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DIGITAL ECONOMY

THE DIGITAL SERVICES ACT AND NEW COMPETITION TOOL: EU PLANS MAJOR REFORMS TO DIGITAL AND COMPETITION RULES

The EU is to fundamentally reform its legal framework for the digital economy. In particular, the Commission wants to tackle issues observed over recent years in the area of digital services and online platforms. To this end, it has started the following two initiatives:

- › The **Digital Services Act** is intended to revise the **e-Commerce Directive** from 2000, in particular the liability shield currently enjoyed by platform providers. Digital service providers' responsibilities for third-party content will be defined more closely, so as to strengthen and harmonize c' rights and their implementation across the EU. The new act is also intended to create a level playing field on the digital markets, where a small number of major online platforms currently act as gatekeepers.
- › The **New Competition Tool** is intended to identify and remedy structural competition problems at an early stage. The changes to antitrust law under discussion primarily concern the expansion of the Commission's powers to intervene, so that it can keep up with the rapid developments on the digital markets and react appropriately to problems arising under competition law.

The planned reforms may therefore represent a caesura for the EU's digital economy. On 2 June 2020 the Commission initiated a consultation process on the two initiatives. Companies and stakeholders were able to contribute to this key interim step until 8 September 2020. A legislative proposal in this regard is planned for 9. December 2020.

Antitrust focus: far-reaching reform to promote fairness in the digital sector

Both the New Competition Tool and the Digital Services Act may effect key reforms in antitrust law. The two initiatives aim to counter distortion of competition within the digital economy, which is based on two problems. The first is the structural risks to competition owing to certain market conditions such as effects of network and scale, the impossibility of using several networks in parallel, the transfer of dominant undertakings' market power to neighbouring markets, as well as lock-in effects. Such features are harmful in the context of so-called "tipping markets", where such tipping can only be prevented by early intervention. The second problem concerns markets that lack competition, above all markets characterised by strong concentration and high barriers to entry, large volumes of data or oligopolistic markets. Such markets are at risk of tacit collusion. According to the Commission, the antitrust tools that are currently available are inadequate for addressing these issues.

1. New Competition Tool

Within the framework of the New Competition Tool, the Commission is **looking at various options enabling it to intervene in a timely manner**, e.g. without a market already being dominated or abuse having to be established. The Commission is investigating whether these powers to intervene should be restricted to digital markets or apply to further markets as well. **Underlying all these considerations is the idea that the Commission should be able to take action even where the threshold of Article 102 TFEU has not been reached. The counter-measures** the Commission intends to claim for itself here **could end up being far-reaching**. To date, however, the Commission has largely left it open as to what kind of counter-measures might apply in practice. It is also unclear what type of measures (structural and/or behavioural measures) are intended. Sector-specific obligations on interoperability

vis-à-vis market participants would be one conceivable option. These are stipulated by the UK's open banking regulation as well as the EU's revised Payment Services Directive (PSD2), for example. According to these regulations, banks have to open up their payment infrastructure and enable third-party payment service providers that initiate transactions, such as PayPal, to access customer account data. Such obligations to facilitate access to data are intended to encourage new market participants and strengthen competition in the payment sector.

2. Digital Services Act

In parallel, the Digital Services Act also addresses the issue of equal and fair conditions of competition on the digital markets. The Commission is reviewing the degree to which competitors depend on gatekeepers, namely the major online platforms, as well as the obstacles and distorting effects on competition that exist around digital ecosystems. These include the capacity of a dominant undertaking operating a platform to penetrate new markets and secure itself a dominant market position there too.

To combat such imbalances on the digital market, **the Commission is considering a number of options** that will apply to undertakings of a certain size that operate platforms. One point of particular relevance is the **ex-ante rule** that has been proposed. **This will blacklist certain practices such as self-preferment**, and may also include **counter-measures tailored to individual cases**. Possible measures include specific requirements on the portability of personal data as well as data access and interoperability obligations on undertakings operating platforms. The planned regulations follow the current tendencies among cartel authorities, such as the Commission's ongoing proceedings against Amazon. The Commission accuses Amazon of using competitively sensitive data the company has obtained through Amazon Marketplace for the purpose of its own sales activities on the platform.

e-Commerce Directive: reforming the liability rules

A reform of the e-Commerce Directive's liability rules could fundamentally alter the role of platform providers with regard to third-party illegal content. Above all, this could have far-reaching consequences for social network providers. For right holders and other people concerned, by contrast, it could be easier in future to have infringing content removed from platforms. It is currently unclear whether and to what extent the reform will also impact the liability regime for other service providers such as access providers.

The background: now over 20 years old, the e-Commerce Directive's rules provide for a comprehensive liability shield for platform operators with regard to third party content. As "hosting providers" platform operators only become liable for third party content if they fail to remove unlawful content once obtained knowledge thereof. This is known as the **notice and take down procedure**. These liability rules are implemented in national provisions (in Germany, it is implemented in *Telemediengesetz*, or Telemedia Act) as well as numerous court decisions. The latter have concerned, for example, the exclusion of the liability shield for platform providers that take on an "active role", or the duty of hosting providers upon having obtained knowledge of unlawful content to also block content which is equivalent to the unlawful content of information. Increasingly, moreover, internet services are being used to spread unlawful and harmful content (so called hate crime) with serious consequences for users, service providers and society as a whole. Individual Member States have already reacted to this development. In 2018, Germany issued its Network Enforcement Act (*Netzwerkdurchsetzungsgesetz*). Under this law, social network providers such as Facebook, YouTube and Twitter are obliged to delete clearly unlawful content within 24 hours of receiving a complaint. Other EU Member States have followed suit. France, for example, has issued its "Avia" law, although this has been ruled largely unconstitutional by the French constitutional court, which considered that the law essentially violates freedom of expression.

The increasing problem of hate crime has also been recognized on the EU level. In 2018, the Commission gave a recommendation on effective measures for addressing illegal online content. Corresponding reforms are now planned.

The European Commission is reviewing three approaches to reform:

- › **Base line approach:** this includes obligations regarding the notice and take down mechanism in accordance with the Commission's recommendation from 2018. In particular, a complaints system is set up in addition to proactive measures to automatically recognize unlawful content. Hosting providers' liability privileges under the e-Commerce Directive are to be left untouched, however.
- › **Comprehensive reform of the e-Commerce Directive:** in particular, the liability regime is harmonized and defined more precisely, and incentives are created for service providers to take action against unlawful content/offers. These measures would include:
 - harmonizing the notice and take down mechanism,
 - imposing a duty on platform providers to undertake risk assessments in connection with the spread of

- › merely “harmful”, but not illegal, content,
 - improving legal protection where lawful content is unjustifiably deleted,
 - imposing cooperation and reporting obligations on service providers vis-à-vis public authorities.

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In addition to approach 1 or 2: an effective system to monitor and enforce statutory obligations is created, involving cooperation between the Member States and supported by a public authority on the EU level.

In principle, a standard legal framework for platform providers – including a standard notice and take down mechanism – is to be welcomed, as it will create a level playing field. Specific proposals to amend the e-Commerce Directive’s liability regime have yet to see the light of day. Stakeholders will therefore need to wait and see whether the EU Commission manages to balance the interests of people concerned / rightholders on the one hand and platform providers on the other.

Gleiss Lutz comment

The reforms to the digital sector that the Commission is planning are ambitious. How far they will in fact go, and what can be pushed through, will only become evident later. But in view of far-reaching announcements and the public consultations that have been conducted, we can expect that major points of the project will be implemented and antitrust law will be toughened up as it applies to the digital economy.

In any event, it will be imperative for companies in the digital sector to follow this process closely so as to prepare for these reforms in good time. Of particular relevance to undertakings that operate platforms are the planned provisions on the e-Commerce Directive’s liability rules, as well as antitrust tools and regulations that will keep a closer eye on major players. At the same time, the reform will offer companies, above all start-ups, the opportunity to profit from the opening of the digital markets.

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