The ever increasing market power and often criticised conduct of data driven platforms is not new, but lately the efforts to tackle these appear to have taken a decisive turn. We are now on the verge of new rules and tools to tackle the competition issues arising with the tech giants.

There is a perceived enforcement gap, especially with regard to the leading players in the digital sector, which the EU intends to address with new tools. These will come as amendments to the existing competition rules and as new upfront regulations. Other network industries, such as telecommunications or energy, serve as a blueprint for such endeavours.

The underlying competition concerns in digital markets are not confined to Europe. The USA have also seen increased concentration, rising profit margins, declining market entry and low investment relative to profits. The EU is even pushing for a
coordinated approach in working towards a “trans-Atlantic technology space”, but this note covers only the current EU proposals.

In April 2019, the European Commission’s Executive Vice-President Margrethe Vestager, in charge of both digital and competition policy, published a comprehensive report including a set of initial suggestions, such as:

- tougher treatment of dominant platforms’ alleged “self-preferencing” of their own products and services;

- potential data-sharing or interoperability remedies for dominant technology companies if required to ensure effective competition by breaking down network effects and data-related entry barriers;

- requirements for “killer” acquisitions to prove no anti-competitive effects or offsetting efficiencies.

This came in the form of a “roadmap” for public consultation prior to the adoption of legally binding rules.

On 15 December 2020, the European Commission presented two legislative proposals, to be adopted by the Council of Ministers and the European Parliament:

- The Digital Services Act (DSA) is intended to regulate online services. It covers a number of relevant aspects of the platform economy such as liability for content, advertising, safety, smart contracts, online www.sheppardmullin.com self-employment, and future governance frameworks. These new rules shall modernise the EU-Directive on E-Commerce of 2002 as an important step towards tackling new concerns which have emerged. These rules go as far as placing tough new obligations on large internet companies to ensure that their platforms are free of illegal content, such as hate speech, terrorist messages and images, counterfeit goods or pirated movies and TV shows. The DSA shall remove obstacles to cross-border online services in the EU.

- The Digital Markets Act (DMA) is intended to tackle the economic power of large online platforms and is the focus of this article. It includes new ex ante regulation, prohibiting and requiring certain behaviour for large online platforms acting as gatekeepers, to prevent actual harm to the markets. In addition to that, the DMA introduces a new tool giving the European Commission the power to conduct market investigations to identify gatekeepers and to impose remedies on these to address their systematic non-compliance with the new rules.

What enforcement gaps need to be addressed and how?

Not only the European Commission but also national competition authorities worldwide have imposed high fines and interim measures on tech companies in recent years. However, there still does not appear to be sufficient progress in the overall deterrence level, to which the endless series of new complaints and new investigations are a testament. The authorities now realise the limitations of their powers. The current competition rules are considered inappropriate for addressing certain structural competition problems, such as monopolisation strategies by non-
dominant companies, or parallel leveraging strategies by dominant companies into multiple adjacent markets. In particular, the European Commission has identified two categories of structural concerns:

- structural risks for competition: market characteristics (e.g. network and scale effects) and company conduct threatening competition through the creation of powerful players with entrenched market positions;
- structural lack of competition: markets not delivering competitive outcomes due to their structure, displaying systematic failures such as high concentration and entry barriers, or an increased risk for tacit collusion in oligopolies (e.g. increased transparency due to algorithm-based technological solutions).

**What are the proposed solutions?**

The two main pillars to the DMA proposals are: (i) new ex ante regulation for so-called “digital gatekeepers”, (ii) and a new market investigation tool allowing the European Commission to better monitor and address shortcomings in the digital markets with the existing competition rules.

**Ex ante regulation**

The purpose of ex ante regulation is to empower the European Commission to impose specific obligations and prohibitions on designated digital gatekeepers. Under the proposed regulation, a company will be considered as a gatekeeper if it provides a core platform service and meets the following three cumulative criteria:

- **Significant impact on the internal market**: to be presumed if the company achieved annual EEA turnover of at least EUR 6.5 billion in the last three financial years, or average market capitalisation/fair market value of at least EUR 65 billion in the last financial year, and offers the platform service in at least three Member States;
- **Control over a channel important for business users to reach end users**: to be presumed if the core platform service has 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 last financial year;
- **Current or foreseeable entrenched and durable position**: to be presumed if the thresholds for end users and business users were met in each of the last three financial years.

However, these three presumptions can be rebutted if the provider demonstrates to the European Commission that any of these criteria are not met in its specific case. Once a designated gatekeeper, the provider of core platform services will be subject to a specific set of obligations and prohibitions. The draft regulation distinguishes between self-executing obligations and others that require the intervention by the European Commission. Self-executing obligations include the prohibition to combine personal data sourced from core platform services with personal data from any other services offered by the gatekeeper, or with personal data from third-party services. The same applies to data sourced from signing in end users to other services of the gatekeeper in order to combine personal data without their proactive consent. Into the category falls the obligation to allow business users to offer the same products or services to end users through third-party online intermediation services at prices
or conditions different from those offered through the online intermediation services of the gatekeeper.

Obligations requiring the European Commission’s intervention would occur in the event the measures implemented by the gatekeeper to ensure compliance with the ex ante obligations are not effective in achieving their objective. Under the new rules, the European Commission will have the power to adopt non-compliance decisions, impose interim measures and accept commitments. Like in antitrust cases, the fines could reach a maximum of 10% of a company’s total turnover. In case of systemic non-compliance, the European Commission would also be able to impose behavioural or structural remedies, following a market investigation.

The draft regulation also enhances merger rules for gatekeepers, which will be required to inform the European Commission of any planned transactions, even if they do not qualify for a merger notification under the EU Merger Regulation or do not affect intra-EU trade. This proposed change does not amend the EU Merger Regulation, despite many discussions about whether it is necessary to amend the filing thresholds or include other substantive criteria in order to capture mergers in the tech space. However, this will place an additional burden on gatekeepers and is a new sector-specific procedure which is meant to keep the European Commission informed of what is happening in the digital sector.

The new market investigation tool

The proposed regulation also provides for a new market investigation tool in connection with the EU competition rules. Its purpose is threefold. This will allow the European Commission to identify and designate gatekeepers and investigate their conduct with regard to any systematic infringements of their obligations. This would be the case with three infringements or fining decisions within five years. In such cases, the European Commission will be empowered to impose any behavioural or structural remedy deemed necessary to ensure compliance with the regulation.

In addition, the European Commission will have the power to examine the digital market to identify new services to be added to the list of core platform services or practices subject to the regulation. The European Commission could make use of this new tool either on its own initiative or following a Member States’ request. This new tool must nevertheless not take away from the core objectives of competition law namely preserving and fostering a level of innovation, quality of digital products and services, a consideration of the degree to which prices are fair and competitive, and the degree to which quality or choice for business users and for end users is or remains high. Notwithstanding, this is a clear shift in the European Commission’s enforcement trends from fining companies in order to remedy the harm caused by anticompetitive behaviour to attempted prevention of that behaviour from even being given the space to occur. The market investigation tool ensures that the obligations contained in the DMA and the companies governed therein are kept in constant check in a manner which reflects the fast pace of the digital sector.

It is also worth noting that this comes in addition to the current sector inquiry by the European Commission into the Internet of Things focusing on consumer-related products and services that are connected to a network and can be controlled at a
distance, for example via a voice assistant or mobile device. Knowledge about the market gained through this sector inquiry will also contribute to the European Commission’s enforcement of competition law in this sector.

What’s next?

The proposals for both the DMA (with the new market investigation tool and the new ex ante regulation) and the DSA were published on 15 December 2020 and should be heavily debated within the EU institutions throughout 2021. But this is not the only step the European Commission is taking in this field. A possible revision of the 1997 Notice on market definition is also on the agenda, evaluating whether the current way of defining relevant markets across different industries needs to be adapted to new sectors and in particular the digital and tech sectors.

What are the direct takeaways for businesses?

The proposed ex ante regulation could contribute to a higher compliance level of digital platform companies. This will entail some upfront efforts, but could then serve them as a shield against competition law action if they take the necessary steps. The new market investigation tool will not focus only on the companies’ conduct but also on the specific characteristics of the market in which they operate. Whilst it does not have as its primary objective the fining of companies for their illegal behaviour, it will have an impact on their business models and would concern entire sectors of the economy. Against this background, all companies involved in digital markets one way or another should prepare for what could come next to prevent or mitigate any negative consequences for their business strategies:

- the new rules and powers would not necessarily mean only higher or additional fines but could have severe repercussions on the business structure of digital players as they might result in forced company breakups or other kinds of remedies being imposed;
- with regulators and governments aligned on the need for faster intervention, it is likely that regulators will get more creative, and thus digital platforms need to be prepared and seek the necessary advice to help them navigate these unchartered waters;
- new regulation could also have an impact on merger control which could be enhanced in the digital sector and entail additional burdens;
- companies should review the forthcoming proposals and develop advocacy positions, individually or collectively within trade organisations, in order to adjust or defend business positions and to influence the global decision-making process in the EU;
- companies should identify opportunities where complaints or defence on a case-by-case basis should be favoured in their business interests.

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