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Toward New European Rules for Digital Players in the Internal Market

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GAFAM (Google, Apple, Facebook, Amazon & Microsoft), the providers of core platform services, are dominating the digital market. In other words, globally, almost all digital services depend on GAFAM. This phenomenon was stressed by the COVID-19 pandemic with the massive move of our daily life to virtual life. Indeed, GAFAM built their power on an unregulated market and are accused of unfair competition, lack of transparency in the collect of personal data, threatening democracy by spreading false information or breaching the freedom of speech.

In order to regulate digital players in the internal market which became out of control, the European Commission published a new draft digital legislative package on 15 December 2020: on the one hand, a Proposal for a Regulation on a single market for digital services (Digital Services Act)¹ and on the other hand, a Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act)². The Digital Services Act (DSA) improves and completes the provisions of the outdated E-Commerce Directive³ on the regulation of illegal content of all digital services intermediary providers whereas the Digital Markets Act (DMA) regulates providers of core platforms services acting as “gatekeepers”, i.e. controlling access to digital market (GAFAM are the target of this text), to supplement EU antitrust rules.

This ambitious new framework will regulate all digital players operating in the internal market with a particular attention for core platforms (1), creating new strict obligations (2) as well as a heavy sanction regime for them (3).

1. A flexible scope for Digital Players with a particular attention to core platforms

The DMA is applicable to the largest digital players operating in the internal market to address the systemic risk similar to the bank regulation on systemic risk in response to the 2008 subprime crisis. On the contrary, the DSA has a larger scope as it is applicable to all providers of intermediary services but with also special rules for core platforms.

1.1. The DMA: one text for larger digital players

The DMA is meant to regulate core platform services provided or offered by gatekeepers to business users established in the EU or end users established or located in the EU. To be qualified as a “gatekeeper”, the provider of core platform services shall meet three cumulative conditions.

¹ Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final.

² Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final.

³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”), Official Journal L 178, 17/07/2000, p. 0001 – 0016.

Firstly, a provider of core platform services shall have a significant impact on the internal market which is presumed to be satisfied if the undertaking to which it belongs achieves in the EEA an annual turnover of at least €6.5 billion in the last three financial years, or if the average market capitalisation or the equivalent fair market value was of the amount to at least 65 billion euros in the last financial year, and it provides a core platform service in at least three Member States.

Secondly, a provider of core platform services shall operate a core platform service which serves as an important gateway for business users to reach end users which is presumed to be satisfied if the platform 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.

Thirdly, a provider of core platform services shall enjoy an entrenched and durable position in its operations, or it is foreseeable that it will enjoy such a position in the near future which is presumed to be satisfied if the last thresholds are met in each of the last three financial years. However, the DMA is flexible regarding the quantitative conditions set. Indeed, the European Commission is free to identify as a gatekeeper any provider of core platform services who does not meet the thresholds.

1.2. The DSA: one text for all providers of intermediary services and very large online platforms

The DSA is meant to regulate all providers of intermediary services – whatever their size - in the internal market, meaning “mere conduit”, “caching” and “hosting” services, and irrespective of the place of establishment of the providers of those services. In this regard, the large definitions of the E-Commerce Directive are retained. It contains also special provisions for the “very large online platforms”.

2. New strict obligations for Digital Players

The DMA is designed for the digital players who consider themselves as “*too big to care*” as explained the Commissioner for Internal Market Thierry Breton. The purpose of the DSA is summed by Margrethe Vestager, Executive Vice-President for a Europe fit for the Digital Age: “[...] *what is illegal offline is equally illegal online*”. Thus, the DMA introduces *ex-ante* regulations for gatekeepers whereas, under the DSA, general and specific obligations apply following the size and impact of digital service providers.

2.1. Ex-ante regulations for gatekeepers

The DMA introduces *ex-ante* regulations for gatekeepers, in the form of a list of do’s and don’ts to identify and exclude aggressive and monopolistic behaviours, which are also subject to investigative procedures to establish the infringement of EU competition law.

In the Internal Market, the European competition authorities regularly sanction GAFAM for breaching EU antitrust rules. As an example, Microsoft was fined €561 million 2013 for imposing its search engine Internet Explorer on users of Windows 7⁴. Google was fined a total €8.25 billion between 2017 and 2019 for illegal practices regarding Android mobile devices to

⁴ Commission Decision of 6 March 2013 relating to a proceeding on the imposition of a fine pursuant to Article 23(2)(c) of Council Regulation (EC) No 1/2003 for failure to comply with a commitment made binding by a Commission decision pursuant to Article 9 of Council Regulation (EC) No 1/2003, Case COMP/39.530 - Microsoft (Tying), C(2013) 1210 final.

strengthen dominance of Google's search engine⁵. The European Commission has opened a formal antitrust investigation to assess whether Amazon's use of sensitive data from independent retailers who sell on its marketplace is in breach of EU competition rules⁶. Formal antitrust investigations were also opened to assess whether Apple's rules for app developers on the distribution of apps via the App Store violate EU competition rules⁷.

The problem is that antitrust sanctions come after years of investigations and that the fines are not dissuasive for GAFAM. Moreover, EU antitrust rules do not address the negative consequences arising from certain behaviours as the unfair use of data from businesses operating on online platforms, situations where users are locked into a particular service and have limited options for switching to another one or acquisitions of competitors. Finally, the digital market is always evolving very quickly.

Thus, gatekeepers will *inter alia* be prohibited from combining personal data from their core platform services with personal data from any other services and will have the obligation to allow business users to offer their products or services to end users through other online intermediation services at different prices or conditions.

Some prohibitions and obligations imposed to gatekeepers will be subject to further clarification by the European Commission as the obligation to uninstall pre-installed applications without service restrictions and to ensure interoperability of ancillary applications.

Finally, gatekeepers will have the obligation to inform the Commission of any intended concentration involving another platform or digital service provider and submit to the Commission an independently audited description of any techniques for profiling of consumers that they apply to or across its core platform services.

2.2. Liability and obligations of providers of intermediary services

The DSA maintains the key principles of the E-Commerce Directive. On the one hand, the providers of digital services are not liable for the illegal content they transmit, “cache” or “host” as long as they do not have knowledge of the content. On the other hand, the providers of digital services have no general obligation to monitor the information they transmit or store.

The DSA introduces new obligations for providers of digital services. They are required to establish and communicate a single point of contact and mention the restrictions they impose on the use of their services within their terms and conditions. Finally, a new duty to report on any content moderation they engaged is also created.

Further obligations are introduced for all hosting providers, including online platforms. They will have to put in place mechanisms to request the removal of illegal content, including a statement of reasons for the removal.

⁵ Commission decision of 27 June 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement, Case AT.39740 - Google Search (Shopping), C(2017) 4444 final; Commission Decision of 18 July 2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement, Case AT.40099 - Google Android, C(2018) 4761 final; Commission decision of 20 March 2019, not published yet (https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40411).

⁶ https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077

⁷ https://ec.europa.eu/competition/antitrust/cases/dec_docs/40716/40716_13_3.pdf

Obligations that apply only to online platforms are also added and include the creation of internal complaint-handling systems to manage the removal of illegal content and/or the suspension or termination of the services and/or of users' accounts, transparency on online advertisements and on algorithms used to display them.

Finally, the DSA adds obligations for “very large online platforms” and define them as providers of services to a number of average monthly active recipients of the service in the Union equal to or higher than 45 million, that is, a number equivalent to 10% of the EU population. Very large online platforms should therefore assess the systemic risks stemming from the functioning and use of their service, as well as by potential misuses by the recipients of the service, and take appropriate mitigating measures.

3. Heavy sanctions regime applicable to digital players

In order to create an effective framework, the DMA and DSA create very dissuasive fines and gives important powers to EU regulators.

3.1. Sanctions regime applicable to gatekeepers

If the gatekeeper does not comply with the obligations set in the DMA, the European Commission may impose on the gatekeepers fines not exceeding 10% of their total turnover in the previous financial year. Periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding financial year per day may be added. In case of systematic infringement, the European Commission may impose any behavioural or structural remedies such as separation, including the divestiture of a business, or parts of it. The European Commission enjoys the same authority in competition law.

3.2. Sanctions regime applicable to providers of intermediary services

Under the DSA, the European Commission proposes the appointment of a Digital Services Coordinator in each Member State to assess the compliance of the providers of intermediary services with their obligations and impose fines, if relevant. The Commission may impose on the very large online platform fines not exceeding 6% of its total turnover in the preceding financial year. Periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding financial year per day may be added.

The two further regulations are built not to enter in conflict with competition rules but to complete them by *ex-ante* new provisions applicable *per se*, *i.e.* without the measure of a restriction of the competition on the relevant market. The DSA and DMA aims also to develop new expertise capacities in the field of digital economy and to create a tighter coordination through a network of local authorities and coordinators, a European Board for Digital Services and the European Commission. To note also that the two texts in the initial version let a large power to the European Commission to precise the rules through “delegated acts”.

The European Parliament and the Member States will discuss the European Commission's both proposals in the ordinary legislative procedure in the light of the news. If adopted, the final text of the EU regulations will be directly applicable in the Member States.

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