Questions and Answers: Digital Markets Act: Ensuring fair and open digital markets*

Brussels, 23 April 2022

What is the Digital Markets Act?

The Digital Markets Act introduces rules for platforms that act as "gatekeepers" in the digital sector. These are platforms that have a significant impact on the internal market, serve as an important gateway for business users to reach their end users, and which enjoy, or will foreseeably enjoy, an entrenched and durable position. This can grant them the power to act as private rule-makers and to function as bottlenecks between businesses and end users.

The Digital Markets Act aims at preventing gatekeepers from imposing unfair conditions on businesses and end users and at ensuring the openness of important digital services. Examples of changes that gatekeepers will have to implement include ensuring end users can easily unsubscribe from core platform services or uninstall pre-installed core platform services, stopping the installation of software by default alongside the operating system, providing advertising performance data and ad pricing information, allowing developers to use alternative in-app payment systems or allowing end users to download alternative app stores.

Common rules across the single market will foster innovation, growth and competitiveness, and facilitate the scaling up of smaller platforms, small and medium-sized enterprises and start-ups who will have a single, clear framework at EU level.

Who will be subject to the Digital Markets Act?

The Digital Markets Act will be applicable only to companies that will be identified as "gatekeepers" according to objective criteria set out in the proposal. These are companies that play a particularly important role in the internal market because of their size and their importance as gateways for business users to reach their customers.

As a precondition, these companies need to be identified as gatekeeper for at least one of the so-called "core platform services" enumerated in the DMA (such as online search engines, social networking services, app stores, certain messaging services, virtual assistants, web browsers, operating systems and online intermediation services). The same company can be identified as gatekeeper for several core platform services.

Specifically, there are three main cumulative criteria that bring a company under the scope of the DMA:

1. A size that impacts the internal market: this is presumed to be the case if the company achieves an annual turnover in the European Economic Area (EEA) equal to or above €7.5 billion in in each of the last three financial years, or where its average market capitalisation or equivalent fair market value amounted to at least €75 billion in the last financial year, and it provides a core platform service in at least three Member States;
2. The control of an important gateway for business users towards final consumers: this is presumed to be the case if the company operates a core platform service with more than 45 million monthly active end users established or located in the EU and more than 10,000 yearly active business users established in the EU in the last financial year;
3. An entrenched and durable position: this is presumed to be the case if the company met the other two criteria in each of the last three financial years.

Companies that satisfy the above criteria are presumed gatekeepers but have the opportunity to rebut the presumption and submit substantiated arguments to demonstrate that due to exceptional circumstances it should not be designated as a gatekeeper despite meeting all the thresholds.

Conversely, the Commission may launch an investigation to assess in more detail the specific situation of a given company and decide to nonetheless identify the company as a gatekeeper on the

basis of a qualitative assessment, even if it does not meet the quantitative thresholds.

What are the consequences of being identified as a gatekeeper under the Digital Markets Act?

Gatekeepers will carry an extra responsibility to conduct themselves in a way that ensures an open online environment that is fair for businesses and consumers, and open to innovation by all, by complying with specific obligations laid down in the draft legislation.

Under the DMA, companies identified as gatekeepers will be subject to a number of dos and don'ts. They will therefore have to proactively implement certain behaviours that make the markets more open and contestable and at the same time refrain from engaging in unfair behaviour, which is defined in the legislation in the light of market experience to date including from competition cases.

When a company does not yet enjoy an entrenched and durable position, but it is foreseeable that it will in the near future, a proportionate subset of obligations will apply, to ensure that the gatekeeper concerned does not achieve by unfair means an entrenched and durable position in its operations.

Under the final agreement, which are the types of core platform services that are covered by the Digital Markets Act?

Based on the final agreement between the co-legislators, ten core platform services will be subject to the DMA:

- online intermediation services;
- online search engines;
- online social networking services;
- video-sharing platform services;
- number-independent interpersonal communication services;
- operating systems;
- cloud computing services;
- advertising services;
- web browsers;
- virtual assistants.

Of these ten core platform services, eight were part of the Commission's initial proposal, and during the negotiations, two core platform services (virtual assistants and web browsers) were added to the list initially proposed by the Commission.

The inclusion of these two additional core platform services is justified based on the developments since the DMA has been proposed in December 2020. Such developments include, among others, findings of the sector inquiry into the consumer Internet of Things, which looked into voice assistants, as well as recent enforcement experience and broader developments when it comes to web browsers.

What are the "dos and don'ts" for gatekeepers?

The Digital Markets Act establishes a series of obligations that gatekeepers will need to implement in their daily operations to ensure fair and open digital markets. This will open up possibilities for companies to contest markets based on the merits of their products and services and innovate.

Some examples of the "dos" imposed on gatekeepers include the following:

- Allow end users end users to easily un-install pre-installed apps or change default settings on operating systems, virtual assistants or web browsers that steer them to the products and services of the gatekeeper and provide choice screens for key services;
- Allow end users to install third party apps or app stores that use or interoperate with the operating system of the gatekeeper;
- Allow end users to unsubscribe from core platform services of the gatekeeper as easily as they subscribe to them;
- Allow third parties to inter-operate with the gatekeeper's own services;
- Provide the companies advertising on their platform with access to the performance measuring tools of the gatekeeper and the information necessary for advertisers and publishers to carry out their own independent verification of their advertisements hosted by the gatekeeper;
- Allow business users to promote their offers and conclude contracts with their customers

outside the gatekeeper's platform;

- Provide business users with access to the data generated by their activities on the gatekeeper's platform.

Some example of the "don'ts" imposed on the gatekeepers include the following to:

- Ban on using the data of business users when gatekeepers compete with them on their own platform;
- Ban on ranking the gatekeeper's own products or services in a more favourable manner compared to those of third parties;
- Ban on requiring app developers to use certain of the gatekeeper's services (such as payment systems or identity providers) in order to appear in app stores of the gatekeeper;
- Ban on tracking end users outside of the gatekeepers' core platform service for the purpose of targeted advertising, without effective consent having been granted.

What changes will it make for interoperability of messenger services?

The final political agreement includes an interoperability obligation for gatekeepers providing messenger services concerning basic functionalities.

This obligation will apply upon request by third party providers. Gatekeepers will have to respond in a fixed timeline. Some basic functionalities have to be made available for interoperability from the entry in to force of the DMA, (e.g. text messages between two individual users), more complex ones will be introduced gradually and have to be made available after two years (e.g. group text messages) or four years (e.g. audio and video calls between two individual users or groups of end users) from the moment of designation.

It is important to stress that non-gatekeepers service providers of messenger services are not obliged to implement interoperability, meaning they are free to choose either to benefit from such interoperability obligation that falls upon the gatekeeper, or to keep their service separate from the gatekeeper.

In addition, end users will equally have the choice to use or refuse such an option, where their provider has decided to interoperate with a gatekeeper.

The final agreement on the interoperability obligation also ensures that the levels of service integrity, security and encryption offered by the gatekeeper shall and will not be reduced.

What is the final decision on fair, reasonable and non-discriminatory access conditions? Is the Digital Markets Act changing the copyright rules?

The final agreement ensures an obligation of ensuring fair, reasonable and non-discriminatory general conditions of access in a targeted manner to app stores, online search engines and online social networking services.

The Digital Markets Act is without prejudice to the Copyright Directive and its transposition in the Member States. The Digital Markets Act will impose an obligation on gatekeepers to design their general access conditions in a fair, reasonable and non-discriminatory manner and to publish them.

Finally, gatekeepers will have to offer an alternative dispute settlement mechanism in case of a disagreement between the gatekeeper and a business user as regards the application of such general conditions of access.

How does the Digital Markets Act work in practice?

Once the Digital Markets Act enters into force, the Commission will first assess whether companies active in core platform services qualify as a "gatekeeper" under the DMA:

1. Companies will have to verify themselves if they meet the quantitative thresholds included in the DMA to identify gatekeepers. They will then have to provide the Commission with information on this;
2. The Commission will then designate as "gatekeepers" those companies that meet the thresholds in the DMA based on the information provided by the companies (subject to a possible substantiated rebuttal) and/or following a market investigation;
3. Within six months after a company is identified as a "gatekeeper", it will have to comply with the "dos" and "don'ts" listed in the DMA. For those gatekeepers that do not yet enjoy an entrenched and durable position, but are expected to do so in the near future, only those obligations apply that are necessary and appropriate to ensure that the company does not

achieve by unfair means such entrenched and durable position in its operations.

What happens if a gatekeeper ignores the rules?

To ensure the effectiveness of the new rules, the possibility of sanctions for non-compliance with the prohibitions and obligations is foreseen.

If a gatekeeper does not comply with the rules, the Commission can impose fines of up to 10% of the company's total worldwide annual turnover or 20% in the event of repeated infringements and periodic penalty payments of up to 5% of the company's total worldwide daily turnover.

In case of systematic infringements the Commission can impose additional remedies. Where necessary to achieve compliance, and where no alternative, equally effective measures are available, these can include structural remedies, such as obliging a gatekeeper to sell a business, or parts of it (i.e. selling units, assets, intellectual property rights or brands), or banning a gatekeeper from acquiring any company that provides services in the digital sector or services enabling the collection of data affected by the systematic non-compliance.

How to ensure that the new rules are future proof in view of the fast-evolving digital sector?

Ensuring that the Digital Markets Act is and remains future proof has been a key objective of the Commission from the start, and it was strongly retained in the final agreement.

To this end, the Commission is empowered under the Digital Markets Act to supplement the existing obligations applicable to gatekeepers based on a market investigation, which may translate into a supplementary act (delegated act), or a review of the DMA. This should ensure that the same issues of fairness and contestability are tackled also where the practices of gatekeepers and digital markets evolve.

In addition to supplementing the obligations, the Commission will be able to designate so-called 'emerging' gatekeepers that are on a clear path to making services tip to their advantage. This way the instrument is both very precise and therefore easily implementable and effective, as well as flexible enough to keep pace with developments in the fast-evolving digital sector.

What is the purpose of market investigations under the Digital Markets Act?

To ensure that the new gatekeeper rules keep up with the fast pace of digital markets, the Commission will have the power to carry out market investigations. The purpose of market investigations is three-fold:

1. Identifying gatekeepers that are not captured by the quantitative thresholds foreseen in the Digital Markets Act, or which meet these thresholds but have presented a substantiated submission rebutting the presumption based on these thresholds;
2. Identifying whether other services within the digital sector should be added to the list of core platform services falling within the scope of the Regulation, or whether new practices appear which risk having the same detrimental effects as those already covered;
3. Designing additional remedies for when a gatekeeper has systematically infringed the rules of the Digital Markets Act.

Who will enforce the Digital Markets Act?

The Commission will be the sole enforcer of the rules laid down in the Digital Markets Act. This centralised enforcement matches the inherently cross-border activities of the gatekeepers and the objective of the DMA to establish a harmonised framework with maximum legal certainty for businesses across the entirety of the European Union.

At the same time, as a part of the supervisory architecture of the Digital Markets Act, the Commission will cooperate and coordinate closely with competition authorities and courts in the EU Member States. The final agreement also envisages that where such competence is provided under the national law, the relevant national authorities may conduct investigatory steps in view of determining non-compliance of the gatekeeper with the Digital Markets Act and report about their findings to the Commission. This leverages the strength and expertise of the relevant authorities across the European Union and will ensure a maximum level of compliance.

Will private damages be available to those harmed by gatekeeper conduct?

The DMA is a Regulation, containing precise obligations and prohibitions for the gatekeepers in scope, which can be enforced directly in national courts. This will facilitate direct actions for damages by those harmed by the conduct of non-complying gatekeepers.

Can the enforcement of existing competition law not tackle these issues?

The DMA complements the enforcement of competition law at EU and national level. The new rules are without prejudice to the implementation of EU competition rules (Articles 101 and 102 TFEU) and to national competition rules regarding unilateral behaviour.

Regulation and competition enforcement already coexist in other sectors, such as energy, telecoms or financial services. The DMA addresses unfair practices by gatekeepers that either (i) fall outside the existing EU competition control rules, or, (ii) cannot always be effectively tackled by these rules because of the systemic nature of some behaviours, as well as the ex-post and case-by-case nature of competition law. The DMA will thus minimise the harmful structural effects of these unfair practices ex-ante, without limiting the EU's ability to intervene ex-post via the enforcement of existing EU competition rules.

What is the legal basis for the DMA?

Article 114 TFEU ensures the functioning of the single market and is the relevant legal basis for this initiative.

Digital services are by essence of cross-border nature. The new rules will limit regulatory fragmentation for digital services, in particular in relation to gatekeeper platforms, and reduce compliance costs for companies operating in the internal market.

When will the rules become applicable?

Once formally adopted, the Act, which takes the legal form of a Regulation, will enter into force 20 days after publication in the EU Official Journal and will apply six months later. The designated gatekeepers will have a maximum of six months after the designation decision by the Commission to ensure compliance with the obligations laid down in the Digital Markets Act.

When will the Commission designate the first gatekeepers?

The DMA will start to apply six months after it enters into force. Once it starts applying any company that meets the quantitative thresholds for identifying a presumed gatekeeper will have two months to notify those quantitative thresholds to the Commission.

The Commission will have 45 working days to adopt a decision designating such company as a gatekeeper for each of its relevant core platform services that meet the quantitative thresholds individually.

In limited and exceptional circumstances where the company concerned rebuts the presumption of this gatekeeper status with sufficiently substantiated arguments manifestly putting into question the presumption, the Commission would have five months to assess the matter and to adopt its decision on whether or not to designate the company concerned as a gatekeeper.

For More Information

Press release – Commission welcomes political agreement on Digital Markets Act

Digital Markets Act proposal fact page

**Updated on 23/04/2022*

QANDA/20/2349

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