

CLIENT ALERT

Proposed EU and UK Regulatory Regimes for the Digital Market

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Introduction

The European Commission's (**Commission**) proposal for a Digital Market Act (**DMA**),¹ which introduces a new regulatory regime on platforms which are considered under the DMA to act as 'gatekeepers' in the digital economy in the European Union (**EU**), was published by the Commission on 15 December 2020.

The announcement comes exactly a week after the UK Digital Markets Taskforce (the **Digital Taskforce**)² published its advice on the designation test for platforms with 'Strategic Market Status' (**SMS**) in the UK and a new set of rules for such SMS platforms. The SMS regime will be enforced by the Digital Market Unit (**DMU**), a specialist unit to be established within the UK Competition and Markets Authority (the **CMA**).³

The Commission also unveiled in tandem its proposal for a new Digital Service Act (**DSA**)⁴ which builds on the E-commerce Directive⁵ and will regulate the obligations of digital services that act as intermediaries in their role of connecting consumers with goods, services, and content. (The DSA will not be discussed further in this alert.)

¹ See the Commission's [Q&A](#) and [Proposal for a Regulation on Contestable and Fair Markets in the Digital Sector](#).

² <https://www.gov.uk/cma-cases/digital-markets-taskforce>.

³ See Willkie's article: [UK Government Establishes New Digital Platform Regulator](#).

⁴ See the Commission's [Q&A](#) and [Proposal for a Regulation on a Single Market for Digital Services](#). The DSA will not be analysed in this alert.

⁵ [Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market](#).

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The new EU and UK regulatory regimes usher in a new era of enhanced scrutiny and regulation for designated platforms. Neither the new EU nor the new UK regimes are in force yet.

In the EU, the DMA will now need to be debated by the Council and the European Parliament before a final version is agreed upon and adopted – This process could take up to two years. In the UK, the details of the proposed new SMS regime will be open for consultation before going through the legislative process in the coming year.

Both the EU's proposed DMA regime and the UK's proposed SMS regime seek to establish an *ex ante* regulatory framework focused on preventing harm in digital markets which will be applicable to firms identified as 'gatekeepers' for the purposes of the DMA or as SMS platforms for the purposes of the new UK regime. Both proposed regimes will provide a list of principles – contained in a list of do's and don'ts (for the DMA) and a code of conduct (for the proposed SMS regime) – for designated platforms to abide by. The Commission and the DMU will be given powers to enforce compliance with these principles. The proposed regimes will also lead to closer scrutiny of all acquisitions made by such 'gatekeepers' and 'SMS platforms'.

The new proposed EU and UK platform regulation regimes will create similar, yet distinct sets of rules and will be applied in parallel, given the UK's exit from the EU.

The full version of this article provides details of the proposed new DMA and SMS regimes, highlighting similarities as well as differences.

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Applicability of the proposed regimes

It is expected that only a small number of firms will fall within the scope of the proposed regimes which are designed to capture firms that have significant market power as a result of their size or strategic/gateway status.

The companies that will be designated as gatekeepers or SMS platforms have not been specified by the Commission or the Digital Taskforce at this stage.

The proposed criteria for designating companies as gatekeepers or as SMS Platforms are set out below.

The EU DMA regime

The DMA will apply to providers of core platform services (the **Providers**) which are deemed to be gatekeepers. Core platform services include: (i) online intermediation services (including, for example, marketplaces, app stores and online intermediation services in other sectors like mobility, transport or energy), (ii) online search engines, (iii) social networking,

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(iv) video-sharing platform services, (v) number-independent interpersonal electronic communication services, (vi) operating systems, (vii) cloud services, and (viii) advertising services.⁶

The Commission will have the power to open market investigations to investigate whether other services within the digital sector should be added to the list of core platform services falling within the scope of the DMA.⁷

A Provider will be designated as a gatekeeper if it meets the following three cumulative criteria:⁸

(a) It has a **significant impact** on the internal market.

This criterion is presumed to be satisfied if: (i) the Provider achieves an annual turnover in the EEA of €6.5 billion or more in each of the last three financial years, or where its average market capitalisation or equivalent fair market value amounted to at least €65 billion in the last financial year; *and* (ii) it provides a core platform service in at least three Member States.

(b) It serves as a **gateway to customers**.

This criterion is presumed to be satisfied if: (i) the Provider operates a core platform service with more than 45 million monthly active end users established or located in the EU; and (ii) it has more than 10,000 yearly active business users established in the EU in the last financial year.

(c) It enjoys or is expected to enjoy an **entrenched and durable position** in its operations.

This criterion is presumed to be satisfied if the Provider satisfies the presumption in point (b) for each of the last three financial years.

The gatekeeper designation will be reviewed at least every two years.

Providers that do not meet the criteria set out above, may nevertheless be designated as gatekeepers where, following a market investigation,⁹ the Commission considers that, given the specific context, such designation is warranted.¹⁰

⁶ Article 2(2) of the DMA.

⁷ Article 17 of the DMA. The Commission must issue a public report with its findings and proposed amendments within 24 months from opening the investigation.

⁸ Article 3(1) and (2) of the DMA.

⁹ Article 15 of the DMA.

¹⁰ The Commission must endeavour to communicate its preliminary findings to the provider of core platform services concerned within six months from the opening of the investigation.

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Providers that do not yet enjoy an entrenched and durable position in their operations may also be subject to part of the DMA in order to prevent them from achieving an entrenched and durable position by unfair means.¹¹

The UK SMS regime

The proposed SMS regime will apply to firms which have **substantial, entrenched market power** in at least one digital activity, providing the firm with a strategic position. This SMS test may be satisfied in relation to one or more activities of the firm (the **Designated Activity**).

The substantial, entrenched power assessment should focus on direct evidence of market power, such as whether consumers or businesses could credibly switch to an alternative service offered by another company without losing out, and the ease with which other firms could enter the market and expand. The assessment would be applied with respect to each Designated Activity.

For a firm to be designated under the SMS regime, the effect of the firm's market power should be particularly widespread or significant such as to give it a strategic position. Factors indicative of a strategic position include (i) the size and scale of the firm's activity, (ii) the fact that the firm is an important access point to customers (a gateway)/an important input for a diverse range of other businesses, (iii) the possibility to extend market power from one activity into a range of other activities and/or the existence of an 'ecosystem' of products which protects a firm's market power.¹²

In addition, it is recommended that the proposed SMS regime should prioritise SMS designation for firms: (i) with a UK annual revenue in excess of £1 billion and in particular those with a global revenue in excess of £25 billion, and (ii) which are active in the supply of specified activities such as online marketplaces, app stores, social networks, web browsers, online search engines, operating systems and cloud computing services.

The designation process will be open to consultation and the SMS designation will be set for a fixed period of time, e.g. a five-year period.

Obligations applicable to gatekeepers and SMS platforms

Gatekeepers and SMS platforms will be subject to a series of rules which will apply to the services/activities which underpin the gatekeeper or SMS designation.

¹¹ Article 15(4) of the DMA which provides that only obligations laid down in Article 5(b) and Article 6(1) points (e), (f), (h) and (i) will be applicable in this instance.

¹² [See paragraph 4.19 of the Digital Taskforce advice.](#)

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The EU DMA regime

The DMA lays down, in the form of a do's and don'ts list, 18 obligations¹³ which the gatekeeper must comply with (the **Obligations**). Examples of practices which must be permitted include:

- allowing business users to offer the same products or services to end users through third party online intermediation services at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper;¹⁴
- allowing business users to promote their offers and conclude contracts with their customers outside the gatekeeper's platform;
- allowing business users to access the data that they generate in their use of the gatekeeper's platform; and
- ensuring access under equal conditions to, and interoperability with, the same operating system, hardware or software features that are available or used in the provision of any ancillary services by the gatekeeper.

Practices which a gatekeeper should not engage in include:

- requiring business users or end users to subscribe to or register with any other core platform service;
- treating services and products offered by the gatekeeper itself more favourably in ranking than similar services or products offered by third parties on the gatekeeper's platform;
- technically restricting the ability of end users to switch between and subscribe to different software applications and services to be accessed using the operating system of the gatekeeper; and
- using data obtained from their business users to compete with those business users.

New practices may be added to the do's and don'ts list following a market investigation which can last up to 24 months.¹⁵

¹³ The obligation can be either self-executing obligations (Article 5) or obligations that are susceptible to being further specified following a dialogue between the gatekeeper and the Commission (Article 6).

¹⁴ Recital 37 of the DMA also notes that such a restriction should apply to any measure with equivalent effect, such as increased commission rates or de-listing of the offers of business users.

¹⁵ Article 17 of the DMA.

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The Commission will be able to monitor the effective implementation and compliance with the Obligations using powers such as requesting information, carrying out interviews, and conducting dawn-raids.¹⁶

Non-compliance with the Obligations could lead to significant fines of up to 10% of the gatekeeper's total worldwide turnover.¹⁷ It is noted that the Commission will also have the power to impose interim measures and accept commitments.¹⁸

Repeated failures to comply with the Obligations¹⁹ may lead to the Commission imposing behavioral or structural remedies following a market investigation specifically designed for that purpose.²⁰

The UK SMS regime

At this stage, the principles applicable to the Designated Activity of the SMS platform are yet to be determined. The Digital Taskforce recommends that the enforceable principles (and related guidance) be designed by the DMU on the basis of a set of overarching objectives set out in legislation.

The proposed objectives²¹ are:

- **Fair trading** ensuring that users are treated fairly and are able to trade on reasonable commercial terms with the SMS platform;
- **Open choices** ensuring that users face no barriers to choosing freely and easily between services provided by the SMS platform and other firms; and
- **Trust and transparency** ensuring that users have clear and relevant information to enable them to understand what services SMS platforms are providing, and to make informed decisions about how they interact with the SMS platforms.

¹⁶ Articles 18 to 21 of the DMA.

¹⁷ Fines would be imposed by the Commission by way of a decision following communication of its preliminary findings to the gatekeeper.

¹⁸ Articles 22 and 23 of the DMA.

¹⁹ Where the gatekeeper has been found not to comply with the Obligations at least three times.

²⁰ The Commission must communicate its objections to the gatekeeper concerned within six months from the opening of the investigation.

²¹ Paragraph 4.38 of the Digital Taskforce advice.

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Although the main focus of the proposed SMS regime will be on remedying conduct found to breach the code of conduct and stopping the harm from occurring, the Digital Taskforce recommends that the DMU should have the power to issue financial penalties up to a maximum of 10% of the SMS platform's worldwide turnover.²²

It is proposed that the DMU will be able to open formal investigations into breaches of the code of conduct and impose interim measures. The DMU would also have a wide range of powers to gather evidence.²³

Gatekeeper and SMS platform merger rules

Under the DMA, gatekeepers will be required to notify the Commission of all acquisitions involving another Provider (which is not necessarily a gatekeeper) regardless of whether the EU or national jurisdictional thresholds are met. That said, the Commission will have no new merger control powers. The notification requirement will allow the Commission to monitor whether a deal further entrenches a gatekeeper's market power or raises barriers to entry.

In contrast, the proposed SMS regime is more extensive. The Digital Taskforce is proposing to:²⁴

- implement a suspensory mandatory notification regime for transactions that meet clear-cut thresholds. The thresholds are yet to be determined, but the Digital Taskforce is proposing to apply a value of the transaction threshold and to confirm that the transaction has a UK nexus by reference to the target's activity; and
- require SMS platforms to report all transactions entered into, including those not related to the SMS platform's Designated Activity. This would allow the CMA to verify whether the jurisdictional tests that govern whether transactions are subject to mandatory notification are being applied appropriately, as well as supporting the CMA's monitoring of transactions that fall outside the thresholds for mandatory notification.

Additional powers

The DMA abandoned its initial ambition of creating a new competition tool to allow the Commission to carry out broad, all-encompassing market investigations to deal with structural problems across markets. Under the DMA, market investigations will only be available to (i) identify gatekeepers, (ii) identify other services which could be added to the list of services falling within the scope of the DMA or new practices which risk having specific detrimental effects, and (iii) design additional remedies for systematic non-compliance.

²² Paragraphs 4.95 and 4.96 of the Digital Taskforce advice.

²³ Paragraphs 4.102 to 4.105 of the Digital Taskforce advice.

²⁴ [Appendix F](#) of the Digital Taskforce advice.

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The Digital Taskforce's recommendations are comparatively broad as it proposes to grant the DMU new intervention powers to tackle sources of market power which cannot be addressed by the remedies available under the code of conduct.²⁵ These powers could be implemented outside of the existing UK market investigation regime where it is demonstrated that a specific intervention would be an effective and proportionate remedy to an adverse effect on competition and consumers.

With the exception of full ownership separation remedies which should only be available following a CMA market investigation under the current regime, the Digital Taskforce considers that the DMU should not be limited in its intervention powers.²⁶ Such powers, which have not yet received full support from the UK Government, would allow the DMU to continuously intervene in digital markets.

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²⁵ [Appendix D](#) of the Digital Taskforce advice.

²⁶ On 27 November 2020, the UK Government noted that further work and analysis would be required to decide the appropriate extent of additional powers of intervention (beyond the powers to enforce the new 'code of conduct') which should be given to the DMU.