Digital markets act

OVERVIEW

In December 2020, the European Commission published a proposal for a regulation on contestable and fair markets in the digital sector, otherwise referred to as the digital markets act (DMA). The proposed 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 would enshrine within EU law a set of ex-ante rules that would radically change how large digital platforms are allowed to operate in the EU.

The Council and the European Parliament agreed their positions on the DMA proposal in November and December 2021, respectively. While endorsing the proposal, both institutions adopted a number of amendments to the Commission’s text. Trilogue negotiations aiming to reach a compromise text began in January 2022.


| Committee responsible: | Internal Market and Consumer Protection (IMCO) |
| Rapporteur: | Andreas Schwab (EPP, Germany) |
| 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) |
| COM | 2020/0374(COD) |
| Next steps expected: | Continuing trilogue negotiations |

Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly ‘co-decision’

EPRS | European Parliamentary Research Service

Author: Tambiama Madiega
Members’ Research Service
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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, despite 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 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

The market power of large platforms is also coming under increasing scrutiny in other regions of the world. In the United States (US), a number of states have recently sued Google for anticompetitive conduct in the advertising sector, and the Department of Justice has filed a complaint relating to Google’s dominance on the web search marketplace and associated advertising business. China, meanwhile, is considering legislating to curb the monopolistic power of technology giants such as Alibaba. In the United Kingdom (UK), a dedicated Digital Markets Unit is being set up to introduce and enforce a new code to govern the behaviour of dominant platforms.

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 European 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 highlights three problem clusters.

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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.

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, 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.

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.

The changes the proposal would bring

Legal basis
The Commission has 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. The first is 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. The second is to ensure fairness and a level playing field for players.
on digital markets in the EU. To that end, the draft DMA entails a shift from ex-post antitrust intervention to ex-ante regulation.

The DMA proposal **departs from a classical competition** policy approach. While antitrust law is primarily concerned with the protection of undistorted competition, ex-ante regulation embraces a different set of objectives (i.e. contestability and fairness), and entails a reversal of the burden of intervention, since the approach no longer consists of assessing the behaviours of a company ex-post, but rather in providing a precise definition of expected or prohibited behaviour up front.\(^\text{10}\)

## Gatekeeper designation

The draft DMA designates 'gatekeepers' as providers of CPS that satisfy **three cumulative criteria**. Accordingly, 'gatekeepers' are 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 (Article 3).

The draft DMA establishes a **rebuttable presumption** for qualifying as a gatekeeper. A company that operates a 'core platform service' would be required to notify the European 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 would be empowered to adopt **delegated acts** to specify the methodology for determining and adjusting the quantitative thresholds (Article 37). Member States would participate via the **digital markets advisory committee** supporting the Commission in market investigation (Article 32) 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 (Article 33). 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. While the Commission expects that only **10 to 15 gatekeepers** would be identified, based on such quantitative thresholds, the basis of this estimate is questionable given the leeway left to the regulators and it could be that a larger number of companies will fall within the scope of the DMA.\(^\text{11}\)

## Obligations and prohibitions

Companies identified as gatekeepers would need to implement a range of obligations and prohibitions. Accordingly, the draft legislation sets out **dos and don'ts** – defined in the light of the past antitrust experience in the EU – and spells out two distinct sets of requirements.

**Proposed gatekeeper designation**

**quantitative thresholds**

- **The impact on the internal market** is presumed to be fulfilled if the company achieves an **annual turnover** in the European Economic Area (EEA) equal to or above **€6.5 billion** in the last three financial years, or where its **average market capitalisation** or equivalent fair market value amounted to **at least €65 billion** in the last financial year, and it provides a core platform service **in at least three Member States**; and
- **the control of an important gateway** for business users towards final consumers is presumed to be fulfilled if the company operates a core platform service with 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 last financial year; and
- **the entrenched and durable position** is presumed to be fulfilled if the company met the other two criteria in each of the **last three financial years**.

**Obligations and prohibitions**

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Article 5 imposes a list of **directly applicable requirements** on gatekeepers that provide CPS.
These include the following prohibitions and obligations:

- to refrain from combining personal data from different sources;
- to allow business users to offer end-users the same services through third-party intermediation services at different conditions than those offered through the gatekeeper intermediation (e.g. prohibition of most favoured nation clauses);
- to allow business users to promote offers and conclude contracts with end-users, regardless of whether they use the gatekeepers’ CPS, and allow end users to access and use content without using the gatekeeper’s CPS (i.e. prohibition of anti-steering practices);
- to refrain from stopping business users from raising issues with relevant public authorities in relation to gatekeeper practices;
- to refrain from imposing some bundling and tying practices on business or end-users (e.g. require business users to use, offer or interoperate with gatekeeper services);
- to provide advertisers and publishers with information concerning the price paid by the advertiser and remuneration paid to the publishers.

Article 6 imposes on gatekeepers a list of requirements that need to be specified – following a dialogue with the gatekeeper – as they potentially apply in different ways. These include the obligations below:

- refrain from using competitors’ data to compete with them (i.e. data generated through the activities of business users);
- allow, more broadly, end-users to un-install any pre-installed software applications;
- allow, more broadly, the use of third-party software application and systems;
- implement interoperability (i.e. allow business users and providers of ancillary services, e.g. payment services, to access and interoperate with the gatekeeper);
- refrain from treating gatekeeper or allied products and services more favourably in ranking and apply fair and non-discriminatory access (FRAND) conditions to such ranking;
- refrain from technically restricting customer switching (i.e. between different apps and services to be accessed with the gatekeeper’s operating system);
- provide advertisers and publishers, free of charge, with access to the performance measuring tools of the gatekeeper and related information;
- provide business users with continuous and real-time data portability (i.e. for data generated by both business and end users in the context of the use of the CPS);
- provide third-party providers of online search engines with access on fair, reasonable, and non-discriminatory (FRAND) terms to ranking, query, click and view data in relation to search generated by end-users on online search engines of the gatekeeper;
- apply FRAND conditions of access to its software application store for business users.

Furthermore, gatekeepers are subject to two general obligations (Article 12 and Article 13):

- to inform the Commission about any intended concentration involving another provider of a CPS or of any other services provided in the digital sector; and
- to submit (on an annual basis) to the Commission an independently audited description of any techniques deployed for profiling consumers that the gatekeeper applies to, or across, its core platform services.

However, ‘emerging gatekeepers’ (i.e. gatekeepers that do not yet enjoy an entrenched and durable position but will do so in the foreseeable future) would only be subject to a limited set of obligations and prohibitions necessary to ensure that the market remains contestable (Article 15(4)).

Enforcement, sanctions and relationship to competition law

The European Commission would 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 (DMAC), composed of representatives of EU Member States. The Commission would have the power to adopt interim measures, impose and accept binding commitments.
upon and from gatekeepers, and impose fines (Articles 22 to 29). Furthermore, in cases of systematic non-compliance, which requires (i) three non-compliance decisions within five years and (ii) the strengthening or extension of the gatekeeper position, the Commission may impose more stringent behavioural or, if needed, structural remedies (Article 16).

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 DMA is ‘without prejudice’ to the application of Articles 101 and 102 and national competition laws (Article 1(6)). 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 Committee of the Regions (CoR) recently adopted an opinion on platform regulation in the context of the collaborative economy and its opinion on the DMA is expected in June 2022. The European Economic and Social Committee (EESC) adopted its opinion on the DMA on 28 April 2021. The EESC believes that the provisions on market investigation into non-compliance must be strengthened in terms of both the time lag and penalties, that all gatekeepers should be required to establish a legal representative in the EU, and that the notions and institutional design proposed should be clarified.

National parliaments

The deadline for the submission of reasoned opinions on the grounds of subsidiarity was 7 April 2021. The Czech Chamber of Deputies notes 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

The Body of European Regulators for Electronic Communications (BEREC), welcomed the draft regulation, but proposes 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 on 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 (Article 6.1(f)) would reduce innovation incentives, meaning fewer features and functionalities for consumers. A broad coalition from the European media sector, including public and commercial broadcasters, radio 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. However, critics warn that the DMA would likely have a chilling effect on research, development and innovation. 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. 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.

#### 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. 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. 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. 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.

#### 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 ask 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. 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. 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. 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. 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 are 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. EU lawmakers could also clarify how the rules enshrined in the DMA interplay with the GDPR and how they will interact with intellectual property law and trade-secret protection.

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. Finally, several proposals have been made to complement the rules on interoperability. The European Data Protection Supervisor (EDPS) recommends 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.

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). In addition, some experts stress that enforcement depends too heavily on the European Commission and advocate stronger involvement of private parties, independent bodies and the Member States in enforcement. 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. Other commentators argue that the DMA should require the Commission to publish guidelines providing general guidance as to the interpretation of the obligations contained in Articles 5 and 6 and that the provisions on the regulatory dialogue should be clarified. Furthermore, while there are strong arguments for concentrating enforcement powers in the Commission (size of the gatekeepers and the EU-wide effect of their conduct), the independence of the EU regulator, the extent of their powers and the interplay with competition law investigations and national regulators need to be better clarified. One way would be to differentiate more clearly between implementation and enforcement processes and rely on expertise at Member State level. BEREC also recommends including dispute resolution mechanisms in the DMA proposal and believes that an advisory board of national independent authorities should be set up 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. In addition, the fact that the DMA gives the Commission substantial leeway (for instance to define which firms qualify as gatekeepers, by stipulating the criteria), could impede the effectiveness of the judicial review of Commission decisions by the Court.

Interaction with competition law

The Commission proposal provides for an obligation for gatekeepers to inform the European Commission of any planned deals (Article 31). Some academics point 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. A legal study from three leading academics concludes that strengthening the control of acquisitions by digital gatekeepers under Article 114 TFEU as part of the DMA would be legally feasible.

Impact on consumers and end-users

A report from the Centre for European Reform warns 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 call on EU lawmakers to empower the European Commission with more flexibility to exempt tech firms from the rules in some cases and protect innovation. In the same vein, other experts argue that restricting collection or aggregation of user data could impair the viability of ad-funded platforms and have a significant potential to harm consumers.

Legislative process

In the European Parliament, the DMA was assigned to the Internal Market and Consumer Protection (IMCO) Committee, which has appointed Andreas Schwab (EPP, Germany) as rapporteur. The Committees on Industry, Research and Energy (ITRE) and on Economic and Monetary Affairs (ECON) are associated committees (under Rule 57 of Parliament’s Rules of Procedures) and are involved in fixing Parliament’s position and trilogue negotiations.

Council position

The Council agreed its position (‘general approach’) on the proposal for a digital markets act on 25 November 2021. The main changes to the Commission proposal are:

- The Council’s text shortens the deadlines for the Commission (e.g. from 60 to 45 days) and amends the quantitative and qualitative criteria for the designation of gatekeepers (Article 3). To ensure legal clarity and speed up the designation process, it also proposes to include a new annex that defines ‘active end users’ and ‘active business users’.
- The Commission’s powers to adopt delegated acts to update obligations for gatekeepers are refined and circumscribed (Article 10), to ensure legal certainty and that the DMA is future-proof. A new obligation (Article 6) is added, to enable end-users to unsubscribe from core platform services.
- Provisions on regulatory dialogue (Article 7) are specified, to ensure that the Commission’s discretionary power to engage in this dialogue is used appropriately.
- The relationship between the DMA and national legislation, and the cooperation and coordination between the Commission and Member States (Article 1 and Article 32a) are clarified. To prevent fragmentation of the internal market, the text confirms the Commission as the sole enforcer of the regulation. The Council insists that Member States empower national competition authorities to start investigations into possible infringements and transmit their findings to the Commission.
Germany highlighted in a statement that they will pay particular attention in the negotiations to the appropriate involvement of national competition authorities for the effective implementation of the DMA. Austria and Denmark, Italy, Portugal and Spain and Luxembourg also asked for their positions to be considered in the course of negotiations.

European Parliament position

The IMCO report was endorsed by Parliament in plenary by 642 votes in favour, 8 against and 46 abstentions in December 2021. Parliament proposes a number of amendments, including:

- **Scope.** The European Parliament text extends the scope of the DMA to include web browsers, virtual assistants and connected televisions.

- **Gatekeeper identification.** The Parliament's text increases the quantitative thresholds for a company to fall under the DMA to €8 billion in annual turnover in the European Economic Area, and a market capitalisation of €80 billion. In addition, companies would also need to provide a core platform service in at least three EU countries and have at least 45 million monthly end-users, as well as more than 10,000 business users per year. The methodology for identifying and calculating the 'end users' and the 'business users' for each core platform service is specified in an Annex.

- **Obligations.** The Parliament’s text strengthens the obligations imposed on gatekeepers. Inter alia, it introduces an obligation to provide interoperable messaging and social network services, gives users the option to uninstall pre-installed software applications and change the default settings at any time, adds additional requirements for delivering targeted advertising to end-users (and some restrictions for protecting minors). The report mandates fair and non-discriminatory conditions of access to all 'core platform services' (not merely to application stores).

- **Enforcement.** The Parliament’s text calls for the creation of a European High-level Group of Digital Regulators (composed of EU and national authority representatives in sectors such as data protection, electronic communications and consumer protection), to assist the Commission in the governance and enforcement of the DMA. Furthermore, the Parliament introduces provisions empowering and protecting whistle-blowers who are willing to alert the competent authorities to actual or potential infringements of the regulation.

- **Systematic non-compliance and killer-acquisitions** The Parliament’s text strengthens the provisions on systematic non-compliance with the regulation. Structural remedies may be imposed in cases of systematic non-compliance (and not only as a last resort as envisaged in the Commission and Council texts). Furthermore, the Commission would be empowered to temporarily prevent digital gatekeepers from acquiring other companies, and the DMA would set a minimum fine for non-compliance of 4% and a maximum fine of 20% of the company's total worldwide turnover (compared to up to 10% in Commission and Council texts).

The approved text is Parliament's mandate for negotiations with EU governments (the trilogue procedure, which began in February 2022), to reach a compromise agreement.

**EUROPEAN PARLIAMENT SUPPORTING ANALYSIS**


EPRS, Regulating digital gatekeepers, briefing, December 2020.

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

EPRS, Digital services act, European added value assessment, October 2020.


**OTHER SOURCES**

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

1. This briefing focuses on the digital markets act. See also, Digital services act, EPRS, March 2021.
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 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.
7. ibid.
8. ibid. at p 14-15.
9. See Article 1(1).
11. 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.
12. 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’.
18. See D. Geradin, What is a digital gatekeeper? Which platforms should be captured by the EC proposal for a Digital Market Act?, 2021.
19. See CERRE, above.
25. See Cabral and others, above.
26. In this sense, see the EDPS Opinion 2/2021 on the proposal for a Digital Markets Act, 2021.


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.


See R. Podszun, P. Bongartz, and S. Langenstein, above.

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

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

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


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


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eprs@ep.europa.eu (contact)

www.eprs.ep.parl.union.eu (intranet)

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