EU Policy Alert

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Digital Markets Act—The New Era of EU Digital Regulation for Big Tech

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Key Points

- The co-legislators of the EU have provisionally agreed on new rules to limit the market power of big technology platforms.
- The provisionally agreed-upon text[1] of the Digital Markets Act (**DMA**) establishes a wide range of obligations for so-called "gatekeepers" of core platform services in relation to data, advertising, e-commerce, interoperability and the commercial relationship between the service providers, customers and end users.
- Compliance with the DMA will entail material changes to the business models of some of the larger digital platforms, which will be required to, *inter alia*, allow app users to download apps from the Internet and third-party app stores, allow app developers to use the in-app payment solution of their choice and to promote offers to app users and offer access to the app store on fair, reasonable and non-discriminatory (**FRAND**) terms.
- Compliance with such obligations should go a long way towards addressing many concerns expressed by app developers and other market participants in recent years, which the European Commission (**EC**) and national competition authorities have struggled to address given the limitations of competition law.
- The provisional agreement on the DMA is subject to formal approval by the Council and the European Parliament.
- On current timing, the EC will designate "gatekeepers" by early next year, with bans on self-preferencing and other abusive practices, together with obligations to grant access and interoperability, expected to be effective from early 2024.

Introduction

In late March, EU lawmakers provisionally agreed to new EU rules to curb the market power of big technology platforms acting as "gatekeepers". The DMA will ban large digital platforms designated as gatekeepers from engaging in certain practices, which are deemed unfair or which otherwise limit the contestability of core platform services. To enforce these prohibitions, the DMA will enable the EC to carry out market investigations and sanction non-compliant behavior. The legislation is intended to

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target companies providing so-called “core platform services”, which legislators have deemed the most prone to unfair business practices and therefore consumer harm, including search engines, social media networks, e-marketplaces and web browsers. Further, only those companies meeting certain criteria will be deemed “gatekeepers” and, therefore, subject to the proposed restrictions. The DMA reflects a shift from ex post antitrust intervention to ex ante regulation and will radically change how large digital platforms are allowed to operate in the EU.

Background

The EC initiated the legislative process in December 2020 with a proposal for a regulation to ensure contestable and fair markets in the digital sector. Negotiators for the Parliament, the Council and the EC subsequently entered into trilogue negotiations in January 2022. The negotiators reached a compromise on March 25, 2022. The text must now be formally approved by the Council and the Parliament before entering into force.

The DMA is one of those rare pieces of EU legislation that has ended up being more stringent than the initial EC proposal (which was already relatively strict). Certainly, the French Presidency of the Council was determined to get a strict DMA over the line prior to the French elections. Furthermore, there were many businesses – including rivals of the large digital platforms – who supported a strong DMA throughout the lobbying process. Moreover, there was a blanket consensus among EU institutions and politicians that something needed to be done as swiftly as possible, not least because competition law had not been effective in constraining big tech’s market power.

Below, we outline some of the main features of the compromise text, which totals 56 articles.

Gatekeepers

Pursuant to Article 1 of the DMA, the act covers *core platform services* provided or offered by *gatekeepers* to business users established in the EU or end users established or located in the EU.

Core platform services include:

1. online intermediation services.
2. online search engines.
3. online social networking services.
4. video-sharing platform services.
5. number-independent interpersonal communications services.
6. operating systems.
7. web browsers.
8. virtual assistants.
9. cloud computing services.
10. online advertising services, including advertising intermediation services.

The compromise text clarifies that the definition of core platform services should be technology neutral and should be understood to encompass those provided on or through various means or devices, such as connected TV or embedded digital services in vehicles.

"Gatekeeper", in turn, refers to an undertaking providing core platform services that meets the following qualitative and quantitative criteria, set out in Article 3:

- First, it must have a *significant impact on the EU internal market*. An undertaking is presumed to satisfy this requirement where (a) it either has achieved an annual EU turnover equal to or above EUR 7.5 billion in each of the last three financial years, or where its average market capitalization or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year, and (b) it provides the same core platform service in at least three Member States.
- Second, it must provide a *core platform service* which is an important gateway for business users to reach end users. This requirement is presumed to be met where the undertaking provides a core platform service that had on average at least 45 million monthly active end users established or located in the EU and at least 10,000 yearly active business users established in the EU in the last financial year.[2] Users are to be identified and calculated in accordance with a methodology set out in an Annex to the DMA.
- Third, it must enjoy an *entrenched and durable position* in its operations. This requirement is presumed to be met where the threshold points in the paragraph above were met in each of the previous three financial years.

Article 3(5) of the DMA allows the nominated undertaking to rebut the presumption that it has a significant impact on the internal market by demonstrating that, although it meets the quantitative thresholds, it does not fulfill the requirements for designation as a gatekeeper (see qualitative requirements set out in Article 3(1) of the Regulation). The EC, in its assessment of the arguments put forward by the undertaking, should take into account only those elements which directly relate to the *quantitative* criteria, namely the impact of the undertaking providing core platform services on the internal market beyond revenue or market capitalization, such as its size in absolute terms, and the number of Member States in which it is present; by how much the actual business user and end user numbers exceed the thresholds and the importance of the core platform service provided, considering its overall scale of activities; and the number of years for which the thresholds have been met (see Recital 23 of the DMA). Inferring such a gatekeeping status of an undertaking solely from the quantitative criteria, such as the number of business and end users, limits the EC's ability to focus on the most relevant elements of analysis, namely whether the undertaking in question is an important gateway for business users to reach end users and sits at odds with the concept of **evidence-based regulation**. Unless this recital and the corresponding Article 3(5) of the DMA is interpreted in a flexible manner, it is likely to lead to over-inclusion.

If an undertaking meets the qualitative but not the quantitative criteria outlined above, the EC may still designate it a gatekeeper, taking into account certain elements such as the size, including turnover and market capitalization, and position of that undertaking, the number of business users using the core platform service to reach end users and the number of end users.[3]

The Act applies irrespective of the place of establishment or residence of the gatekeeper.

Obligations for gatekeepers

Articles 5 and 6 of the DMA set out various obligations for gatekeepers related to each of the enumerated core platform services, which will have a significant impact on the way gatekeepers will have to manage their products and services. This includes *obligations related to personal data of end users*. For example, the DMA prohibits gatekeepers, when providing online advertising services, from using the personal data of users using services provided by third parties that, in turn, make use of the core platform services of the gatekeeper. Gatekeepers are also prohibited from combining or cross-using personal data from a core platform service with personal data from other services provided by the gatekeeper or third parties. Further, gatekeepers are prevented from using, in competition with business users, non-public data generated in the context of their use of a core platform service, and gatekeepers are required to provide end users with effective portability of data provided by the end user or generated through the activity of the end user in the context of the relevant core platform service.

The DMA also *prohibits gatekeepers from placing certain limits on business users' dealings with end users*. For example, the DMA requires that business users offering products or services through the online intermediation services of the gatekeeper be allowed to offer the same products or services at different prices and conditions through other intermediaries or through their own direct online sales channel. It would also require that end users be allowed access to the services of the business user through the core platform services, and that business users are free to conclude contracts with end users acquired through a core platform without using the platform.

In addition, the DMA *prohibits gatekeepers from forcing users to use the gatekeepers' other services* in the context of services provided by the business users through the core platform service, including identification services, web browsers or payment services (such as a payment system for in-app purchases). This provision seeks to address, among others, Apple's policy of requiring all browsers running on iOS to utilize Apple's WebKit browser engine – a policy which the UK Competition and Markets Authority has recently found may have restricted the development of web apps.[4]

The DMA also limits gatekeepers' ability to prevent users from raising issues of non-compliance with EU or national law. In addition, gatekeepers are also prohibited from requiring users to register with a core platform service as a condition of being able to use another core platform service.

The DMA also regulates the relationships between gatekeepers, advertisers and publishers. For instance, the DMA requires that advertisers be granted information concerning each advertisement placed by the advertiser on a daily basis free of charge, including in relation to prices and fees; the remuneration received by the publisher; and the metrics on which the prices, fees and remunerations are calculated. Similarly, the DMA requires that each publisher supplied with online advertising services be granted information concerning each advertisement displayed on the publisher's inventory regarding the remuneration received and the fees paid by that publisher; the price paid by the advertiser; and the metrics on which each of the prices and remunerations are calculated. Further, the gatekeeper is required to provide advertisers and publishers with access to the performance measuring tools and the

data necessary for advertisers and publishers to carry out their own independent verification of the advertisements inventory.

The DMA also includes *obligations relating to the right to use third party-applications*. For example, the DMA requires gatekeepers to allow end users to easily uninstall software applications, as well as to change default settings on operating systems, virtual assistants and web browsers that direct end users to products or services provided by the gatekeeper. The DMA also mandates that end users be provided with the option to set and modify selection of products and software, including by opting for software and services provided by parties other than the gatekeeper. The DMA also prevents a gatekeeper from using, in competition with business users, any data that is not publicly available and that is generated or provided by those business users in the context of their use of the relevant core platform services, including data generated or provided by the end users of those business users. Finally, the DMA requires *gatekeepers to provide to any third-party offering online search engines an access on fair, reasonable and non-discriminatory terms* to ranking, query, click and view data in relation to free and paid searches generated by end users on its online search engine. The Preamble explains in this respect that access by gatekeepers to such ranking, query, click and view data constitutes an important barrier to entry and expansion, which undermines the contestability of online search engine services. Self-preference in ranking is also regulated, as gatekeepers are prohibited from treating their own services more favorably in ranking and related indexing and crawling. It should be noted however that this provision is limited to self-preference involving “ranking” only and does not represent a general ban on self-preferencing. Finally, the DMA prohibits gatekeepers from having general conditions for terminating the provision of a core platform service that are disproportionate, i.e. the terms must not hamper the ability of business users and end users to unsubscribe from a core platform service to which they have previously subscribed.

While some companies that are likely to be designated as gatekeepers will need more guidance on the exact meaning of some of the obligations and prohibitions contained in Articles 5 and 6, it seems unlikely that published EC guidance will come much before the date by which gatekeepers are obliged to comply. Gatekeepers may be expected to engage in informal dialogue with the EC in this regard, and some gatekeepers are expected to dispute the precise ambit of Articles 5 and 6, as well as the fact of their designation.[5]

Interoperability

In addition to establishing obligations for gatekeepers, one of the main features of the DMA relates to interoperability, which means the ability of computer systems or software to exchange and make use of information. The DMA establishes interoperability obligations with respect to software and hardware in Article 6(7) and for number-independent interpersonal communications services in Article 7.

Pursuant to Article 6(7), gatekeepers are required to allow providers of services and providers of hardware, free of charge, effective interoperability with, and access for the purposes of interoperability to, the same hardware and software features accessed or controlled via the operating system or virtual assistant as are available to services or hardware provided by the gatekeeper.

The Preamble notes in this context that a gatekeeper can provide services or hardware, such as wearable devices, that access hardware or software features of a device accessed or controlled via an operating system or virtual assistant in order to offer specific functionalities to end users. In that case, competing service or hardware providers, such as providers of wearable devices, require equally effective interoperability with, and access for the purposes of interoperability to, the same hardware or software features to be able to provide a competitive offering to end users. The Preamble further notes that gatekeepers can also have a dual role as developers of operating systems and device manufacturers, including any technical functionality that such a device may have. It therefore explains that, if dual roles are used in a manner that prevents alternative service and hardware providers from having access under equal conditions to the same operating system, hardware or software features that are available or used by the gatekeeper in the provision of its own complementary or supporting services or hardware, this could significantly undermine innovation by such alternative providers, as well as choice for end users.

Article 7 outlines obligation for gatekeepers on interoperability of number-independent interpersonal communications services (e.g. messaging services). The term “number-independent interpersonal communications services” refers to a service that does not connect or connects to publicly assigned numbers, that is, numbers in national or international numbering plans.

Pursuant to the DMA, gatekeepers that provide such services are required to make the basic functionalities of number-independent interpersonal communications services interoperable with the number-independent interpersonal communications services of another provider offering or intending to offer such services in the EU, by providing the necessary technical interfaces or similar solutions that facilitate interoperability, upon request and free of charge. These “basic functionalities” include end-to-end text messaging between two individual users; the sharing of images, voice messages and other attached files in end-to-end communications; and, after a certain period, group chats, and end-to-end voice and video calls.

In this context, the Preamble notes that the lack of interoperability allows gatekeepers that provide number-independent interpersonal communications services to benefit from strong network effects, which contributes to the weakening of contestability. Furthermore, regardless of whether end users “multi-home”, gatekeepers often provide number-independent interpersonal communications services as part of their platform ecosystem, and this further exacerbates entry barriers for alternative providers of such services and increases costs for end users to switch.

Investigative, Enforcement and Monitoring powers

The DMA grants the EC broad investigative powers to initiate a market investigation to designate gatekeepers, examine and monitor non-compliance, and impose fines and penalties. National authorities are expected to assist and liaise with the EC, where appropriate.

In case of non-compliance, the EC may impose fines on gatekeepers of up to 10 percent of the gatekeeper’s total worldwide turnover in the preceding final year, and fines for repeat infringements may be up to 20 percent of total worldwide turnover. Failure to fulfill certain transparency and cooperation requirements may attract fines of up to 1 percent of the total worldwide turnover of the undertaking in the preceding

year. To compel compliance with its decisions, the EC may impose periodic penalty payments on undertakings, including gatekeepers, where applicable, and associations of undertakings not exceeding 5 percent of the average daily worldwide turnover in the preceding financial year. Further, if a gatekeeper systematically violates the new rules (i.e. where the EC issued at least three non-compliance decisions), the EC could impose a temporary ban on mergers for the business or impose divestment requirements.

Next Steps

The provisional agreement on the DMA is subject to formal approval by the Council and the Parliament. If approved, the DMA would take effect six months after its entry into force.[6] The EC is expected to designate gatekeepers later on this year and early next year. Designated gatekeepers will then need to comply with the formal obligations of the DMA (including Articles 5 and 6) by Q1 2024.[7] This would be almost two years from now, which many end and business users of the gatekeepers' products and services may find frustrating. In the meantime, EC competition law investigations and enforcement efforts will continue.[8]

Conclusions

To say that the final version of the DMA is an ambitious piece of legislation would be an understatement. The DMA imposes a series of far-reaching obligations on gatekeepers, signaling a new era of digital regulation for the EU, that may be replicated elsewhere. Compliance with the DMA will entail material changes to the business models of the larger digital platforms, which will be required to, *inter alia*, allow app users to download apps from the Internet and third-party app stores, allow app developers to use the in-app payment solution of their choice and to promote offers to app users; and offer access to the app store on FRAND terms. Compliance with such obligations should go a long way towards addressing the concerns expressed by app developers and other market participants in recent years.

Going forward, much will depend on when and how the Regulation will be applied and what guidance the EC, and eventually the EU Courts, will provide to assist with the interpretation and application of its rules.

[1] This Client Alert is based on the compromise text of the European Parliament and the Council dated 11 May 2022. The final version of the DMA text is due to be published this Summer. Akin aims to provide an updated Client Alert on publication which will include, *inter alia*, any changes to the compromise text version.

[2] *Business users* are any natural or legal person acting in a commercial or professional capacity using core platform services, while end users are any natural or legal person using core platform services other than as a business user. The DMA also clarifies that the fact that an undertaking providing core platform services not only intermediates between business users and end users, but also between end users and end users, for example in the case of number-independent interpersonal communications services, should not preclude the conclusion that such an undertaking is or could be an important gateway for business users to reach end users.

[3] Article 3(8) of the DMA.

[4] See in this respect the CMA's mobile ecosystems market study interim report, published in December 2021: Mobile ecosystems market study interim report - GOV.UK (www.gov.uk).

[5] The original DMA proposal of the EC provided for a so-called "**regulatory dialogue**" through which the gatekeeper could seek guidance from the EC with respect to the measures it intended to take to comply with the obligations laid down in Article 6 (which are considered "susceptible of being further specified", as opposed to those in Article 5). The possibility for a regulatory dialogue made its way to the compromise text of the DMA, but with a significant caveat, which may in turn reduce its effectiveness: the EC will have **discretion** in deciding to engage in such dialogue, subject to respecting the principles of equal treatment, proportionality and good administration (see Recital 65 of the DMA).

[6] The DMA will first come into force 20 days after its publication in the Official Journal of the EU (OJEU), though many of its provisions will only begin to apply at least six months later.

[7] Please see in this respect Margrethe Vestager's speech at the Charles River Associate's (CRA) annual competition conference held on 31 March 2022 in Brussels: Keynote address to the CRA annual conference (europa.eu)

[8] The Preamble of the DMA refers explicitly to limitations of ex post competition enforcement. It provides that the scope of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) is limited to certain instances of market power, for example dominance on specific markets and of anti-competitive behavior, and enforcement requires an extensive investigation of often very complex facts on a case by case basis. This takes years. At the same time, the Preamble makes clear that the DMA aims to complement the enforcement of competition law and it should apply, without prejudice to Articles 101 and 102 TFEU, to the corresponding national competition rules.

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