ALLEN & OVERY

The European Commission's proposal for a Digital Markets Act in light of its decision-making practice and that of the French Competition Authority

In recent years, online platforms have been the subject of numerous investigations by competition authorities, at both the European Union (**EU**) and French levels and elsewhere.

In France, the digital sector will be one of the priorities of the French Competition Authority (**FCA**) in the coming years, as emphasised by the creation of a dedicated Digital Economy Unit in 2020 and its announcement, during the course of last December, of its priorities for 2021 which will focus on the digital economy. At the EU level, the European Commission (**EC**) has just taken a new step in the regulation of platforms with its regulation proposal for a "Digital Markets Act" (**DMA**) which was published on 15 December. The DMA, jointly put forward by European Commissioner for Competition Margrethe Vestager and European Commissioner for Internal Market Thierry Breton, sets out numerous obligations for platforms acting as "gatekeepers" in digital markets, namely "*platforms that have a significant impact on the internal market, serve as an important gateway for business users to reach their customers, and which enjoy, or will foreseeably enjoy, an entrenched and durable position*".

The DMA will be designed to coexist with existing competition rules, while at the same time addressing practices implemented by gatekeepers and considered as unfair, which (i) are not covered by existing EU competition rules, or (ii) are not currently effectively addressed by such rules because of the systemic nature of certain behaviours and because competition rules apply only **ex post** and on a case-by-case basis.

Requirements for the DMA to apply

The DMA is expressly limited to the digital sector, and in particular to core platform services defined as (i) online intermediation services, (ii) online search engines, (iii) social networking, (iv) video sharing platform services, (v) number-independent interpersonal electronic communication services, (vi) operating systems, (vii) cloud services, and (viii) advertising services, provided that they have a large and stable user base in several EU countries and meet the EC's criteria for designation as "gatekeepers".

The EC has attached rebuttable presumptions to these criteria. In that sense, an undertaking will in principle be considered a gatekeeper if it meets the following three cumulative criteria:

- **it has a significant impact on the EU internal market**: this is presumed to be the case if the company (i) achieves an annual turnover in the European Economic Area (EEA) equal to or above EUR6.5 billion in the last three financial years, or where its average market capitalisation or equivalent fair market value amounted to at least EUR65bn in the last financial year, and (ii) provides a core platform service in at least three Member States;
- **it operates a core platform service which serves as an important gateway for business users to reach end users**: this is presumed to be the case if the company operates a core platform service with (i) more than 45 million monthly active end users established or located in the EU and (ii) more than 10,000 yearly active business users established in the EU in the last financial year; and
- **it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such position in the near future**: this is presumed to be the case if the company met the other two criteria in each of the last three financial years.

If these thresholds are met, the company qualified as "gatekeeper" must notify the EC of its status within three months, and, where appropriate, present sufficiently substantiated arguments to rebut the presumption.

If not all of the above thresholds are met, or if the undertaking has presented sufficiently substantiated evidence to rebut the presumption, the EC may assess, in the context of a market investigation aiming at designating gatekeepers, the specific situation of a given company and decide to nevertheless designate it as a gatekeeper.

The EC shall review, at least every two years, its list of gatekeepers and verify that they continue to meet the requirements mentioned above, or amend the list with new gatekeepers if necessary.

Introducing *ex ante* merger control for gatekeepers

The DMA introduces an obligation for platforms designated as gatekeepers to notify ex ante the EC of any intended concentration within the meaning of Article 3 of Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the **EUMR**) involving another provider of (i) a core platform service or (ii) any other service provided in the digital sector.

This obligation applies irrespective of whether the transaction is notifiable under the EUMR or to a competent national competition authority (**NCA**) under national merger rules.

The aim of this provision is not, however, to enable the EC to review that transaction on competition grounds, but to inform the EC as to whether any changes to individual gatekeeper designations are required as well as to aid monitoring broader trends in the digital sector.

This proposal has, in this regard, a different scope than the proposal that had been put forward by the FCA as part of a contribution to the OECD in 2020, where it suggested the establishment of an obligation for "structuring" platforms (predetermined according to objective criteria) to inform the EC or the relevant NCA(s) of all concentrations contemplated in Europe. The relevant competition authority could then ask the platform to notify concentrations that could seriously affect competition. The French Senate had also included, in its debates on the Law adapting French provisions to EU law on economic and financial matters promulgated on 3 December 2020 (the **DDADUE law**), an obligation to inform the FCA of any concentration contemplated by a structuring company. This provision was however not included in the final text adopted by both houses.

This desire to subject key digital players to a notification obligation echoes Margrethe Vestager's announcement in September 2020, which will introduce in 2021 the possibility for NCAs to refer to the EC cases they do not have the power to review themselves when such mergers are likely to "seriously affect competition". However, the EC did not specify how this referral mechanism would be implemented. Madam President of the FCA Isabelle de Silva clarified that this new referral policy should only apply to highly concentrated markets where a dominant company, or one with significant market power, acquires one of its competitors, as well as "niche" markets[1]. The referral system could also apply to avoid dominance in emerging markets, such as in the digital sector.

For more information on the Commission's plans on merger control in the EU, please read our alerts EU merger control: the road ahead and New European Commission referral policy for merger cases: implications for French businesses.

1. 8th Global Merger Control Conference, organised by *Concurrences* on 2 December 2020.

Implementing obligations and prohibitions for gatekeepers

The proposed Regulation sets out a series of obligations that gatekeepers will be required to proactively comply with in their daily activities to ensure a fair online environment for businesses and consumers, which would be open to innovation, regardless of its origin. These obligations are designed so that gatekeepers can comply with them without the need for the EC to further clarify their scope. In that sense, a gatekeeper will have to:

- allow business users to offer the same products or services to end users through third party online intermediation services at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper (this obligation is reminiscent of the EC's 2017 Amazon (e-books) case and the FCA's 2015 Booking case, where the authorities initiated investigations following the implementation by these market players of parity clauses and similar provisions in their contracts with e-book suppliers and hotels respectively);
- allow business users to promote offers to end users and to conclude contracts with these end users outside the gatekeeper's platform; and
- provide advertisers and publishers with access to its performance measuring tools and the information necessary for advertisers and publishers to carry out their own independent verification of the ad inventory of the gatekeeper.

On the other hand, the DMA expressly prohibits gatekeepers from engaging in the following practices, which are considered as unfair:

- combining personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third party services, unless consent from the end user is obtained;
- preventing or restricting business users from raising issues with any relevant public authority relating to any practice of gatekeepers;
- requiring business users to use, offer, or interoperate with an identification service of the gatekeeper in the context of services offered by the business users using the core platform services of that gatekeeper; and
- requiring business users or end users to subscribe to or register with any other core platform services as a condition to access, sign up or register to any of their core platform services.

The DMA also provides a list of obligations and prohibitions applicable to gatekeepers and which may be further specified by the EC, such as:

- the prohibition for gatekeepers to prevent users from uninstalling any pre-installed software or application;
- the prohibition for gatekeepers to use data originating from business users to compete with them (a practice for which the EC sent a Statement of Objections to Amazon last November);
- the prohibition to treat more favourably in ranking services and products offered by the gatekeeper itself compared to similar services or products of any third party (a practice sanctioned by the EC in its 2017 Google Search (Shopping) case – this decision is subject to an appeal before the Court of Justice of the European Union);
- the obligation to allow business users and providers of ancillary services access to and interoperability with the same operating system, hardware or software features that are available or used in the provision by the gatekeeper of any ancillary services (the EC opened an investigation into Apple on this issue in June 2020 as Apple limits its "tap and go" functionality on iPhones for in-store payments to Apple Pay); and
- the obligation to provide advertisers and publishers, upon their request and free of charge, with access to the performance measuring tools of the gatekeeper and the information necessary for advertisers and publishers to carry out their own independent verification of the ad inventory.

For this second set of obligations and prohibitions, the DMA establishes a framework for a possible dialogue between the gatekeeper and the EC regarding the measures that the gatekeeper intends to implement or has implemented in order to comply with the obligations listed above. The EC may, in this respect and by decision, specify the measures that the relevant gatekeeper must implement in order to comply with the DMA.

If a company does not yet enjoy an entrenched and durable position in the market, but it is foreseeable that it will enjoy such a position in the near future, a subset of proportionate obligations will also apply in order to prevent that company from acquiring, by unfair means, such a position in its fields of business.

Strengthening the EC's enforcement powers

The DMA provides the EC with broad investigative powers to ensure compliance by gatekeepers with the obligations and prohibitions laid down in the proposed regulation, including the power to conduct inspections and to compel gatekeepers to supply information to the EC or to let the EC access their databases and algorithms. In the event of a proven violation, the sanctions provided for by the DMA are similar to those existing in the context of anti-competitive practices: the EC may impose on the gatekeeper a fine not exceeding 10% of its total worldwide annual turnover, as well as periodic penalty payments not exceeding 5% of its total worldwide annual turnover, and pecuniary penalties not exceeding 1% of its total worldwide annual turnover notably in the event of a refusal of access by the gatekeeper to its database or algorithms or in the event of the supply of incorrect, incomplete or misleading information. The EC may also adopt interim measures or make commitments entered into by the gatekeeper mandatory.

The DMA goes even further by granting the EC the right to impose, in the event of systematic non-compliance (ie where the EC has issued at least three non-compliance or fining decisions within a period of five years), any behavioural or structural remedy which appears proportionate to the infringement committed and necessary to ensure that the gatekeeper at stake complies with the provisions of the DMA. The EC may nonetheless only impose structural remedies where there is no equally effective behavioural remedy, or where an equally effective behavioural remedy would be more burdensome for the relevant gatekeeper than the structural remedy.

Although the DMA provides for these new powers for the benefit of the EC only, Madam President of the FCA has nevertheless advocated granting the same powers to NCAs, as is already the case with traditional competition law tools. In this respect, the European Competition Network could ensure coordination and consistency in the application of this new competition tool throughout the EU[2].

The EC also specifies that, because of its nature as a (directly applicable) Regulation, the DMA will facilitate direct actions for damages by persons harmed by a gatekeeper's non-compliant behaviour.

The DMA – together with the EC's proposal for a Regulation on digital services published at the same time (Digital Services Act, or DSA) – will soon be debated by the European Parliament and the Member States under the ordinary legislative procedure. Given the nature and importance of what is at stake, however, it is likely that numerous amendments to this proposal will be debated before the Parliament and the Council of the EU in the course of their successive readings. Regulators at global level are, in any event, very likely to closely monitor the parliamentary debates, as Japanese authorities have already indicated that the DMA will serve as a reference for the creation of their own rules applicable to the digital sector[3].

For more information on the EC's consultations that preceded the DMA and DSA, please read our alerts Revamping of antitrust law? The EC proposes a new competition tool and digital economy regulation and Digital Services Act – a consultation on an evolution.

2. 8th Global Merger Control Conference, organised by periodical *Concurrences* on 2 December 2020.
3. MLex, 16 December 2020, Japanese competition regulator to examine EU's draft laws as reference for its own big tech regulations, official says.

Allen & Overy means Allen & Overy LLP and/or its affiliated undertakings. Allen & Overy LLP is a limited liability partnership registered in England and Wales with registered number OC306763. Allen & Overy LLP is authorised and regulated by the Solicitors Regulation Authority of England and Wales. The term **partner** is used to refer to a member of Allen & Overy LLP or an employee or consultant with equivalent standing and qualifications. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners is open to inspection at our registered office at One Bishops Square, London E1 6AD.

© Allen & Overy LLP 2021. This document is for general guidance only and does not constitute advice.

ROW
CS2101_CDD-62607_EN