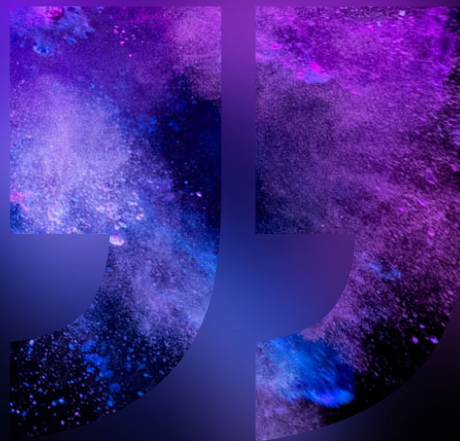


C L I F F O R D

C H A N C E



**THE DIGITAL MARKETS
ACT: A NEW ERA FOR
THE DIGITAL SECTOR
IN THE EU**



— THOUGHT LEADERSHIP

MAY 2022



THE DIGITAL MARKETS ACT: A NEW ERA FOR THE DIGITAL SECTOR IN THE EU

The Digital Markets Act (DMA) ushers in a new era for the digital sector in the EU, as compliance will require some of the most influential digital companies to make unprecedented, far-reaching changes to the way they operate and interact with their customers, even going as far as to rethink aspects of their business models.

The European Parliament (EP) and the Council provisionally agreed on the final text of the DMA on 24 March 2022.¹ It will impose on digital companies designated as "gatekeepers" a long list of obligations and prohibitions, seeking to ensure fair and contestable digital markets in the EU.

The DMA creates a novel *ex ante* regulatory regime for large digital companies, complementing traditional EU competition law enforcement. The DMA text was agreed in record time, only 16 months after the European Commission (EC) issued its first draft text, reflecting overwhelming political consensus in the EU.² In addition, the legislative deliberations did not water down the EC's draft text, which emerged in many material respects stricter than the EC's proposal. The DMA will be formally adopted in the coming months and is expected to enter into force in October 2022. This means that gatekeepers will most likely need to comply with the DMA by early 2024.

One thing is clear: regulation of the digital sphere in coming decades will be defined by seeking to interpret (and likely litigating) the scope of the DMA and its limits. In addition, EU and national competition law continues to apply and complements the protection of fairness and contestability of markets in the digital sector.

What is the scope of the DMA?

The DMA seeks to regulate companies that provide at least one so-called "core platform service" (CPS) in a commercial capacity to a large number of end users

and businesses in the EU, irrespective of where in the world the company is incorporated.

Which CPSs are caught by the DMA?

The DMA provides an exhaustive list of ten CPSs – unless a company offers one of these services, it is not caught by the DMA. The CPSs listed in the DMA are: (i) online intermediation services (e.g., online marketplaces, app stores); (ii) online search engines (e.g., Google); (iii) online social networking services (e.g., social media such as Facebook); (iv) video-sharing platform services (e.g., YouTube); (v) number-independent interpersonal electronic communication services (e.g., instant messaging services such as WhatsApp or iMessage); (vi) operating systems (e.g., Windows, Android, iOS); (vii) web browsers (e.g., Chrome); (viii) virtual assistants (e.g., Siri, Google Assistant); (ix) cloud computing services (e.g., Azure); and (x) online advertising services provided by a company providing another CPS.

The EC can expand the list of CPSs following a market investigation.

Who qualifies as a gatekeeper?

The DMA does not seek to regulate all companies providing CPSs. It applies only to so-called "gatekeepers", *i.e.*, companies which, under the DMA, are viewed as having "*considerable economic power*" and "*feature an ability to connect many business users with many end users through their services*",³ and only in relation to any CPS(s) that individually constitutes an important gateway for businesses to reach end users.



The legislative deliberations did not dilute but overall made stricter the dos and don'ts that the Commission had proposed to impose on digital gatekeepers. Now, the focus will be on enforcement and the interplay between the DMA and EU and national competition law.



Michael Dietrich
Partner

¹ Our analysis in this briefing is based on a draft version of the agreed text and may be subject to change once the final text of the DMA has been published.

² See our [briefing](#) on the EC's DMA proposal issued on 15 December 2020.

³ Recital 3.

A company is considered a gatekeeper (and is obliged to comply with the DMA) once it is designated as such by the EC.

To be a gatekeeper, an undertaking providing CPS(s) must meet three cumulative criteria, which are presumed to be met if certain quantitative thresholds are exceeded:

- **Ability to have a significant impact on the EU internal market:** a company is presumed to meet this criterion if it achieved an annual EU-wide group turnover of at least EUR 7.5 billion in each of the last three financial years, or where its average market capitalisation or equivalent fair market value amounted to at least EUR 75 billion in the last financial year, and it provides the same CPS in at least three EU Member States (Financial Thresholds).
- **Its CPS is an important gateway for business users to reach end users:** this criterion is presumed to be met for any CPS that has at least 45 million active monthly end users and at least 10,000 yearly active business users in the EU in the last financial year (User Number Thresholds). The different methods to calculate the number of monthly active end users and yearly active business users for each type of CPS are set out in an annex to the DMA.
- **Entrenched and durable market position:** this criterion is presumed to be met if the User Number Thresholds have been met in each of the last three financial years (Entrenchment Thresholds).⁴

One of the key aims of the DMA is speed. To seek to ensure fast gatekeeper designations, companies meeting the Financial Thresholds, User Number Thresholds and Entrenchment Thresholds (together, the Quantitative Thresholds) are *presumed* to be gatekeepers and the EC can designate them as such.

The legal standard for rebuttal of the presumption appears to be high. A presumed gatekeeper can avoid the designation only by providing "sufficiently substantiated arguments" that it should not be designated despite meeting the Quantitative Thresholds. The recitals to the DMA indicate that sufficiently substantiated arguments are those that "*manifestly put into question the presumption*".⁵ The nature of acceptable arguments to rebut the presumption was highly contested during the legislative deliberations – ultimately, the DMA provides that the EC can accept only narrow argumentation directly related to the Quantitative Thresholds⁶ and cannot accept economic arguments related to market definition or efficiencies.⁷

Companies that do not meet the Quantitative Thresholds as well as emerging gatekeepers can still be designated as gatekeepers on the basis of a *qualitative* assessment, which the EC may carry out through a market investigation within a non-binding 12-month timetable.⁸

What is the process for designating gatekeepers?

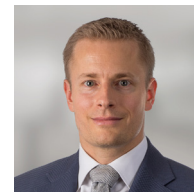
A company meeting the Quantitative Thresholds must notify the EC within two months of satisfying the thresholds. The EC will then designate the undertaking as a gatekeeper and list all of the gatekeeping CPSs within 45 days of receiving all required information, unless the undertaking – through "sufficiently substantiated" arguments – avoids the gatekeeper designation.

If a company fails to make a notification, the EC is empowered to designate it as a gatekeeper on becoming aware of relevant information.

The EC shall review each gatekeeper designation at least every three years and check whether new companies meet the Quantitative Thresholds at least every year.



The rights of defence of companies that could be designated as gatekeepers must be respected. The Commission cannot simply jump to conclusions as to whether these companies' conduct is caught by the provisions of the DMA, not least given the potentially draconian sanctions for non-compliance.



Nelson Jung
Partner

⁴ Article 3(2).

⁵ Recital 23.

⁶ Such arguments include, for example, arguments related to the size and number of Member States where the company is present, the extent to which user numbers exceed the User Number Thresholds, the importance of the undertaking's CPS considering its overall scale of activities, and the number of years for which the thresholds have been met.

⁷ Recital 23.

⁸ Emerging gatekeepers are companies that do not yet have an "entrenched and durable position" but can be expected to obtain one in the near future.



Complying with the DMA will require far-reaching changes to certain of the gatekeepers' operations. No doubt – companies likely to meet the DMA's gatekeeper thresholds are already now considering their plans to comply with – or indeed to challenge – the DMA.



Thomas Vinje
Chairman Emeritus,
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What are the "Dos and Don'ts" for gatekeepers?

Upon designation, gatekeepers must comply with the obligations and prohibitions set out in Articles 5, 6 and 6a, covering a wide range of issues.

Freedom on app stores. The DMA includes several obligations related to app stores. These will require gatekeepers such as Apple and Google to change substantially their practices in relation to the distribution of apps on their respective operating systems (OS). Gatekeepers will be required to:

- allow sideloading of apps or third-party app stores on their OS and allow such apps to be easily set as default (Article 6(1)(c));
- allow users easily to uninstall apps (Article 6(1)(b));
- refrain from restricting users from switching between, and subscribing to, different apps (Article 6(1)(e)); and
- provide fair, reasonable and non-discriminatory (FRAND) general conditions of access to their app stores (and to search engines and social networks) (Article 6(1)(k)).

Finally, the DMA tackles the issue of in-app payment mechanisms. Google and Apple, for example, will no longer be able to require app developers exclusively to use Google Play Billing or Apple's In-App purchase systems to offer in-app purchases on their Android or iOS apps (Article 5(f)).

Prohibition of anti-steering practices.

The DMA will put an end to practices preventing business users from directing their consumers to alternative offers. These provisions appear to be inspired by the EC's ongoing antitrust investigations into Apple's App Store conduct. Gatekeepers are required to allow businesses using their intermediation services (e.g., app developers distributing apps on app stores) to promote offers to end users free of charge and subsequently transact with these users without using the gatekeeper's services (e.g., without using the app store owner's in-app purchase solution) (Article 5(c)). In addition, under Article 5(ca), app store

owners may not eliminate so-called "reader apps", which allow end users to access content purchased from a business outside the app store (e.g., accessing a Netflix subscription purchased on Netflix.com on the Netflix iOS app). At the same time, the DMA prohibits wide and narrow Most-Favoured-Nation (MFN) clauses. Businesses will be able to offer their products and services on other sales channels (including their own) at better conditions than those offered through the gatekeeper's service (Article 5(b)).

Users' freedom to set defaults. The DMA also expressly requires that users are able easily to change the default services to which a gatekeeper's OS, virtual assistant or web browser steers them for various functions (e.g., which music service comes up when the user gives an order to Siri to play a song). It also introduces the obligation to provide a choice screen on the OS enabling users to choose their preferred default online search engine, web browser or virtual assistant when first using a device (Article 6(1)(b)).

Restrictions on gatekeepers' use of data.

The DMA considerably restricts how gatekeepers can use the data gathered through their various activities. For instance, without specific user consent, gatekeepers must not combine or cross-use personal data from a CPS with personal data from any other service of a gatekeeper. Gatekeepers should also obtain consent to use, for advertising purposes, the data collected from end users through their usage of, for example, third-party websites and apps. Repeated cookie banners requiring consent will also likely be banned, as the gatekeepers cannot request consent more than once in a year if consent has already been refused (Article 5(a)).

Moreover, gatekeepers who compete with their business users must not use data generated by these businesses and their users on the CPS, or another service offered with or supporting the CPS (Article 6(1)(a)).

Access to gatekeepers' data. Data is a critical input in the digital economy. Aiming to lower barriers to entry in these

markets, the DMA obliges gatekeepers to give competitors and end users access to different types of data.

Search engine gatekeepers will need to provide rivals with FRAND access to user-generated search data (Article 6(1)(j)). Gatekeepers will also have to provide business users with access to data that is generated by those business users (and their customers) on the CPS, or another service offered with, or supporting, the CPS (Article 6(1)(i)). Moreover, to facilitate switching between different services and multi-homing, the DMA requires gatekeepers to ensure portability and provide free-of-charge tools to enable end users to port the data they generated on the gatekeeper's CPS (Article 6(1)(h)).

Prohibition of self-preferencing.

Inspired by the *Google Shopping* case,⁹ the DMA includes a prohibition on gatekeepers' treating their own services and products more favourably in ranking, indexing and crawling. It also requires rankings to be conducted under FRAND terms (Article 6(1)(d)).

Prohibition of tying. Gatekeepers must not impose on businesses or end users, *inter alia*, their identification services, web browser engines, payment services and in-app purchase mechanisms (Article 5(e)). They should also refrain from requiring end users to subscribe to further CPSs, as a condition for subscribing to any of their other CPSs (Article 5(f)).

Advertising transparency. The DMA aims to increase information available to advertisers and publishers about the terms of the advertising services they purchased. Gatekeepers will have to provide advertisers and publishers with information about prices paid and remuneration received as well as the methodology under which the prices and remuneration were calculated (Article 5(g)). Moreover, the DMA requires gatekeepers to provide advertisers and publishers with access to the performance measuring tools and data, allowing them to run their own verifications to assess the performance of

gatekeepers' advertising services (Article 6(1)(g)).

Interoperability. The DMA also includes new and far-reaching obligations related to interoperability. Gatekeepers will need to provide third-party services interoperability with the same software and hardware features as their own services (Article 6(1)(f)). An entirely new Article 6a that did not exist in the EC's original legislative proposal addresses interoperability between messaging services. Subject to conditions, gatekeeper messaging services must interoperate with competing messaging services for basic functions such as text messaging, voice and video calls and sharing files. In practical terms, this would mean that iMessage users must be allowed to correspond with, for instance, Signal users on iMessage.

Articles 5, 6 and 6a are considered self-executing and gatekeepers must comply within six months following their gatekeeper designation. However, in relation to Article 6 obligations, the gatekeeper may request the EC to engage in regulatory dialogue to determine whether measures it intends to implement are compliant. The EC has discretion on whether to engage in such a process. Following a request, the EC may adopt a decision specifying the measures that a gatekeeper should put in place to comply with the relevant article of the DMA.

Does the DMA affect M&A activity?

Under Article 12, gatekeepers must inform the EC (pre-closing) of any M&A activity in the digital sector, irrespective of whether it is notifiable for merger control approval. Such notification is non-suspensory (and therefore does not delay closing) and requires less detail than a merger control notification.

The EC will inform the Member States of all such notifications. National authorities can then choose to refer transactions to the EC for merger control approval under the recently reinterpreted Article 22 of the



Antitrust enforcement will continue playing a major role in the tech sector. One particular area of focus for future abuse of dominance cases could relate to conduct that gatekeepers might adopt to circumvent their obligations under the DMA.



Stavroula Vryna
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⁹ T-612/17, *Google and Alphabet v Commission*; see our client [briefing](#) on the judgment.



The DMA is not just relevant to gatekeepers and their users. Smaller online platforms potentially will be impacted in a variety of ways – they will play a role in enforcing the DMA, they can engage in practices that the DMA prohibits for gatekeepers, and can benefit from DMA obligations on gatekeepers such as on interoperability and data portability.



Dieter Paemen
Partner

EU Merger Regulation.¹⁰ As a result, a greater number of digital transactions will become visible to the EC and might be subjected to EC merger control review even if they fall below EU or national merger control thresholds.

Who will enforce the DMA?

The EC as a sole enforcer...

The EC will be the sole enforcer of the DMA, despite national competition authorities (NCAs) and regulators lobbying for concurrent powers. The details on which EC Directorate-General (DG) will be in charge are not yet known. It is likely that DG Competition, with its decades of experience in enforcing EU competition law, will play a central role. DG for Communications Networks, Content and Technology (DG Connect) may be involved as well, given that it contributed to shaping the DMA together with DG Competition.

To enforce the DMA, the EC will have broad investigative powers, similar to those under EU competition law. The EC will be able to request all relevant information in order to carry out its duties, regardless of ownership, location, format or storage medium. The EC also has the power to conduct inspections (dawn raids) and interviews.

Under the EC's original DMA proposal, it was envisaged that the size of the EC team enforcing the DMA would increase to 80 EC officials over the next few years. Given the size of the task, these resources might be too limited and insufficient to ensure effective enforcement. The EC has since acknowledged this as a potential issue and has committed to providing further clarity on how (and by whom) this new instrument will be enforced.

...but there is a role for Member States, NCAs and other regulators

While the EC may be the sole enforcer of the DMA, national authorities will have a role to play in ensuring effective enforcement.

First, the EC and NCAs will co-ordinate their respective enforcement actions under the DMA or traditional competition rules.

Second, NCAs may, on their own initiative, conduct an investigation into possible gatekeeper non-compliance with Articles 5 and 6. The relevant NCA will then report its findings to the EC and the EC can at any point relieve the NCA by opening its own investigation. The NCAs have no power to sanction gatekeepers for violations of the DMA.

Third, NCAs and other regulators, such as the Body of the European Regulators for Electronic Communications, will also be represented in the High-Level Group for the DMA. This High-Level Group may provide the EC with advice and expertise regarding the implementation and enforcement of the DMA.

Fourth, Member States will be represented in the Digital Markets Advisory Committee. This Advisory Committee is to provide its opinion to the EC on a specific issue presented to it.

Finally, three or more Member States may request the EC to open an investigation on suspicion that an undertaking should be designated as a gatekeeper. They may also request the EC to open a market investigation to add a service or practice to the DMA (Article 17). A sole Member State may request the EC to open an investigation into suspected systematic non-compliance by a gatekeeper.

Private actions

As an EU regulation, the DMA has direct horizontal effect, meaning third parties can bring private actions before the national courts against gatekeepers. In doing so, private actors could enforce compliance with the obligations and prohibitions set out in Articles 5 and 6 DMA after the EC has designated a gatekeeper which is an exclusive competence of the EC. The possibility of private enforcement is recognised in Article 31c, which sets out a mechanism for co-operation between the EC and national courts. However, the extent to which private enforcement can establish

¹⁰ See our client [briefing](#) on the EC's guidance regarding the revised interpretation of Article 22 of the EU Merger Regulation.

itself as a successful dispute resolution mechanism will also depend on further clarification by the EC which DMA obligations provide individual rights to private actors.

In addition, third parties also have the ability to inform competent national authorities and the EC regarding any behaviour by gatekeepers that falls within the scope of the DMA. However, this is not a formal complaint procedure. National authorities or the EC will have full discretion to follow up on any information received by third parties.

Penalties for non-compliance

The EC may adopt a non-compliance decision if it considers that a gatekeeper does not comply with the DMA. The EC will aim to adopt a non-compliance decision within 12 months from opening a proceeding. In addition to a cease and desist order, the EC is empowered to impose on a gatekeeper fines of up to 10% of its total worldwide turnover in the preceding financial year. In the case of a second non-compliance decision within eight years concerning the same or a similar infringement of a DMA obligation in relation to the same CPS, the maximum amount of the fine the EC could impose increases to 20% of the gatekeeper's total worldwide turnover in the preceding financial year. The DMA also gives the EC the power to impose periodic penalty payments.

To prevent serious and irreparable harm, the EC has the ability to order interim measures against a gatekeeper on the basis of a *prima facie* finding of an infringement.

When a gatekeeper has engaged in systematic non-compliance, the EC may impose appropriate behavioural or structural remedies in order to ensure effective compliance with the DMA. In this regard, the DMA explicitly sets out the ability for the EC to prohibit, for a limited time-period, the gatekeeper from entering into any concentration regarding those CPSs or other digital services that are affected. A gatekeeper shall be deemed to have engaged in systematic non-compliance with the obligations in Articles

5 and 6 where the EC has issued three non-compliance decisions against a gatekeeper within eight years in relation to any of its CPSs. In order to ensure that the remedies the EC adopts are effective, interested third parties will have the ability to provide comments during the market investigation into possible systematic non-compliance.

EC's subordinate acts

Once the DMA enters into force, it is likely that it will be complemented by various non-legislative acts which can be adopted by the EC. In particular, the DMA foresees that the EC may adopt implementing acts, delegated acts, and guidelines.

The **implementing acts** could cover various issues, such as: specifying the details of gatekeepers' notifications (e.g., notification on meeting the thresholds, notification of concentrations), submissions (e.g., compliance reporting) and requests (e.g., request for a suspension of obligations); the EC's proceedings (e.g., market investigations, interim measures, commitments proceedings); and co-operation between EC and national authorities, or could even specify the technical measures that the gatekeepers should put in place to ensure compliance with DMA obligations.

The **delegated acts** may be used to supplement the list of DMA obligations following a market investigation. This could, for example, include the extension of existing obligations to other CPSs or ancillary services or specifying the manner in which the obligations are to be performed to ensure compliance. In addition, the delegated act may also specify the methodology of calculation of quantitative thresholds.

Finally, the EC could also adopt **guidelines** "on any of the aspects" of the DMA to "facilitate its effective implementation and enforcement". It remains to be seen how and when the EC will make use of these powers. It is possible that, in the first instance, the EC will prioritise those acts that are strictly necessary for the designation process and other proceedings foreseen in the DMA.

“

The Commission still needs to adopt soft law to refine critical details of the DMA's implementation. The process is not over.

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Katrin Schallenberg
Partner

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Next steps

The DMA is not yet law. It will likely enter into force in October 2022 and start applying in April 2023. Companies that meet the Quantitative Thresholds will then have two months to provide the relevant data to the EC, which would then issue a designation decision within 45 working days following receipt of the complete information. Provided that there are no delays in this process, gatekeepers would need to comply with their obligations under the DMA within six months after designation which will likely be early 2024. At that time, gatekeepers will have to submit a compliance report to the EC, describing the measures they have implemented to ensure compliance.

A key question is how the DMA regime will interact with traditional antitrust enforcement under EU and national competition laws. In principle, both regimes can be applied in parallel as the DMA expressly states that it does not pursue the same objectives, is

complementary and applies without prejudice to the application of EU and national competition rules. In particular, national prohibitions of unilateral conduct continue to apply provided that they go beyond the concrete scope of gatekeeper obligations under the DMA. Since the purpose of the DMA is not to prevent undertakings from reaching a gatekeeper position, EU and national competition law can play an important role in preventing digital markets which are characterized by network effects and strong economies of scale from "tipping".

In addition to the DMA, other jurisdictions have enacted (Germany) or are developing (UK) new legal frameworks targeting tech companies. The EU is also expected shortly to adopt the Digital Services Act (DSA) and the EC recently presented a proposal on a new Data Act. There will undoubtedly be overlaps between these proposals, creating a complex regulatory framework for digital companies to navigate.

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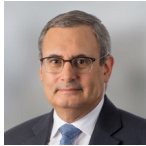
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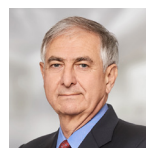
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