ARTICLE

DIGITAL MARKETS ACT

IT and Data Protection European Law Public Law and Public Procurement Law | 25/03/22 | Emmanuelle Mignon Mahasti Razavi Eden Gall

TECH & DIGITAL

Following several trilogues (informal tripartite meetings), the Council of the European Union and the European Parliament have reached a political agreement on the Digital Markets Act ("DMA").

The main points of divergence that were clarified concern the thresholds for a platform to qualify as a gate-keeper. The European Parliament managed to persuade the Council to impose interoperability requirements on messaging services, which means that large platforms such as WhatsApp, Facebook, Messenger or iMessage will have to open up and interoperate with smaller messaging platforms.

The way is now effectively open for the DMA to take effect as of January 1st, 2023.

Announced in February 2020 in a communication from the European Commission titled "*Shaping Europe's digital future*",[1] the DMA is part of a dual legislative project to regulate the practices of large digital platforms in the European market.

While the Digital Services Act (DSA)[2] aims at regulating the relations between digital platforms and consumers – and provides for increased liability for such platforms as regards illegal content, the DMA has for its main aim to regulate the relations between large digital platforms and business users.

I. **Aims of the DMA[3]**

The DMA *aims at rebalancing the relationship between the large digital platforms that control access to the digital market*, called "gatekeepers", and business users, to promote innovation, growth and competitiveness, facilitate the development of smaller platforms, small and medium-sized enterprises and start-ups, and ultimately revitalize competition for the benefit of consumers and greater economic freedom.

To achieve these aims, the DMA introduces harmonized rules to fight against unfair or abusive behavior by gatekeepers. While a number of regulatory solutions have already been adopted or proposed at the national level to address issues related to the power and concentration of certain digital services, the DMA seeks to approximate different national laws and thus avoid fragmentation of the internal market.

In view of the foregoing, and taking into account the cross-border nature of digital services, the purpose of the DMA is to ensure fairness and equal opportunities for digital players within the European Union and to ensure that the markets on which gatekeepers operate remain contestable. In other words, the central objective is to avoid digital dependency of business users on the core platform services offered by gatekeepers.

The DMA thus supplements the rules already in place in the European Union. However, unlike competition law, which allows abusive behavior to be sanctioned, but on an ex post basis and following lengthy proceedings, the DMA imposes objective, ex ante obligations on the largest operators of core platform services.

II. **Undertakings targeted by the DMA**

The rules introduced by the DMA only apply to gatekeepers (**1**) who are in principle required to self-designate themselves to the European Commission, (**2**) which will take a *designation decision* regarding the gatekeeper, which may be amended (**3**).

1. Definition of gatekeepers

The DMA introduces rules aimed solely at gatekeepers – irrespective of their place of establishment or of residence – who provide core platform services to:

i. end users established or located in the European Union, meaning any natural or legal person using core platform services other than as a business user;
ii. business users, irrespective of their place of establishment, meaning any natural or legal person acting in a commercial or professional capacity using core platform services for the purpose of or in the course of providing goods or services to end users;
iii. irrespective of the law applicable to the provision of these services.

The core platform services listed in Article 2 of the DMA include:

- online intermediation services;[4]
- online search engines;
- online social networking services;
- video-sharing platform services;
- number-independent interpersonal communication services;
- operating systems;
- cloud computing services;
- virtual assistants;
- web browsers;
- connected TV;
- advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by a provider where the undertaking to which it belongs is also a provider of any of the core platform services listed above.

An undertaking qualifies as a gatekeeper when it meets the following cumulative conditions:[5]

- has a **significant impact on the internal market**: this requirement is met when an undertaking offers one or more core platform services in at least three Member States and which, during the past three years (i) has achieved annual turnover of at least EUR 7.5 billion within the European Union; or (ii) has achieved a market capitalization of at least EUR 75 billion;

- ensures **a core platform service which serves as an important gateway** for business users and end users to reach other end users. This requirement is deemed met when the core platform service or services has or have:

- at least 45 million monthly end users established in the European Union; and

- at least 10,000 yearly business users established in the European Union;

- has an **entrenched and durable position** in its operations, meaning that the thresholds in the second bullet point have been achieved during the past two or three years.[6]

An undertaking not satisfying the thresholds to qualify as a gatekeeper may nonetheless be designated as a gatekeeper following an investigation conducted by the European Commission pursuant to Article 15 of the DMA, as explained below.

2. Designation of gatekeepers (Art. 3 and Art. 15)
A gatekeeper can be designated:

- either at the initiative of the undertaking concerned, meaning that, when an undertaking provides core platform services satisfying the thresholds indicated above, it must notify the European Commission as soon as possible and in any cases no later than two (2) months following the date of entry into effect of the DMA.

It must provide it with the relevant information – such as information pertaining to its turnover, the number of business users and end users.

At the end of the notification procedure, it may present arguments to demonstrate that, in the circumstances in which the core platform service(s) operates, it should not be considered a gatekeeper.

The European Commission has a maximum of 60 days in which to conduct a review, following which it will designate or not – pursuant to what is known as a *designation decision* – the relevant undertaking as a gatekeeper and establish the list of core platform services concerned;

- or, failing notification of the required information by the undertaking, the European Commission will conduct a market investigation to consider whether a core platform service provider should be designated as a gatekeeper. An undertaking that does not meet each of the above-mentioned thresholds may still be designated as a gatekeeper on the basis of criteria assessed by the Commission relating to the company's size, the number of business users, barriers to market entry, scale effects enjoyed by the provider, and other structural characteristics of the market.

3. Review of the status of gatekeepers (Art. 4)
The DMA provides for two possibilities of amending the status of the gatekeeper: in the first scenario, the European Commission can, upon request or its own initiative reconsider, amend or repeal a designation decision (or a non-designation decision) for one of the following reasons: (i) change in the situation of the undertaking; or (ii) the decision

was based on incomplete, incorrect or misleading information. In the latter scenario, the Commission will regularly, and at least every 3 years, review whether the designated gatekeepers continue to satisfy the above requirements.

The review process does have the effect of suspending the obligations of the gatekeepers.

In addition, the DMA provides that the European Commission will publish and update the list of designated gatekeepers and the list of core platform services for which they need to comply with the obligations.

III. New obligations applicable to gatekeepers

While the main thrust of the DMA is to impose obligations and prohibitions on designated gatekeepers to make the digital market fairer and more open (**1**), it also acts upstream by requiring them to notify any concentration to the European Commission (**2**).

1. General obligations and prohibitions (Art. 5 and Art. 6)

The DMA defines directly applicable obligations (Art. 5) and those that can be specified – through a dialogue between the European Commission and the gatekeeper (Art. 6), that gatekeepers need to comply with as regards each of their core platform services listed in the European Commission's designation decision.

Below is a table presenting (i) the main obligations and prohibitions imposed on gatekeepers, and (ii) clarifications as to the practical application of the measure.

Measure	Observation
The gatekeeper may not combine or cross-use personal data from its core platform services with data from any other service offered by the same gatekeeper or with personal data from third party services.	A gatekeeper may in certain circumstances have a dual role whereby it provides a core platform service to its business users, while also competing with those same business users in the provision of the same or similar services or products to the same end users. In these circumstances, a gatekeeper may take advantage of its position to use the data generated by its business users to improve its own similar services.
The gatekeeper may not impose contractual obligations on business users that prevent them from offering the same products or services to end users through third-party online intermediation services or their own online distribution channel at prices or terms that differ from those offered through the gatekeeper's online intermediation services.	For example, a company offering accommodation that is considered a gatekeeper cannot prohibit business users, i.e. hotels wanting to have their offers published on its platform, from offering the same nights through other online intermediation services (another website allowing the booking of a hotel room for a night) or on their own website (the hotel's website) at prices that are different and therefore lower than those offered by the gatekeeper.
The gatekeeper must allow business users to communicate about and promote their offers, including at different terms of purchase, to end users acquired via the core platform service, and to conclude contracts with these end users, regardless of whether for that purpose they use the core platform services of the gatekeeper or not.	The gatekeepers through which business users sell goods or services, must be able to interact directly with the end user.

The gatekeeper is prohibited from engaging in preferential treatment in favor of its own products (self-preferencing).	The gatekeeper may resort to different means of preferencing its own goods or services on its core platform service, to the detriment of identical services that end users can procure elsewhere. This could be the case, for example, when some software applications or services are preinstalled by the gatekeeper. Gatekeepers are also often vertically integrated and offer certain products or services to end users via their own core platform services or via a business user over which they have control. This situation also arises when the gatekeeper offers its own online intermediation services through its own online search engine. The gatekeeper should not give more favorable treatment to its own services in terms of ranking.
The gatekeeper cannot require business users to use, offer or interact with an identification service or any other ancillary service of the gatekeeper in the context of the services offered by them.	This measure is reminiscent of the prohibition on tied sales in competition law. Accordingly, a gatekeeper that offers several services that can interact with each other cannot impose on a business user the use of a service that is ancillary to the core platform service.
The gatekeeper may not directly or indirectly prevent a business user from raising issues with any relevant public authority, relating to any practice of gatekeepers.	Any practice that would in any way inhibit such a possibility of raising concerns or seeking available redress, for instance by means of confidentiality clauses in agreements, is prohibited.

The DMA provides for two possible exemptions to the automatic application of these obligations to the gatekeeper:

- suspension of an obligation by the Commission (Art. 8): if the gatekeeper demonstrates that, due to exceptional circumstances, compliance with a specific obligation under Articles 5 and 6 of the DMA would endanger its economic viability. On a reasoned request by a gatekeeper, the European Commission may exceptionally suspend, in whole or in part, for a period of one year, a specific obligation for a core platform service. Its suspension decision will be accompanied by a reasoned statement explaining the reasons for the suspension. The Commission will review the suspension decision every year and may lift it in whole or in part;

- exemption for reasons of public morality, public health or public security (Art. 9): acting on a reasoned request by a gatekeeper or on its own initiative, the European Commission may exempt a gatekeeper, in whole or in part, from an obligation laid down in Articles 5 and 6 in relation to an individual core platform service. This type of exemption can only be granted on grounds of public morality, public health or public security.

2. Notification of concentrations (Art. 12)

The gatekeeper is required to inform the European Commission of any intended concentration within the meaning of Article 3 of Regulation (EC) No. 139/2004 of January 20th, 2004 *on the control of concentrations between undertakings* involving another provider of core platform services or of any other services provided in the digital sector, irrespective of whether it is notifiable to a Union competition authority or to a competent national competition authority.

If, following a concentration, it is demonstrated that other core platform services individually satisfy the thresholds, the gatekeeper concerned is required to inform the Commission thereof within three months from the implementation of the concentration and provide the Commission with the necessary information.

IV. The European Commission's investigative and monitoring powers

The DMA gives the European Commission broad investigative powers (**1**) and the possibility of imposing fines and periodic penalty payments on gatekeepers (**2**).

1. The European Commission's investigative powers

The DMA provides for several types of investigation at the initiative of the European Commission:

- a **market investigation for designating gatekeepers** (Art. 15): the European Commission can open an investigation for the purpose of determining whether a company should be designated a gatekeeper within the meaning of the DMA;

- a **market investigation into systematic noncompliance** (Art. 16): the European Commission can conduct a market investigation to examine whether a gatekeeper has systematically infringed its obligations;

- a **market investigation into new services or practices** (Art. 17): the European Commission can conduct a market investigation to examine whether (i) one or more services within the digital sector should be added to the list of core platform services (Art. 2) or (ii) new obligations or prohibitions should be added to Articles 5 and/or 6.

The DMA also gives the European Commission broad enforcement and monitoring powers. In particular, the Commission may (i) by simple request or by decision require undertakings and associations to provide all necessary information, for the purpose of monitoring, implementing and enforcing the rules laid down in the DMA; (ii) also request access to, and explanations of, data bases and algorithms and test information of undertakings, by a simple request or by a decision; (iii) carry out on-site inspections on the premises of an undertaking or association of undertakings; (iv) interview any natural or legal person who consents to being interviewed for the purpose of collecting information relating to the subject of an investigation.

2. Fines and sanctions imposed by the European Commission

If a gatekeeper infringes the rules laid down by the DMA, it risks being imposed a fine of up to 10% of its total worldwide turnover and of up to 20% in case of a repeated infringement.

When the Commission ascertains that the gatekeeper has systematically infringed its obligations, the Commission may impose, as a last resort, after three decisions of non-compliance or fines, "*behavioural or structural remedies*".

V. Articulation between the DMA and the domestic legislation of Member States

Member States may not impose on gatekeepers, as this term is defined by the DMA, any additional obligations, by legislative, regulatory or administrative means, in order to avoid fragmentation of the internal market.

However, Recital 9 of the DMA, as modified on first reading by the European Parliament, specifies that "*This is without prejudice to the ability of Member States to impose the same, stricter or different obligations on gatekeepers in order to pursue other legitimate public interests, in compliance with Union law. Those legitimate public interests can be, among others, consumer protection, fight against acts of unfair competition and fostering media freedom and pluralism, freedom of expression, as well as diversity in culture or in languages. […]*

[1] Communication by the European Commission, February 19th, 2020 (COM (2020) 67 final).

[2] Proposal for a Regulation of the European Parliament and of the Council *for a Single Market For Digital Services*.

[3] This document has been drafted by reference to the latest version of the DMA issuing from the agreement between the European Parliament and the Council of the European Union reached on Thursday, March 24th, 2022. A few clarifications or modifications may still be made to the DMA, but its basic outline is now stable.

[4] Online intermediation services are defined in Article 2 of Regulation No. 2019/1150 of June 20th, 2019 *on promoting fairness and transparency for business users of online intermediation services* as being websites that allow third parties to offer content, services or space to sell goods or services, such as Amazon, Blablacar or Airbnb.

[5] In this respect, it should be noted that the European Commission is authorized to adopt delegated acts pursuant to Article 37 of the DMA to specify the methodology used and to regularly adjust it to market developments.

[6] Period to be specified.