looks at labour market agreements through the lens of ancillary restraints, explaining that although such agreements are unlikely to be deemed ancillary restraints, there may be some scenarios in which the relevant criteria (such as

Main Article
Other Developments
Antitrust
General competition

showing that no less restrictive means of achieving the same objective is available and that the restriction is limited in scope) can be met. With regards to the exemption under Article 101(3), the brief makes clear that it would be difficult to argue that wage-fixing and no-poach agreements may have pro-competitive effects, although the brief left room for the argument that no-poach agreements may occasionally solve an "investment hold-up" problem (where parties risk losing the investment they made in training their employees, due to these employees later being poached by a competitor).

The publication of the brief signals that the Commission is continuing to step up its enforcement of anti-competitive agreements in labour markets and will coordinate with national competition authorities within the European Competition Network to ensure a consistent enforcement approach is adopted.

SAMR issues new rules against unfair competition in cyberspace

On 11 May 2024, China's State Administration for Market Regulation (SAMR) issued the Interim Provisions Against Unfair Competition in Cyberspace, which are set to take effect on 1 September 2024. The Interim Provisions supplement the Anti-Unfair Competition Law by offering specific guidance on the applicability of the existing legal framework in the digital sector, with the aim of addressing the regulatory challenges that are unique to this highly dynamic sector.

The Interim Provisions set out a list of prohibited commercial tactics that have been quite common in Chinese e-commerce in recent years. For instance, "passing off" through the use of another business's logo search keywords (e.g. to mislead customers into believing the product is associated with that business) is expressly prohibited. Personalised pricing is another prohibited conduct, where online businesses leverage consumer data (e.g. browsing history, purchasing behaviour, smartphone model) to determine a consumer's willingness to pay and adjust prices accordingly, which echoes SAMR's recent consumer protection efforts to prohibit similar conduct (for details, see our previous newsletter here).

Another notable feature of the Interim Provisions is the introduction of the concept of "platform operators with competitive advantages", which refers to "*advantages in a platform's data (e.g. transaction data, traffic data) or management rules*". For the first time, Chinese regulators are seeking to address self-preferencing concerns in the digital space by prohibiting platform operators from abusing such "competitive advantage" to the disadvantage of third parties (e.g. by interfering with the display order of a third party's products on the platform). It remains to be seen how the authorities will define "platform operators with competitive advantages" and the scope of this restriction in practice.

Violations of the Interim Provisions can lead to liability for a criminal and/or administrative penalty in accordance with the Anti-Unfair Competition Law, E-Commerce Law or Advertising Law, which may include fines of up to RMB 3 million (around £327,000) or 5 times the illegal gain for certain types of infringement. Unfair competition activities in cyberspace may also be investigated and penalised under the Anti-Monopoly Law. Companies with online businesses in China should therefore keep abreast of these new regulations and evaluate their e-commerce practices to ensure compliance accordingly.

GENERAL COMPETITION

Vodafone/Three wins conditional UK national security approval

In a Final Order released by the UK government pursuant to section 26 of the National Security and Investment Act 2021 (NSIA), Vodafone UK and Three UK's proposed merger has conditionally been granted national security clearance.

The telecoms deal, announced in June 2023, will result in Vodafone holding 51% of the merged entity with Three UK's owner, Hong Kong-based CK Hutchison, owning the remaining 49%. The NSIA regime allows the government to monitor and regulate foreign investment into critical sections of the UK economy (including critical telecoms infrastructure) with the purpose of safeguarding the UK's national security interests.

The Cabinet Office imposed security conditions to approve the deal including that the companies set up a National Security Committee with the task of overseeing potentially sensitive issues which could relate to the

Main Article
Other Developments
Antitrust
General competition

UK's national security. The merged entity must also establish a technical group within the aforementioned committee to monitor a specified list of topics relating to "*cyber, physical and personnel security*". It will be tasked to provide regular updates to the government on these issues. Further conditions stipulate that the merged entity's network migration planning will be subject to review by an independent, external and government-approved auditor – and that there will be special arrangements put in place for the governance of the merged entity.

According to the announcement by the Secretary of State, these measures mitigate any risk to national security in relation to Vodafone's role as a strategic supplier of services to many parts of government. These measures will ensure the security of UK networks and data, including cyber, personnel and physical security, resulting from the process of merging two large, complex organisations and their respective staffing, policies, processes and networks.

The proposed merger is currently still under competition review by the UK Competition and Markets Authority (CMA). On 4 April 2024, the CMA confirmed the launch of a Phase 2 investigation into the proposed transaction.

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