BRIEFING

EU Legislation in Progress

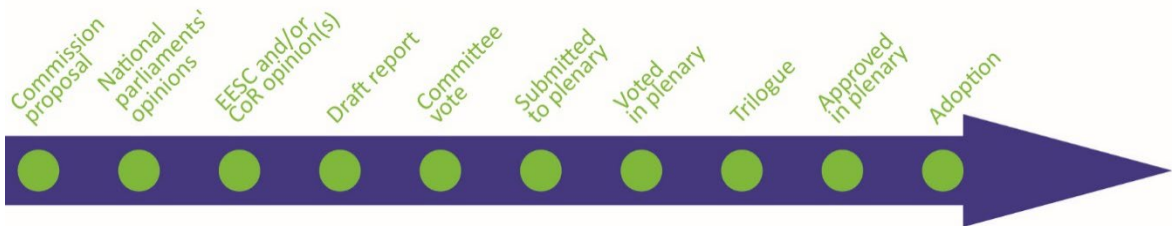
European Parliament

Digital Markets Act

OVERVIEW

EU lawmakers signed a regulation on contestable and fair markets in the digital sector, otherwise referred to as the Digital Markets Act (DMA), in September 2022. The DMA was published in the Official Journal of the European Union on 12 October 2022 and entered into force on 1 November 2022. The new legislation lays down harmonised rules aimed at regulating the behaviour of digital platforms acting as gatekeepers between business users and their customers in the European Union (EU). This approach entails a shift from ex-post anti-trust intervention to ex-ante regulation, and enshrines a set of ex-ante rules within EU law that will radically change how large digital platforms are allowed to operate in the EU. The European Commission is expected to undertake the designation of gatekeeper platforms in mid-2023. Compliance enforcement will begin around mid-2024, with gatekeepers having to adhere to a range of obligations and prohibitions.

Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)		
Committee responsible:	Internal Market and Consumer Protection (IMCO)	COM(2020) 842 15.12.2020
Rapporteur:	Andreas Schwab (EPP, Germany)	2020/0374(COD)
Shadow rapporteurs:	René Repasi, (S&D, Germany) Andrus Ansip (Renew, Estonia) Marcel Kolaja (Greens/EFA, Czechia) Virginie Joron (ID, France) Adam Bielan (ECR, Poland) Martin Schirdewan (The Left, Germany)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
Procedure completed.	Regulation 2022/1925 OJ L 265 12.10.2022, pp 1-66.	



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Introduction

Whereas online platforms – such as social media and e-commerce platforms – play an increasingly important role in people's social and economic lives, current EU rules on digital services date back two decades and have remained largely unchanged since the adoption of the e-Commerce Directive in 2000 (Directive 2000/31/EC). On 15 December 2020, the European Commission presented a digital services act package, with two draft pieces of legislation: a digital services act (DSA) and a digital markets act (DMA), designed to create a fairer playing field and make online platforms more accountable for the content posted on them.[1] If adopted, the new rules will enshrine within EU law a set of ex-ante rules that will radically change how gatekeeper platforms can operate in the EU.

Context

To tackle the competition issues raised by large online platforms, the EU has launched a series of **antitrust proceedings** in recent years (e.g. the Google Android and Amazon cases) and reflected on how to **adapt EU competition law tools** to level the playing field in the digital environment.[2] The EU also adopted a Platform-to-Business Regulation, in force since July 2020, establishing new rules for transparency and redress mechanisms for businesses using online platforms' services. However, despites these initiatives, a number of recent reports and studies have shown that a few large platforms are increasingly becoming **online gatekeepers**.[3] These gatekeepers control key channels of distribution, notably because of: strong **network effects** (i.e. users are more likely to value and choose platforms with a large user base); their **intermediary role** (i.e. between sellers and customers); and their ability to access and collect **large amounts of data** (e.g. users' personal and non-personal data and competitors' sales data).

Against this backdrop, EU policy-makers have considered a shift from ex-post antitrust intervention to ex-ante regulation. This new approach is driven by the fact that existing EU competition rules do not deal adequately with market failures resulting from the behaviours of digital gatekeepers, notably because Article 101 and Article 102 of TFEU investigation procedures require a specific analysis that can only take place ex-post (i.e. after a competition problem has emerged) and may take too long. Furthermore, antitrust rules are ill suited to cases of structural competition problems because of the economic features of these markets (i.e. tipping markets).[4]

Preparation of the proposal

The Commission ran a public consultation from June to September 2020 to assess how best to ensure online safety, fairness, and a level-playing field in the digital economy; it garnered more than 2 000 replies. In addition, the Commission consulted on adopting ex-ante regulatory instruments for gatekeepers and on a possible new competition tool to address structural competition problems in both digital and non-digital markets. Together with a number of legal and economic studies, these replies fed into the Commission's impact assessment (of which EPRS has published an initial appraisal), which concluded that a few large platforms control access to digital markets. This leads to extreme dependencies on these platforms for many businesses, with evidence of negative effects on effective competition and on the contestability of the markets concerned. The Commission highlighted three problem clusters.

Weak contestability

Some of these gatekeepers exercise control over entire digital ecosystems that existing or new operators cannot contest, irrespective of how innovative and efficient they may be. As a result of this weak competitive pressure, there is a risk that these markets do not – or will not– function well and do not deliver the best outcome for consumers in terms of prices, quality, choice or innovation. To substantiate its claim, the Commission points at an unprecedented trend of growing market concentration, the existence of entry barriers in digital markets where gatekeepers are present and

the fact that such gatekeepers may reach an entrenched market position that is hard to contest and that they can further expand through the creation of ecosystems.[5]

Unfair gatekeeper practices vis-à-vis business users

Businesses are increasingly dependent on these gatekeepers, which in many cases leads to gross imbalances in bargaining power and therefore results in unfair practices being imposed on business users, and small and medium-sized enterprises (SMEs) relying on the platforms to reach their customers.

A wide range of such practices have been identified,[6] including: the imposition of **anti-steering** provisions (i.e. preventing business users from directing their consumers to alternative offers other than those provided on the platform); **lock-in strategies** (such as imposition of the platform's identification services); **self-preferencing** practices (i.e. unfairly favouring own products and services to the detriment of competing businesses); mechanisms to **limit or refuse access to data** collected by gatekeepers (e.g. an app store limiting the information that third-party app providers receive about their subscribers, lack of meaningful interoperability to access such data); imposition of **unfair terms of access** upon business users (e.g. prices or bundling offers); and mechanisms to **limit access or interoperability** of the platform's services/functionalities (e.g. operating system) with the services offered by business users.

The Commission's research has shown that such practices are more frequently implemented for what are referred to as **'core platform services' (CPS)**, such as (i) online intermediation services (e.g. marketplaces and app stores); (ii) online search engines; (iii) social networking sites; (iv) video sharing platform services; (v) number-independent interpersonal electronic communication services; (vi) operating systems; (vii) cloud services; and (viii) advertising services.[7]

Legal uncertainty for market players

Finally, the Commission concludes that there is increasing regulatory fragmentation of the online platform space in the EU and that coordination among national legislators appears to be insufficient. Such fragmentation creates compliance costs that are particularly harmful for smaller platforms as well as for start-ups, and results in legal uncertainty detrimental to all players.[8]

The changes the proposal would bring

Legal basis

The Commission put forward a proposal for a regulation on contestable and fair markets in the digital sector (digital markets act – DMA) on the basis of Article 114 TFEU to prevent divergences from hampering the free provision of cross-border digital services and to guarantee uniform rights and obligations for business and consumers across the internal market. Objectives

The DMA has two main objectives: to ensure that digital markets in which gatekeepers operate are and remain contestable, namely that other market operators can impose competitive pressure on such gatekeepers; and to ensure **fairness** and a **level playing field** for players on digital markets in the EU. To that end, the DMA entails a shift from ex-post antitrust intervention to ex-ante regulation.

Gatekeeper designation

The Commission proposed to designate as 'gatekeepers' the providers of CPS that satisfy **three cumulative criteria:** entities that: (i) have a significant impact on the EU internal market; (ii) operate one or more important gateways to customers; and (iii) enjoy or are expected to enjoy an entrenched and durable position in their operations.

The draft DMA established a **rebuttable presumption** for qualifying as a gatekeeper. A company that operates a 'core platform service' would be required to notify the Commission upon meeting all the pre-defined quantitative thresholds for turnover, market capitalisation, and their number of

European consumer users and business users, unless it submitted substantiated arguments to demonstrate the contrary. Furthermore, following a **market investigation**, the Commission could determine that smaller companies – that do not meet the quantitative thresholds – nevertheless qualify as emerging gatekeepers given foreseeable market developments.

The Commission could adopt **delegated acts** to specify the methodology for determining and adjusting the quantitative thresholds. Member States would participate via the **digital markets advisory committee** supporting the Commission in market investigation and at the request of at least three of them the Commission would be bound to open such an investigation to determine if a CPS should be designated as a gatekeeper. The DMA would apply to CPS provided by gatekeepers for business or end users established or located in the EU, even where such gatekeepers were established outside the EU.

Obligations and prohibitions

Companies identified as gatekeepers would need to implement a range of obligations and prohibitions. Accordingly, the draft legislation set out **dos** and **don'ts** – defined in the light of the past antitrust experience in the EU – and spelled out two distinct sets of requirements on gatekeepers that provide CPS: **a list of directly applicable requirements (Article 5)** and a **list of requirements that need to be specified** – following a dialogue with the gatekeeper – as they potentially apply in different ways (Article 6). '**Emerging gatekeepers**' (i.e. gatekeepers that do not yet enjoy an entrenched and durable position but will do so in the foreseeable future) were proposed to be subject to a limited set of obligations and prohibitions necessary to ensure that the market remains contestable.

Enforcement, sanctions and relationship to competition law

The Commission proposed to be the regulatory body competent to implementing and enforcing the DMA, and to that end would be granted **new powers to conduct market investigations** and take **decisions on non-compliance** with the obligations and prohibitions. In implementing the DMA, the Commission would be assisted in its decisions by the **Digital Markets Advisory Committee**, composed of representatives of EU Member States.

While, under the draft text, Member States could not impose further obligations on gatekeepers by way of laws, regulations or administrative action for ensuring contestable and fair markets, the draft DMA was said to be 'without prejudice' to the application of Articles 101 and 102 and national competition laws. As a result, conduct that infringes both the DMA and competition law would be subject to parallel actions and national competition authorities and courts remain competent to address conduct that infringes the DMA under national or under EU competition law.

Advisory committees

The European Economic and Social Committee (EESC) adopted its opinion on the DMA in April 2021 and the Committee of the Regions (CoR) adopted an opinion on the Digital Services Act and the Digital Market Act In June 2021.

National parliaments

The deadline for the submission of reasoned opinions on the grounds of subsidiarity was 7 April 2021. The Czech Chamber of Deputies noted that the proposals do not take sufficient account of the monopoly position of multinational internet players, the interoperability of user data, the protection of user data by means of encryption, the right to anonymity and the protection of consumers against identity theft.

Stakeholder views[9]

The Body of European Regulators for Electronic Communications (BEREC), welcomed the draft regulation, but proposed some amendments for ensuring swift, effective and future-proof enforcement of the new rules. The European Consumer Organisation (BEUC), stressed that more focus should be put on consumer protection and called on Council and Parliament to strengthen the gatekeepers' obligations, enforcement of the DMA, and consumer rights and protections. Digital Europe, a leading trade association, proposed amending the proposal to ensure more legal certainty, effective and proportionate obligations based on regulatory dialogue and procedural safeguards. The European Tech Alliance (EUTA), representing the major European digital companies and start-ups, pleaded for a narrow definition of gatekeeper to ensure digital start-ups' growth and scale-up is not compromised. The Developers Alliance also warned of imposing too rigid a regulation that would chill investment and have a detrimental impact on innovative products and services. The European DIGITAL SME Alliance, representing European small and medium-sized information and communication technology enterprises urged lawmakers to strengthen the ex-ante interoperability requirement and welcomed the European Parliament's position in this respect. The Information Technology Industry Council (ITI), representing the biggest technology companies, called on policy-makers to ensure fair procedural rules and to streamline proceedings. The association representing cloud infrastructure service providers in Europe called for the case of software gatekeepers to be addressed. Several companies providing search engines asked, in a joint letter, to amend the DMA proposal to prevent gatekeepers from suppressing search engine competition. The Computer & Communications Industry Association warned that a one-size-fits-all approach to implementing the DMA is likely to have significant unintended consequences that could harm consumers and business users of platform services in Europe. A report by Oxera on their behalf found that, while the compromised text provides more protection for business users, some provisions overlook the negative impact on end-users. In their view, for instance, mandating free interoperability would reduce innovation incentives, meaning fewer features and functionalities for consumers. A broad coalition from the European media sector, including public and commercial broadcasters, radios and the press, called on the co-legislators to fix loopholes that could undermine effective competition in the supply of media content to European audiences.

Academic views

DMA objectives and legal basis

There is **strong support** among academics for ensuring the contestability of digital markets and fairness in business relationships, given the main concerns that have been raised by recent reports on the functioning of digital markets.[10] However, critics warn that the DMA would likely have a **chilling effect on research, development and innovation**.[11] It has also been stressed that 'contestability' and 'fairness' are largely left undefined in the draft text, leaving the Commission and other regulators significant room to adjudicate what is 'fair' in commercial disputes, re-write agreements with suppliers, and protect favoured industries.[12] Furthermore, some commentators pointed out that, for Article 114 TFEU to be a **valid legal basis** for the DMA, the draft proposal would require important adaptation to ensure harmonisation of national laws and respect for the principle of proportionality and for companies' fundamental rights, and to reduce the Commission's margin for discretion.[13]

Designation of gatekeepers

The process for designating gatekeepers as proposed in the draft DMA has been criticised. For some competition experts, there is a risk that such a process based on quantitative criteria may capture platforms that satisfy the quantitative thresholds owing to their size but do not act as gatekeepers.[14] Against this background, the **designation mechanism could be improved** to ensure that it only targets those platforms that are necessary gateways between business users and their customers

and are creating a real dependency for business partners.[15] Furthermore, because the gatekeeper concept is a new concept enshrined in EU law, commentators proposed to **enhance legal predictability** through the adoption of a delegated act or guidelines on how to use and assess the proposed indicators.[16] In addition, BEREC recommended that the DMA should not restrict the possibility to regulate platforms that have a significant gatekeeping role but that are potentially only active in one Member State. Some commentators also called for clarification in the final text of the procedure 'core platform services' should use to rebut the presumption that they have gatekeeper power when they meet the quantitative thresholds.[17]

Definition of ex-ante obligations and prohibitions

Some possible shortcomings in the Commission's approach to identifying obligations and prohibitions imposed on gatekeepers (i.e. dos and don'ts) have been highlighted. Some competition experts asked for **more flexibility** when it comes to imposing obligations on gatekeepers. They argued for a very limited black list (Article 5) of prohibited behaviours (with detailed obligations) and a grey list (Article 6) containing obligations that are more generally drafted and based on well-established theories of harm under competition law.[18] A Joint Research Centre (JRC) study also proposed to refine the Commission's approach and create a black list of forbidden behaviours and a grey list of practices that are in principle considered anti-competitive, but for which a pro-competitive justification is possible, with the gatekeeper bearing the burden of proof for that **efficiency defence**.[19] The procedure for updating obligations (24 months for a market investigation after officially starting the procedures, plus delegated act, plus individual proceedings against companies) is too time-consuming, according to some experts, who proposed instead to introduce a rule that enables the Commission to take **interim measures**.[20] Furthermore, it was proposed to substantially amend the DMA and include a single list of **self-executing prescriptive obligations** per core platform service, complemented by a legally binding code of conduct or similar provision to ensure more legal certainty.

Data portability, interoperability and data-sharing obligations

Data portability under the DMA seems to have a broader scope than the GDPR's right to data portability and would ensure additional forms of portability, including portability of non-personal data for business users and real-time and continuous portability.[21] However, the implementation of data portability runs into a number of technical, legal and economic obstacles (e.g. loss of context once data assets are ported from the original platform, need to obtain consent from natural persons to port personal data). Against this backdrop, lawmakers were invited to look at the feasibility of implementing an alternative to data portability, which would be to grant individuals 'in-situ rights to access end user data'. Under such a scenario, rather than transferring the individual data from the gatekeeper to another business user, the business user could run third-party algorithms on the data resident on the gatekeeper's server, without direct access to individual data.[22] EU lawmakers were also called to clarify how the rules enshrined in the DMA interplay with the GDPR[23] and how they will interact with intellectual property law and trade-secret protection.[24]

Some experts have stressed that the scope of the **data-sharing obligation** under the draft DMA does not provide a structural solution to the lack of data sharing, because the scope of this obligation is restricted to search data and to a few large online platforms acting as gatekeepers. They call on EU policy-makers to adopt a more detailed institutional framework to enforce the data-sharing obligation, possibly with the creation of a European data-sharing agency or a data-sharing cooperation network.[25] Finally, several proposals have been made to complement the rules on **interoperability**. The European Data Protection Supervisor (EDPS) recommended introducing minimum interoperability requirements to be imposed on gatekeepers and the implementation of technical standards drawn up at EU level. Another proposal has also been made to use a three-step approach to determine the degree of interoperability necessary, taking into account the potential

negative impacts on social networks and on users (such as the risk for privacy) and leaving flexibility for national regulators and agreements between platforms.[26]

Enforcement, compliance and judicial review

A set of recommendations have been made to boost DMA enforcement. These include setting up a **compulsory notification procedure** (enabling companies to make commitments), instead of the proposed self-assessment, and providing the Commission with the **power to impose additional obligations on gatekeepers more quickly** (e.g. after an infringement decision) and to withdraw obsolete obligations (e.g. phasing out the sunset clause).[27] In addition, some experts stressed that enforcement depends too heavily on the European Commission and advocated stronger involvement of private parties, independent bodies and the Member States in enforcement.[28] In this context, a new regulatory ex-ante regime for platforms comprising both pro-competitive interventions and an **enforceable code of conduct** for gatekeeper platforms has been recommended.[29] Other commentators argued that the DMA should require the Commission to publish guidelines providing general guidance as to the interpretation of the gatekeepers obligations and that the provisions on the regulatory dialogue should be clarified.[30]

Furthermore, while there were strong arguments for concentrating enforcement powers in the Commission, the independence of the EU regulator, the extent of its powers and the interplay with competition law investigations and national regulators needed to be better clarified.[31] One way would be to **differentiate more clearly between implementation and enforcement processes** and rely on expertise at Member State level.[32] BEREC also recommended including **dispute resolution mechanisms** in the DMA and setting up an advisory board of national independent authorities to support the EU competent authority and provide technical expertise and guidance.

Other commentators have warned of the **need to ensure a judicial review** of the DMA. For some, there is a risk that regulators could use the DMA provisions to bypass the legal requirements of Article 102, developed over decades under the scrutiny of the Court of Justice of the EU (CJEU), since the Commission can impose the same behavioural obligations under the DMA as under competition law, but without having to prove likely anticompetitive effects.[33] In addition, the fact that the draft DMA was found to give the Commission substantial leeway (for instance to define which firms qualify as gatekeepers), could impede the effectiveness of the judicial review of Commission decisions by the Court.[34] Interaction with competition law

The Commission proposal provided for an obligation for gatekeepers to inform the European Commission of any planned deals. Some academics pointed to lacunae and call for explicit changes to EU merger rules to better protect EU companies against killer acquisitions or the acquisition of nascent competitors.[35] A legal study from three leading academics concluded that strengthening the control of acquisitions by digital gatekeepers under Article 114 TFEU as part of the DMA would be legally feasible.[36]

Impact on consumers and end-users

A report from the Centre for European Reform warned that although the DMA's approach of setting a single set of rules for a diverse set of companies is understandable, this approach risks unintended consequences. They called on EU lawmakers to empower the Commission with more flexibility to exempt tech firms from the rules in some cases and protect innovation.[37] In the same vein, other experts argued that restricting collection or aggregation of user data could impair the viability of ad-funded platforms and have a significant potential to harm consumers.

Following the adoption of the DMA's final text, some commentators have pointed to a risk of over-regulation, especially with regard to the provisions potentially allowing a structural break-up of a company for non-compliance.[38] Others have called Member States and the EU to put strategies in place at national, pan-European and international level for successful enforcement of the Digital Markets Act.[39] In addition, prioritising compliance with the DMA over opening antitrust proceedings might be a more suitable course of action for new digital competition cases.[40]

Legislative process

Negotiation phase

In the European Parliament, the DMA was assigned to the Internal Market and Consumer Protection (IMCO) Committee, which appointed Andreas Schwab (EPP, Germany) as rapporteur. The Committees on Industry, Research and Energy (ITRE) and on Economic and Monetary Affairs (ECON) were associated committees (under Rule 57 of Parliament's Rules of Procedures) and were involved in fixing Parliament's position and trilogue negotiations. Following interinstitutional negotiations, the Parliament and Council reached a provisional political agreement on the DMA in March 2022. Both the Council and the Parliament endorsed the text in July 2022. In the Parliament, 588 Members voted in favour, 11 against and 31 abstained. Council and Parliament signed the DMA in September 2022.

Final text

The DMA's main provisions are as follows:

Scope and gatekeeper identification

A provider of CPS shall be designated as gatekeeper if: (a) it has a significant impact on the internal market; (b) it provides a CPS that is an important gateway for business users to reach end users; and (c) it enjoys an entrenched and durable position in its operations or it could enjoy such a position in the near future.

In practice, the new DMA rules apply to those large companies – designated as gatekeepers – that provide one or several of the following CPS: online intermediation services; online search engines; online social networking services; video-sharing platform services; number-independent interpersonal communication services; operating systems; web browsers; virtual assistants; cloud computing services; or online advertising services (Article 2).

The quantitative thresholds for a company to fall within the DMA's scope are set at €7.5 billion in annual turnover and €75 billion in market capitalisation. In addition, companies would also need to provide a CPS in at least three EU countries and have at least 45 million monthly active end users, established or located in the EU in the last financial year, as well as at least 10 000 active business users established in the EU. The DMA provides that companies must self-assess whether they meet the gatekeeper criteria and inform the Commission of their status within two months of those thresholds being met. Companies that satisfy the above-mentioned criteria are presumed to fulfil the conditions set out in points (a), (b), and (c) above, but have the opportunity to rebut the presumption and submit substantiated arguments to demonstrate that, due to exceptional circumstances, they should not be designated as a gatekeeper despite meeting all the thresholds. Conversely, the Commission may launch an investigation to assess the specific situation of a given company in more detail and decide to identify the company as a gatekeeper on the basis of a qualitative assessment, even if it does not meet the quantitative thresholds. The exact number of companies that would potentially fall within the scope of the DMA is a debated question.[41]

Obligations and prohibitions

The DMA requires gatekeepers to comply with a set of obligations and prohibitions within six months of their designation as gatekeepers.[42]

Article 5 imposes a set of requirements **directly applicable** to gatekeepers:

- **Processing and use of end-users' personal data** – prohibits a gatekeeper from processing end-users' personal data using third-party services for online advertising purposes without users' consent, from combining or cross-using personal data across CPS or between CPS and other services without users' consent and from signing-in users to other services without their consent (Article 5(1)).
- **Parity clauses** – requires a gatekeeper to allow its business users (e.g. app stores or marketplaces) to offer their products or services at different prices or conditions on third-party intermediation services or their online sales channels (Article 5(3)).
- **Anti-steering** – requires a gatekeeper to allow business users (e.g. app developers) to promote their offers to end-users acquired through its CPS and to allow end-users to access services, content and subscriptions outside its CPS (Article 5(4) and 5(5).
- **Raising issues of non-compliance** – prohibits a gatekeeper from preventing business users from raising issues of non-compliance with public authorities about its practices (Article 5(6)).
- **Tying** – prohibits a gatekeeper from requiring business or end-users to use its web browser engine, identification or payment services (Article 5(7)).
- **Bundling** – prohibits a gatekeeper from requiring business or end-users to subscribe to one of its CPS as condition to access another of its CPS (Article 5(8)).
- **Transparency concerning online advertising practices** – requires a gatekeeper to provide advertisers and publishers with transparent pricing and remuneration information regarding online advertising practices (Article 5(9) and 5(10)).

Articles 6 and 7 impose on gatekeepers a **list of requirements that may need to be specified** – following a dialogue with the gatekeeper – as they potentially apply in different ways:

- **Data silo** – prohibits a gatekeeper from using not-publicly available data generated by the business users to compete with them (Article 6(2)).
- **Uninstalling apps and changing default settings** – requires a gatekeeper to allow end-users to easily uninstall apps on its operating system and to change default settings prompting end users towards its operating system, virtual assistant or web browser (Article 6(3)).
- **Sideloading** – requires a gatekeeper to allow the installation of third-party apps and app stores using its operating system (Article 6(4)**)**.
- **Self-preferencing** – prohibits a gatekeeper from favouring its own products and services to the detriment to those of third parties (Article 6(5)).
- **Switching apps** – prohibits a gatekeeper from restricting end-users to using its CPS to switch apps and services (Article 6(6)).
- **Interoperability** – requires a gatekeeper to allow third-party providers and business users free of charge and effective interoperability to the same hardware and software features accessed or controlled via its operating system or virtual assistant (Article 6(7)).
- **Access to online advertisement performance measuring tools** – requires a gatekeeper to provide online advertisers and publishers with access to its performance measuring tools (Article 6(8)).
- **Data portability** – requires a gatekeeper to provide end-users with effective data portability upon their request and allow them real-time access to such data (Article 6(9)).
- **Data access** – requires a gatekeeper to provide business users with real-time access to data generated in the context of the use of the gatekeeper's CPS and of the users' interaction (Article 6(10)).
- **Search data access** – requires a gatekeeper to provide third-party search engines with access to fair, reasonable, and non-discriminatory (FRAND) terms for ranking, query, click and view data (Article 6(11)).
- **Access to app stores, search engines and social networking services** – requires a gatekeeper to provide fair and non-discriminatory (FRAND) access for business users to its app stores, search engines and social networks (Article 6(12)).
- **Terminating provision of service** – prohibits a gatekeeper from imposing disproportionate conditions for the termination of services (Article 6(13)).

- **Interpersonal communications services' interoperability** – requires a gatekeeper to make its interpersonal communications services interoperable with those of another provider (Article 7(1)).
- **Basic functionalities' interoperability** – requires a gatekeeper to ensure interoperability of the basic functionalities' (e.g. messaging apps) it provides to its own end users (Article 7(2) and 7(4)).

Furthermore, gatekeepers are subject to **general obligations** (Articles 13, 14 and 15):

- **Anti-circumvention** – requires undertakings providing CPS (including gatekeepers) not to circumvent quantitative thresholds, engage in any behaviour undermining compliance, or alter CPS quality and conditions (Article 13(1), (4) and (6)).
- **Concentrations** – gatekeepers are required to inform the Commission of any intended concentration involving another provider of CPS or other services (Article 14(1)).
- **Audit** – gatekeepers have to submit an audit to the Commission describing customer profiling techniques (Article 15).

Enforcement and sanctions.

The DMA provides a framework for cooperation under which (after engaging in a regulatory dialogue), the Commission may, by way of implementing acts, specify the measures that the gatekeeper must implement to comply with its obligations in Article 6 and 7 (Articles 8(2) and 8(3)). The Commission will be the sole enforcer of the regulation – with help from a high-level group of digital regulators and in close cooperation and coordination with national authorities. Gatekeepers failing to comply will be subject to fines (up to 20 % of worldwide turnover for repeated offences), as well as to structural remedies in cases of systematic non-compliance (a fixed-term ban on acquiring other companies). Where the gatekeeper has systematically infringed the obligations in the DMA and has maintained, strengthened or extended its gatekeeper position, the Commission may adopt an implementing act imposing on such gatekeeper any behavioural or structural remedies that are proportionate and necessary to ensure effective compliance with the DMA (Article 18 DMA).

Updating obligations for gatekeepers

After conducting a market investigation (18 months) on its own initiative or at the request of at least three Member States, the Commission can (a) present a legislative proposal to include new CPS or new obligations in the DMA, or (b) propose a delegated act to supplement or amend existing obligations. Council and Parliament experts must be associated, in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making.

Furthermore, a review clause requires the Commission to evaluate the regulation and report to the European Parliament, the Council and the EESC of any amendments needed by 3 May 2026, and subsequently every three years (Article 53). Evaluation will specifically have to assess the need to extend the interoperability obligation of Article 7 to online social networking services and amend the provisions concerning the list of CPS, the obligations and their enforcement.

Entry into force and implementation

The final text of the DMA was published in the Official Journal of the European Union on 12 October 2022 and came into force on 1 November 2022. The Commission will start to designate the gatekeeper core platform services (CPS) operating in the EU in **mid-2023**.

EUROPEAN PARLIAMENT SUPPORTING ANALYSIS

Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Digital Services Act & Digital Markets Act - Collection of studies for the IMCO committee, March 2022.

EPRS, Regulating digital gatekeepers, briefing, December 2020.

EPRS, Online platforms: Economic and societal effects, study, March 2021.

EPRS, Digital markets act, Initial appraisal of the Commission impact assessment, May 2021.

OTHER SOURCES

Contestable and fair markets in the digital sector (Digital Markets Act), European Parliament, Legislative Observatory (OEIL).

ENDNOTES

1 This briefing focuses on the digital markets act. See also, Digital services act, EPRS, April 2022.

2 See J. Crémer, Y.-A. de Montjoye and H. Schweitzer, Competition policy for the digital era, 2019.

3 See Stigler Centre, Stigler Committee on Digital Platforms: Final Report, 2019; J. Crémer, Y.-A. De Montjoye and H. Schweitzer, above; UK, Report of the Digital Competition Expert Panel, Unlocking digital competition, 2019; German Federal Ministry for Economic Affairs and Energy, Report by the Commission 'Competition Law 4.0', A new competition framework for the digital economy, 2019.

4 For the background, see T. Madiega, Regulating digital gatekeepers, EPRS, European Parliament, December 2020. 'Tipping' refers to a situation where 'once a firm has obtained a certain advantage over rivals in terms of market share, its position may become unassailable and the market may gravitate towards a situation of dominance or (quasi)-monopoly' because of the presence of specific market features such as network effects, economies of scale and access to data (See European Commission, impact assessment, at pp. 32-34).

5 See European Commission, impact assessment at pp. 8-10. The Commission highlights, inter alia, that the top seven large platforms account for 69 % of the total €6 trillion valuation of the platform economy, and that the total net revenues of some of these platforms (of billions of euros) double and triple over a few years.

6 See European Commission, impact assessment at pp. 10-14.

7 ibid.

8 ibid. at p 14-15.

9 This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'European Parliament supporting analysis'.

10 See CERRE, The European proposal for a Digital Markets Act: A first assessment, 2021. See also, Online platforms: Economic and societal effects, EPRS, March 2021.

11 See D. J. Teece and H. J. Kahwaty, Is the Proposed Digital Markets Act the Cure for Europe's Platform Ills? Evidence from the European Commission's Impact Assessment, 2021. See also N. Petit, who argues the DMA should send incentivising market signals and prioritise innovation.

12 See K. Jebelli, The EU Digital Markets Act: Five Questions of Principle, February 2021.

13 See A. Lamadrid de Pablo and N. Bayón Fernández, Why the Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, 2021.

14 See C. Cennamo and D. Sokol, Can the EU Regulate Platforms Without Stifling Innovation?, Harvard Business Review blog, 2021. See also CERRE above.

15 See D. Geradin, What is a digital gatekeeper? Which platforms should be captured by the EC proposal for a Digital Market Act?, 2021.

16 See CERRE, above.

17 See D. Geradin and others, One needed area of improvement for the Digital Markets Act: The designation of gatekeepers, 2022.

18 See CERRE, above. See as well generally on the draft DMA, De Streel and others, Making the Digital Markets Act More Resilient and Effective, 2021.

19 See Cabral and others, The EU Digital Markets Act, Publications Office of the European Union, Luxembourg, 2021.

20 See R. Podszun, P. Bongartz and S. Langenstein, Proposals on how to improve the Digital Markets Act, 2021.

21 See I. Graef, The opportunities and limits of data portability for stimulating competition and innovation, *Competition Policy International – Antitrust Chronicle*, Vol. 2(2), pp. 1-8, 2020.

22 See Cabral and others, above.

23 In this sense, see the EDPS Opinion 2/2021 on the proposal for a Digital Markets Act, 2021.

24 See B. Lundqvist, The Proposed Digital Markets Act and Access to Data: A Revolution, or Not?, *IIC – International Review of Intellectual Property and Competition Law*, Vol. 52, 2021, pp. 239-241.

25 I. Graef and J. Prüfe, Governance of Data Sharing: A Law & Economics Proposal, TILEC Discussion Paper No 001, 2021.

[26] See Opinion of the French Digital Council, July 2020. A distinction is proposed between 1) social graph interoperability, which would allow the user to maintain the relationships acquired on the previous social network when joining a new one; 2) instant messaging interoperability, which would enable the user on network A to send or receive messages from a user on network B; and 3) content interoperability, which would allow the user to view, publish or even interact with content on a third-party social network.

[27] G. Monti, The Digital Markets Act – Institutional Design and Suggestions for Improvement, TILEC Discussion Paper, 2021.

[28] See R. Podszun, P. Bongartz, and S. Langenstein, above.

[29] See Online platforms: Economic and societal effects, EPRS, March 2021.

[30] See D. Geradin and others, Compliance with the DMA: the need for interpretative guidelines and a proper regulatory dialogue, 2022.

[31] In this sense, see CERRE, Improving EU Institutional Design to Better Supervise Digital Platforms, 2022 at pp. 55-56.

[32] See D. Geradin, DMA proposal: Should there be a greater role for the Member States?, 2021.

[33] See, for instance, K. Jebelli, The EU Digital Markets Act: Five Questions of Principle, February 2021.

[34] See P. Ibáñez Colomo, The Draft Digital Markets Act: A Legal and Institutional Analysis, 2021.

[35] See C. Caffara and F. Scott Morton above. See also Online platforms: Economic and societal effects, EPRS, March 2021.

[36] See J-U Franck, G. Monti and A. de Streel, Legal Opinion, Article 114 TFEU as a Legal Basis for Strengthened Control of Acquisitions by Digital Gatekeepers, September 2021.

[37] See Z. Meyers, No pain, no gain? The Digital Markets Act, Centre for European Reform, 2022. For a critical assessment of the potential impact of the DMA on competition, see P. Hanspach and N. Petit, The European Union's Big Policy Bet Against the Tech Giants, December 2021.

[38] See A. Portuese, The Digital Markets Act: The Path to Overregulation, June 2022.

[39] See C. Carugati and C. Martins, Insights for successful enforcement of Europe's Digital Markets Act, *Bruegel Blog*, May 2022. For an overview of the rules applicable in digital markets worldwide, see OECD, G7 inventory of new rules for digital markets, 2022.

[40] See C. Carugati, How the European Union can best apply the Digital Markets Act, October 2022.

[41] See European Commission, impact assessment at p. 48. See also C. Caffara and F. Scott Morton, How Will the Digital Markets Act Regulate Big Tech?, Chicago University Stigler Centre, Promarket, 2021. The authors argue that these criteria will capture not only the core businesses of the largest players (GAFAM), but perhaps also a few others. They believe Oracle and SAP, for instance, would appear to meet the thresholds, as would AWS and Microsoft Azure, while Twitter, AirBnB, Bing, Linkedin, Xbox Netflix, Zoom and Expedia do not appear to meet the thresholds at present, and Booking.com, Spotify, Uber, Bytedance/TikTok, Salesforce, Google Cloud and IBM Cloud appear to meet some but not others at this point.

[42] Regarding emerging gatekeepers, i.e. when a company does not yet enjoy an entrenched and durable position, but it is foreseeable that it will in the near future, a proportionate subset of obligations will apply (Recitals 26 and 27).

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