

# Kluwer Competition Law Blog

## Commission's New Tools for Policing Digital Markets Are Shaping Up Gradually, But Slowly

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After [two rounds](#) of public consultations that ended 8 September 2020, the European Commission ('Commission') appears to be on track and make its proposals for new enforcement powers more concrete. The Commission intends to adopt its two definitive legislative proposals before the end of 2020. In this post, we take a look at where the Commission stands in shaping its proposals, and where it might be heading.

### Where Do We Stand?

#### *Digital Services Act*

On the one hand, there is the [Digital Services Act](#) (DSA). The Commission aims to propose rules in respect of the responsibilities of digital service providers in order to address the risks faced by their users and to protect their rights. The new rules would ensure a modern system of cooperation for the supervision of digital platforms and guarantee effective enforcement. In addition, the Commission intends to propose rules on unfair trading practices covering large online platforms that can be regarded as 'gatekeepers', that in the Commission's words "*set the rules of the game for their users and their competitors*".

#### *New Competition Tool/Digital Markets Act*

The second pillar of the Commission's regulatory package is the so-called [New Competition Tool](#) (NCT). The exact contents of this potential new instrument for the Commission are still unclear, but the Commission proposed that it is given the powers to impose *ex ante* measures on digital platforms with significant market power (which in many cases will amount to a dominant position) even in the absence of (demonstrated) abusive conduct.

According to [PaRR](#), Commissioner Vestager announced on 19 October 2020 that the NCT would be repackaged to be part of a broader Digital Markets Act (DMA). This DMA would also incorporate the aforementioned obligations for gatekeepers, which would thus not be part of the eventual DSA. This is however not currently confirmed on the Commission's own website. Vestager was quoted by PaRR saying: "*We will have to say to some of the gatekeepers – the largest platforms – that things will change. (...) [We] [w]ill also provide [a] market investigation*

*framework, to investigate markets prone to market failure, and creation of new gatekeepers*". Thus, it appears that the Commission intends to establish one single set of rules on gatekeepers, prohibiting, on the one hand, unfair trading practices by these gatekeepers and on the other hand allowing the Commission to impose *ex ante* measures on them.

### **Where Could We Be Heading?**

No definitive proposal for either the DSA or the DMA (assuming that indeed these will be separate pieces of legislation) has currently been made public, but both proposals are expected to be released later this year. Taking into account the Commission's and other European competition authorities' previous enforcement actions against digital platforms such as Google and Amazon, it is possible to imagine what types of issues and behaviour the Commission is envisaging to tackle.

Digital platforms are often characterised by two-sided network effects: a platform becomes more attractive for sellers or advertisers if it has more users and *vice versa*. These network effects may also be indirect: a social network, for example, becomes more attractive for advertisers if it gains more users. For these users, on the other hand, the only network that matters is the number of other users: the more other users, the greater the attractiveness of the network. These direct and/or indirect network effects may lead to 'market tipping' and/or 'winner take-it-all' market dynamics, which can eventually result in only one platform remaining in a particular market. Such a platform could develop into a 'gatekeeper' as referred to by the Commission. Potentially undesirable behaviour by a gatekeeper platform may include:

- Self-preferencing, whereby a platform favours its own services directly or indirectly in situations when it has a dual role of providing the platform and competing on the same platform. (see for example the [Google Shopping](#) case);
- Anti-steering, whereby a platform prevents business users of platforms from 'steering' consumers to other offers than those provided by platforms that may be cheaper or otherwise potentially attractive alternatives (the hotel booking sites cases handled by various European competition authorities in the past years are well-known examples);
- Tying and bundling;
- No or selective data sharing.

### **France and the Netherlands lead the way and plead in favour of rules to restrict the power of gatekeeper platforms**

In a [joint non-paper](#) dated 15 October 2020, the French and Dutch governments plead – as input on the DSA and NCT consultations of the Commission – in favour of further regulation and provide clear advice regarding the direction they believe the Commission should take in the DSA and/or DMA.

Their first recommendation is that the Commission should draw up a list with principle-based obligations and prohibited practices for gatekeeper platforms. The full set of behavioural obligations could be widened to the whole ecosystem of the platform to tackle the risks stemming from its gatekeeper position on a number of neighbouring markets (leveraging). Also, it could be adjusted over time, in light of the evolution of the business environment. The measures could be

either eased or tightened depending on the actual evolution of these conditions.

Possible behavioural measures suggested by the French and Dutch governments are:

- An extension of the right to data portability for business users;
- Rules regarding fair contracts;
- Rules prohibiting disruptive self-preferencing;
- Rules prohibiting halting access for third party providers of services or goods, including for instance application programming interfaces ('APIs') and data without objective justification.

Their second recommendation relates to case-by-case remedies. The joint governments propose that access obligations might be imposed to ensure market openness. The purpose of these measures would be to enhance competition by regulating access to relevant inputs, users, and online infrastructures. These obligations may include:

- An obligation to offer alternatives to users proactively;
- Safeguarding interoperability;
- Data sharing obligations.

The joint governments further advise that the level of fines or other sanctions should be significant enough to ensure the effectiveness of the rules at stake by deterring the platform from breaking them. They believe that the requirement of an efficient and deterrent mechanism of sanctions is all the more important since any breach of the rules would be likely to induce serious and irreversible harm.

### **Still unclear what the Commission will eventually propose**

As becomes clear from the foregoing, the Commission's exact plans remain shrouded in mystery for the moment and this uncertainty is fuelling speculations and discussions around the globe. However, it seems highly likely that the European Commission will propose a list of obligations and forbidden practices regarding gatekeepers under the DSA and that the *ex ante* rules under the NTC will focus on closing the alleged enforcement gap that currently exists according to the Commission. More clarity will be obtained once the actual legislative proposals will be published, which the Commission intends to do already later this year. At that moment, we intend to revert with an in-depth analysis of these proposals.

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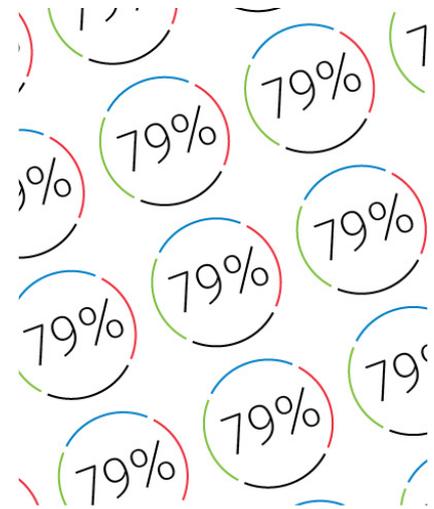
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