

DMA: 10 Things to know

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What does the adoption of the Digital Markets Act mean for companies around the world?

On 14 September 2022, the Regulation 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act) (“DMA”) was adopted. This marks a new step towards increased regulatory interventionism and in Europe’s digital strategy.

Background

- In 2020, the Commission announced the implementation of a new strategy titled “Shaping Europe’s digital future”.
- On 15 December 2020, the Commission published two proposals for a regulation: the Digital Markets Act (“DMA”) and the Digital Services Act (“DSA”).
- On 24 March 2022, around 18 months later (an exceptionally short period for this type of ambitious legislation), the EU Parliament and the Council have reached a political agreement on the text of the DMA. It marks an important step in a “new era of tech regulation”.
- On 5 July 2022, it was formally adopted by the EU Parliament.
- On 12 October 2022, it was published in the EU Official Journal.
- In terms of immediate next steps, the DMA will (for the most part) enter into force on 2 May 2023.
- Now is the time to think about the implementation of this new regulation, which reflects an increased interventionism by competition authorities on digital markets.

What are the 10 key things to know about the DMA?

1. What is the rationale for the adoption of the DMA?

The DMA answers the need to better safeguard a fair and competitive economy on digital markets, in reaction to a perceived inadequacy of competition law tools to the digital era. It is the first regulatory instrument in the world targeted at remedying the negative consequences linked to an significant market power held by important digital platforms acting as “gatekeepers”.

2. What is the scope of the DMA?

The scope of the DMA is in principle limited to undertakings (i) which have had an annual turnover of at least € 7.5 billion within the EU in the past three years or have a market valuation of at least €75 billion, (ii) have at least 45 million monthly end users and at least 10 000 business users established in the EU in the last three years, and (iii) control one or more core platform services (e.g. marketplaces, search engines, social networking, cloud services, etc.) in at least three Member States. Such undertakings will be presumed to be “gatekeepers”. However, the Commission can also designate as “gatekeepers” any entity that provides an important B2C platform service, enjoys an entrenched and durable position in the market, and has a significant impact in the¹ EU internal market.

3. Is the scope of the DMA flexible enough to be "future-proof"?

In order for these thresholds to remain flexible while being able to remedy new competition risks, two mechanisms have been put into place: (i) SMEs are in principle exempted from being identified as gatekeepers and (ii) a category of "emerging gatekeepers" is created to allow the Commission to impose obligations on companies which enjoy a strong competitive position but are not yet sustainable from an economic standpoint (i.e. they may not satisfy the standard thresholds for gatekeepers set out by the DMA).

4. What obligations are imposed by the DMA on gatekeepers?

There is a wide range of obligations which gatekeepers may be subject to, depending on their activities. Some DMA obligations are specific, and may typically apply to "gatekeepers" that operate marketplaces (data access), ad technologies (advertising data sharing), search engines (self-preferencing), and similar services), browsers and operating systems (choice screens), interpersonal communications services (interoperability), etc.

Other obligations are horizontal and will generally apply to all types of platforms. Notably, gatekeepers will have to allow users to cancel their subscriptions in similar conditions to the acceptance of subscriptions, inform the Commission of their M&A operations (even if they fall below EU or national merger control thresholds), etc.

Finally, it should be taken into account that some gatekeeper obligations will not only apply to core platform services, but also to ancillary services or other services related to the service in question (e.g., to payment services in connection with a marketplace).

5. What are the sanctions applicable in the event of non-compliance ?

Non-compliance with the provisions of the DMA may result in a fine of up to 10% of the total worldwide turnover of the gatekeeper (at the group level) which may be increased to 20% in the event of repeated infringements. In case of several repeated infringements (at least three infringements in a 8-year time period), the Commission may also impose behavioural or structural remedies, including a prohibition imposed on the infringing gatekeeper to acquire other companies during a specific timeframe.

6. Who will enforce the DMA?

The Commission will be the sole enforcer of the DMA even though it will cooperate with national authorities. This increased scope of powers will certainly lead to a time of adaptation, which may represent a challenge given that the material resources of competition authorities are in practice limited.

7. Does that mean that there will be less antitrust enforcement in the digital sphere?

The application of the DMA is without prejudice to the application of EU antitrust laws, which shall continue. However, how competition authorities will proceed in practice is still unclear. According to public statements made by Vice-President Vestager, the enforcement of the DMA and of competition law is intended to be complementary. Some national authorities have expressed their view that antitrust enforcement will be focused on new types of abuses not (yet) covered by the DMA.

The articulation between ex-ante regulation (DMA) and ex-post enforcement (competition law) will raise interesting debates and, in answering the questions to come on, e.g., parallel enforcement and *ne bis in idem*, reference to recent case law from the ECJ will prove to be useful (see for instance the recent ECJ decision in the *Bpost* case, C 117/20, March 22nd 2022).

8. Is there any guidance on the interpretation of the obligations defined by the DMA?

No official guidance has been published yet. The preparatory documents leading to the adoption of the DMA contain some case studies and scenarios to which the DMA should apply, but these are insufficient to predict its application and enforcement. Compliance with the “do’s and don’ts” of the DMA will lead to practical hurdles, for instance, in defining what constitute “fair” conditions and what it is feasible for gatekeepers from a technical point of view.

9. Does the DMA really mark a “new era of tech regulation”?

Even though the DMA is intended to remedy competition issues and if the obligations set out in the DMA take their inspiration in recent competition investigations, it is not a competition law tool but rather a sector regulation. Thus, by adopting the DMA and imposing “ex ante” obligations, EU legislation is departing from the doctrine built by competition authorities and courts during the last twenty years, by refining the applicable competition law tests to analyse potentially anticompetitive conducts. By using a new sector regulation, the EU Commission is now taking a different approach in a declared will to partly avoid the difficulties and costs linked with complex antitrust enforcement.

10. What is the expected impact of the DMA on the economy?

There is little doubt that in the short run, the impact of the DMA will be significant with an increased workload for businesses and other stakeholders involved in digital markets. Gatekeepers will have a limited time period after the adoption of the DMA to notify their status of gatekeepers and ensure compliance with a series of new obligations. For other companies active in digital markets and working with gatekeepers, they may want to closely assess how the DMA may impact their relationships with the gatekeepers and whether it will create new business or growth opportunities.

In the long run, the impact of the DMA is harder to predict. Its implementation and its effectiveness should be closely monitored in the coming years to ensure that the DMA is fit for its purpose, safeguarding a fair and competitive economy, but does not unduly chill innovation and non-EU investments or divide digital markets into regional zones.

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