Competition climate in the digital world: THE IMPACT OF DMA AND DSA

The more hectic the world becomes, the more the digital landscape evolves. Businesses tend to recourse to virtual channels to conduct their activity as the Internet ensures a much wider availability of their products or services, making it easier for their clients to access them and leading the way for online platforms to thrive. In order to tackle the challenges and imbalances brought forward by this dynamic, on top of the existing legislative tools, the EU developed a "**Digital Services Package**", comprising two major legislative acts: the **Digital Markets Act**1 ("**DMA**"), applicable from May 2, 2023, and the **Digital Services Act**2 ("**DSA**"), applicable from February 17, 2024. This legislative package upgrades the existing EU legislation on online markets and services by providing special requirements to be met by the "really big" tech companies (DMA), as well as clearer rules for all online services (DSA).

From a competition point of view, the Digital Services Package encourages new and innovative online platforms to enter this market by preventing big companies from dominating it. The **DMA** defines as "gatekeepers" the big tech companies that fulfill certain criteria established therein (briefly, a size impacting the internal market, the provision of a core platform service where business users reach end users and an entrenched and durable position). Such companies shall be monitored more closely and subjected to stricter rules in order to avoid the undesirable effects of their power and position over the competition and the end users. For instance, gatekeepers shall have the obligation **not to prevent business users from offering the same products or services to end users** through **third-party online intermediation services** or through **their own direct online sales channel at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper**; this approach follows the path of the new VBER3 regarding across-platform retail parity obligations.

Ioana Gabriela Ciornei,
Attorney-at-law,
SCA Markó & Udrea

Moreover, the **combining and cross-using of personal data between more platforms of the gatekeeper** (which in fact is allegedly currently happening with many big tech companies) is forbidden unless the end user has been presented with the specific choice and has given proper consent4.

The **DSA**, in parallel, lays down substantive rules that aim at creating safer online environments where the fundamental rights of the users are ensured, including protection against intrusive data processing or profiling. It also establishes the creation of an independent advisory group that will supervise the providers of intermediation services, called the European Board for Digital Services.

Furthermore, **the Digital Services Package brings forward a new approach in the EU competition law**. It creates a centrally governed digital playfield for competitors and end users, forbidding Member States to adopt further obligations on gatekeepers. The purpose is to obtain a unified "contestable and fair" market. What sparked many debates in the field is the fact that the new system moves away from the traditional existing competition legal framework as it has a pre-emptive, ex-ante approach. As opposed to the case-by-case analysis sanctioning the already-produced effects of non-compliance with the competition rules, the DMA creates the possibility to intervene before any non-compliance, on risk-based presumptions. The gatekeepers are deemed the most likely to create an unfair competition environment, based on clearly established criteria. **It appears that the EU started from the assumption that gatekeepers are "too big not to abuse"**. In this context, the DMA seems to be a more efficient instrument to actually enforce competition law, even before the creation of any harm. Regarding the application of the existing competition rules, DMA clearly states that it will be complementary to articles 101 and 102 TFEU5. Therefore, if this ex-ante mechanism is not efficient and the gatekeepers do not comply with their obligations, the traditional ex-post mechanism would intervene to punish such behaviors that have already generated negative effects on the competition environment. Even though it could be argued that this approach doubles the efforts of the European Commission and therefore could lead to inefficiency, **it is likely that the DMA will change the entire digital culture, leading to fewer cases of actual negative effects on the competition.** Moreover, the DMA creates mandatory rules for companies that have not reached the market power necessary for article 102 TFEU to apply (gatekeepers that fulfill the criteria to be designated as such, but do not have a dominant position), thus extending the scope of application of competition rules in general.

The European Commission has designated six gatekeepers so far (Alphabet, Amazon, Apple, TikTok, Meta, Microsoft) and there are more to come. It's true that only time will tell whether the Digital Services Package manages to truly remove entry barriers for new, smaller, safer online platforms, but the prospects are promising.

---

1 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828

2 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC

3 Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices

4 As per the General Data Protection Regulation

5 Treaty On The Functioning Of The European Union