

The European Commission recently launched two complementary consultations that would expand its competition enforcement powers and establish regulations for digital markets. The commission intends to close perceived gaps in its statutory powers to curb gatekeepers in digital markets.

Digital Markets Investigation Powers

The [first consultation](#) and [roadmap](#) outlines alternative scenarios that would enhance the commission's enforcement powers to ensure fair and competitive markets with a view to delivering lower prices and higher quality, as well as more choice and innovation.

The proposal draws on the market investigation powers of the UK Competition and Markets Authority (CMA), which can change the behaviour of firms or impose the sale of parts of their businesses where it finds that certain features of a market have an adverse effect on competition (AEC), without the need for a finding of a breach of competition rules. It remains to be seen, however, whether the commission will propose to adopt an AEC test for its new enforcement powers.

The proposed new powers build on the commission's investigations in the digital sector where the commission claimed that market characteristics, such as high entry barriers, network, and scale effect, can make a "dominant position," once acquired, difficult to contest. Among the questions posed by the commission is whether the new authority should be limited to the digital sector and/or to dominant companies or whether it should also target other sectors with entrenched market positions based on exclusive use of data or IP rights, such as the pharmaceuticals and automotive sectors.

Digital Markets Ex Ante Regulation

The [second consultation](#) and [roadmap](#) would establish a new ex ante regulatory framework, most likely overseen and enforced by the commission, to "ensure contestability, fairness and innovation and the possibility of market entry" in digital markets. The proposed regulation would address platforms that are online "gatekeepers," controlling access to data and users. The consultation will feed into the wider legislative proposal for a Digital Services Act, which also revamps the e-Commerce Directive of 2000.

Factors such as size of the user base, significant network effects, and/or ability to leverage data across markets will determine whether the rules would apply. Thus, only a subset of large online platforms or other large digital market players would potentially be subject to these new regulations. The proposed regulations contemplate a blanket prohibition of some practices (e.g., ban on self-preferencing) and/or tailor-made access and interoperability remedies (where systems interface with each other without restriction) similar to the type of ex ante regulation that is applicable under the EU Electronic Communications Code.

Global implications

The proposed rules would be a substantial expansion of the commission's investigative powers and could potentially lead to imposing significant prohibitions or even divestitures without a violation of existing competition laws. The proposed rules and options are controversial. Some may suggest that certain options do not go far enough whereas others say the rules are a burdensome overreach that risks stifling competition and innovation.

A key question is how this set of tools to come will fit into the international order. Digital markets are cross-border by nature and many other countries are also considering or have proposed new regulation – for example, the UK has established a Digital Competition Experts Panel to present proposals later this year on the heels of the Furman Report (see our overview of Global Digital Markets Regulation [here](#)). The OECD has noted, "governments may need to enhance co-operation across national competent agencies to address competition issues that are increasingly transnational in scope or involve global firms."

Next steps

Companies must submit comments on the roadmaps by 30 June 2020 and the consultations by 8 September 2020. A formal proposal for the new Digital Services Act is expected to be adopted by the end of 2020. These proposals will then need to go through the legislative process, including the European Parliament and the Council.

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