COMPETITION LAW IN THE DIGITAL AGE

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DIGITAL MARKETS ACT: EU LEGISLATURE AGREES ON UPFRONT REGULATION OF ONLINE GATEKEEPERS

After years of debate, and against a backdrop of widening belief that existing competition rules cannot prevent large online service providers from frustrating competition in digital markets, the EU legislature has reached a political agreement on the new Digital Markets Act (DMA).

Historical development of integrated ecosystems

In the beginning, large online service providers might have offered only one or few services (such as Google's search engine and Facebook's social media platform). Over the years, however, the largest digital players have expanded far beyond their traditional bases, whether through organic development or acquisitions, to offer a host of interrelated digital products and services. This process of expansion has led to the emergence of so-called digital "ecosystems", and in the process has given rise to concerns about the concentration of market power and, in particular, data in the hands of a limited number of digital giants. More broadly, this trend has posed broader questions for governments and regulators globally: how can they best encourage and maintain competitive digital markets, without stifling innovation, and does the current regulatory toolkit contain the right tools for the job?

A desire for new upfront regulation

The DMA is the EU's attempt to answer these questions. With the perception that certain digital players have become too large and too powerful (in the eyes of authorities, legislators and smaller digital rivals), the clamour for a set of new enforcement tools had grown steadily louder. Critics observed that enforcement action targeting anti-competitive conduct after it has occurred may not always be effective in the digital economy. Investigations take years, while the digital economy is characterised by rapid innovation and expansion, fuelled by strong network effects. Ultimately, legislators in several countries have decided that tools for greater and earlier intervention are needed: as discussed further in this briefing, Germany has implemented a new set of rules in January 2021 targeting digital platforms, and in the UK a new Digital Markets Unit has been established within the Competition and Markets Authority.

As for the DMA itself, after a period of trilogue between the Commission, the Council and the European Parliament, a political agreement was eventually reached on 24 March 2022. This is only a provisional agreement, as the final texts still have to be approved. The outline of what we can expect is clear since the Council has **disclosed** the outcome of the trilogue negotiations.

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Which large platforms are targeted?

The DMA assumes that large platforms can decide who can and who cannot have access to the relevant digital markets. The DMA, therefore, considers them "gatekeepers" who can influence competitive processes in the markets concerned. To designate online platforms as gatekeepers, the DMA establishes a three-pronged test.

1. The undertaking must provide core platform services, such as advertising services, app stores, cloud services, marketplaces, search engines, social networks, voice assistants and web browsers.
2. Furthermore, it must provide those core platform services
    - in at least three Member States;
    - to 10,000 or more business users;
    - to 45 million or more monthly end-users and;
    - in each of the previous three financial years.
3. Lastly, it must have had
    - an annual EU-wide turnover of at least EUR 7.5 billion in the last three financial years; or
    - a market capitalisation of at least EUR 75 billion in the last financial year.

The European Commission first has to decide whether an online platform can be designated as a gatekeeper under the DMA. Once that decision is taken, the gatekeeper has to comply with a set of obligations listed in the DMA.

Obligations and prohibitions for designated gatekeepers

Within six months following designation, the gatekeeper must comply with the DMA's obligations and prohibitions. Those that have been made public so far include:

- ensuring that users can unsubscribe from core platform services with the same ease (and under similar conditions) with which they subscribed to them;
- ensuring instant messaging services are interoperable with other instant messaging services (this concerns basic functionalities);
- allowing app developers fair access to other functionalities of smartphones such as the NFC chip;
- granting business users access to data, more specifically marketing and advertising performance data of a seller who uses the gatekeeper's platform;
- informing the European Commission of their future mergers & acquisitions, even when those acquisitions are below merger control thresholds.

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Gatekeepers will also be prohibited from

- applying unfair conditions to business users;
- self-preferencing their services or products by ranking them higher than those of others (for which Google was already fined under the prohibition of the abuse of dominance in the Google Shopping case, currently on appeal before the Court of Justice);
- reusing personal data collected for one service in their ecosystem for another service in the ecosystem;
- pre-installing specific software applications; and
- bundling/tying specific services, such as:
  - requiring users to install web browsers upon installation of an operating system; or
  - requiring app developers to use in-app payment systems as a precondition to be listed in an app store (for which Apple already made **penalty payments to the Dutch ACM** under the prohibition of the abuse of dominance).

With these obligations and prohibitions, the DMA aims to prevent (i) unfair trading practices of gatekeepers and (ii) the creation or strengthening of barriers to market entry.
In the event a gatekeeper does not live up to its obligations under the DMA or infringes its prohibitions, the Commission may fine a gatekeeper up to 10% of its worldwide turnover (up to 20% in cases of recidivism and in case of systematic non-compliance, even a possible ban on M&A activity). If a gatekeeper systematically fails to comply with the DMA, the Commission can open a market investigation and, if necessary, impose behavioural or structural remedies.
The national competition authorities of the Member States will not be able to enforce the DMA but may help the Commission during investigations, and the DMA does not prevent national competition authorities from applying their own competition rules to conduct in digital markets, subject to the overarching principle of ne bis in idem.

THE FCO HANDS DOWN ITS FIRST DECISION UNDER THE NEW DIGITAL RULES

In recent years, the FCO has, among other competition authorities, been one of the driving forces in the debate whether traditional competition law and policies are still suited to adequately address the highly dynamic nature of the digital economy and rapid growth of the large digital platforms. While the FCO has been able to complete various proceedings against Big Tech firms using traditional competition tools (e.g., **the FCO's order to prohibit certain of Facebooks's data processing practices**), it nevertheless heavily promoted the idea that more was needed during the legislative process for the 10th amendment of the German competition law (German Act Against Restraints of Competition – "**GWB**").

The FCO eventually got what it wanted: the new Section 19a GWB. This provision aims to empower the FCO to impose preventive measures against large digital platforms in a faster and more effective manner. Given that backdrop expectations were high that the FCO should get to work and show results quickly. On 30 December 2021, i.e., eleven and a half months after the introduction of Section 19a GWB, the **FCO handed down its first decision**, which declares the new rules applicable to Google.

New rules for "UPSCAMs"

The new Section 19a GWB entails two elements: First, the FCO may declare, following proceedings pursuant to Section 19a(1) GWB, that the company under investigation is an "undertaking of paramount significance for competition across markets" ("UPSCAM"). As a result of such declaratory order, the FCO may subsequently impose ex-ante prohibitions, even on markets where the company is not dominant, for a number of practices specifically listed in Section 19a(2) GWB. Conduct prohibited under Section 19a(2) GWB includes, among other things, self-preferencing, impeding competitors in accessing purchase or sales markets, raising entry barriers, or demanding disproportionate benefits. Decisions pursuant to Section 19a GWB must be directly appealed to the highest German court (Federal Court of Justice), bypassing the first instance appellate court (Higher Regional Court of Dusseldorf). This – heavily debated – provision has been introduced to address the experience with the protracted and still on-going appeal proceedings concerning the FCO's aforementioned Facebook decision, which was issued in 2019.

Determining whether a company holds an UPSCAM position involves a holistic assessment of several factors, including whether there is activity on multi-sided ("platform") markets to a significant extent, dominance on several markets, vertical integration, financial strength, access to data, or other resources. The FCO's UPSCAM designation decision against Google does not come as a surprise, considering that Section 19a GWB has explicitly been introduced to tackle certain practices of large digital firms such as Google, Amazon, Facebook, and Apple. In a nutshell, the FCO argued that Google holds an UPSCAM position because it (i) operates on several platform markets involving, amongst others, Google Search, (ii) has significant influence in its "digital ecosystem" over third-party access to its users and advertising customers (e.g. via Google Search, YouTube, Android, Play Store or its advertising services), (iii) has access to a broad and deep database of, particularly user, data, and (iv) has considerable financial resources.

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Google has not appealed the UPSCAM designation decision, which is therefore legally binding. As a result, the FCO may ex-ante prohibit the company from certain conduct laid down under Section 19a(2) GWB. Google could, however, appeal such prohibition decisions to the Federal Court of Justice as they relate to separate proceedings. According to its press release, the FCO is currently pursuing three proceedings against Google, where Section 19(2) GWB plays a role, relating to **Google's data processing terms**, the **Google News Showcase** offer and **Google Maps Platform**.

Who's next?

On 4 May 2022 the FCO confirmed that it had also found that Meta (formerly Facebook) similarly held a position of paramount significance under Section 19a GWB, noting that "[t]he digital ecosystem created by Meta has a very large user base and makes the company the key player in social media." Like Google, Meta has chosen not to appeal its designation.

The FCO has initiated UPSCAM proceedings against Amazon on 18 May 2021 and Apple on 21 June 2021. Considering the pace of the Google and Meta proceedings, it can be expected that the FCO will try to complete these other cases quickly, perhaps this year.

The FCO has made quick use of its new tool, driven also by its ambitions to keep a leading role in the race among competition authorities around the globe by bringing new and innovative cases against Big Tech firms. Recently, there has been some tension between the FCO and the Commission about the role of national competition authorities in the enforcement of the EU's **Digital Markets Acts** ("DMA") and its interplay with national rules. Following the political agreement struck on the DMA in late March, Andreas Mundt, president of the FCO, was quick to welcome the fact that the FCO can continue its proceedings under Section 19a GWB and emphasized that the DMA will be an "important element" to be able to tackle Big Tech. Any digital companies hoping that the DMA might, ultimately, move enforcement towards a "one-stop-shop" are therefore likely to be disappointed. They must continue to carefully review their business models not only against the DMA, but also Section 19a GWB and other national legislation.

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CHALLENGES TO APP STORE EARNING MODELS

Both Apple and Google have app stores in which users of their operating systems for mobile devices purchase and download apps. Purchasing of the apps and in-app purchases (IAP) is done through Apple's App Store or Google's Play Store. Paid apps providers and their consumers have virtually no other distribution and payment option available besides the two large app platforms.. In addition, Apple and Google require app suppliers to pay a fee that can be as high as 30% of their sales. App developers, in particular those with a large number of customers using their paid apps and making IAP, have been complaining about the restrictions on app distribution and payment options outside the app stores. They also challenge the level of commission payable within the app stores and the fact that Apple and Google develop apps that are directly competing with apps from independent app developers.

Apps competing with Apple's apps

A prime example of a type of app whereby Apple is competing with independent app developers is in music streaming. Well-known music streaming app developer Spotify has complained to the European Commission that Apple abuses its dominant position. Following an investigation, in April 2021, the Commission sent a **statement of objections** to Apple. Commissioner Vestager in this regard stated that *"[o]ur preliminary finding is that Apple is a gatekeeper to users of iPhones and iPads via the App Store. With Apple Music, Apple also competes with music streaming providers. By setting strict rules on the App store that disadvantage competing music streaming services, Apple deprives users of cheaper music streaming choices and distorts competition. This is done by charging high commission fees on each transaction in the App store for rivals and by forbidding them from informing their customers of alternative subscription options."*

In 2021, the UK's Competition and Markets Authority (CMA) **opened** an investigation against Apple on its terms and conditions for app developers and in January 2022, the CMA also started a **market study** into the music streaming market focusing not only on the App store market but on the entire supply chain.

Non-competing apps in Apple's App Store

In July 2018, the Dutch Authority for Consumers and Markets (ACM) **launched** a market study into Apple's App Store and Google's Play Store. Due to possible competitive restrictions that became apparent from the findings of the study, the ACM in April 2019 started an **investigation** against Apple. The ACM alleged that Apple abuses its dominant position by imposing unfair conditions on app developers for the use of its App Store. In its investigation, the ACM focussed on the conditions imposed on app providers which do not compete with Apple's apps.

When the Commission and a Member State's competition authority review the same behaviour, the Commission's jurisdiction takes precedence. This is, however, different when they investigate behaviour on two distinct markets, even when the behaviour is similar. While the Commission's investigation based on Spotify's complaint focusses on app providers competing with Apple's apps, the ACM's investigation focusses on non-competing apps. The ACM considered these two markets to be distinct enough and therefore considered itself **competent** to continue its enforcement actions against Apple in parallel to the Commission's investigation. The ACM focussed quite specifically on dating apps.

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Dating app providers use a freemium business model. This means that the app can be downloaded for free and certain features in the app can only be used against payment. According to Apple's Apps Store terms, dating app providers are not allowed to use any other payment system. Nor are they allowed to refer in their apps to another method of payment outside Apple's IAP system. In August 2021, the ACM issued a **decision** in this case. It concluded that Apple holds a dominant position on the market for app store services supplied to dating app providers for the mobile operating system iOS. According to the ACM, dating app providers have no real alternative to Apple's App Store when they want to supply their apps to consumers who use mobile devices operated with Apple's iOS. The ACM considered Apple's terms and conditions unreasonable and therefore abusive, since dating app providers are (i) restricted in their freedom of choice of payment systems and (ii) cannot engage directly with their users, since the users can pay only through Apple. While ahe ACM did not impose a fine, it imposed an order subject to periodic penalty payments of EUR 5 million per week (with a maximum of EUR 50 million) in order to persuade Apple to amend the terms.

Apple first tried to alleviate concerns by suggesting that app providers could express their "interest" in alternative payment systems to Apple. Apple's second suggestion was that app providers interested in alternative payment systems had to build a new app and offer the new app in the App Store. The ACM **considered** these proposals to be insufficient and consequently Apple was subject to penalty payments and the maximum amount of EUR 50 million in **penalty payments** has become due. Commissioner Vestager expressed **disappointment** that "Apple essentially prefers paying periodic fines, rather than comply with a decision of the Dutch Competition Authority on the terms and conditions for third parties to access its Appstore." Only in June 2022, the ACM **concluded** that the changes Apple proposed met competition law requirements.

What's next?

The ACM's decision is the first in the EU to address restrictions of app distribution and payment options. Nevertheless, the European Parliament and the Council of the EU have in March 2022 **reached an agreement** on the **Digital Markets Act** (DMA). Once in force, the DMA will prohibit app stores to bundle other offerings, such as payment services. The longstanding earning model of app stores will therefore soon require fundamental revisions.

[1] *Apple immediately filed an administrative appeal with the ACM and sought preliminary relief from the Rotterdam district court to prevent the publication of the ACM's decision. The legality of the decision is only subject to judicial review during a regular action for annulment. In December 2021, the Rotterdam district court largely upheld the decision of the ACM. Concerning another unspecified abusive conduct of Apple, the court ruled it to not be sufficiently plausible.*

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ITALIAN COMPETITION AUTHORITY FINDS AMAZON ABUSED ITS DOMINANT POSITION IN ONLINE MARKETPLACES

On 30 November 2021, Amazon group companies ("Amazon") were hit with an approx. EUR 1.128 bn fine by the Italian Competition Authority ("ICA") for violating Art. 102 of the TFEU.
Amazon's conduct concerned the following markets, which the ICA held to be national in scope:

- Online marketplace intermediation services: This market consists of online platforms on which retailers and consumers transact. Online marketplaces are an essential income component for retailers because the running costs are much lower than those of independent e-commerce websites. The ICA's analysis revealed that Amazon has a dominant position in this market, with a share of approx. 75–80%.
- E-commerce logistics services: Amazon offers the following logistics services solutions to retailers in this market:
  - independent management (by the retailer) of the distribution process through its own choice of logistics provider;
  - the Fulfilment by Amazon service ("FBA"), whereby Amazon handles distribution and retailers' products can be classified as 'Prime', thereby granting retailers access to several additional benefits ("Prime Benefits"); and
  - the hybrid Seller Fulfilled Prime service ("SFP"), whereby retailers can work with their own choice of logistics provider and still have their products classified as Prime. However, Amazon selects the eligible logistics providers and sets the terms and conditions.

Subscribing to the FBA service is crucial for retailers, as it is the only way to receive all Prime Benefits. And only by using the FBA service can retailers sell their discounted products on the Amazon website during special events, e.g., Black Friday, Cyber Monday and Prime Day. FBA retailers also have the advantage of not being subject to Amazon's performance measurement, which influences product placement and can sometimes cause products to be delisted. Thus, the ICA found, retailers whose products have the Prime label and are not subject to performance measurement are far more likely to be placed in the website's highlighted section and see sales boosted.

Conversely, retailers subscribed to the SFP service are subject to performance measurement even though their products have the Prime label. Moreover, Amazon does not allow SFP retailers' products to count towards the spending threshold for free shipping, which can result in consumers choosing other products.

The ICA held that Amazon grants exclusive benefits on its Italian marketplace – amazon.it – only to FBA subscribers and concluded that Amazon's conduct constitutes an abuse of dominant position.

The ICA also found that Amazon leverages its dominant position by exploiting its vertical integration between the upstream market for marketplace intermediation services and the downstream market for e-commerce logistics services in order to impede the growth of competing logistics service providers.

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The ICA considered that this conduct has strengthened Amazon's position in marketplace intermediation services: the advantages of the full Prime Benefits has led many retailers to subscribe to the FBA service. Amazon has thus, in the ICA's view, discouraged retailers from selling products on other marketplaces, given its absolute importance in the sector and that retailers would otherwise likely incur double the costs for logistics services.

Finally, the ICA ruled that Amazon's different treatment of FBA and non-FBA retailers is discriminatory and not justified by its efficiency objectives.

In addition to paying the hefty fine, Amazon has to introduce non-discriminatory standards for placing products on its website and ensure that the requirements for having products classified as Prime/receiving Prime Benefits are fair.

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THE CREATION OF AN ECONOMIC INTELLIGENCE UNIT BY THE SPANISH COMPETITION AUTHORITY

In March 2021, the Spanish Competition Authority (Comisión Nacional de los Mercados y la Competencia, "CNMC") announced the creation of an Economic Intelligence Unit (the "EIU"). The EIU is responsible for applying statistics and artificial intelligence techniques to strengthen surveillance of potential anticompetitive practices. While other competition authorities have already created similar units recently (such as the United Kingdom [1] and France [2]), this is the first time that the CNMC publicly announces the use of big data and AI techniques in its horizon scanning.

New tools to identify cartels and anticompetitive behaviour

The EIU is composed by a team of experts in mathematics, computer science, law and economics that apply big data and artificial intelligence techniques to detect irregularities in the market. In addition to their ability to screen irregularities ex officio pursuant to publicly available information, the CNMC has created a confidential digital channel for whistle-blowers on anticompetitive behaviour (Sistema de Informantes de Competencia Anónimos, "SICA").

SICA is an encrypted and anonymous chat with the CNMC that any citizen can use to send information on practices that might undermine competition. The EIU is responsible for analysing the information received and for deciding whether there is merit in further investigating any reported conducts. An essential feature of this system is that the complainant is not required to provide any personal information to use SICA and all communication is kept confidential.

Data analysis in ongoing investigations

The EIU may also take part in analysing evidence for ongoing antitrust and merger control investigations. In August 2021, the CNMC fined several companies active in the road maintenance sector. Its decision –subject to appeal– was heavily based on the statistical analysis of the behaviour of the companies in all public tenders during the investigated period. It can also be expected that the EIU gets involved in complex merger control cases with a significant amount of market data. The EIU also screens various sources of information such as media, statistics, etc. to detect potential unreported mergers which may be subject to a merger control filing.

In addition, the EIU supports the decision making of the CNMC by analysing data through business intelligence tools, as well as improving the effectiveness of inspections, e.g. by obtaining information with Open Source Intelligence techniques.

[1] *See press release of the UK Competition Authority of 24 October 2018, available at:* **https://competitionandmarkets.blog.gov.uk/2018/10/24/cmas-new-data-unit-exciting-opportunities-for-data-scientists/**

[2] *See press release of the French Competition Authority of 9 January 2020, available at:* **https://www.autoritedelaconcurrence.fr/en/press-release/autorite-creates-digital-economy-unit**

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