ALLEN & OVERY

Global Antitrust
Digital Markets Act

December 2020

EC publishes details of proposed competition rules for 'gatekeeper' digital platforms

The European Commission (**EC**) has published its draft Digital Markets Act (**DMA**), which will introduce broad reforms to the application of EU competition law to 'gatekeepers' in the digital sector. The proposals set out in-principle criteria for companies that offer 'core platform services', which, if met, raise the rebuttable presumption that the company is a gatekeeper. Companies that meet the criteria will either need to prove to the EC that they are not gatekeepers or will need to abide by specific 'dos and don'ts', with significant fines for non-compliance, and the possibility of repeat offenders being required to divest parts of their business. The DMA would also allow the EC to conduct market investigations to enable it to keep the gatekeeper criteria and 'dos and don'ts' updated dynamically and to design remedies to tackle systematic infringements of the DMA rules. The DMA was published alongside a draft Digital Services Act (**DSA**), which has a wider scope (applying to all digital services that connect consumers to goods, services, or content) and will, if adopted, introduce new obligations relating to such issues as illegal content, transparency and traceability of business users. Our initial overview sets out the key elements of both proposals. This article looks in more detail at how the DMA will work, and its likely impact.

Only ‘gatekeepers’ of ‘core platform services’ are in scope

A provider of core platform services will be designated a gatekeeper where it meets a three-limbed test. The EC has provided for quantitative thresholds above which there is a rebuttable presumption that the limb is met:

– **Limb 1: the core platform services provider has a significant impact on the EU internal market.**
This limb will be presumed to be met where (i) the undertaking that the provider forms a part of has achieved more than EUR6.5 billion turnover in the EEA in each of its last three financial years; or (ii) the average market capitalisation or the equivalent fair market value of the undertaking was at least EUR65bn in its last financial year and it also provides a core platform service in at least three EU Member States.

– **Limb 2: the provider operates a core platform service which serves as an important gateway for business users to reach end users.**
This limb will be presumed to be met by providers of core platform services that have more than 45 million monthly active end users established or located in the EU and more than 10,000 yearly active business users established in the EU in the provider’s last financial year.

– **Limb 3: the provider enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future.**
This limb will be presumed to be met if the rebuttable presumption thresholds for Limbs 1 and 2 were met in each of the last three financial years.

The EC proposes that all businesses which meet the above criteria in relation to any core platform service would have three months, once the DMA comes into force (and/or from the point that they start to meet the criteria, if later), to notify the EC that they meet the thresholds. They are required to provide further notifications if the thresholds are met subsequently in relation to other core platform services. Businesses could (and we expect many if not all of them would) submit arguments with their notifications that one, some or all of the limbs were not in fact met by them. The EC would then have 60 days to consider the notification and the arguments put forward by the business and to decide whether to designate the business as a ‘gatekeeper’. If so designated, a business would have six months to start complying with the EC’s ‘dos and don’ts’. Compliance must continue until such time as the EC removes the gatekeeper designation. The EC would be required to review designations at least every two years.

‘Dos and don’ts’ for gatekeepers

The EC has identified two broad categories of obligation for gatekeepers.

The first are what the EC calls ‘self-executing’ obligations. These are framed so that gatekeepers should be able to comply without the need for the EC to specify any further details. These include obligations:

– to restrict the platform from combining personal data from different sources;

– to increase the ways that business users can sell or promote their products and services outside of the platform and to refrain from stopping business users from raising issues with relevant public authorities in relation to gatekeeper practices;

– to allow end users more (and freer) access to products and services via the platform; and

– to provide advertisers and publishers to which a gatekeeper supplies advertising services, upon their request, with information concerning the price paid by the advertiser and publisher, as well as the amount of remuneration paid to the publisher, for the publishing of a given ad and for each of the relevant advertising services provided by the gatekeeper.

The second category of obligations would be ‘susceptible to be further specified’, so that the EC can give further clarity on whether a business’s proposed method of implementing the obligations is sufficient (which the EC can investigate either on its own initiative or at the request of the gatekeeper). These include obligations:

– not to use data acquired by the platform in relation to business users to then compete with those business users, unless the data is publicly available;

– to allow end users to un-install any pre-installed software applications on its core platform service, to allow installation and effective use of third party software applications or software application stores (subject to certain carve-outs) and not to technically restrict end users from switching between and subscribing to software applications and services accessed under a gatekeeper’s operating system;

– 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;

– not to treat more favourably in ranking services and products offered by the gatekeeper itself or by any third party belonging to its wider ‘undertaking’ (broadly speaking, its group) compared to similar services or products of third parties and to apply fair and non-discriminatory conditions to such ranking;

– 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;

– to provide effective portability of data generated through the activity of a business user or end user;

– subject to personal data restrictions, to provide business users, or third parties authorised by a business user, free of charge, with effective, high-quality, continuous and real-time access and use of aggregated or non-aggregated data, that is provided for or generated in the context of the use of the relevant core platform services by those business users and the end users engaging with the products or services provided by those business users;

– to provide to any third party providers of online search engines, upon their request, with access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data in relation to free and paid search generated by end users on online search engines of the gatekeeper, subject to anonymisation of the query, click and view data that constitutes personal data; and

– to apply fair and non-discriminatory general conditions of access for business users to the gatekeeper’s software application store.

Gatekeepers must comply with all obligations (while they can apply for suspension of particular obligations, the EC will only grant this exceptionally, and in light of circumstances that lie beyond the control of the firm). The DMA provides for an exception, however, for firms which have been designated as gatekeepers in relation to a particular service only because it is foreseeable that they may enjoy an entrenched and durable position in the near future but do not yet meet the quantitative ‘rebuttable presumption’ thresholds. In this situation, the EC may, following a market investigation, decide to impose only some of these requirements.

A merger notification system – but not a fully-fledged review process

The DMA requires gatekeepers to inform the EC of any proposed merger or acquisition involving another provider of core platform services or of any other services provided in the digital sector. This is irrespective of whether it triggers a notification requirement under the EU (or national) merger control rules. The aim of these provisions is not, however, to enable the EC to review that transaction on competition (or other) grounds. Rather, the intention is to inform the EC as to whether any tweaks to individual gatekeeper designations are required as well as to aid monitoring broader trends in the digital sector.

In this regard the DMA is very different from proposals put forward in other jurisdictions, some of which (eg the UK) envisage a distinct merger control review process applying to certain digital firms. The EC is instead planning to deal with its desire to review potentially anti-competitive deals where the target has no or little turnover (so-called 'killer acquisitions'), many of which fall in the digital sector, by using its merger referrals system (see our alert for more details). We expect to hear more on this in 2021.

A 'market investigation' tool to build flexibility into the regime

The DMA proposals include a 'market investigation' tool that will allow the EC the flexibility to:

– proactively investigate providers of core platform services that do not meet the thresholds that require them to notify a rebuttable presumption of gatekeeper status, in case they nonetheless meet the three 'limbs' of the test;

– revise and update the scope of what constitute 'core platform services'; and

– investigate systematic non-compliance with the gatekeeper 'dos and don'ts', including to consider whether the business investigated should be broken up and/or subject to behavioural remedies.

The EC is keen that market investigations are carried out in a "reasonable" timeframe. The DMA sets out various time limits, which are dependent on the aim of the market investigation. For example, the EC should endeavour to conclude market investigations for designating gatekeepers and systematic non-compliance within 12 months (with a possible six-month extension for non-compliance investigations), but investigations into whether a new 'core platform service' or type of practice should be addressed by the DMA should be completed within two years.

Interestingly this tool is far reduced in scope from the EC's initial proposal back in June, which suggested that the EC might use the market investigation tool to look at structural competition issues across any sector, akin to the UK's markets regime (see our alert). The proposed tool was later pared back to only apply to the digital sector, and now has been narrowed further, effectively for use in managing and enforcing the rules described above, rather than as a standalone measure. This is certainly good news for firms likely to fall within the DMA's scope.

Powers of investigation, interim measures and consequences of non-compliance

Many of the investigation powers and procedural steps and safeguards envisaged in the DMA will be familiar to those acquainted with the existing EU competition law regime. The DMA as currently drafted would give the EC extensive powers to require information from businesses and it could even conduct on-site investigations (although, in contrast to competition law 'dawn raids', it would give businesses notice ahead of an inspection). Businesses under investigation would have the right to access the EC's file, the right to be heard and the right for decisions to be transparent.

Generally the consequences of non-compliance will also be broadly similar to those for infringements of EU competition law. In particular, undertakings which do not comply with their obligations under the DMA could be subject to fines of up to 10% of their annual worldwide turnover. And even in advance of finding that a gatekeeper has not complied with the rules, the EC would have the power to impose interim measures to prevent an urgent risk of serious and irreparable damage for business users and end users. The EC may close its investigation where businesses offer binding commitments that ensure compliance with their obligations.

However, the DMA contains an additional, significant novel power for enforcement in relation to 'repeat offenders' who systematically do not comply with the DMA. Gatekeepers will be deemed to have engaged in systematic non-compliance where the EC has issued three non-compliance or fining decisions against them within a period of five years. Where this is the case, the EC can open a market investigation and has the power to impose behavioural remedies on the gatekeeper or to require it to make divestments. It should only resort to the latter option where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the gatekeeper than the divestment.

Relationship with existing competition rules and existing unfair practices/digital platforms regulation in Member States

The DMA regime is intended to complement existing competition rules, aiming to address conduct on an ex-ante rather than ex post basis, more quickly, and to deal with practices which fall outside the competition rules (or that cannot be effectively addressed by them). Competition enforcement will still have its place, and the DMA explicitly provides that the new regime is without prejudice to the application of EU and national Member State competition rules. Indeed, Executive Vice President and Commissioner Vestager was clear when announcing the proposals that the EC would continue its on-going competition cases and that its enforcement action could inform future versions of the DMA. The two mechanisms are therefore intended to go hand in hand – it will be interesting to see how in reality they fit together.

The EC intends that EU Member States will be prevented from adopting gatekeeper regulations at local level. It does not believe that regulatory initiatives at local level can "fully address" the competition issues it is seeking to regulate and wishes to put in place a harmonised EU system which avoids regulatory fragmentation. This begs the question as to how proposed Member State level regimes (some of which are already in progress, and progressing at a quicker rate than the EC, for example in Germany) will fit with the DMA.

However, Member States will still have a role to play. They could legislate for unfair practices more generally and would have a voice in the enforcement of the DMA regime through appointing representatives to a Digital Markets Advisory Committee that would be consulted by the EC before taking particular decisions, including on non-compliance and fines. Member States could also request that the EC open a market investigation into whether a particular provider of core platform services should be designated as a gatekeeper: where three or more of them make such a request, the EC is required to consider within four months whether there are reasonable grounds to do so. Having said this, the involvement of Member States in the DMA regime looks set to be still significantly less than proposed under the DSA, which provides for direct enforcement at national level.

What next?

The DMA, if adopted, is likely to have significant consequences for many large online platforms. It comes amidst a flurry of proposals for reform as jurisdictions across the globe grapple with how best to deal with the conduct of digital firms. Only a week before the DMA was announced, for example, a UK 'Digital Markets Taskforce' made recommendations as to the scope and implementation of a new UK regulatory regime to govern the behaviour of digital firms with 'Strategic Market Status' (see our alert for more details). The proposed EU and UK regimes have certain similarities – both (no doubt to the relief of some firms) are intended to apply only to a limited category of businesses, rather than digital activities as a whole. However, unlike the proposed UK regime, which would allow for a code of conduct to be tailored to the potential competition harms arising from a particular business, the EC's 'dos and don'ts' are intended to apply across the board to all gatekeepers with only limited flexibility for dialogue with the EC in order for it to 'specify' whether a business's proposed compliance arrangements are consistent with its DMA obligations.

Given the impact of these provisions on many large online platforms and their users, we can expect significant lobbying from the private sector as the proposals move through the legislative process in 2021. Member States will also want to provide material input, particularly where their governments had already taken significant step towards national legislation. The DMA, once enacted, may well contain significant modifications as a result.