

The Digital Markets Act

Digital Content Next Webcast

22 June 2021

Yves Botteman / Paul Henrion

Genesis and outline

On December 15, 2020, EC released its highly anticipated **Digital Act package** in the form of two new sets of rules:

- the Digital Services Act (DSA), which seeks to set harmonized due diligence rules for online platforms
 - the Digital Markets Act (DMA), which pursues the narrower objective of taming the market power of large gatekeeper platforms without introducing new antitrust powers.
-
- The **DMA** represents a shift from ex-post antitrust intervention to **ex-ante regulation**.
 - It willingly departs from a classical competition policy approach and **adopt new and untested notions and concepts**.
 - 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). Approach no longer consists of assessing the anti-competitive effect of dominant platforms' practices *ex-post* but rather in providing a **an upfront definition of expected and/or prohibited practices**.
 - DMA expected to limit room for arguing pro-competitive benefits and efficiencies (although reference is made to proportionality in the assessment of 'grey list' measures to be imposed on digital platforms).

Which activities would be targeted?

- The regulation, as initially proposed by the EC, focuses on a list of digital activities, the so-called **core platform services (CPS)**, which are commonly associated with weak market contestability and ‘unfair’ competitive practices.
- They include, in particular, the following activities:
 - Online intermediation services;
 - Online search engines;
 - Online social networking services; and
 - Video-sharing platform services.
- Only the core platform services of the largest digital platforms, i.e. those acting as **gatekeepers** between business users and end users and enjoying ‘*an entrenched and durable position, often as a result of the creation of conglomerate ecosystems around their core platform services, which reinforces existing entry barriers*’ will be subject to the regulation.

Which platforms would be impacted?

- Under the EC's proposal, such a gatekeeper status may be first determined with reference to “crude” quantitative metrics, which will create a **rebuttable presumption as gatekeeper** if:
 - The provider achieves an annual EEA turnover equal to or above €6.5 billion in the last three years (or the equivalent fair market value of €65 billion in the last financial year)
 - It provides its core platform service in at least three member states
 - This service exceeds 45 million monthly active end users established or located in the EU (which correspond to a tenth of its population), and more than 10,000 yearly active business users established in the EU in each of the last three financial years.
- Alternatively, the status could be attributed by the EC to a core platform service provider, following a **case-by-case qualitative analysis** under a novel market investigation procedure, if the following criteria are satisfied:
 - The digital service provider has a significant impact on the internal market
 - It operates one or more important gateways to customers
 - It enjoys or is expected to enjoy an entrenched and durable position in its operations

What would the *ex-ante* rules be about?

- The draft legislation sets out dos and don'ts in the form of two distinct sets of requirements:
 - Article 5 imposes **a list of directly applicable requirements ('black list')** on gatekeepers. For instance:
 - Prohibition of MFN practices
 - Prohibition of anti-steering practices (e.g. access to services outside app stores)
 - Duty to provide (upon request) information re prices paid by advertisers and publishers and remuneration paid to the publishers
 - Article 6 imposes on gatekeepers a **list of requirements that need to be specified ('grey list')** – 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)
 - **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 **self-preferencing** in ranking and **apply fair and non-discriminatory access (FRAND) conditions to such ranking**
 - provide third-party providers of online search engines with access on **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 access for business users to the platform application store**

NB: Gatekeepers' will also need to **inform the EC of any contemplated mergers or acquisitions**, irrespective of whether the operation is reportable under European or national merger control rules.

How does the DMA affect publishers and content providers? (i)

Online ad markets

Context:

- Google dominates search advertising, FB dominates display advertising
- CMA 2020 Market Study on digital advertising identified lack of transparency, leveraging of data and conflicts of interest (linked to vertical integration) as sources of competition concerns
- French Competition Authority's decision in June 2021 focused on Google's lack of interoperability and discriminatory treatment in the ad markets to impose a fine of EUR 220 Mio
- Last week, news broke that DG COMP launched its own investigation against Google's ad-tech stack

Does the DMA (EC proposal) provide effective *ex-ante* remedies?

- Price transparency obligation (black list)
- Access to performance measuring tools and ad inventory information (grey list)
- Interoperability obligation (grey list)?
- Self-preferencing / discriminatory treatment (but grey list focused on app stores and rankings)?

How does the DMA affect publishers and content providers? (ii)

Subscribers

Context:

- App stores and ecosystems as gatekeepers (payment methods, commissions,...)
- Risk of desintermediation
- Publishers' lack of access to subscribers' data

How does the DMA (EC proposal) addresses such concerns?

- Ban on MFN clauses and anti-steering practices
- FRAND conditions on access to app-stores (grey list)
- Interoperability (e.g. use of third party payment services, non-mandatory use of ID service of gatekeeper)
- Access to user data in compliance with GDPR (with privacy as a possible 'sword' against data sharing)

How does the DMA affect publishers and content providers? (iii)

Content use

Context

- Copyright Directive (Articles 15 and 17)
- Uneven (and late) implementation at MS level
- Contrasting experience (France vs. Australia)
- Google News Showcase roll-out raising concerns

Could the DMA be used to enforce the publishers' neighboring rights?

- Non-challenge clause (black list)
- Bundling and tying practices (black list)

How will the DMA be enforced?

- Under the initial DMA proposal, the EC will have a central role in the implementation of the DMA
- The draft regulation sets up a new instrument, called **market investigation**, which should give flexibility to the EC and enable it to:
 - Examine whether a provider of core platform services should be designated as a gatekeeper
 - Assess whether a gatekeeper has systematically infringed its obligations
 - Investigate new services and new practices, in particular to determine whether one or more services within the digital sector should be added to the list of core platform services
- As regards the enforcement mechanisms, ‘Gatekeepers’ would face similar investigative powers as under competition rules: dawn raids, information requests, interviews of relevant officers and employees.
- If a gatekeeper is found to be non-compliant, the EC will be empowered to hand down **finest of up to 10% of the company’s total worldwide annual turnover**. The DMA also includes periodic penalty payments of 5% of average daily turnover, and additional remedies imposed on gatekeepers for systemic infringements.
- In the most extreme cases, the draft regulation even includes the controversial power to break-up a gatekeeper’s business.

Ongoing legislative process

- The proposal received **strong support** from stakeholders, even if certain concerns have also been raised:
 - Advocate General Giovanni Pitruzzella of the European Court of Justice warned that Google, Apple and other gatekeeper platforms might face a “disproportionate” burden if they can’t justify that certain conduct banned by draft digital rules is actually good for the market
 - The chief economist of the EC’s competition department, Pierre Régibeau, said there are a number of dimensions of the DMA — such as interoperability, self-preferencing and data access — which if badly managed, could adversely affect the innovation loop.
- In Parliament, the DMA will be adopted under the European **ordinary legislative procedure**. It has been assigned to the IMCO committee (Internal Market and Consumer Protection), which has in turn appointed Andreas Schwab (EPP, Germany) as rapporteur.
- **State of play:**
 - Andreas Schwab suggested raising the European turnover threshold to 10 billion euros (\$12.2 billion) a year —up from 6.5 billion euros — and ensuring that a platform offers at least two core services, not one;
 - Arguments in favor of a stronger role of national authorities and courts in the implementation of the DMA have also been made.
- We don’t expect an implementation of the DMA before the **end of 2022 or the beginning of 2023**.

Useful links

- https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en#new-rules-in-a-nutshell
- <https://www.europarl.europa.eu/legislative-train/theme-a-europe-fit-for-the-digital-age/file-digital-markets-act>
- https://www.europarl.europa.eu/doceo/document/IMCO-PR-692792_EN.pdf
- <http://www.businessgoing.digital/two-instruments-one-purpose-the-eu-takes-the-gloves-off-against-digital-platforms/>

Thank you!



Yves Botteman
Partner, Brussels
EU Competition Law



Paul Henrion
Associate, Brussels
EU Competition Law

D +32 2 552 29 52 | M +32 4 769 80 405

yves.botteman@dentons.com

Dentons Europe LLP

Rue de la Régence 58, 1000 Brussels, Belgium

D +32 2 552 29 20 | M +32 499 695 308

paul.henrion@dentons.com

Dentons Europe LLP

Rue de la Régence 58, 1000 Brussels, Belgium

Dentons is the world's first polycentric global law firm. A top 20 firm on the Acritas 2015 Global Elite Brand Index, the Firm is committed to challenging the status quo in delivering consistent and uncompromising quality and value in new and inventive ways. Driven to provide clients a competitive edge, and connected to the communities where its clients want to do business, Dentons knows that understanding local cultures is crucial to successfully completing a deal, resolving a dispute or solving a business challenge. Now the world's largest law firm, Dentons' global team builds agile, tailored solutions to meet the local, national and global needs of private and public clients of any size in more than 125 locations serving 50-plus countries. www.dentons.com.

© 2017 Dentons. Dentons is a global legal practice providing client services worldwide through its member firms and affiliates. This publication is not designed to provide legal advice and you should not take, or refrain from taking, action based on its content.
Please see dentons.com for Legal Notices.