

COMPETITION & REGULATORY NEWSLETTER

QUICK LINKS

[Main Article](#)

[Other Developments](#)

[Merger control](#)

[Antitrust](#)

[General competition](#)

Digital Markets Act: European Commission publishes first annual report, as deadline for gatekeeper compliance arrives

On 6 March 2024, the European Commission submitted its first annual report on the Digital Markets Act (DMA) to the Council of the European Union and the European Parliament. [The report](#) was published the day before those designated as gatekeepers were required to comply fully with their obligations under the Act. It sets out the progress made towards achieving the DMA's objectives during 2023.¹

The Commission's activities in 2023

The report starts by noting that in April 2023 the Commission adopted the Implementing Regulation, which sets out the detailed arrangements for the practical aspects of the DMA, including (amongst other things) the form and content of notifications and submissions, time limits, and the exercise of the right to be heard. According to the report, the Implementing Regulation draws on procedures used in competition law enforcement, but also includes "*novel elements to ensure a leaner and more effective procedure given the dynamic nature of digital markets*" - in particular, a leaner procedure for access to file, which the Commission considers nevertheless "*ensur[es] legal certainty and rights of defence for the companies concerned*".

The report also summarises the Commission's 2023 activities with respect to designation decisions. 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 that they meet those thresholds. The Commission therefore received notifications on 3 July 2023 from Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft and Samsung. On 5 September 2023 it announced that it had designated Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft as gatekeepers in respect of 22 'core platform services' (as reported in a [previous edition](#) of this newsletter).

As noted in the annual report, companies exceeding the thresholds set out in Article 3(2) could nevertheless present arguments as to why they should not be designated as gatekeepers. The Commission received 10 such rebuttals in its first wave of notifications, of which three were rejected (those relating to ByteDance's TikTok and Meta's Messenger and Marketplace), three were accepted outright (relating to Alphabet's Gmail, Microsoft's Outlook and Samsung's Samsung Internet Browser), and four were sufficiently substantiated for the Commission to open market investigations to consider the companies' arguments further (those relating to Apple's iMessage and Microsoft's Bing, Edge and Microsoft Advertising). The outcome of those market investigations is not covered in the

¹ Since the annual report covers the calendar year 2023, it does not cover developments since then such as the Commission's closing of market investigations into iMessage, Bing, Edge and Microsoft Advertising in February 2024 (as reported in a [previous edition](#) of this newsletter).

For further information on any EU or UK Competition related matter, please contact the [Competition Group](#) or your usual Slaughter and May contact.

Square de Meeûs 40
1000 Brussels
Belgium
T: +32 (0)2 737 94 00

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

[Main Article](#)[Other Developments](#)[Merger control](#)[Antitrust](#)[General competition](#)

report since it falls outside the period covered by the report. As reported in a [previous edition](#) of this newsletter, the Commission closed all four market investigations in February 2024, finding that Apple and Microsoft should not be designated as gatekeepers for Apple's iMessage and Microsoft's Bing, Edge and Microsoft Advertising.

Monitoring

While gatekeepers have only been required to comply with the majority of the obligations under the DMA since 7 March 2024 (such that the Commission has not monitored compliance with those obligations for this first annual report), certain obligations kicked in immediately on designation - namely, the requirement to report certain concentrations and the requirement to set up a compliance function.

In respect of the transaction reporting requirement, the report notes that in 2023 the Commission received three submissions of intended transactions, in September, October and December 2023.

As for the establishment of compliance functions, the report notes that the Commission has been monitoring the progress of each gatekeeper in this regard, to ensure they meet the necessary requirements. After discussions with and guidance from the Commission, all designated gatekeepers have appointed compliance officers. The gatekeepers have now published their DMA compliance reports (such deadline being 7 March 2024) as required under Article 11 of the DMA. Since the publication of these reports, the Commission has launched DMA enforcement workshops discussing the gatekeepers' compliance with the DMA and providing interested parties with the opportunity to ask for clarifications and provide feedback on the proposed compliance solutions. These workshops are set to take place throughout March 2024.

Cooperation with national competition authorities

The report recalls that the DMA envisages close cooperation and coordination between the Commission and Member States, to "*ensure coherent, effective and complementary enforcement*" of the rules to which gatekeepers are subject. It notes that, to date, such cooperation has largely taken place through the European Competition Network - with the Commission providing updates to the national competition authorities (NCAs) on its designation decisions and market investigations, and NCAs providing information and exchanging views with the Commission on relevant enforcement actions under their national competition laws. During 2023, no NCA informed the Commission of first formal investigative measures or an intention to launch an investigation into any designated gatekeeper under national competition laws. However, one NCA informed the Commission of draft measures it intends to impose on a designated gatekeeper based on national competition law.

Conclusion

While the report provides an initial overview of the measures the Commission has taken to implement the DMA, including designating those who will be subject to it, all eyes are on the year ahead as the gatekeepers begin to navigate the requirements imposed upon them. Moreover, the list of companies subject to the requirements is set to expand, with the Commission having received notifications from Booking, ByteDance and X on 1 March 2024, as reported in a recent [press release](#).

OTHER DEVELOPMENTS

MERGER CONTROL

CMA clears Arçelik / Whirlpool

On 7 March 2024, the UK's Competition and Markets Authority (CMA) [cleared](#) the proposed joint venture between the EMEA business of Whirlpool and the European business of Arçelik. Arçelik and Whirlpool are two of the largest suppliers of major domestic appliances (MDAs) in the UK. Their products are similar in terms of price and functionality. Arçelik operates in the UK under the Beko, Blomberg and Grundig brands. Whirlpool supplies MDAs under the brands Indesit and Hotpoint.

[Main Article](#)[Other Developments](#)[Merger control](#)[Antitrust](#)[General competition](#)

During a Phase 1 investigation, the CMA identified competition concerns as a result of horizontal, unilateral effects in the supply of washing machines, tumble dryers, dishwashers, cookers, ovens and hobs in the UK. The CMA announced its intention to refer the case for a Phase 2 investigation on 11 October 2023. In February of this year, the CMA published its provisional findings, which indicated that consumers would continue to have a wide range of choices following the transaction and that the merger would not be expected to result in a substantial lessening of competition in the UK MDA market.

In its [final report](#), the CMA largely confirmed its provisional findings. The CMA stated that although both Arçelik and Whirlpool have strong market positions, they will continue to face significant competition from a range of other MDA suppliers (including Bosch, Neff, Hoover, Candy, Samsung and LG) and private label brands. The CMA found that Whirlpool's MDA market position has significantly declined over the past decade while the positions of other suppliers (including Haier Group, Hisense) are likely to expand.

The European Commission [approved](#) the proposed transaction after a Phase 1 investigation in October 2023.

ANTITRUST

Qualcomm recovers legal costs from European Commission after win at General Court

In an [order](#) issued on 29 February 2024, the EU General Court (GC) awarded Qualcomm €785,857 in costs to be reimbursed by the European Commission.

In 2018, Qualcomm was [fined](#) over €997 million - 4.9% of its annual turnover the preceding year - for abusing its market dominance by engaging in predatory pricing of chipsets. Qualcomm lodged an appeal to the GC, which [annulled](#) the decision in its entirety and ordered the Commission to pay the costs incurred by Qualcomm. Qualcomm subsequently filed another case to recover the costs incurred for the GC proceedings.

The sum awarded to Qualcomm by the GC is less than 10% of the €12,041,775 originally claimed, comprising €12,017,848 in fees for legal and economic advisory services and €23,907 in disbursements for attending a three-day hearing in Luxembourg.

In determining the amount to be awarded, the GC noted that some of the costs claimed stemmed from US proceedings and not those in Luxembourg. The GC stated that invoices relating to legal fees had been heavily redacted and it was not therefore able to determine what tasks had been performed. The Court found the number of hours invoiced for certain services provided and some of the hourly rates applied to be "*manifestly excessive*".

GENERAL COMPETITION

Revamp of Anti-Unfair Competition Law on 2024 agenda of China's top legislature

China's top legislature has included in its work plan for 2024 a revamp of the Anti-Unfair Competition Law (AUCL), according to the [annual work report](#) of the Standing Committee of the National People's Congress, which was released on 9 March.

Since it came into effect in 1993, the AUCL has undergone a comprehensive revision in 2017 and some further subsequent modifications in 2019. At the end of 2022, a revised draft was published for public consultation. The revised draft significantly broadens the scope of the AUCL and includes 15 new provisions, which aim to:

- Refine and introduce new measures to address unfair competition in the digital economy, focusing on regulating the acquisition and use of data and the use of algorithms and technology for unfair competition;
- Introduce new types of unfair competition such as acts that harm fair trade, malicious transactions, inappropriately influencing user choice or misleading users through false promotion; and
- Adjust the legal liabilities of unfair competitors (e.g. trade secrets infringement, commercial defamation and online unfair competition practices etc.).

[Main Article](#)

[Other Developments](#)

[Merger control](#)

[Antitrust](#)

[General competition](#)

The proposed changes signify China's proactive approach to modernising and strengthening regulation to keep up with changing business practices, particularly in the digital economy.

London

T +44 (0)20 7600 1200

F +44 (0)20 7090 5000

Brussels

T +32 (0)2 737 94 00

F +32 (0)2 737 94 01

Hong Kong

T +852 2521 0551

F +852 2845 2125

Beijing

T +86 10 5965 0600

F +86 10 5965 0650

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For further information, please speak to your usual Slaughter and May contact.

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