NOV. 21

INFORMATIVE NOTE

EU AND COMPETITION LAW

The Digital Markets Act ("DMA")

1. What is the DMA?

The Digital Markets Act is a legislative proposal from the European Commission intended to ensure a higher level of competition in European digital markets. It will prevent large companies, referred to in the proposal as "gatekeepers", from abusing their market power so that new companies will be able to enter the market.

Together with the Digital Services Act, the Digital Markets Act is one of the core elements of Europe's digital strategy.

2. What is the rationale behind this proposal?

Large online platforms such as Meta, Amazon, and Google which are characterised by significant network effects, and which are typically embedded in their own platform ecosystems are key elements of today's digital economy, where they act as the intermediary in most transactions between end-users and business users. A number of these platforms also comprehensively track and profile end users, collecting and storing large amounts of personal data on these users. Increasingly, a few large platforms act as gatekeepers between business users and end users. They also enjoy an entrenched and durable position, often as a result of the creation of conglomerate ecosystems around their core platform services which reinforces existing entry barriers.

"A number of these platforms also comprehensively track and profile end users, collecting and storing large amounts of personal data on these users."

Ricardo Oliveira
Andrea Gomes da Silva
EU and Competition Law team

As such, these gatekeepers have a major impact on, have substantial control over the access to, and are entrenched in digital markets. As a result, many business users are dependent on these gatekeepers, which paves the way, in certain cases, for unfair behaviour against these business users. It also leads to negative effects on the contestability of the core platform services concerned.

"This greater competition [will] ensure that consumers have more and better services to choose from."

Therefore, the objectives of the Digital Markets Act are to:

- Ensure that these platforms conduct themselves fairly online;
- Ensure that technological start-ups and entrepreneurs have new opportunities to compete and innovate in the online platform environment, without having to subject themselves to unfair conditions that limit their development.
- Through this greater competition, ensure that consumers will have more and better services to choose from, more opportunity to switch providers if they wish, direct access to services, and fair prices.

3. What businesses will be affected by this law?

The first central concept of this proposal is "core platform services". These are (i) online intermediation services, for example, marketplaces, app stores and online intermediation services in other sectors like mobility, transport or energy) (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, including advertising networks, advertising exchanges and any other advertising intermediation services, where these advertising services are being related to one or more of the other core platform services mentioned above

Additional digital services may subsequently be added to the list by the European Commission.

Under Article 3 of the Act, a core platform services provider can be considered a **gatekeeper** if:

i) **It has a significant impact on the internal market**. This requirement is presumed to have been met if the undertaking to which it belongs has achieved an annual EEA turnover of EUR 8 or more billion in each of the last three financial years, or where the average market capitalisation or the equivalent fair market value of the undertaking to which it belongs amounted to at least EUR 80 billion in the last financial year, and it provides a core platform service in at least three Member States. The commission originally proposed that these thresholds be set at €6.5 billion for a company's annual turnover or €65 billion for its average market capitalisation.

ii) **It operates a core platform service which serves as an important gateway for business users to reach end users**. This requirement is presumed to have been met if it provides a core platform service that has more than 45 million monthly active end users established or located in the Union, and more than 10 000 yearly active business users established in the Union in the last financial year.

iii) **It 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 requirement is presumed to have been met if the thresholds in point (ii) have been met in each of the last three financial years.

The status of gatekeeper can be determined by reference to clearly circumscribed and appropriate quantitative metrics, which can serve as rebuttable presumptions to determine the status of specific providers as a gatekeeper, in accordance with Article 3(2), or based on a case-by-case qualitative assessment by means of a market investigation.

Large undertakings operating in digital markets (namely "big tech" companies such as Apple, Amazon, Meta, and Google) are the main targets of this legislative proposal. It is likely however, that other companies will also be caught, given the breadth and scope of the proposal, with German companies Zalando and DeliveryHero expressing concerns that they may be caught. Since these companies do business with others, inevitably not only large companies will be affected, but also small and medium-sized companies may be indirectly affected.

"A provider will only be considered to be a gatekeeper if and when the Commission designates it as such by means of a decision to that effect."

Where a provider considers that it meets the requirements in Article 3, it must notify the Commission, following which the Commission will have 12 months to take a decision to designate the provider. However, these quantitative thresholds establish a rebuttable presumption. The provider can, using well-founded arguments, demonstrate that it does not meet the overall qualitative criteria of a gatekeeper. The Commission will then decide based on various factors listed in the proposal, including the size of the provider, barriers to entry, user blocking and effects of scale and scope.

In any case, a provider will only be considered to be a gatekeeper if and when the Commission designates it as such by means of a decision to that effect.

Following a market investigation, the Commission may designate a provider as a "gatekeeper" even if the provider does not meet the quantitative thresholds.

Once designated as a gatekeeper, the provider has to comply with certain directly applicable obligations (Article 5) and obligations that can be specified (Article 6). It must comply with these obligations within six months. One of the most important obligations on providers, once they are designated as gatekeepers, is the need to notify the Commission of any acquisitions they intend to carry out.

PL
MJ

"The Commission can also impose periodic penalty payments on undertakings of up to 5% of the average daily turnover for each day's delay in taking various actions."

4. What are the consequences of non compliance?

In case of non-compliance with the obligations, the Commission can issue a non-compliance decision (Article 25) and impose fines of up to 20% of an undertaking´s total turnover in the preceding financial year (Article 26), doubling the previously envisaged 10% cap, and up to 1% of total turnover in the preceding financial year for the supply of incorrect, incomplete or misleading information in the context of the investigation. There's also a minimum sanctions cap, which prevents the commission from imposing a fine that is less than 4% of a company's turnover.

Under Article 27, the Commission can also impose periodic penalty payments on undertakings of up to 5% of the average daily turnover for each day's delay in taking various actions including responding to an information request and complying with an obligation. ■