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Gatekeepers, dominance, economic dependency, ex-ante regulation: current and future tools for the online world

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A new era for digital players in the EU

- In the last years, both the EC and NCAs have been very active in investigating and enforcing competition law in the digital world.
  - The EC's enforcement ranged from large digital players to mainstream business models operating online – see for example *Amazon* and *Guess*.
  - NCAs have been equally active in the digital world – see for example the FCO *Facebook* case and the FCA *Apple Pay* case.
- Yet, **significant gaps** in enforcement have led the EC to propose a new set of rules for digital platforms designated as gatekeepers.
- The proposed Digital Markets Act (DMA) provides for an **ex ante regulation** to "*complement*" the current competition toolkit (Recital 10).
- Aims at a **harmonised enforcement** across all Member States and ensuring **fair and contestable digital markets** (Article 1(5)) :
  - For *digital players* – one set of rules, avoidance of inconsistent findings or enforcement action across Member States
  - For *consumers* – harmonised and more effective enforcement through one set of rules offers European consumers a high level of protection no matter where they are placed

Gatekeepers

Who is a Gatekeeper?

- Key to the DMA is the **concept of gatekeeper.** Legally defined as (Art. 2 and 3):
  1. a **provider** of a **core platform service** to business users or end users
  2. that is **designated** as a gatekeeper by a **Commission decision**
- A provider of a core platform service will be considered a gatekeeper if it meets three **qualitative criteria -** Art. 3(1):
  - It has '*significant impact*' on the internal market;
  - The provided service is '*an important gateway*' for business users to reach end users; and
  - It enjoys (or foreseeably will enjoy) an '*entrenched and durable position*' when operating its services.
- Qualitative criteria are *presumed* if certain **quantitative** criteria are met – Art. 3(2)
  - Presumption is rebuttable

Who is designated as a ‘gatekeeper’ by the EC?

- If a provider reaches thresholds, it will need to **notify** it to the EC within three months – Art. 3(3)
- Provider will only be considered a gatekeeper after the EC’s **designation** by way of a decision.
- Now:
  - Presumption is **rebuttable** but will require substantial assessment and argumentation that qualitative criteria are not met
  - EC can designate a provider as a gatekeeper even if quantitative thresholds not met, but only after a **market investigation**
  - EC to periodically **review** status of gatekeeper

What is the ‘gatekeeper’ concept designed for?

The characteristics of ‘gatekeepers’ in the DMA can be summarised as follows:

- Very large platforms
- Offering services that connect business users to end users
- Exercising control over the platform, i.e. over how business users (who may be competing with the platform’s own services) offer their services and over data generated on the platform.

The concern:

…imbalances in bargaining power and, consequently, to unfair practices and conditions for business users as well as end users of core platform services provided by gatekeepers, to the detriment of prices, quality, choice and innovation

Dominance

Does ‘gatekeeper’ status equal dominance?

- No, ‘gatekeepers’ are not necessarily dominant.
- The obligations imposed on ‘gatekeepers’ **complement** competition law enforcement, in order to
  - in order to “*ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, likely or presumed effects of the conduct of a given gatekeeper* […] *on competition on a given market”.*

    - Recital (10)
- DMA and Article 102 TFEU
  - *Whereas Articles 101 and 102 TFEU remain applicable to the conduct of gatekeepers, their scope is limited to* ***certain instances of market power (e.g. dominance on specific markets)*** *and of anticompetitive behaviour, while enforcement occurs* ***ex post*** *and requires an* ***extensive investigation of often very complex facts on a case by case basis****.*
  - *Moreover, existing Union law does not address, or does not address effectively, the identified challenges to the well-functioning of the internal market posed by the conduct of gatekeepers, which are* ***not*** *necessarily dominant in competition-law terms.*

  - Recital (5)

Does ‘gatekeeper’ status equal dominance? (2)

- Interestingly, there is a **rebuttable presumption** that ‘gatekeepers’ will have an ‘*increased incentive’* to leverage their power from *core* platform services to *ancillary* ones.
  - It is not clear however why the opposite should not be caught by the rules too, i.e. leveraging power from an ancillary service to take over a platform. This would avoid the creation of ‘gatekeepers’ in the first place.
  - In practice, it will be difficult for a platform that has been pronounced dominant by regulators, to escape the ‘gatekeeper’ status.
- The rationale of the ‘gatekeeper’ concept reminds a lot of the ‘**special responsibility**’ concept in the case law

  “A finding that an undertaking has a dominant position is <u>not</u> in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a <u>special responsibility not to allow its conduct to impair genuine undistorted competition on the [internal] market</u>”- Michelin

Open questions

- Does meeting the criteria for the ‘gatekeeper’ status mean that there is no **need for a classic market definition**?

  Arguably not, given that the criteria for the ‘gatekeeper’ status don’t seem to relate to a specific market.

- Is it possible for a ‘gatekeeper’ who has taken measures to comply with the obligations described in the DMA, and where the EC has not raised concerns in relation to these measures being inadequate, to be still **fined** on the basis of infringing competition law?

  Arguably yes, given that the DMA clarifies that obligations described therein and those from arising from competition law are merely complementary.

- Could the new rules disincentivise undertakings from innovating fearing that they may meet the ‘gatekeeper’ criteria?

  Arguably yes, given that they would have to balance cost and risk in light of the new rules.

Economic dependency

A flavour of ‘economic dependency’ doctrine in the ‘gatekeeper’ concept?

- The economic dependency doctrine has not traditionally formed a distinct stream of analysis or a separate obligation in terms of EU competition law. A gap?
- It was rather captured **through the concept of the “unavoidable trading partner”**

  An undertaking is “*by virtue of that share in a position of strength which makes it an unavoidable trading partner and which already because of this secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position*”.

  - Hoffman-La Roche

- The ‘**gatekeeper’ concept** to incorporate the rationale of the economic dependency?

  … qualifies as a core platform service in light of its widespread and common use and its importance for connecting business users and end users … core platform services that individually constitute an important gateway for business users to reach end users.

  – Recital (15)

Economic dependency rules – the example of Belgium

- Belgian competition law prohibits companies from abusing **a non-dominant position *vis-à-vis* companies that are "<u>economically dependent</u>"** from them.
- The criteria:

1. *One company must be in a position of "economic dependence"*

   Economic dependence is defined as a "*subordinate position of a company in relation to one or more other companies, characterised by the absence of reasonably equivalent alternatives available within a reasonable period of time, on reasonable terms and at reasonable costs, allowing it or each of them to impose services or conditions that could not be obtained under normal market circumstances*".

   – *The other company must have "abused" this position of economic superiority vis-à-vis the first company; and*

   – *The abuse must have the potential to "affect competition" on (a part of) the Belgian market.*

- Generally, economic dependency rules aim at addressing abusive conduct in **vertical** relationships.

Economic dependency – the practitioner's perspective

- The language used (not only in Belgium but also France) is very **broad** in terms of scope.
- Assessing whether an undertaking is 'economically superior' entails a **complex analysis** with little guidance from case law or previous decisional practice.
- Unlike the prohibition on the abuse of dominance which applies *erga omnes,* the prohibition on the abuse of a situation of economic dependence requires a case-by-case assessment of **each separate commercial relationship**.
- Demonstrating economic dependence is likely going to be **more challenging** - not least because largely unexplored - than showing dominance for which one can rely on market shares.

Ex ante regulation

Ex ante rules – a novel tool?

- Traditionally, EU antitrust enforcement occurs **ex post** and requires an lengthy investigation of often very complex facts on a **case by case basis.**
- But ex ante regulation is **not new** – e.g., EUMR; also in other areas, e.g. telecommunications, etc.
- The DMA is actually a **reactive** proposal, as it addresses conduct that has been identified as harmful from a competition perspective – behaviour that is already known and that the EC wants to tackle without having to jump on a long and complex investigation.
- Not all is ex ante - **ex ante obligations** combined with ex post mechanisms

Tough ex ante obligations for ‘gatekeepers’

The proposed obligations contained in Art. 5 and 6 – some examples :

- Prohibition of wide MFN clauses
- Prohibition from using non-public information generated on their platforms as a result of third parties’ business activities to compete against them
- Prohibition of self-preferencing in rankings

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✓ Obligation to have data marshalled into silos and made available to rivals under interoperability rules

✓ Take concrete steps to ensure compliance with GDPR

✓ Apply general conditions of access deemed to be fair and non-discriminatory

Ex ante obligations coupled with ex post mechanisms

- Additional obligations
  - Obligation to **inform the EC of intended acquisitions** of another provider of core platform services or any other digital services, irrespective of the EUMR (Art. 12) – power to review killer acquisitions?
  - Obligation to submit an independently audited description of any techniques for profiling of consumers (Art. 13)
- Enforcement and penalties
  - EC power to conduct **market investigations** to
    - identify new gatekeepers (Art. 15)
    - add new services to the list of core platform services or new practices to be prohibited (Art. 17) and
    - remedy systematic non-compliance by way of behavioural or structural remedies (Art. 16)
  - EC will have extensive **investigative powers** under Arts. 19-21 to impose fines (up to 10% of ww turnover) and periodic penalty payments (5% of daily turnover) in case of non compliance

Concluding remarks

Towards the EU antitrust enforcement of the 21st century

Some preliminary considerations:

1. DMA could lead to a significant **overhaul** of EU antitrust law and enforcement.
2. Platforms are likely to persuade the EC that certain **services**, even if "core", do not enjoy an entrenched position or are not a 'gateway' for business users to reach consumers.
3. Avoiding the **designation as a 'gatekeeper'** will be important from a legal perspective, not least because this opens the door to an EC finding of 'systemic non-compliance' with the ex ante obligations, which in turn opens the door for imposing "*behavioural or structural remedies which are proportionate to the infringement committed and necessary to ensure compliance".*
4. The special obligation to **notify acquisitions** between 'gatekeepers' and any other services in the digital sector, irrespective of whether the EUMR thresholds are met. It is not clear what the review of such notifications will entail, nor what powers the European Commission will have in this respect.
5. Tough enforcement by the EC through new powers. **Structural remedies**, including divestitures, are possible, even if only as a last resort and if there are no equally effective behavioural remedies.

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