GEDİK & ERAKSOY

The European Commission Released the Draft Digital Markets Act

December 2020

Introduction

Competition in the digital markets continues to be in the spotlight, with a number of competition authorities around the globe publishing studies and targeting new regulations in this area. As we have discussed in our latest newsletter, the UK Competition and Markets Authority and the relevant taskforce authorized by the UK government have released their subsequent reports regarding digital markets. Shortly after this development, the European Commission (**EC**) published the draft Digital Markets Act and Digital Services Act on 15 December 2020. The draft Digital Markets Act (the **Draft DMA**) introduces new rules for gatekeepers, which are defined as large digital platforms that serve as a gateway to reach consumers. Undertakings fulfilling the three-limbed criteria set out under the Draft DMA are deemed as gatekeepers, unless they demonstrate otherwise. Gatekeepers need to comply with certain obligations, the "dos and don'ts", and are subject to the specific merger notification system and the new market investigation tool of the EC.

The scope of the Draft DMA

The Draft DMA states that large platforms having an "entrenched and durable" position in digital markets cause unfair behaviour and inefficiency. As a result, consumers are faced with higher prices, lower quality, less choice and innovation. These large platforms are small in number, however they set the commercial conditions in the market and act as a gateway between business users and customers. The Draft DMA aims to provide regulatory safeguards in order to improve the functioning of the market and maintain competition. The scope of the Draft DMA does not concern all digital markets, but is limited to 'core platform services' of 'gatekeepers'. Some core platform services include online intermediation services (such as marketplaces, app stores, etc.), online search engines, and social networking. Gatekeepers are undertakings holding a significant position in the market for digital platform services.

How are gatekeepers identified?

There are three conditions set out under the Draft DMA in order for a core platform service provider to be deemed as a gatekeeper.

- Significant impact on the EU market

  This condition will be presumed to be met where (i) the undertaking that the provider forms a part of has achieved more than EUR6.5 billion turnover in the EEA in each of its last three financial years; or (ii) the average market capitalisation or the equivalent fair market value of the undertaking was at least EUR65bn in its last financial year and it also provides a core platform service in at least three EU Member States.

- Important gateway for business users to reach consumers

  This condition will be presumed to be met by providers of core platform services that have more than 45 million monthly active end users established or located in the EU and more than 10,000 yearly active business users established in the EU in the provider's last financial year.

- Entrenched and durable position in the market

  There is an entrenched and durable position in the market if the thresholds for significant impact and gateway are met in each of the last three financial years.

"Dos and don'ts" for gatekeepers

There are two different categories of obligations for gatekeepers provided under the Draft DMA. The first category includes "self-executing" obligations. These are obligations which the undertaking may implement itself, without the need for the EC to provide further specification. Such obligations include:

- restricting the platform from combining personal data from different sources;
- increasing the ways that business users can sell or promote their products and services outside the platform and refraining from preventing business users from raising issues with public authorities;
- allowing end users more access to products and services via the platform.

The second category of obligations are "susceptible to be further specified," meaning that EC can provide further details on whether the method of implementation by the undertaking is sufficient. Some of these obligations include:

- not using business users' data to compete with them, unless it is publicly available;
- allowing end users to un-install pre-installed software applications on the core platform service, allowing installation of third party software;
- providing advertisers and publishers free of charge access to the performance measuring tools of the gatekeeper upon their request.

Other rules

The Draft DMA requires gatekeepers to inform the EC of any proposed merger or acquisiton involving another core platform or any other service provided in the digital sector. This mechanism is separate from the notification requirement under EU and any national merger control rules. The aim of this rule is to allow the EC to monitor gatekeepers and the digital sector in general. This mechanism is notably different from the new developments in the UK, where the proposal is for digital firms to be subject to a distinct merger control review process.

The proposals of the Draft DMA also include a market investigation tool. This tool will allow the EC to (i) investigate core platform service providers who do not exceed the thresholds necessary to be deemed as gatekeepers but show similar characteristics, (ii) revise and update the definition of core platform services, (iii) investigate systematic non-compliance with gatekeeper "dos and don'ts."

Contacts

Hakkı Gedik
Turkey – Istanbul
Tel +90 212 371 29 53
Mobile +90 549 480 15 35
hakki.gedik@gedikeraksoy.com

Umut Gürgey
Turkey – Istanbul
Tel +90 212 371 29 66
Mobile +90 549 480 15 37
umut.gurgey@gedikeraksoy.com

Emre Önal
Turkey – Istanbul
Tel +90 212 371 29 65
Mobile +90 549 480 15 33
emre.onal@gedikeraksoy.com