Kluwer Competition Law Blog

Germany, France, and the Netherlands call for a tougher Digital Markets Act, EP Rapporteur agrees

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The draft Digital Markets Act (DMA) has been public for several months now (see a previous blog for our initial review when the draft came out) and opinions on its content continue to roll in. In brief, the DMA aims to lay down a set of rules for certain crucial platform services, so-called *gatekeepers*.

EU Member States' governments and the European Parliament (EP) are now in the process of determining their positions regarding the draft. On 26 May 2021, a non-paper was released by Peter Altmaier (German Minister of Economic Affairs), Bruno Le Maire (French Minister of Economy, Finance and Recovery), Cédric O (French Minister of State for the Digital Transition and Electronic Communication) and Mona Keijzer (Dutch State Secretary of Economic Affairs and Climate Policy). The document contains suggestions for a(n) (even) stricter DMA, in particular, to introduce additional, stricter rules on merger control. The joint governments express their opinion that the EU should be tougher on big tech companies and take the position that the rules in the DMA proposal do not suffice. In their proposal, the three countries identify seven elements of the DMA they believe require strengthening.

At almost the same time, Andreas Schwab, Rapporteur of the EP in relation to the DMA, also believes that the European Union should be tougher on gatekeepers. In his draft report on the DMA published 4 June 2021, Schwab proposes no less than 127 amendments to the DMA. These have been interpreted to place the DMA's focus more on the five largest tech companies: Google, Amazon, Apple, Facebook (together: 'GAFA'), and Microsoft.

Suggestions of Germany, France, and the Netherlands: a tougher act and more national involvement

In the non-paper, the governments of Germany, France and the Netherlands welcome the DMA because they acknowledge that the digital transformation has changed the global economy and that due to the Covid-19 pandemic, its importance has only increased. The three governments believe that access to the digital market is controlled by a few large providers. The governments express their doubts about whether the current draft for the DMS is sufficiently equipped to ensure the effectiveness of the DMA to ensure a fair digital market in which users have free choice and

control. They believe various elements of the DMA would need to be altered, specified, or put in a broader perspective. Those seven elements will now be discussed more in-depth below.

The first proposal in the non-paper is to narrow the scope of the DMA. The Member States believe that a narrower scope will increase enforceability. In addition, there should be a more central role to the importance of a company's ecosystem. This criterion is currently lacking in the combination of quantitative thresholds with qualitative criteria that govern the DMA's applicability.

Second, the three governments believe that the relationship between the DMA and European competition law should be clarified. In their opinion, it is very important that the DMA adds to existing European and national rules and enhances these, instead of weakening or replacing the existing rules.

Third, the authors believe that the DMA should leave sufficient room for national rules to apply to gatekeepers. They reiterate their view that national and European rules should be complementary instead of undermining each other. The governments believe that the complex and multifaceted nature of the digital economy may give rise to national peculiarities that require tailor-made solutions at the national level. Therefore, the governments argue that the DMA should leave room for Member States to draw up and enforce additional national rules.

Fourth, the three countries believe that the DMA should be better tailored to be able to keep up with the dynamic and innovative character of digital markets. Article 10 of the DMA already offers some flexibility in this respect, providing the Commission with the power to update the obligations for gatekeepers under the DMA. Without becoming very concrete on the exact nature of the desired amendments, the authors propose a 'further step' to complement Articles 5 and 6 of the DMA, which contain the proposed obligations for gatekeepers.

Fifth, the three governments propose to strengthen the role of Member States, in particular where it comes to the possibility of updating the DMA. The authors welcome the market investigation tool already foreseen in the draft DMA. However, they believe that the cooperation between the Commission and the Member States in the process of adapting the DMA on the basis of the outcome of such market investigation should be reinforced. Specifically, the three governments propose to extend the possibility for Member States to request a market investigation under Article 15 (designation of gatekeepers) to Articles 16 (investigation of systematic non-compliance) and 17 (investigations into new services and practices).

Sixth, the authors believe that all available resources should be used to ensure effective enforcement of the DMA. That would imply involving national authorities in the DMA's enforcement to a larger extent than presently foreseen. The governments further believe that it should be clarified that private enforcement of the gatekeeper obligations under the DMA is legally possible, as private enforcement would add to the DMA's effectiveness.

The seventh and final point the three governments bring forward is that merger control vis-à-vis gatekeepers should be further strengthened and sped up. The governments fear so-called 'killer acquisitions', whereby a gatekeeper buys up a start-up company with the aim of preventing it from becoming a competitor. The authors believe that Article 12 of the DMA – which obliges gatekeepers to inform the Commission of any concentrations they enter into without making such concentrations subject to a full-scale notification procedure under the merger regulation if they do not fulfil the thresholds – lacks ambition and further-reaching ideas should be considered. Their

fear is that if Article 12 of the DMA would be implemented as stated in the current draft, enforcement against such killer acquisitions may not be sufficiently effective. The governments propose to strengthen Article 12 of the DMA to modify the merger control system under Regulation (EC) No 139/2004. A first amendment to the ECMR should create the possibility to introduce clear and legally certain notification thresholds for acquisitions by gatekeepers in case gatekeepers aim to purchase a company with relatively low turnover but with a high value. The second aim is adapting the substantive test of the ECMR so that potentially predatory acquisitions could be effectively addressed. The non-paper does not address the nature of the desired changes to the substantive test.

European Parliament Rapporteur wants to target 'GAFA' and Microsoft

Rapporteur Schwab first calls for higher thresholds for undertakings to be designated as gatekeepers under the DMA. The draft report proposes a threshold of at least EUR 10 billion turnover in the last three financial years, instead of the original EUR 6.5 billion. In addition, the draft report proposes to raise the threshold relating to market capitalisation or the equivalent fair market value to at least EUR 100 billion, instead of the original EUR 65 billion. This will obviously mean that fewer undertakings shall be designated gatekeepers.

Furthermore, the draft report also proposes a narrowing of the scope of the DMA in other respects. Schwab proposes to define a gatekeeper as a company that offers two or more core platform services (rather than one as proposed by the Commission). According to the report, the DMA should be clearly targeted at those platforms that play an unquestionable role as gatekeepers due to their size and their impact on the internal market. Rapporteur Schwab, therefore, finds it appropriate to increase the quantitative thresholds and to add – as an additional condition for companies to be designated as gatekeepers under Article 3 (2) of the Regulation – that they are providers of not only one but, at least, two core platform services. The provision of two or more core platform services is also an important indicator of the role of these companies as providers of an ecosystem of services.

Whereas Schwab's proposals discussed above (deliberately) narrow the scope of the DMA, the draft report at the same time calls for stricter rules for those companies that will still qualify as gatekeepers under this narrower scope. *Inter alia*, the draft report suggests clarifying the obligations and prohibitions under Articles 5 and 6 of the DMA and strengthening the anti-circumvention prohibition. This should be done by prohibiting gatekeepers from engaging in any behaviour that would, in practice, have the same object or effect as the practices listed in Articles 5 and 6 (proposed new Article 6a). Schwab furthermore believes that it should be clarified that the obligations and prohibitions foreseen in the DMA are self-executing and that gatekeepers are expected to ensure compliance as soon as the DMA shall enter into force. Furthermore, the Rapporteur is of the view that the regulatory dialogue should foresee the possibility for the Commission to market-test the measures a gatekeeper is expected to implement in order to ensure effective compliance with the DMA.

Schwab also proposes several changes to sharpen the behavioural rules that the DMA intends to impose on gatekeepers. Arguably, his most far-reaching proposal in this respect is introducing a complete ban for gatekeepers on imposing most favoured nation (MFN) clauses, whereas the Commission's draft 'merely' introduces an obligation for gatekeepers to allow their business users

to engage in multi-homing (i.e. also using competing platforms), see Article 5(1)(b).

Another important proposed amendment is to delete the possibility (in Article 23 of the draft DMA) for gatekeepers to offer commitments to the Commission. The draft report takes the position that commitments are not compatible with the self-executing nature of the DMA. In addition, Schwab proposes to delete the provision in Article 16(2), allowing the Commission to impose structural remedies only as a last resort. If adopted, this amendment would allow the Commission to impose structural remedies on gatekeepers also when other remedies are available.

Like the three Member States, Schwab also calls for a strengthening of the role of national authorities. Proposals in this respect include creating the possibility for the Commission to request national authorities to support market investigations for the designation of gatekeepers. Schwab also proposes to create *a High Level Group of Digital Regulators* where all the representatives of the relevant authorities of the Member States, the Commission, and other relevant authorities are represented. Their tasks should include facilitating cooperation and coordination between the Commission and Member States regarding their enforcement decisions and supporting the Commission with monitoring compliance.

Do the noses of the Member States and the EP Rapporteur point in the same direction?

Some of Schwab's proposed amendments correspond to the suggestions of Germany, France, and the Netherlands. This includes notably the pleas for a narrowing of the DMA's scope (specifically targeting Big Tech) combined with the imposition of stricter rules on (fewer) gatekeepers, and for more involvement of national authorities in the DMA's enforcement.

On the other hand, the opinions of the Member States on the one hand and of the Rapporteur on the other hand clearly differ where the possibility to impose additional national rules alongside the DMA is concerned. The Commission's proposal for the DMA currently does not envisage this possibility and Schwab does not propose to amend this. If the EP would agree with Schwab's proposal in this respect whilst at the same time other Member States would join the three governments in their call to allow additional national rules and measures, this could potentially lead to a clash between the Commission and the EP (proposing a one-size-fits-all approach for the entire EU) on the hand and the Council of Ministers (proposing additional national solutions) on the other hand. It is not entirely surprising that the discussion appears to emerge; we already referred to the role of national authorities as a point of discussion in our first blog on the DMA. On the one hand, a uniform set of rules for gatekeepers would add greatly to legal certainty. In this respect, it is important to point out that most gatekeepers operate in a large number of EU Member States and this would only become the case to a larger extent if the DMA's scope is indeed narrowed – as both the three Member States and Schwab propose. On the other hand, it does not come as a surprise that national governments would prefer having the possibility of creating tailor-made solutions for their specific national situations.

It will be interesting to see where the discussion will go from here ad whether this will indeed become a serious point of debate. We certainly intend to keep monitoring the discussions closely and if relevant report back on these in future posts.

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