ALLEN & OVERY

EU institutions announce political agreement on proposed rules for "gatekeeper" digital platforms

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The Council of the EU and the European Commission (EC) announced on 25 March that the Council and Parliament had reached a provisional political agreement on the Digital Markets Act (DMA), which will introduce new rules for online platforms that act as 'gatekeepers'.

The details released so far indicate that the DMA will impose significant obligations on those defined as gatekeepers. However, the platforms that are within scope, and the requirements placed on them, have been heavily negotiated and there are some important changes since the EC's original proposal in December 2020 (see our detailed alert **here**).

Reports indicate that the DMA may enter into force around October 2022 and become applicable in early 2023. In the meantime, it remains to be seen how the proposals will be elaborated in the final revised regulation, and how the DMA will interact with other regimes including the EU antitrust regime, private litigation frameworks and any Member State-level efforts to regulate digital markets.

Heavy negotiations have led to some changes

At the moment we do not have sight of a full revised DMA, only high-level descriptions of the agreement in **Commission** and **Council** press releases, and related speeches. The Council's press release mentions that the text of the DMA is expected to be finalised in the coming days, although it is not clear when this would be published.

However, the details that have already been disclosed show some movement from the original proposal in December 2020.

Amended "gatekeeper" thresholds

While it continues to be the case that only "gatekeepers" of "core platform services" are in scope of the DMA, the thresholds for what amounts to a "gatekeeper" have been adjusted.

According to the Council, platforms must meet all of the following criteria in order to qualify as a gatekeeper under the DMA:

- either an annual turnover of at least EUR7.5 billion within the EU in the past three years, or a market valuation of at least EUR75bn
- at least 45 million monthly end users and at least 10,000 business users established in the EU
- a platform must control one or more "core platform services" in at least three EU Member States (these include marketplaces and app stores, search engines, social networking, cloud services, advertising services, voice assistants and web browsers)

SME carve-out

The thresholds also now include a carve-out for small and medium-sized enterprises (SMEs), except in "exceptional cases".

This is consistent with other recent efforts by the EC to reduce compliance burdens on SMEs when evaluating and amending the antitrust rules, for example in reviews of its vertical and horizontal block exemption regulations.

"Emerging gatekeepers" may be in scope

The Council press release also indicates that a category of "emerging gatekeeper" has been introduced. This would cover certain "companies whose competitive position is proven but not yet sustainable". It notes that emerging gatekeepers will be subject to "certain obligations". While not clear from the announcements, this appears to suggest that a subset of the wider obligations set out in the DMA would apply to these companies.

Platforms that do not meet the full "gatekeeper" criteria will be keen to see more detail on how this concept is defined and what obligations they might face if they fall within it.

Changes to core obligations/restrictions

The Council press release includes the key obligations and restrictions that will be placed on gatekeepers.

Based on the descriptions included in the release, some changes from the EC's initial proposals are already apparent, including to add a requirement for interoperability for messaging services. Other changes may emerge when the details of the revised DMA are released.

The Council notes that gatekeepers will be required:

- to ensure that users have the right to unsubscribe from core platform services under similar conditions to subscription to these services
- to ensure the interoperability of their instant messaging services' basic functionalities
- to allow app developers fair access to the supplementary functionalities of smartphones

- to give sellers access to their marketing or advertising performance data on the platform
- to inform the EC of acquisitions and mergers (a requirement that had been previewed in the original DMA proposal – it appears that this remains an information requirement, rather than an obligation to seek clearance outside of the EU Merger Regulation)
- not to rank their own products or services higher than those of others (known as self-preferencing)
- not to re-use private data collected during a service for the purposes of another service (in a separate **speech on the DMA**, Executive Vice-President Vestager also mentioned a "ban on data collection for the purpose of targeted advertising unless there is effective consent" – it is not clear whether this refers to the same restriction on private data that the Council mentions, or a separate ban)
- not to establish unfair conditions for business users
- not to pre-install certain software applications
- not to require app developers to use certain services (eg payment systems or identity providers) in order to be listed in app stores

Harsher sanctions for non-compliance

The EC's original proposal indicated that firms that did not comply with their obligations under the DMA could be subject to fines of up to 10% of their annual worldwide turnover.

According to the Council's press release this remains the case for initial offences. But for repeat offences, a fine of up to 20% of worldwide turnover could be imposed.

The Council has also indicated that where gatekeepers systematically fail to comply with the DMA (ie least three violations in eight years), the EC will be able to open a market investigation and, if necessary, impose behavioural or structural remedies.

In addition, Vestager has mentioned in a **speech** that sanctions for repeat offenders could include a possible ban on future transactions.

Market investigation options remain

The original proposal suggested that the DMA would include a broad market investigation tool allowing the EC to proactively investigate some core platform providers, revise and update the scope of the concept of "core platform services" and potentially also investigate systematic non-compliance with gatekeeper obligations.

Based on the Council's press release, an investigation tool will remain at least for systematic non-compliance. The EC's press release also indicates that the DMA will give the EC the "power to carry out market investigations that will ensure that the obligations set out in the regulation are kept up-to-date in the constantly evolving reality of digital markets".

However, it is not clear whether the EC still intends to be able to investigate, proactively, core platform providers outside of these circumstances.

The EC as sole enforcer

One key proposal from December 2020 that has been maintained is the EC's position as sole enforcer of the DMA. This means that, unlike under EU antitrust law, the DMA would not be enforced by Member States. Some Member State antitrust authorities had previously indicated resistance to this and called for national-level authorities to have a greater role in enforcement, including **Germany**.

The Council does note, however, that Member States will be able to require national competition authorities to commence investigations into potential infringements and pass findings on to the EC.

Interaction with other regimes uncertain

More broadly, it remains unclear whether and how Member States will continue with any separate, national-level digital market regulation.

Key questions also remain on how the DMA will interact with antitrust law and merger control rules, although Vestager has signalled that the intention is for the DMA to play a complementary role to these regimes.

On mergers, she states that the DMA will "complete" the toolbox by ensuring that both the EC and Member State antitrust authorities are informed of transactions involving gatekeepers and core platform services in the digital sector, or transactions enabling the collection of digital data. For deals that fall below EU-level and national merger control thresholds, this information may prompt greater use of the EC's revised Article 22 policy. The EC now encourages Member States to refer below-threshold transactions to it for review. The aim is to enable the EC to review 'killer acquisitions' which might otherwise evade merger control scrutiny.

In terms of antitrust enforcement, Vestager says that "[n]o one should expect the new regulatory instrument to replace Article 101 and 102 enforcement actions". The extent to which we will continue to see the EC opening antitrust investigations into digital firms once the DMA takes effect, however, remains to be seen.

In this context, a recent ECJ ruling is also worthy of note. It **clarified** that it can be possible in some circumstances for a fine to be imposed under antitrust rules where the same facts have also given rise to an infringement of sectoral rules. The possibility of parallel sanctions therefore cannot be ruled out.

Finally, it is unclear whether and on what basis customers/consumers may be able to seek redress by bringing damages actions against gatekeepers that infringe the DMA. Some reports indicate that companies and individuals will have the right to file collective actions against gatekeepers in national courts in cases of non-compliance with DMA obligations.

A global movement to police the digital sector

The agreement on the DMA is the latest development in a global push by regulators to attempt to address competition issues in fast-evolving digital markets.

The UK Competition and Markets Authority, for example, has set up a Digital Markets Unit in shadow form in anticipation of new UK rules being passed – see our alert **here**. The German Federal Council (Bundestag) also adopted a bill known as the 'GWB Digitalisation Act' in early 2021 – see our alert **here**.

Vestager has noted that she hopes that this regulation will "inspire all over the planet". Digital firms will certainly want to pay close attention as the EU's plans become clear and as other regulators finalise their own proposals or regulations. Given the pace of these developments there is some risk of a 'patchwork' regulatory approach that may become increasingly difficult to navigate.

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