AK EUROPA

Position Paper
January 2021
Digital

Digital Markets Act – The process of designating gatekeeper platforms must be accelerated

COM (2020) 842

Executive summary

The proposed Regulation on the Digital Markets Act (DMA) published on 15 December 2020 provides a good basis for discussion, but there are several points that require fine-tuning.

AK finds it incomprehensible that the EU Commission has excluded the issues of taxation of the digital sector and online platform work, which are important in terms of competition policy, and only plans to present proposals on these at a later date.
The procedural design of the proposed Regulation only pays limited attention to the pressing need for ex ante regulation of large online platforms. More particularly, the designation of online platforms as gatekeepers can be a lengthy process that should be accelerated.

AK stresses the need to ensure that there still is adequate room to manoeuvre for national rules.

In the proposed Regulation, AK takes a positive view of the obligations and prohibitions that apply to gatekeeper platforms as designated by the EU Commission, because these represent an important step towards creating a level playing field, and they are also welcomed from the consumer's viewpoint. However, some points need to be fine-tuned or made more specific.

AK welcomes the possibility of flexibly designating platforms as gatekeepers or including new business practices in the list of obligations and prohibitions as part of market investigations in accordance with Chapter 4.

Sanctions for systematic non-compliance with obligations should be toughened up.

Monitoring compliance with the provisions of the Digital Markets Act requires an efficient supervisory authority – in addition to the EU Commission – but this possibility is missing in the proposed Regulation. Organisations that deal with consumer protection and representing the interests of employees should be represented on the Digital Markets Advisory Committee and should have a right to be heard.

The AK's position

1. General remarks

In the wake of the consultation process on the Digital Services Act, the EU Commission swiftly proposed a Regulation to improve the governance of online platforms. First of all, the Commission seeks to use this Act as an ex ante regulatory instrument for large online platforms with significant network effects that act as gatekeepers in the European Union's internal market. It also envisages the possibility of targeted market investigations within the framework of the New Competition Tool as a flexible instrument for identifying more gatekeeper platforms at an early stage and thus be in a position to subject them to the new regulatory framework.

In principle, AK welcomes the Commission's desire to create the conditions for a fair internal market in the digital sector as soon as possible. The proposed Regulations for the Digital Markets Act and the Digital Services Act (which is not the subject of this Opinion) provide a good basis for discussion, but they need to be fine-tuned so that the regulations can be implemented as quickly as possible.

AK finds it incomprehensible that the EU Commission has excluded the issues of taxation of the digital sector and online platform work, which are very important in terms of competition policy, and only plans to present proposals on these at a later date. It is well known that unequal treatment of workers and unequal taxation have both given the digital sector an unfair competitive advantage at the expense of traditional business sectors. According to the European Commission, for example, the effective tax rate for online businesses is 9.5% compared to 23.2% for traditional business models . For its part, the European Trade Union Confederation (ETUC), pointed out during a debate in the European Parliament that workers in the digital sector are subject to precarious working conditions and that online companies regularly abnegate their role and responsibilities as employers .

2. On the Proposal for a Regulation on the Digital Markets Act (DMA)

2.1. Designation procedure

Article 3(1) sets out the qualitative criteria under which platforms are designated as gatekeepers.

Article 3(2) lists several rebuttable requirements that an online platform designated as a gatekeeper is presumed to satisfy and that must have been fulfilled in the last three financial years (annual turnover of at least 6.5 billion euro, or a market capitalisation of at least 65 billion euro, 45 million active end users per month, and 10,000 active business users per year). Another requirement for designation as a gatekeeper is that the company must offer a core platform service in at least three Member States.

If a provider of platform services meets all these thresholds, it is required to report this within three months and the Commission has to designate them as gatekeepers within 60 days and enrol them on a gatekeeper list. However, they are only required to comply with the obligations and prohibitions after further six months. (Article 3(8)). Moreover, if the companies concerned put forward sufficiently substantiated arguments that they are not gatekeepers as defined in Article 3(1), it triggers a lengthy process that, in the worst case, may drag on for years. This is particularly the case if Commission´s decisions can be appealed before the ECJ – a question that remains open. From its experience with competition proceedings, AK knows that companies can be very inventive in this respect.

In AK's opinion, the procedural design of the proposed Regulation only pays limited attention to the pressing need for ex ante regulation of large online platforms. Above all, the designation of online platforms as gatekeepers, which is necessary for the implementation of the obligations and prohibitions, can be a lengthy process that drags on for months and does not meet the need for rapid, timely regulation of large online platforms.

AK also believes it is not possible to discern which platforms should be subject to ex ante regulation according to the thresholds selected by the Commission. In AK's view, the presumptions of turnover/market capitalisation and number of users should not necessarily be cumulative. Fulfilling one or two of these criteria should be sufficient for a company to be designated as a gatekeeper. The observation period of three years is also much too long.

It would be more effective for the businesses concerned to be automatically subject to the rules if they fulfil the conditions set out in Article 3. In any case, pursuant to Art. 4, the EU Commission is required to conduct regular reviews every two years, either ex officio or upon request, to review whether the business still has gatekeeper status. For the platforms, therefore, decisions are not set in stone.

2.2. Full harmonisation and room for manoeuvre at national level

The proposed Regulation stipulates that the rules relating to the envisaged ex ante regulation of platforms should be fully harmonised pursuant to Article 1(5) and that Member States may not impose any further legal obligations or regulatory measures. However, exceptions exist with regard to national regulations that protect consumers or seek to combat unfair competition.

After an initial assessment, AK finds these provisions too vague. The scope of this provision could be interpreted either very broadly or very narrowly. If deemed necessary, Member States should be allowed to impose regulatory measures even if the thresholds of the proposed Regulation are not met. It should still be possible to impose regulations such as the measures taken in Austria with regard to best price clauses on booking platforms.

In AK's view, ex ante regulation that functions well at European level would, in any case, rule out national unilateral action.

Recent national regulations (such as Austria's advertising tax for online platforms and France's digital tax), which were primarily designed to target large online companies, have generally attracted strong criticism, particularly from the US. This has ultimately led to countermeasures being taken.

In any case, we welcome the fact that the proposed Regulation does not restrict the scope for tackling abuse of market power at national level.

2.3. Obligations and prohibitions for designated gatekeeper platforms

According to the proposed Regulation, online platforms that are designated as gatekeepers will have to comply with a series of regulations that are both prohibitive and mandatory in nature. In regard to this, AK takes a positive view of most of the proposals because they represent an important step towards creating a level playing field, and they are also very welcomed from the consumer's point of view. We particularly welcome the provisions that increase the choice and decision-making power of consumers. We also take a positive view of the provisions of Article 6, which strengthen data protection for consumers.

Our assessment of the platforms' obligations under Article 6(1)(i) is more mixed. Here, the question arises whether the data privacy of users is being adequately protected. Concerning this, it is necessary to clarify who, in the interaction between the actors (gatekeepers and third-party providers), assumes responsibility under data protection law and who must obtain consent from consumers for the use of their personal data (login data, behavioural profiling). Both the General Data Protection Regulation (GDPR) and Consumer Rights Directive fail to clearly regulate these points. AK asserts that, in practice, lack of clarity increases the risk that none of the actors will feel responsible and that third parties will have real-time access to customer data, leading to data transfers in breach of the GDPR.

With regard to Article 6(1) (j), we note that, in order to protect consumers, third party providers are obliged to anonymise users' personal data before they are allowed to access search engine data. However, there is currently no legal definition of when data is reliably anonymised. In this context, AK has reservations about this (otherwise understandable) provision.

The following provisions should also be included in the list of obligations and prohibitions:

- A right of appeal for business users and end consumers in the event that they are refused access to platform's services. Concerning this, there is a need to set up a national coordination body for digital markets.

- Logging out of a service of a gatekeeper platform should meet the same requirements as logging in. Deregistration must not be made more difficult or complicated.

2.4. Flexible tool for identifying other platforms that require regulation or new business practices – market investigations

AK welcomes the possibility of flexibly designating platforms as gatekeepers or including new business practices in the list of prohibitions and obligations as part of market investigations in accordance with Chapter 4. At this point, we would also point to the problem of the lengthy designation process mentioned above.

2.5. Sanctions for systematic non-compliance with obligations

In addition to fines, which can be up to 10% of annual turnover in accordance with competition law, it should also be possible to impose structural conditions (e.g. selling off parts of the company). These may apply if the gatekeeper platform violates the rules three times within five years, and this has been determined in decisions. AK believes that the possibility of committing three acts of non-compliance before being sanctioned goes too far and undermines the significance of this important legal instrument.

In addition, a failure to report or false reporting pursuant to Art. 3(3) (designation of gatekeeper platforms) should also result in a fine.

2.6. Need for an effective supervisory authority

Companies generally act rationally and will only cease a certain behaviour if the costs of it are higher than the returns from it or if the likelihood of detection is high. An effective supervisory authority is, therefore, necessary for monitoring compliance with the DMA rules. AK takes a positive view of the list of obligations and prohibitions, but stresses that they will only be effective if non-compliance is swiftly acted on and sanctioned, and the unfair behaviour ultimately terminated. Alongside the EU Commission, which is responsible for the designation of gatekeepers and monitoring the rules, the planned Digital Markets Advisory Committee also needs to be set up for maximum effectiveness. Article 32 is currently very vague in this respect. This committee should be entrusted with ongoing supervision and monitoring, and it is important to ensure that the interests of employees and consumers are represented.

2.7. Information on mergers

AK is cautiously positive about the requirement for gatekeeper platforms to inform the EU Commission about planned mergers (Article 12). This provides the Commission with a good overview of concentration trends in the digital sector. However, decisions on prohibitions, or conditions such as a ban on further company acquisitions are not possible under the terms of this Regulation. However, AK believes that a suitable instrument should be available at EU level in order to prevent "killing mergers". If necessary, the EC Merger Regulation (ECMR) should be amended to take this into account.

2.8. Right to be heard

Article 30 of the DMA stipulates that, before a decision, for example on a violation of obligations and prohibitions, gatekeeper platforms or undertakings or associations of undertakings have a right to be heard. AK believes that organisations concerned with consumer protection and employee interests should also be included in this list. At European level, the BEUC and the ETUC should be seen as suitable organisations for consultation regarding this topic.

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About us

The Austrian Federal Chamber of Labour (AK) is by law representing the interests of about 3.8 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore, the Austrian Federal Chamber of Labour is a part of the Austrian social partnership. The Austrian Federal Chamber of Labour is registered at the EU Transparency Register under the number 23869471911-54.

The main objectives of the 1991 established AK EUROPA Office in Brussels are the representation of AK vis-à-vis the European Institutions and interest groups, the monitoring of EU policies and to transfer relevant Information from Brussels to Austria, as well as to lobby the in Austria developed expertise and positions of the Austrian Federal Chamber of Labour in Brussels.