

A WHOLE NEW WORLD? THE EUROPEAN COMMISSION'S PROPOSED FRAMEWORK FOR THE MODERN ECONOMY

RECENT DEVELOPMENTS

The European Commission is consulting on new rules to update competition law for the modern economy. For digital platforms this could mean new safety rules for online goods and content as well as ex ante regulation targeting “very large” platforms acting as market “gatekeepers”. This will be complemented by a new market investigation tool, with potential application to digital and non-digital markets. We take a look at the impact of these measures, and the issues the Commission will need to consider as it refines the proposals. Companies have until 8 September to make comments on the proposals.

While the world is still picking itself up from COVID-19, Brussels is steaming ahead with new regulatory proposals. If implemented, these proposals will significantly expand the European Commission's (Commission) existing antitrust toolbox. These measures are part of the Commission's initiative to ensure competition law and enforcement powers are fit for the modern economy.

New measures for the modern economy

Earlier this year the Commission announced its intention to introduce the Digital Services Act (DSA) in late 2020. After months of speculation, the Commission has now unveiled its plans. The Commission has launched two parallel consultations on proposed measures for the DSA package, namely:

- **new rules** to clarify the responsibilities of all online platforms; and
- an additional **ex ante regulatory framework** for large online platforms that are market “gatekeepers”.

The Commission has also **proposed a new competition tool (NCT)** that will give the Commission increased powers to intervene directly in digital and other markets. This has clear parallels to the market investigation powers of the UK Competition and Markets Authority (CMA).

Clarifying the responsibilities of online platforms

In response to growing concerns about online sales of counterfeit or illegal goods and services, the dissemination of illegal content and the propagation of disinformation, the Commission plans to review whether the **eCommerce Directive** (introduced in 2000) can tackle these challenges effectively. The Commission is also contemplating additional measures to protect the online safety of EU citizens. These range from procedural obligations and clarification of platforms' content responsibilities to more comprehensive interventions, such as new liability and safety rules; new obligations around transparency and reporting; and mechanisms to flag illegal content.

An ex ante framework for “very large online platforms acting as gatekeepers”

While the new online platform rules will apply to companies of all sizes, the Commission proposes an additional set of rules that will only apply to “very large” online platforms that act as market “gatekeepers”.¹

The Commission proposes rules to “blacklist” certain practices (such as self-preferencing, or unfair contractual provisions) for large platforms. This new framework could be introduced through revisions to the Platform-to-Business regulation, or through a completely new regulatory framework, that would also give regulators powers to impose tailor-made remedies (e.g. regarding data portability).²

Currently, the Commission is considering options ranging from increased use of sector inquiries and enhanced information gathering powers; to new tools that would allow the imposition of behavioural and structural remedies, including where the conduct at issue would not constitute an infringement under European competition law.

¹ The Commission has expressed concerns that the new Platform-to-Business regulations (that will come into force on 12 July 2020) do not go far enough to regulate these platforms.

² Another option being considered is increased information gathering powers for regulators as regards “gatekeeper” platforms.

The Commission is consulting on whether the tool should have market-wide application, or focus on dominant companies. The Commission is also consulting on the scope of the tool.³

Fit for purpose? What the new measures could mean in practice.

Given the broad scope proposed, the DSA measures may impact all online businesses, large and small. In addition, the NCT may not be limited to digital markets. But what could these new rules mean in practice?

A crackdown on illegal goods, services and content

The Commission envisages that this framework would apply to all online platforms, with or without market power. This seems a step in the right direction. Harmful content, such as hate speech, or sale of counterfeit goods negatively affect consumers and business users, regardless of whether or not the platform in question has market power. It is also hoped this will harmonise the current disparate national regulation of these issues.

These positive developments seem likely to be accompanied, however, by a raft of new, and potentially onerous, compliance requirements for companies with an online presence. For example, independent audits may be required to ensure accountability of algorithmic systems that recommend content. As the Commission refines its proposals, it will be important for it to clearly define the scope of these obligations to ensure that their costs do not outweigh their benefits.

Restrictions on “gatekeeper” platforms’ business practices

The Commission’s proposal for a regulatory framework targeted at “gatekeeper” platforms is not surprising – digital platforms with market power are being scrutinised around the world. However, the current proposal raises several important questions that will need to be resolved to avoid causing more uncertainty when these rules come into force.

First, the Commission does not indicate how it is proposing to identify those platforms that are in-scope of the new framework. This will need to be based on clear and objective criteria and it is not obvious how this would be achieved under the current proposal. For its new ex ante framework, the Commission plans to establish criteria to identify in-scope platforms (e.g. strong network effects).⁴ In practice, however, such an assessment would be difficult and would first

require a detailed investigation of the market. The proposals also make no provision for this designation to be kept under review – an important omission given the fast-moving nature of digital markets.

Second, the Commission proposes to introduce a set of “blacklisted” practices through broad principle-based rules, as well as more specific rules targeted at certain platforms. Both have potential downsides. While a principle-based approach is less invasive to companies’ internal decision-making, if unclear or vague, these rules could inhibit legitimate business practices. At the other end of the spectrum, detailed rules not only usurp a company’s strategic decision-making autonomy, but also risk becoming obsolete quickly.

In both cases, a key risk is that these rules create *per se* infringements for conduct that requires an effects analysis under European competition law, without the rigour of an investigation and evidence-based analysis.

Increased scope for regulatory intervention

The proposed framework for “gatekeeper” platforms includes powers to impose tailor-made remedies “*where considered necessary and justified following prior assessment*”. Similarly, the NCT will allow the Commission to require behavioural and structural changes to a market, even where there is no proven wrong-doing. The contemplated remedies range from non-personal data obligations to interoperability requirements. This is a significant shift in approach, giving the Commission powers more akin to those of a regulator than an enforcement agency.

In the case of the NCT, the impact of this is exacerbated by its broad scope. Although most companies now have some digital presence, the Commission’s proposal explicitly also applies to non-digital markets. This means that concentrated industries, such as airlines or telecommunications, may also end up in the spotlight.

Important questions remain about appropriate safeguards to ensure that the new powers are compatible with the broader EU legal framework, including companies’ rights of defence and burden of proof. As the NCT seems to be inspired by the UK model, the Commission will need to ensure that there is similar oversight and guidance for its new framework, as currently exists around the CMA’s investigation powers.

Conclusion

These measures are significant, as they mark a departure from traditional evidence-based

³ Namely whether this should be horizontal (allowing the Commission to intervene in any market where it identifies potential competition concerns) or limited to only those sectors where structural risks are most prevalent.

⁴ Alternately, if the new “gatekeeper” rules are introduced through the Platform-to-Business regulations, this applies to all online intermediaries (not just “gatekeeper” platforms).

competition law enforcement to ex ante regulation and intervention in circumstances that do not meet the threshold for a competition law infringement. There is a huge challenge for the Commission to achieve its stated policy goals without creating a regulatory environment that chills innovation or slows economic growth.

The Commission is seeking comments on the proposals before 8 September, so companies likely to be impacted now have an opportunity to make their voice heard and help shape the direction of this new regulation.

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