



Recent competition policy initiatives, legislative developments and challenges ahead

ICN Unilateral Conduct WG – Plenary 2

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Outline

- Reflection on developments of case law on unilateral conduct since 2009
- Ongoing evaluation of Regulation 1/2003
- The Digital Markets Act

1. Reflections on developments of the case law on unilateral conduct since 2009

1. Developments of case law on Article 102 TFEU

- In the past 15 years, the EU courts delivered **more than 30 judgments** on exclusionary abuses and the Commission adopted **26 decisions** (both under Art. 7 and Art.9)
- The judgements concerned several types of abuses, including:
 - Exclusive purchasing agreements (Unilever)
 - Self-preferencing (Google Shopping)
 - Refusal to supply (Slovak Telekom, Baltic Rail)
 - Conditional rebates (Post Danmark II, Intel, Google Android)
 - Tying (Google Android)
 - Margin squeeze (Telia Sonera, Telefónica)

2. Key issues

- Case law has endorsed a **more effects-based approach** to Art. 102 TFEU
- General **standard for intervention** is “capability / potential effects” of a conduct (Google Shopping, SEN)
- Role of «**as-efficient-competitor**» test (Intel, Google Android, Unilever)
- «**Constructive refusal to supply**» test (Slovak Telekom, Baltic Rail)
- **Margin squeeze** as independent abuse (Telia Sonera, Telefónica)

3. Conclusions

- Move towards effects-based approach to be welcomed as beneficial to consumers and businesses
- At the same time, important to stress that effects-based enforcement does not become synonym for lax enforcement → it is key to maintain a workable substantive standard for the enforcement of Article 102
- DG COMP continues reflecting on case law developments and adapting its enforcement action as a result

2. Evaluation of Regulations 1/2003 and 773/2004

1. Background

- Regulation 1/2003 establishes the basic framework for the application of antitrust rules by the Commission
- Regulation 773/2004 is the implementing regulation
- 16 December 2022 marked 20 years since Regulation 1/2003 was adopted
- An evaluation process was launched on 30 March 2022 to assess whether the 2 Regulations are “fit for the digital age”, in the current context of increasing complexity of investigation and strict judicial scrutiny, coupled with scarce resources

2. Evaluation exercise

- While the whole system is being evaluated, there is a specific focus on certain areas in light of the Commission's enforcement experience:
 - The Commission's investigative powers, notably requests for information, the power to take statements and inspections
 - The procedural rights of parties to investigations, particularly in relation to the exercise of the right to be heard
 - The procedural rights of third parties, particularly as regards the handling of formal complaints
 - The Commission's enforcement decisions, e.g. with regard to the power to adopt interim measures
 - The functioning of the ECN

3. Consultation process

- Public consultation was launched on 30 June 2022 and closed on 6 October 2022
 - General (on *Have Your Say*) and detailed questionnaires
 - 19 responses to general questionnaire and 24 responses to detailed questionnaire
 - 11 contributions on Call for Evidence
 - 8 contributions directly to the Commission
- + NCA consultation by means of questionnaires and discussion in ECN meetings

4. General overview of feedback

- Abolishing notifications was a success, confirmed usefulness of need for **guidance** (guidelines, decisions, informal guidance)
- Parallel enforcement: overall successful, some concerns expressed concerning **divergent approaches** between NCAs and Commission/cooperation within ECN
- Commission procedures are in general effective – at the same time, calls for greater **transparency** and **timeliness** while protecting **rights of defence** and **confidentiality**
- General acknowledgment that **investigative tools** conceived for paper based environment – possible need to update toolbox to take into account **digitalization** of business activities (e.g. fully remote inspections, freezing orders)

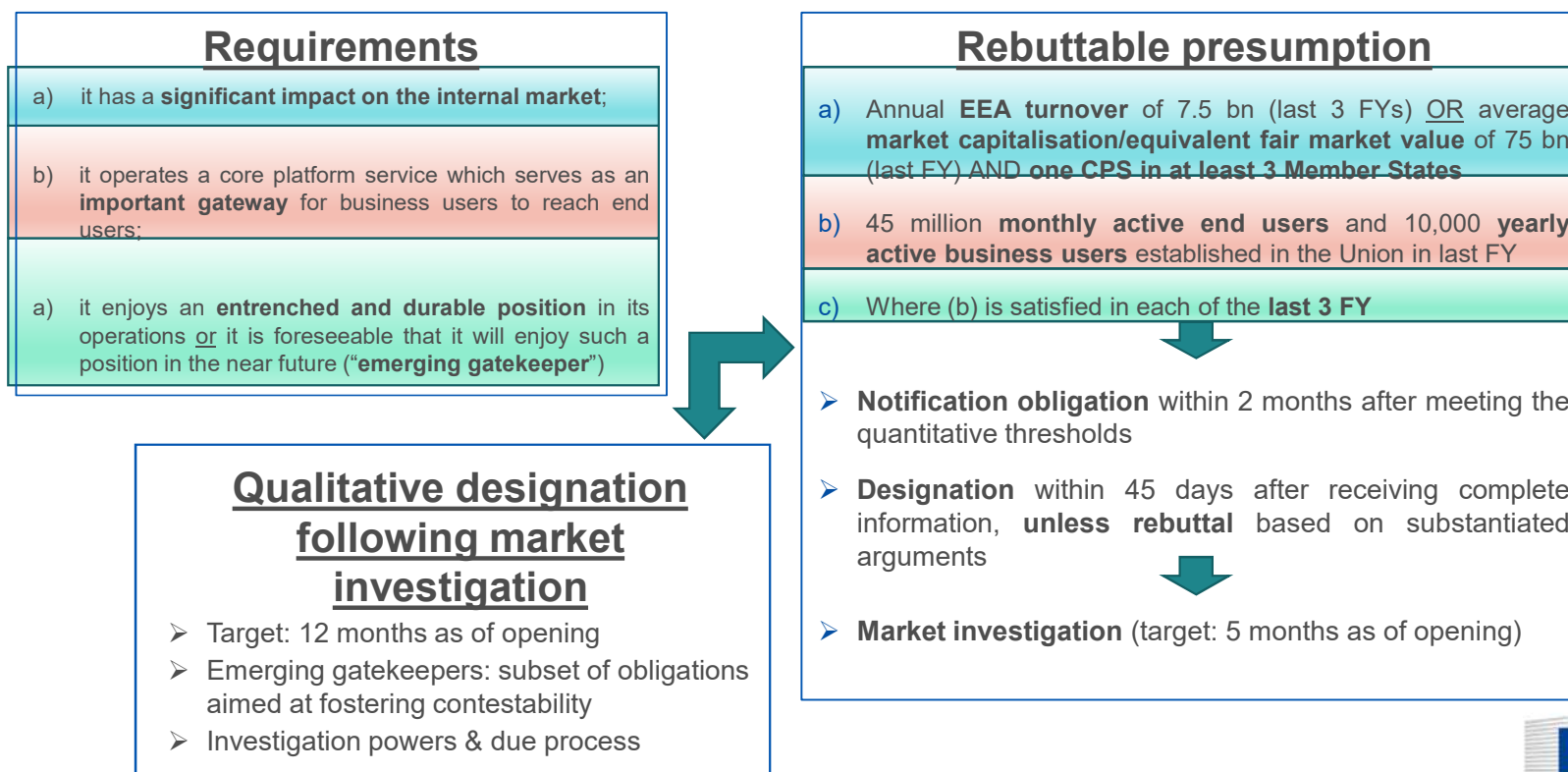
3. The Digital Markets Act

1. The Digital Markets Act

- **Digital Markets Act (DMA) proposal** adopted by the Commission on 15 December 2020
- Final text adopted by legislator **on 14 September 2022 and entered into force in October 2022**
- **DMA does not replace consumer protection legislation and complements existing competition law**

2. Gatekeeper designation process

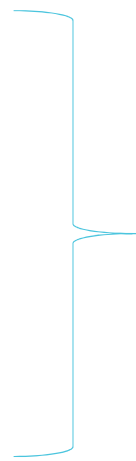
A provider of a core platform service can be designated as a gatekeeper when:



3. Core platform services

Criteria considered:

- highly concentrated platform services;
- one or very few large digital platforms set the commercial conditions irrespective of their competitors, customers or consumers;
- few large digital platforms act as gateways for business users to reach their consumers and vice-versa;
- gatekeeper power often misused by means of unfair behaviour



1. **online intermediation services** (incl. esp. marketplaces, app stores),
2. **online search engines,**
3. **operating systems,**
4. **cloud computing services;**
5. **video sharing platform services,**
6. **number-independent interpersonal electronic communication services,**
7. **social networking services**
8. **advertising services,**
9. **web browsers and**
10. **virtual assistants.**

4. Obligations

- **Philosophy** - precise obligations, that are necessary and appropriate for contestability and fairness
- **Applied to core platform services** that meet the designation criteria
- **Directly applicable obligations** with only limited possibilities to obtain an exemption
- **Some obligations are directly implementable (see article 5) while others may need further specification (see article 6)**
- Compliance to be ensured **within 6 months** following a designation

5. Conclusion

- There is a clear role for competition law enforcement in digital markets (as in any other market)
- Ex ante regulation can complement competition enforcement and ensure that competition agencies can focus their resources on the most harmful cases
- Going forward, competition enforcement will likely continue to tackle both traditional forms of abuse and adapt itself to new forms of harmful behaviour



Thank you

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