Continuing risks of the lack of enforcement of the Digital Markets Act after the trilogue

In our legal opinion of 23 February 2022 on the "Risks of legal and factual bypassing of the objectives and regulatory content of the Digital Markets Act", we analysed the European Commission's draft of the Digital Markets Act[1], in particular with regard to possible enforcement deficits. Below, we summarise the main findings and remedial proposals from the legal opinion and compare them with the changes to the text of the DMA after the trilogue. The comparison makes clear that despite the efforts in the trilogue, many of the shortcomings raised have not been effectively addressed, especially with regard to the participation and challenge rights of EU citizens competitors and business customers. In this respect, there should at least be a considerable increase in the number of staff at the Commission.

Areas of concern identified in the legal opinion

With regard to potential enforcement deficits, the report identified the following areas of concern:

- Deficits in public enforcement due to the limited capacities of the Commission.
- Political concession decisions taken by the Commission for fear of court defeats.
- Insufficient gatekeeper compliance with the Commission's decisions.
- Insufficient control of structural deterioration caused by "killer acquisitions".
- The long duration of proceedings, which jeopardises contestability and market fairness before the conclusion of proceedings.

Solutions proposed in the legal opinion

In order to mitigate or eliminate these problems, the legal opinion suggested the application, inter alia, of the following amendments in the course of the trilogue:

- Formalising the involvement of national authorities and their capacities in the Commission's regulatory process through application and participation rights.

1 COM, 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; available at: https://eur-lex.europa.eu/legal-content/de/TXT/?uri=COM%3A2020%3A842%3AFIN

- Formalising the involvement of (affected) third parties, such as gatekeepers' competitors or customers, in the regulatory process, including the right to information, application, hearing and challenge before the ECJ.
- Strengthening private law enforcement by affected third parties, such as competitors, customers and consumer organisations.
- Retaining, at all costs, the removal of the possibility for the Commission to make commitments under Art. 23 DMA-E, as such commitments are the gateway to concession decisions. Failing which, national competition authorities and affected third parties should at least have mandatory rights of challenge.
- Creating access rights for affected third parties that can be implemented under private law. Strengthening the participation and application rights of private third parties in the follow-up to the official process.
- Ensuring the structural ex-ante control of mergers that may affect the contestability of markets.
- Shifting the burden of proof to the gatekeepers regarding a merger's impact on contestability.
- Creating break-up possibilities as an ex-post control of mergers: both to restore market contestability whether or not there has been abuse and, in the case of significant infringements after the merger, to tackle the specific abuse.
- Strengthening provisional measures. Currently, according to Art. 22 (2) DMA-E, such measures are only for use in cases of gatekeeper non-compliance that fall under Art. 25 DMA-E. However, the Commission should be able to neutralise short-term threats, especially to the contestability of markets, on an interim basis in order to avoid irreparable damage to contestability.
- Enabling affected third parties (competitors or gatekeeper customers) to contest insufficient behavioural remedies.

Actual changes post trilogue

The version of the DMA[2] subsequently agreed upon in the trilogue procedure contains some changes and additions to the Commission's draft. Below, we will briefly describe to what extent these changes address our original concerns or whether more work is required.

- **Art. 8 (6) of the new DMA** provides that the Commission shall publish a **non-confidential case report detailing a gatekeeper's non-compliance with their obligations** and the subsequent measures envisaged by the Commission with a view to enabling third parties to comment on the case.

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The amendment is to be welcomed as a means of improving gatekeepers' satisfactory implementation of Commission decisions, but for several reasons, it threatens to go nowhere. Firstly, antitrust experience shows that companies use disputes over the scope of confidentiality to prevent the timely publication of non-confidential case reports. Without clearly regulating the scope of confidentiality in the DMA itself, there is nothing to stop the confidentiality-related difficulties that arise in antitrust proceedings from being repeated here. It can take years before non-confidential versions of decisions are published. Furthermore, confidentiality could be interpreted so strictly that third parties are unable to learn anything from the case report. Finally, it remains completely unclear whether, and in what form, the Commission will act on comments received from third parties. This has the potential to prove so frustrating to third parties that they refrain from commenting entirely. In this respect, the possibility for third parties to efficiently challenge the decisions of the Commission is still lacking.

- **Art. 9 (4) of the new DMA** clarifies that the Commission, when deciding on the suspension of obligations under the DMA, must consider in particular the **interests of small and medium-sized enterprises (SMEs) and those of consumers.**

  However, no link is made to the increased involvement of third parties or even to formal rights of participation and contestation. The addition is therefore to be classified as declaratory without any substantive meaning.

- **Art. 16 (5) of the new DMA** provides that the Commission may request the assistance of the competent national authorities in market investigations.

  This addition seems to make sense, but it does not solve the problem in the event that the Commission does not wish to initiate a market investigation due to excessive workload or a lack of political will.

- **Art. 17 (5) and Art. 19 (2, 6) of the new DMA** provide, in parallel with **Art. 8 (6)**, that the Commission shall publish a **non-confidential case report** on the **preliminary findings of the market investigation regarding the existence of a gatekeeper position or new services and practices** in order to enable third parties to comment on the file.

  These amendments are to be welcomed with regard to the participation of third parties, but due to the circumstances outlined in relation to Art. 8 (6), above, they are in danger of amounting to nothing.

- **Art. 22 (2) of the new DMA** obliges the Commission, should it wish to conduct an interrogation, to inform the competent authority of the Member State in whose territory the interrogation will take place. Furthermore, the Member State authority has the right to assist the persons being questioned by the Commission during their questioning.

  This addition is to be welcomed, especially given its design as a right of the Member State authority.

- **Art. 27 of the new DMA** stipulates that any third party, in particular business customers, competitors and end customers of the gatekeeper's core platform services, may inform the

Commission or the competent national authorities about gatekeeper practices or conduct that fall within the scope of the DMA.

To start with, this addition merely states the obvious, because in principle it is possible for anyone to raise their concerns with the European or national authorities. The ability to provide such information is only significant if it is accompanied by rights of participation or an obligation to act on the part of the authorities. However, both are expressly excluded in **Article 27 (2) of the new DMA**, according to which the authorities are under no obligation to take action on the basis of the information provided and any measures to be taken are left entirely to their discretion.

- According to **Art. 38 of the new DMA,** the national authorities and the Commission shall cooperate in the area covered by the DMA via the European Competition Network (ECN) and shall be authorised to exchange information. In this respect, it is of particular note that under **Art. 38 (7),** national authorities may also, on their own initiative, instigate investigations on their territory regarding possible infringements of Articles 5**,** 6 and 7 of the DMA.

  This amendment is important as it allows Member States and their authorities to take action even if the Commission fails to launch an investigation due to a lack of capacity or political will. However, it should be noted that, according to **Art. 38 (7 subpara. 2) of the new DMA,** the Commission can take over Member States' corresponding proceedings, whereupon the competence of the Member State authority ends. This can lead to Member State authorities refraining from such proceedings from the outset because they fear being deprived of the "fruits of their labour".

- According to **Art. 39 of the new DMA,** Member States' courts can ask the Commission for, among other things, access to information or the Commission's legal opinion in connection with the DMA.

  In principle, strengthened cooperation between national courts and the Commission in the area of DMA application is to be welcomed. Art. 39 of the new DMA clearly proves that the DMA's directly applicable prohibitions can be enforced through private law. In other words, even without a prior decision by an authority, affected third parties can sue gatekeepers for injunctive relief and damages. However, Art. 39 (5) of the new DMA prevents the courts from taking decisions that contradict Commission decisions. If a Commission decision is in the pipeline, the courts are to stay proceedings until that decision is taken. It is questionable whether a third party would want to take the risk of bringing an action under these circumstances if a Commission decision had not already been taken.

- **Article 41**(**2) of the new DMA** provides that one or more Member States may request a market investigation under Article 18 of the DMA if there are grounds to believe that a gatekeeper is systematically infringing any obligations under Articles 5, 6 or 7 of the DMA.

  Member States' right to file an application is to be welcomed, especially since this is already available to an individual Member State. Due to the political independence of Member

States' competition authorities, as required by the EU, a right of application by the authorities is preferable.

- Furthermore, according to **Art. 41 (3) of the new DMA,** three or more Member States may request an investigation under Art. 19 of the DMA if they have reason to believe that additional services need to be added to the list of core platform services or that certain practices are not adequately covered by the DMA.

  This extension of Member States' application rights is to be supported. However, the requirement for there to be at least three Member States is nonsensical.

- **Art. 42 of the new DMA** clarifies that violations of the DMA can also be brought before the courts by way of representative actions to protect the collective interests of consumers.

  The applicability of representative actions is to be welcomed, even if the general concerns regarding the efficiency of court proceedings remain (see the comments on **Art. 39 of the new DMA**, above).

Evaluation of the amendments agreed in the trilogue

It cannot be denied that the amendments resulting from the trilogue procedure are intended to strengthen the efficient enforcement of the DMA. However, a comparison with the amendments proposed in the legal opinion shows that, all too often, they fall short.

A particular criticism is that the Commission's administrative procedures continue to be "black boxes" for citizens, competitors and business customers, and participation and rights of involvement remain unclear. Indeed, the opportunity principle is explicitly reinforced for both the Commission and national authorities. It clearly suits the Commission to be able to decide whether and to what extent it will take into account information from third parties, allowing them to participate in proceedings without fear of their challenging Commission decisions. However, this neither strengthens the safeguarding of fairness in platform markets or the contestability thereof nor brings the EU and its institutions closer to citizens. The de facto tendency towards concessionary decisions in favour of the gatekeepers remains if legal resistance is expected primarily from their direction. The recommendations set out in the legal opinion for ensuring that third parties have genuine participation and challenge rights thus remain regrettably unfulfilled.

Progress has been made vis-à-vis the involvement of national competition authorities to the extent that these can be given original powers to investigate violations of Articles 5, 6 and 7 of the DMA on their territory. In purely factual terms, the Commission will not be able to ignore violations by gatekeepers revealed through the official proceedings of national authorities. Whether the national authorities will make use of this mechanism remains uncertain, however, given the risk of the Commission taking over proceedings. It would therefore be preferable to grant national competition authorities the right to request an investigation by the Commission.

The remaining implementation deficiencies thus cast a spotlight on the performance of the Commission as the "sole enforcer" of the DMA (Art. 38 [7 subpara. 2] of the new DMA). This

makes it all the more important that the Commission is quickly and comprehensively staffed up. The figures mentioned so far, which range from 20 persons per year to a maximum of 80 additional staff members, are likely to be far from sufficient, as the gatekeepers can form much larger teams for each individual proceeding. Consequently, while there is no substantial improvement to the DMA's enforcement text on the cards, the Commission's staffing levels should be looked at again.