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DAWN OF A NEW ERA FOR DIGITAL? THE COMMISSION'S DIGITAL MARKETS ACT PROPOSAL

Digital – Part of the Horizon Scanning series

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Wrapping up a busy 2020, on 15 December the European Commission (**Commission**) tabled its proposed new rules for digital gatekeepers (the Digital Markets Act, or **DMA**) before the European Parliament. The DMA will operate alongside a Digital Services Act (**DSA**) (also published in draft on 15 December). The DSA will focus on regulating platform content and enhancing platform transparency and accountability. Speaking at a conference in Brussels in December 2020, Commissioner Vestager said that "*the two proposals serve one purpose: to make sure that we, as users, have access to a wide choice of safe products and services online. And that businesses operating in Europe can freely and fairly compete online just as they do offline.*"

These proposals follow the Commission's consultations in June last year (which we wrote about here). Over 3,000 responses were submitted as part of the consultations from a wide range of stakeholders[1] and not all reactions were positive. In particular, there have been varying levels of support from Member States,[2] and the Regulatory Scrutiny Board[3] voiced concerns about how the Commission's proposed market investigation tool would apply. It also noted the need for a high evidential bar in establishing gatekeepers' alleged misuse of market power. Consequently, the Commission's proposal has shifted noticeably since June.

The DMA follows hard on the heels of the Digital Markets Taskforce's (**UK Taskforce**) recommendations for gatekeeper regulation in the UK. While both proposals can be expected to change over the coming months following further consultation, it is interesting that the regulators have taken different approaches to achieve similar objectives.

What's in a name? How to identify a 'gatekeeper'

The DMA will apply to 'core platform services' that the Commission designates as gatekeepers.

'Core platform services' will include (a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communication services; (f) operating systems; (g) cloud computing services; and (h) advertising services, including advertising networks, exchanges and intermediation services. While defining an exhaustive list of platforms could be viewed as short-sighted in fast-moving digital markets, the Commission will be able to investigate from time to time whether this list ought to be extended. Companies can take comfort that this approach provides certainty about whether their activities are in scope, and that the new DMA obligations will only apply to 'core platform'

[1] These included Facebook, Google, Airbnb, Tripadvisor, Deutsche Telekom, Adobe, eBay, Verizon Media, SKY, Booking.com, as well as the BBC, the Body of European Regulators for Electronic Communications (BEREC), the Office of the High Commissioner for Human Rights (OHCHR), and the Computer & Communications Industry Association (CCIA).

[2] France, the Netherlands, Poland and Denmark advocated for further regulation of digital platforms, noting the importance of an *ex ante* instrument and the need to address the spread of harmful content and disinformation. While Germany expressed its support for the introduction of new rules, it did not favour powers to order structural remedies. Similarly, Ireland welcomed the development of a DSA package, but did not support the introduction of blacklisted practices. In contrast to other Member States, the Spanish competition authority cautioned against the risk of over-regulation. Some political groups within the European Parliament, such as the Greens/EFA, considered that the proposed measures "*fall short of expectations*" because they fail to address interoperability sufficiently.

[3] This is an independent body within the Commission that advises the College of Commissioners.

activities rather than the whole firm (unless otherwise specified).

The Commission will designate a 'core platform service' a gatekeeper if it meets the following cumulative thresholds:

- **It has a significant market impact**: This will be presumed if the company has: (i) EEA turnover of at least €6.5 billion in the last three financial years (or a market capitalisation or equivalent fair market value of at least €65 billion in the last financial year); and (ii) provides a core platform service in at least three Member States;
- **It serves as "*an important gateway for business users to reach their customers*"**: This will be presumed if a company operates a platform with more than 45 million monthly active end users established/located in the EU; and has more than 10,000 yearly active business users established in the EU in the last financial year; and
- **It will "*enjoy, or will foreseeably enjoy, an entrenched and durable position*"**: This will be presumed if the company meets the previous two criteria in each of the last three financial years.

A 'core platform service' is not necessarily in the clear, however, even if it falls below these quantitative thresholds as the Commission can still do a qualitative assessment to determine if a firm is acting as a gatekeeper. Conversely, firms that meet the thresholds can present arguments to show that a more detailed investigation is required before designation as a gatekeeper. As part of this assessment, the Commission will consider factors such as pricing, service quality, scale economies, network effects and elements indicating potential market tipping.

The UK Taskforce's recommendations similarly apply to a subset of digital platforms that will be designated as having "strategic market status" (or **SMS**) (a concept similar to gatekeepers). Detailed criteria for assessing SMS have yet to be published, but the Digital Markets Unit (which will enforce the new regime in the UK) will be tasked with assessing whether platforms have "entrenched market power". The UK Taskforce recommends review of a firm's "SMS" status only every five years (a long time in digital markets) – while the Commission will reassess gatekeeper status more often (every two years).

New 'dos' and 'don'ts' for digital gatekeepers

The DMA establishes new obligations for digital gatekeeper platforms – some of these require the gatekeeper to refrain from conduct, while others impose proactive obligations. In particular, the new rules cover practices traditionally regulated by competition law such as:

- exclusivity (gatekeepers must refrain from requiring businesses to provide their services exclusively through the gatekeeper's core platform); and
- tying (gatekeepers must not require business users to subscribe with one core platform service as a condition to accessing another core platform service).

They also cover concerns falling outside of traditional competition law, such as self-favouring (gatekeepers ranking their own products more favourably than similar third-party services), data collection and transparency. For example, gatekeepers will now need to:

- Refrain from combining users' personal data collected on a core platform with personal data collected through "ancillary" services operated by the gatekeeper, unless the user has consented as required by the GDPR;
- Be transparent about the prices paid by publishers and advertisers for a given ad;
- Provide publishers and advertisers with access to data to allow them to verify their performance, including access to query, click and view data;
- Facilitate data portability across services.

Given the open-ended way in which they are drafted, it is likely to prove difficult – at least initially - for gatekeepers to assess whether their practices fall within the scope of these principles. For some rules, however, the DMA makes provision for these to be "further specified", allowing some degree of dialogue with the gatekeeper in order to clarify how to comply.

The DMA proposal bears some resemblance to the UK Taskforce's proposed UK Code of Conduct for SMS firms (the Code will regulate conduct necessary to achieve fair trading, open choices, and trust and transparency). A key difference, however, is that the DMA seems to contemplate standardised rules while the UK Taskforce recommends bespoke rules and guidance tailored to each gatekeeper (although these will sit under standardised high level principles).

You are a gatekeeper – now what?

Once the rules come into force, **gatekeepers will need to self-assess whether they are likely to fall in-scope.** The DMA puts the obligation on firms to notify the Commission within three months if they meet the financial thresholds. After a short investigation, the Commission will then issue a decision.

It would therefore be prudent for firms likely to be designated gatekeepers to start considering now how the new rules might impact their business practices. This will make it easier to achieve compliance once the rules do come into force (companies will have six months to comply after being designated a gatekeeper).

Similar to the existing antitrust regime, the Commission will be able to launch investigations into compliance with the rules (e.g. request information and data and conduct on-site inspections). The Commission will also have **fining powers** (fines could be up to 10% of global revenues) and, particularly where there is systematic infringement, be able to **impose additional measures**, including structural remedies.

Far-reaching remedy powers – such as an order to unwind a product decision, or divest part of a business – can have severe financial consequences. These measures can be imposed without a full antitrust investigation and evidenced-based finding so this aspect of the proposal is likely to attract push-back. It will also be important to have sufficient procedural safeguards so that firms can challenge the Commission's findings and proposed measures.[4] Interestingly, this aspect of the DMA proposal diverges from the UK Taskforce approach: the UK Taskforce recommends that financial sanctions are a measure of last resort and the new UK digital regulator should focus first on working with the firm to fix the issue, before resorting to punitive measures.

The DMA will also impact mergers for gatekeepers. Going forward, gatekeepers will have an obligation to inform the Commission of all acquisitions in the digital sector prior to their implementation, regardless of whether the acquisition is notifiable under the EU merger control rules. While this broadens the Commission's monitoring powers,[5] it does not signal a change to the EU merger rules, since this obligation falls short of a full merger notification[6] and the DMA does not currently give the Commission power to 'call in' transactions that are not strictly notifiable.[7]

What about the New Competition Tool?

The Commission's initial DSA proposal included a new market investigation tool for the Commission, with the ability to impose tailor-made remedies where necessary. Due to the number of negative

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[4] Firms under investigation will have the right to respond with comments or objections to any preliminary findings of the Commission and will be given access to the Commission's file. As with other similar decisions of the Commission, the Court of Justice will have unlimited jurisdiction to review any fines or penalties imposed by the Commission.

[5] In this context, it is also notable that within six months of being designated a gatekeeper, an independently audited report has to be submitted to the Commission, describing any techniques for profiling users across the relevant core platform services. This report will have to be updated at least annually.

[6] The 'notification' shall describe the target's EEA and worldwide turnover and, for any relevant core platform services, the respective EEA annual turnover, the number of yearly active business users and the number of monthly active users, as well as the rationale for the intended acquisition.

[7] The Commission's approach contrasts with the UK Taskforce's proposal to apply a lower standard of proof when assessing whether mergers involving SMS firms substantially lessen competition in order to respond to the risks of under-enforcement.

responses,[8] the Commission has, for now, abandoned this proposal. But there could be scope for the Commission to use new market investigation powers under the DMA to achieve similar scrutiny and remedies. The DMA envisages that the Commission can carry out a market investigation to: (i) designate a gatekeeper; (ii) investigate systematic non-compliance with DMA obligations (see above); or (iii) assess if new platform services should be in-scope of the gatekeeper designation.

What will happen next?

A key question to be considered over the coming months is whether the DMA strikes the right balance between addressing concerns about online platforms' market power, and enabling continued growth and innovation in digital markets. For example, the DMA proposals introduce a higher standard for certain conduct regulated in parallel under the antitrust regime - tying, for instance, traditionally requires an effects analysis to establish an infringement but under the new rules, this type of conduct is effectively *per se* prohibited regardless of potential to foreclose rivals or any related efficiencies. If far-reaching structural and behavioural remedy powers are enacted, the Commission will need to be careful not to cross the line from implementing regulation into dictating market outcomes.

The DMA proposal will be debated and likely amended by the EU co-legislators, the European Parliament and the Council, over the next 18-24 months. Given the scope of the issues that the DMA seeks to address, the draft is expected to attract a large number of comments and questions. Consequently, similarly to the Platform-to-Business regulation (which also generated significant political and public debate), the DMA that is finally brought into effect may look substantially different (and less onerous) than the proposal now on the table – so stay tuned for further developments.

[8] Around a third of the relevant respondents did not see a need for a New Competition Tool to deal with structural competition problems.

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