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News

Commission presents its Digital Markets Act proposal

On 15 December 2020, the Commission presented its proposals for the (i) Digital Markets Act ("DMA") and (ii) Digital Services Act ("DSA"). These are very ambitious reforms in the digital field and have been subject to intense debate amongst legal scholars.

The DMA aims to prevent abusive practices by online platforms from occurring, by operating an ex-ante control. The main protagonists of the proposal are the so-called gatekeepers, that is, companies that have become an inevitable gateway for others to operate online. The DMA applies to core platform services provided by gatekeepers to companies or end-users established in the European Union. To that respect, it is irrelevant whether the gatekeepers are domiciled in the Union or not. The core platform services are defined in the proposal and are: (i) online intermediation services; (ii) online search engines; (iii) online social networking services; (iv) video-sharing platform services; (v) number-independent interpersonal communication services; (vi) operating systems; (vii) cloud computing services; (viii) advertising services.

An operator will be qualified as a gatekeeper if (i) it has a strong economic position, significant impact on the internal market and is active in many Member States, (ii) has a string intermediation position, meaning that it links a large user base to a large number of businesses, and (iii) it has or is about to have an entrenched and durable position in the market, meaning that it is stable over time. In particular, a service provider will be considered a gatekeeper if: (i) its turnover in the European Economic Area is at least EUR 6.5 billion in the last three financial years or has an average market capitalisation or equivalent fair market value of at least EUR 65 billion in the last financial year, and it provides a core platform service in at least three Member States and (ii) it provides a core platform service that has more than 45 million monthly active end-users established or located in the European Union and more than 10.000 yearly business users established in the Union in the last financial year.

The new rules establish obligations for gatekeepers (dos and don'ts) they must comply with. For example, they have to allow third parties to inter-operate with the gatekeeper's own services in certain specific situations, allow their business users to access the data they generate in their use of the gatekeeper's platform, 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 and allow their business users to promote their offer and conclude contracts with their customers outside the gatekeeper's platform. The gatekeepers may no longer treat services and products offered by the gatekeeper itself more favourably in ranking than similar services or products offered by third parties on the gatekeeper's platform, prevent consumers from linking up to businesses outside their platforms and prevent users from un-installing any pre-installed software or app if they wish so.

Finally, the Commission provides for consequences should the gatekeepers not comply with these obligations. In particular, it can impose a fine of up to 10% of their worldwide turnover. In the event of serious and systematic infringements, the Commission can impose additional remedies that have to be proportionate to the infringement committed. If necessary and as a last-resort option, it can include structural remedies such as the divestiture of a business.

Commission presents its Digital Services Act proposal

The Digital Services Act proposal ("DSA") not only amends the e-commerce directive (Directive 2000/31/EC), but goes beyond. The new regulatory framework is characterised by the establishment of new obligations for each type of service provider: intermediator, hosting, online platforms and large online platforms.

It applies to providers offering digital services in the Union, regardless of their place of establishment. Providers whose headquarters are outside the Union must designate a legal representative on European territory to act as a contact point for the competent authorities and who may be held liable, together with the provider in question, for non-compliance with the DSA. Member States must also designate a national coordinator for digital services, who will be responsible for supervising the intermediate services established in his Member State and who will be the contact point for companies and the European Commission.

As regards the obligations imposed to online platforms and online advertising, platforms have to ensure that users know clearly and unambiguously in real time whether the information they receive is an advertisement, who is the person or company behind it and what are the parameters used to determine the recipient to whim the advertisement is shown. The DSA also imposes obligations regarding the identification of operators in online platforms: they must follow a "know your business customer" protocol. With regards to recommendation systems, the DSA requires that the terms and conditions mention that the platform uses customisation algorithms and that, within the platform, there is an option to modify the parameters by which they are categorised.

Finally, there are additional obligations for large digital platforms. These are those that offer their services to a monthly average of more than 45 million users. They will have the duty to create mechanism to identify illegal content and to remove it quickly. They must also give access to supervisors do data necessary for monitoring and evaluating compliance with the regulation. They will have to create and ad repository, in which they will archive the content of the ad, identify the person or company behind it and the variables that the customisation algorithm took into account to show it to the user. Large digital platforms must also carry out audits and impact analyses on compliance with the obligations imposed by the regulation. The consequence of not complying with the obligations imposed by the DSA can be a fine, which can be as high as 6% of the worldwide turnover of the infringing company.

Commission clears Fitbit's acquisition by Google subject to commitments

A few days after presenting the DMA and DSA, the Commission cleared Fitbit's acquisition by Google in Phase II on the conditions that Google (i) does not use health data for Google Ads and (ii) maintains a technical separation of the relevant Fitbit's user data.

According to the Commission, the proposed transaction leads to very limited horizontal overlaps between the activities of Google and Fitbit. More precisely, the Commission had concerns that the transaction would have harmed competition in several markets. It believes that following the transaction, Google would acquire the database maintained by Fitbit about its users' health and fitness and the technology to develop a database similar to that of Fitbit. Google would therefore increase the already vast amount of data it has to personalise ads and it would be even more difficult for competitors to match Google's services. In addition, the Commission considers that Google might restrict competitor's access to the Fitbit Web API, which is used by a number of players in order to provide services to Fitbit users and obtain their data in return. Finally, the Commission is concerned that following the transaction, Google could put competing manufacturers of wrist-worn wearable devices at a disadvantage by degrading their interoperability with Android smartphones.

To address the Commission's concerns, Google offered some commitments. It committed to not use for Google Ads the health and wellness data collected from wrist-worn wearable devices and other Fitbit devices of users in the EEA, to maintain a technical separation of the relevant Fitbit's user data and to ensure that the EEA users will have an effective choice to grant or deny the use of health and wellness data stored in their Google Account or Fitbit Account by other Google services. It will also maintain access to users' health and fitness data to software applications through the Fitbit Web API, without charging for access and subject to user consent. The duration of the commitments is ten years.

Federal Trade Commission sues Facebook for abusing its dominant position

The Federal Trade Commission ("the FTC") and a coalition of 46 Attorneys General have filed a lawsuit against Facebook for abusing its dominant position and engaging in anti-competitive practices to maintain its personal social networking monopoly.

The investigation carried out by the FTC and the coalition of 46 Attorneys General has concluded that Facebook has engaged in a systematic strategy to eliminate threats to its monopoly. This strategy consisted in acquiring in 2012 of the up-and-coming rival Instagram and in 2014 of the mobile messaging app WhatsApp, and imposing anticompetitive conditions on software developers. Through the acquisition of targeted potential competitors, Facebook neutralized the direct threat posed by them and makes it difficult for another personal social networking competitor to gain scale. In addition, Facebook has made key application programming interfaces available to third-party applications only on the condition that they refrain from developing competing functionalities, and from connecting with or promoting other social networking services.

The FTC seeks a permanent injunction in federal court that could require Facebook to divestiture some of its assets, including Instagram and WhatsApp and to seek prior notice and approval for future mergers and acquisitions.

PSA/FCA merger conditionally cleared by the Commission in Phase II

The Commission has approved in Phase II the merger between the automotive companies Fiat Chrysler Automobiles N.V. ("FCA") and Peugeot S.A. ("PSA") subject to some commitments. The transaction will lead to the creation of the fourth largest automotive group in the world ("Stellantis").

The Commission had concerns that the transaction would have harmed competition in the market for small light commercial vehicles in nine Member States, where the merging companies have high or very high combined market shares and are particularly close competitors. According to the Commission, the acquisition would therefore have likely led to higher prices for customers.

In order to address the Commission's concerns, the merging parties committed to (i) extend the cooperation agreement between PSA and Toyota for small light commercial vehicles under which PSA produces the vehicles for sale by Toyota under the Toyota brand mainly in the European Union, and (ii) amend the repair and maintenance agreements for passenger cars and light commercial vehicles in force between PSA, FCA and their repairer networks to facilitate access for competitors. The Commission concluded that these remedies would enable Toyota to compete effectively with the merged entity in the future and help new entrants expand and compete in the market for light commercial vehicles.

Commission publishes report on implementation of Damages Directive

The Commission has published a report on the implementation of the Antitrust Damages Directive, which was transposed by 2018 by all Member States. After its analysis of whether the national implementing rules conform with said directive, the Commission has not revealed any systemic issues.

The report examines the implementation of the rules concerning some of the core rules of the Damages Directive, such as the right to full compensation, disclosure of evidence, evidentiary value of infringement decisions, limitation periods, passing on of overcharges and estimation of harm. The report observes that since the adoption of the directive, the number of damages actions before national courts has significantly increased and damages actions have become much more widespread in the EU. Therefore, while the effectiveness of the measures will depend on their actual implementation by the national courts, the rights of victims of antitrust infringements have been already substantially strengthened.

The Commission aims to continue monitoring the developments in the Member States with a view to reviewing the Directive, once sufficient experience from the application of its rules is available.

Commission launches consultation on VBER review

The Commission has launched a consultation which is part of the impact assessment for the review of the VBER (the Vertical Block Exemption Regulation) and VGL (Guidelines on Vertical Restraints) and aims to gather stakeholders' views, mainly on the policy options and their likely impact. In order to contribute to the consultation, shareholders can file an online questionnaire.

From 18 December 2020 until 26 March 2021, stakeholders can contribute to the consultation launched by the Commission. More particularly, it expects participation from (i) companies with business operations in the EU, including to suppliers of goods and services, distributors/retailers of goods and services and platforms/intermediaries active in e-commerce, (ii) law firms advising them on related competition issues, (iii) industry associations, (iv) consumer organisations, (v) lawyer associations, and (vi) academics with a focus on EU competition law and notably on vertical restraints.

Commission prolongs EU State aid rules applicable to the agricultural, forestry and fishery sectors

The Commission has prolonged for two years the validity of several EU State aid rules applicable in the agricultural, forestry and fishery sectors, which would otherwise expire at the end of 2020. Therefore, the EU Guidelines for State aid in the agricultural and forestry sectors and in rural areas, the Block Exemption Regulations applicable to State aid in the areas of agriculture, forestry, fishery and aquaculture, as well as the Regulation on *de minimis* aid for fishery and aquaculture will be valid until 31 December 2022. All three Regulations are currently being reviewed by the Commission.

The future rules will depend on the outcome of the ongoing reform of the Common Agricultural Policy and the Common Fisheries Policy. Since the future legal frameworks of both policies are still in the process of adoption, the Commission considered it necessary to extend the validity of the current State aid rules. The new State aid rules are aimed to enter into force on 1 January 2023.

Commission approves €500 million Spanish reinsurance scheme to support trade credit insurance market in coronavirus outbreak

The Commission has approved a €500 million Spanish reinsurance scheme to support the trade credit insurance market. More precisely, trade credit insurance protects companies supplying goods and services against the risk of non-payment by their clients. Given the prolonged economic impact of the Covid-19 outbreak, the risk of insurers not being willing to maintain their insurance cover has become higher. In this context, the approved scheme aims at ensuring that trade credit insurance will continue to be available to all companies, avoiding the need for buyers of goods or services to pay in advance, and therefore reducing their immediate liquidity needs.

The Commission found that the Spanish scheme is necessary, appropriate and proportionate to remedy a serious disturbance in the economy of a Member State, in line with Article 107(3)(b) TFEU and the general principles set out in the Temporary Framework for State aid. The scheme is also in line with the Short-term export-credit insurance Communication. Therefore, the Commission approved the measure under EU State aid rules.

CNMC's views on advantages, disadvantages and challenges of the DMA

In November, Cani Fernández, President of the Spanish Competition and Market Authority ("CNMC"), took part in the conference "Digital Markets Act: EU Competition Policy at a Crossroad", organised by the European University Institute and where the advantages, disadvantages and challenges posed by the Digital Market Act ("DMA") were discussed.

During the debate, it was mentioned that the greatest effort to be made will be to strike a balance between new rules, that will cover (i) certain anti-competitive behaviour in the digital markets, and (ii) case-by-case analysis which will allow the difficulties of each market to be tackled more flexibility. The experts noted that the new legislation will have to consider regulatory and antitrust policy in a supplementary manner. Furthermore, experts pointed out that when analysing and correcting anti-competitive situations in digital markets, investigations are still the best instrument, but certain concerns should be taken into account, such as the difficulty of defining certain markets. Finally, the speakers warned of the risks faced by the Commission's draft legislation. According to them, the risks include to focus on a strict regulation that may be excessive and discourage the innovation proves in digitalisation or, if a more flexible regulation is adopted, to entail legal uncertainty among companies and to generate insufficient coverage of the legal solutions established.

CNMC takes part in the Commission's public consultation on competition policy and environmental sustainability targets

The CNMC has published its inputs to the Commission's public consultation on how competition can contribute to the Green Deal. The CNMC believes that integrating sustainability considerations into competition analysis must follow these principles: (i) provide the necessary predictability to economic operators on how their actions will be assessed under competition rules; (ii) maintain the consistency and interpretation of competition rules within the EU; and (iii) preserve effective competition within the internal market, so that it can be "fine-tuned" without a radical transformation.

As regards State aid, the CNMC proposes to clarify the regulations on electricity self-consumption, to develop a network of recharging stations and the reduction of incentives for production activities that rely on fossil fuels when it is technically possible to use clean energy. Concerning anticompetitive behaviours, the CNMC stresses that sustainability goals cannot serve as an excuse to authorise cartels. The CNMC notes that, in order to stimulate the adoption of cooperation agreements in favour of sustainability targets, operators should be given greaterlegal certainty on what kind of actions they can carry out without breaching EU competition rules. Finally, as regards merger control, it notes that sometimes mergers can be detrimental to sustainability by reducing innovation or competition between sustainable competitors. The CNMC has also some concerns as regards killer acquisitions, which are mergers where the acquiring company aims to gain control over the other company in order to avoid developing or commercialising cleaner technology. On the other hand, some mergers have a positive impact on sustainability. The CNMC concludes that including sustainability criteria as part of the efficiency analysis requires a review of the evaluation instruments (concepts, tools and profiles).

Case law

The Court of Justice annuls a Commission decision making binding the commitments offered by a company in order to preserve competition on the markets

Paramount concluded licensing agreements on audio-visual content with the main broadcasters of the European Union, including Sky and Canal +. The Commission considered that certain geo-blocking clauses in these licensing agreements had the purpose of restricting cross-border competition. In order to address the Commission's concerns, Paramount committed to not to enforce these clauses. After receiving comments on the proposed commitments from interested parties, including Canal +, the Commission accepted them. Canal + contested then the Commission's decision making the commitments binding.

In first instance, among others, Canal + argued that the commitments violated the interests and procedural rights of third parties, but the General Court rejected this argument on the ground that national courts can still rule on the validity of the relevant clauses following an action before that court. Precisely, the Court of Justice annulled the judgement rendered in first instance, on the grounds that the General Court had not fully considered the impact of the commitments on the contractual rights of third parties.

The Court of Justice notes that the Commission has to verify if the commitments offered are appropriate to address its competition concerns, and the effects of the commitments on the interests of third parties, so that those third parties' rights are not rendered meaningless. To that respect, the Commission's decision to make binding an operator's commitment not to apply certain contractual clauses vis-à-vis Groupe Canal +, when that contracting party did not consent to it, constitutes an interference with the contractual freedom of that contracting partner.

According to the Court of Justice, the General Court has erred in considering that the parties may have recourse to national courts to have their contractual rights enforced, as this would be contrary to the prohibition on national courts to adopt decisions running counter to an earlier Commission decision. A decision of a national court requiring an operator to breach its commitments which have been made binding by a Commission decision would clearly run counter to that decision.

Finally, the Court of Justice examines the plea for annulment alleging infringement of the principle of proportionality. The Court notes the obligations intended to ensure the territorial exclusivity granted to the broadcasters are essential in the scheme of the licensing agreements. The Court concludes that, by adopting the decision at issue, the Commission rendered the contractual rights of the third parties meaningless, including the contractual rights of Groupe Canal + vis-à-vis Paramount, and thereby infringed the principle of proportionality.

The General Court confirms that the rules of the International Skating Union providing for severe penalties for athletes taking part in speed skating events not recognised by it are contrary to EU Competition law

The International Skating Union ("the ISU") is the only body recognised by the International Olympic Committee ("IOC") in charge of managing figure skating and speed skating on ice. The ISU is formed by national ice skating associations and is competent for organising and generating revenues from speed skating competitions.

The Commission found that, under the ISU eligibility rules, in place since 1998, speed skaters who participate in competitions that are not approved by the ISU may be imposed very significant penalties, including a lifetime ban from all major international speed skating events. According to the Commission, these rules hinder competition and enable ISU's commercial interest to prevail over the interest of athletes and organisers of competing events. More precisely, the Commission concluded that the rules in question diminished the freedom of athletes by preventing them from participating in independent skating events, which may ultimately have a negative impact on their income. In addition, the ISU eligibility rules caused harm to independent organizers in so far as they are not capable of attracting top athletes to their events. This entailed a barrier for the development of alternative and innovative speed skating competitions. On these grounds, the Commission has established that the ISU eligibility rules violated Article 101 TFEU.

The ISU contested the Commission's decision before the General Court, which had the opportunity to rule, for the first time, on a decision finding that rules adopted by a sports federation do not comply with EU competition law.

First, the General Court confirms that the Commission was right to affirm that the eligibility rules have as their purpose the restriction of competition within the meaning of Article 101 TFEU. The

General Court notes that the situation in which the ISU finds itself is capable of giving rise to a conflict of interests since it (i) authorises competitions organised by third parties (regulatory function) and (ii) organises the most important speed skating competitions (commercial activity). In that regard, the General Court considers that the ISU is required to ensure, when examining applications for authorisation, that third-party organisers of competitions are not unduly deprived of access to the relevant market, to the extent that competition on that market is distorted. The General Court finds at the outset that the eligibility rules only set out authorisation criteria, which are not exhaustive, since 2015. Therefore, the requirements applied as from that date cannot all be regarded as clearly defined, transparent, non-discriminatory and reviewable authorisation criteria, which, as such, would be capable of ensuring the organisers of competitions effective access to the relevant market. Consequently, the General Court considers that the ISU retained broad discretion to refuse to authorise competitions proposed by third parties.

Furthermore, the General Court stresses that the severity of the penalties may dissuade athletes from taking part in competitions not authorised by the ISU, including where there is no legitimate reason for such a refusal to grant authorisation. Finally, the General Court examines the objectives pursued by the eligibility rules. In that regard, the General Court recalls that the protection of the integrity of the sport constitutes a legitimate objective recognised in Article 165 TFEU. However, according to the General Court, the rules adopted by the ISU go beyond what is necessary to achieve such objectives and, accordingly, are disproportionate.

Currently at GA_P

GA_P's Competition teams in Spain and Portugal recognised by Global Competition Review 2021

Our competition teams in Spain and Portugal were recognised by Global Competition Review in its GCR100 ranking, which highlights the best firms in this area of practice.

GA_P's Competition Law partners Mário Marques Mendes included as lawyer of the year in the 2021 "Best Laywers" ranking

Our Lisbon-based partner Mário Marques Mendes has been included as lawyer of the year for Competition/Antitrust Law in the 2021 edition of "Best Lawyers" for Spain and Portugal in the Competition/Antitrust Law area.

GA_P's Competition Law partners Iñigo Igartua Arregui and Miguel Troncoso Ferrer and associate Alexandra Dias Henriques ranked in 2021 "Best Lawyers"

Our Barcelona-based partner Iñigo Igartua Arregui, our Brussels-based partner Miguel Troncoso Ferrer and our Lisbon-based associate Alexandra Dias Henriques have been ranked in 2021 "Best Lawyers" in Competition/Antitrust Law.

Furthermore, Eduardo Gómez de la Cruz has been ranked in 2021 "Best Lawyers" in Communications Law, Pedro Vilarinho Pires in Corporate Law, Mário Marques Mendes in European Union Law and Iñigo Igartua Arregui in Corporate Governance and Compliance Practice.