

Regulating fair market behaviour in digital markets

On 15 December 2020, the European Commission published a proposal for a Regulation on contestable and fair markets in the digital sector (**Digital Markets Act**) ("Proposal") establishing criteria for qualifying as "gatekeepers" the providers of the largest online platforms and imposing several new obligations on them.

According to the Proposal, the new Regulation shall apply to core platform services (i.e. online platforms) offered by "gatekeepers" to business users established in the EU or end users established or located in the EU, irrespective of the place of establishment or residence of the gatekeepers and irrespective of the law otherwise applicable to the provision of service.

1. Who is a "gatekeeper"?

The proposed criteria for qualifying a provider of core platform services as gatekeeper are:

- a strong economic position, significant impact on the internal market and an activity in multiple EU countries;
- a strong intermediation position, meaning linking a large user base to a large number of businesses; and
- an entrenched and durable position in the market, meaning being stable over time.

The Proposal sets out quantitative thresholds relating to the size of activity of relevant actors creating a rebuttable presumption. The company would have to notify the Commission if it considers the thresholds are met but the Commission will also be empowered with new market investigation competences with the purpose of examining practices in the digital sector, including identifying gatekeepers.

1. Obligations of "gatekeepers"

The Proposal provides for several new obligations (do's and don'ts) on "gatekeepers", such as:

- a prohibition to treat services and products offered by the gatekeeper itself more favorably in ranking than similar services or products offered by third parties on the gatekeeper's platform;

- a prohibition to prevent consumers from linking up to businesses outside their platforms;
- an obligation to allow their business users to access the data that they generate in their use of the gatekeeper's platform; and
- an obligation to provide companies advertising on their platform with the tools and information necessary for advertisers and publishers to carry out their own independent verification of their advertisements hosted by the gatekeeper.

1. Enforcement

Under the Proposal, in addition to its market investigations allowing it to qualify companies as gatekeepers, update dynamically the obligations for gatekeepers when necessary, or design remedies to tackle systematic infringement. In addition, the Commission will have the power to ensure compliance via interim measures against a "gatekeeper" on the basis of a *prima facie* finding of an infringement, as well as to impose fines and periodic penalty payments. The Commission will also have the power to impose structural remedies, such as ordering the break-up of a gatekeeper's business – for systematic infringement after having conducted a market investigation in this respect.

1. Evaluation and next steps

The Proposal aims at complementing the enforcement of competition law. The Proposal is without prejudice to Articles 101 and 102 TFEU, to the corresponding national competition rules and to other national competition rules regarding unilateral behaviour that are based on an individualised assessment of market positions and behaviour.

The European Parliament and Member States will discuss the Proposal in accordance with the **ordinary legislative procedure**. Once adopted, the Regulation will be directly applicable across the EU, expected at this stage for 2023. Considering its wide impact, the Proposal is controversial and lobbying from relevant actors may impact timing and content of the final text.

For any further information please contact us or visit our website at www.elvingerhoss.lu.

The information contained herein is not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific legal advice concerning particular situations.

We undertake no responsibility to notify any change in law or practice after the date of this newsletter.