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 eld 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, com- panies 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 Euro- pean Union. To that respect, it is irrelevant whether the gatekeepers are domiciled in the Union or not. The core platform services are de ned in the proposal and are: (i) online intermediation ser- vices; (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 quali ed as a gatekeeper if (i) it has a strong economic position, signi cant 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 Euro- pean Economic Area is at least EUR 6.5 billion in the last three nancial years or has an average market capitalisation or equivalent fair market value of at least EUR 65 billion in the last nancial 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 locat- ed in the European Union and more than 10.000 yearly business users established in the Union in the last nancial 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 speci c 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 in- formation necessary for advertisers and publishers to carry out their own independent veri cation of their advertisements hosted by the gatekeeper and allow their business users to promote their o er and conclude contracts with their customers outside the gatekeeper's platform. The gatekeep- ers may no longer treat services and products o ered by the gatekeeper itself more favourably in ranking than similar services or products o ered by third parties on the gatekeeper's platform, prevent consumers from linking up to businesses outside their platforms

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and prevent users from un-installing any pre-installed so ware 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 ne 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 commi ed. If necessary and as a last-resort option, it can include structural remedies such as the divestiture of a business.

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 o ering 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 obliga- tions regarding the identi cation 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.

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Finally, there are additional obligations for large digital platforms. These are those that o er their services to a monthly average of more than 45 million users. They will have the duty to create mech- anism 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 obli- gations imposed by the DSA can be a ne, which can be as high as 6% of the worldwide turnover of the infringing company.

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