The Digital Markets Act: A brave EU world for big tech?

The Digital Markets Act ("DMA")[1] signifies an enormous shift of the regulatory powers of the European Commission ("EC") in the rapidly evolving digital world, requiring so-called "gatekeepers" to drastically alter their business models to allow for greater contestability in the EU digital markets. The DMA will significantly increase the regulatory burden on designated companies, and is expected to trigger a series of investigations, litigation and private enforcement, both at the EU and national level.

I. Background

The genesis of the DMA was a proposal of the EC published on 15 December 2020,[2] which drew inspiration from antitrust investigations in the practices of the behemoths of the digital world including Google, Amazon and Apple. The DMA was formally approved on 18 July 2022, following a lengthy and often contentious negotiating process at the European Parliament and European Council level. Based on current intelligence, the DMA is set for adoption before the end of 2022. Once in force, the DMA will be directly applicable across the EU.

The DMA's stated objective is to tackle "unfair" practices by large, systemic online platforms (so-called "gatekeepers")[3] that either fall outside, or cannot be effectively addressed by, existing EU antitrust rules. The DMA is without prejudice to the application of the EU competition and merger control rules.[4] A number of issues remain unclear, including which EC service(s) will be in charge of enforcing the DMA.

II. The DMA in a nutshell

The DMA targets "gatekeepers" that offer "core platform services," namely: (a) online intermediation services (e.g., app stores and online marketplaces); (b) online search engines (e.g., Google); (c) online social networking services (e.g., Facebook, Instagram, TikTok); (d) video-sharing platform services (e.g., YouTube, Vimeo); (e) number-independent interpersonal communications services (e.g., WhatsApp, iMessage, Facebook messenger); (f) operating systems (Windows, iOS, Android); (g) web browsers (e.g., Internet Explorer, Chrome); (h) virtual assistants (e.g., Alexa, Google Assistant, Siri); (i) cloud computing services (e.g. Azure, AWS); and (j) online advertising services provided by a company that offers any other core platform services.[5]

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1 Regulation EU 2022/[…] of the European Parliament and of the Council on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

2 Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM/2020/842 final.

3 DMA, Article 3.

4 Id, Article 1(6). See also Recitals 5 and 10.

5 Id, Article 2(2).

A core platform service provider may be designated as a "gatekeeper" if it: (a) has a significant impact on the internal market; (b) is an important gateway for business users to reach end users; and (c) enjoys an entrenched and durable position now or is likely to do so in the near future.[6]

The DMA provides for specific thresholds for designating "gatekeepers." In particular, the company in question (a) must provide the same core platform service in at least three EU Member States and have an annual Union turnover of at least EUR 7.5 bn in each of the last three years or average market capitalisation of at least EUR 75 bn in the last financial year; (b) the core platform service must have on average at least 45 million monthly active end users and at least 10,000 yearly active business users in the EU in the last financial year; and (c) must meet point (b) in each of the last three years.[7]

Designated gatekeepers must comply with certain obligations. Article 5 of the DMA identifies a set of *ex ante* prohibited practices, including: (a) self-preferencing; (b) preventing consumers from connecting to businesses outside the gatekeeper's platform; (c) preventing users from migrating to rival products/services; and (d) preventing users from un-installing any pre-installed software or app if they so wish.

Article 6 of the DMA provides for a set of problematic practices that require further examination and potential *ex post* prohibition when gatekeepers engage in them. Gatekeepers **must not**: (a) use/accumulate, in competition with business users, third-parties' generated data that is not publicly available; (b) prevent the uninstallation of pre-installed apps, unless they are essential for the functioning of the operating system and cannot technically be offered on a standalone basis; (c) prevent the installation/effective use of third party software using/interoperating with the gatekeepers' operating system and prevent these software applications from being accessed by means other than the gatekeepers' core platform services (including when third party software prompts users to decide whether to use that software as default); (d) treat their own products/services more favourably in ranking, indexing and crawling and fail to apply transparent, fair and non-discriminatory conditions to such ranking, indexing and crawling; and (e) technically restrict the ability of end users to switch to/subscribe to different software applications using the core platform services of the gatekeeper.

In addition, pursuant to Article 6, gatekeepers **must**: (a) allow interoperability, free of charge, with the same hardware/software features accessed/controlled via the operating system/virtual assistant listed in the designation decision as are available to the services/hardware provided by the gatekeeper; (b) provide advertisers and publishers, upon their request, free access to performance measuring tools of gatekeeper and the data necessary to carry out their own independent verification of the advertisements inventory; (c) provide, at the request of end users or third parties authorized by end users, free and effective portability of data; (d) provide business users, at their request and free of charge, with effective, high-quality, continuous and real-time access to and use of aggregated or non-aggregated data generated from the use of its core platform services by those users; (e) provide third party providers of online search engines, at their request, with access on FRAND terms to ranking, query, click and view data in relation to free and paid search generated by end users on online search engines of the gatekeeper, subject to anonymization; (f) apply fair and non-discriminatory general conditions of access for business users to their software application stores, online search engines and

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6 Id, Article 3(1).

7 Id, Article 3(2).

online social networking services; and (g) apply proportionate general conditions to the termination of the provision of a core platform service that can be exercised without undue difficulty.

Article 7 of the DMA provides for an interoperability obligation on gatekeepers offering number-independent interpersonal communications services.

Other obligations include: (a) compliance and reporting of such compliance measures within six months from designation as gatekeeper (Articles 8 and 11); (b) anti-circumvention obligations (Article 13); (c) an obligation to inform the EC about concentrations where the merging entities or the target provide core platform services or other digital services or enable data collection (Article 14); and (d) an audit obligation (Article 15).

A company meeting the thresholds must notify the EC within two months of satisfying the thresholds.[8] The EC will then designate the undertaking as a gatekeeper and list all of the gatekeeping core platform services within 45 days of a complete notification, unless the company presents sufficiently substantiated arguments to avoid designation.[9] It is noteworthy, however, that the company can only raise arguments pertaining to the quantitative thresholds (and not any substantive arguments regarding for instance, market definition and dominance in the competition law sense or efficiencies).[10] In case of failure to notify the EC, the EC has the power to designate a company as a gatekeeper *ex officio*.[11] The EC will also review each gatekeeper's designation at least every three years, and identify any new companies that meet the thresholds at least every year,[12] and can designate "emerging gatekeepers" (i.e., companies that do not meet the quantitative thresholds but based on a qualitative analysis are deemed to obtain an entrenched and durable position in the market in the near future).[13]

Fines of up to 10% of the company's worldwide annual turnover[14] and periodic penalties up to 5% of the company's average daily worldwide turnover[15] are provided in case of non-compliance with the DMA. Fines of up to 20% of the company's worldwide annual turnover are provided in case of recidivism,[16] and up to 1% of the company's worldwide annual turnover in case of failure to notify the EC within the prescribed time-limit, or failure to provide complete and accurate information.[17] In case of systematic infringement by a designated gatekeeper of the obligations arising from the DMA, additional remedies may be imposed after a market investigation, including behavioural and structural remedies, e.g. the divestiture of (parts of) a business.[18]

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8 Id, Article 3(3).

9 Id, Article 3(4) and (5).

10 Id, Recital 23.

11 Id, Article 3(2), second paragraph.

12 Id, Article 4(2).

13 Id, Article 3(8).

14 Id, Article 30(1).

15 Id, Article 31.

16 Id, Article 30(2).

17 Id, Article 30(3).

18 Id, Article 18. See also Recital 75.

III. Significance

The DMA is expected to create a web of regulatory obligations for gatekeepers and open the floodgates for parallel investigations and litigation at the EU[19] and national level. Moreover, there will likely be enforcement overlaps with the application of EU competition and merger control rules. What is more, the DMA has direct horizontal effect thus allowing third parties to initiate private actions before national courts against gatekeepers. Indeed, Article 39 provides for cooperation of the EC with national courts pertaining to actions regarding the implementation of the DMA.

Potentially affected companies include both established platforms offering core platform services, as well as tech start-ups and smaller digital marketplaces providing niche services and products in the digital world that may wish to complain to the EC against any "gatekeepers" pursuant to the DMA and/or the EU antitrust rules, and/or whose services and products could be used to enforce the DMA (e.g., data storage, processing and management companies that could be used to implement data portability obligations).

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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[19] EC decisions adopted pursuant to the DMA that impose fines and periodic penalty payments will be subject to review by the EU Court of Justice pursuant to Article 261 TFEU (DMA, Article 45). Moreover, while not expressly stated in the draft DMA, the EU Courts have the power to oversee the interpretation of Articles 3, 5 and 6 of DMA pursuant to Article 263 TFEU that provides for the review of the legality of, *inter alia*, EC acts "*intended to produce legal effects vis-à-vis third parties*."