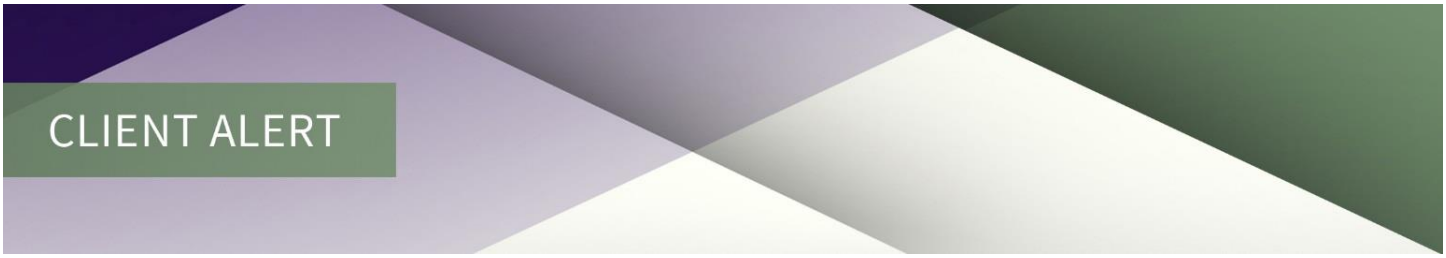

The Digital Markets Act — New Regulation for Big Tech in Europe

October 24, 2022

AUTHORS

Boris Bronfentrinker | Jens-Olrik Murach | Michelle Clark | Faustine Viala
Philipp Girardet | Rahul Saha | Aurel Hille | Ben Gregson

On 14 September 2022, the European Parliament and the Council of the European Union adopted the Digital Markets Act ("**DMA**" or the "**Act**"), which imposes new obligations on large digital platforms qualifying as so-called Gatekeepers. The European Commission ("**EC**") has stated that the purpose of the DMA is to open up digital markets to more and smaller players. The EC refers to this as increasing market 'contestability'. The DMA is intended to increase market contestability by banning a number of 'unfair practices' which have developed in digital markets in recent years.

The adoption of the DMA signals a challenging new time for big tech companies operating in Europe as it will increase the regulatory burden on Gatekeepers (and emerging Gatekeepers) and require them to make significant changes to their business models. The new regulation will also trigger investigations and litigation by businesses and individuals.

The DMA is one component of the EC's broader regulatory strategy to protect consumer rights and promote competition in the digital services sector.[1] The Act will enter into force in November 2022. Gatekeepers will then have six months until the DMA's requirements apply beginning 2 May 2023.

[1] Another component of the initiative coined 'Digital Services Package' is the Digital Services Act ("**DSA**"). The DSA aims to protect the safety and fundamental rights of end consumers of digital services.

What are Gatekeepers?

The DMA applies to big tech companies that qualify as Gatekeepers if they fulfil the criteria of a two-pronged test: namely, they must (i) provide ***core platform services***, and (ii) have a ***certain significance in the market***.

First, the DMA will only apply to companies providing one (or more) of the following core platform services:

- online intermediation services (e.g., online marketplaces and app stores)
- search engines
- social networking services
- video-sharing platform services
- interpersonal communications services (e.g., instant messaging services)
- operating systems
- web browsers
- virtual assistants (e.g., voice assistants)
- cloud computing services
- online advertising services provided by a company that operates any of the aforementioned core platform services

A core platform service provider will be designated as a Gatekeeper if it meets the following cumulative criteria:

- ***Size of the company***. It has a 'significant impact on the Internal Market' by providing the same core platform service in at least three Member States, and has either (i) generated a turnover in the EU of at least EUR 7.5 billion in the past three financial years, or (ii) had a market valuation of at least EUR 75 billion in the last financial year.
- ***Number of users***. It operates as an 'important gateway' for businesses to reach end users by having on average at least 45 million monthly active end users in the EU and at least 10,000 yearly active business users established in the EU.
- ***Entrenched and durable position***. It has reached the user number thresholds (above) in each of the last three financial years. The EC may also designate a core platform service provider as Gatekeeper if the company will foreseeably hold such a position in the near future.

If a core platform service provider meets all three of these quantitative criteria it is obliged to notify the EC of its Gatekeeper status. The EC will then officially designate the core platform service provider as a Gatekeeper, unless the company demonstrates compelling evidence to the contrary. Core platform service providers that do not meet the quantitative

thresholds above, but which might be considered 'emerging Gatekeepers,' can still be designated as Gatekeepers on the basis of a qualitative assessment carried out by the EC. Gatekeeper status will be re-evaluated by the EC every three years.

The DMA Bans 'Unfair Practices'

The DMA sets out a number of dos and don'ts for Gatekeepers. Gatekeepers must not:

- Engage in self-preferencing behaviours (i.e., treat their own products/services more favourably in ranking, indexing and crawling);
- Prevent consumers from connecting to businesses outside a Gatekeeper's platform;
- Prevent users from switching to competing services;
- Prevent users from uninstalling pre-installed apps/software;
- Use, in competition with business users, third-party generated data which is not publicly available; and
- Prevent third-party software from interoperating with a Gatekeeper's operating system.

Gatekeepers must:

- Provide advertisers and publishers, upon request, with free access to performance-measuring tools of the Gatekeeper and data necessary to verify their advertising inventory;
- Provide end users with free and effective data portability;
- Provide business users, upon request, with effective, high-quality and continuous real-time access to and use of aggregated and non-aggregated data which is generated by those business users from the use of a Gatekeeper's core platform service;
- Provide smaller competing online search engines at their request with access on FRAND terms to ranking, query, click and view data (subject to anonymisation);
- Apply fair and non-discriminatory conditions of access for business users to their software application stores, online search engines and online social networking services; and
- Allow consumers to terminate their use of core platform services without difficulty.

The DMA also authorises the EC to supplement the current list of obligations following a market investigation.

Impact on Gatekeepers' Corporate Transactions

The qualification as Gatekeeper will also have an impact on their M&A activities. Gatekeepers will be obliged to inform the EC of all proposed concentrations within the meaning of the EU Merger Regulation ("**EUMR**"), i.e., of any mergers or acquisitions of control of another company that is active in the digital space.[2] The information should be provided to the EC prior to completion of the transaction and post-signing. The DMA does not impose its own standstill obligation on Gatekeepers, i.e., it does not require formal clearance by the EC. However, the obligation to provide information under the DMA will give the EC a better overview of Gatekeepers' deal activities and certainly put it in a better position to solicit case referrals from the Member States' national competition authorities ("**NCAs**") under Article 22 EUMR.

As a reminder, under the EC's new Article 22 EUMR referral policy (see our client alert here), the EC accepts referral requests (also solicited by the EC) from NCAs to review a concentration even if it did not trigger the Member State's or any other national merger control regime in the first place.[3] In any event, if a concentration is subject to any national merger control regime, the EC will learn about it through the European Competition Network and can liaise with the respective NCA about a referral.

Public Enforcement and Penalties

The EC will be the sole enforcer of the DMA, with NCAs having a supporting role. The EC has the power to open market investigations: (i) against Gatekeepers to enforce the DMA rules; (ii) to examine whether a provider of core platform services should be designated as a Gatekeeper; and (iii) to detect other types of 'unfair practices' which prevent small- and medium-sized companies from accessing digital markets. The EC will have essentially the same investigatory tools to enforce the DMA as it has within the context of competition law infringements, i.e., the EC may request information from companies, carry out interviews, take statements, and conduct dawn raids (with the assistance of the NCAs).

As to penalties for non-compliance, a Gatekeeper may be fined up to 10% of its total worldwide turnover — and up to 20% in the event of repeated violations. In addition to fines, the EC may impose behavioural or structural remedies if a Gatekeeper fails to comply with the requirements of the DMA.

While NCAs have no power to sanction Gatekeepers for violations of the DMA, they may launch investigations based on applicable national laws — which may include investigations into infringements of the DMA — and inform the EC of potential violations of the DMA. Once the EC decides to open proceedings into a DMA infringement, NCAs may no longer (continue

[2] The information to be provided to the EC comprises amongst other things a summary of the nature and rationale of the transaction, a description of the participating companies and their business activities, their EU and worldwide revenues, and the value of the transaction. The EC will share this information with the Member States' NCAs and, in addition, publish a list of transactions notified under the DMA every year.

[3] This policy is currently under review by the European Court of Justice (case C-611/22 P), following an appeal against a decision of the General Court of the EU upholding the policy at first instance (case T-227/21; see our client alert here).

to) conduct their own investigations. In addition, NCAs may request the EC to initiate a market investigation. The extent to which NCAs will play an active role in supporting the EC's enforcement of the DMA remains to be seen.

Private Enforcement & Class Actions

The DMA is likely to trigger private enforcement by third parties, such as businesses and individuals. In fact, Article 39 specifically requires cooperation between the EC and national courts on issues concerning private enforcement. The DMA also envisages class actions, Article 42 refers to 'representative actions' to be brought against Gatekeepers for infringements by Gatekeepers that 'harm' or 'may harm' the collective interests of consumers. The EC does not intend to publish Guidelines setting out further details on how Gatekeepers are to comply with the DMA, rather the EC has specifically stated that it will be relying on private enforcement brought by businesses and individuals to provide answers on early questions of interpretation.

Interplay with Competition Laws

The DMA is intended to complement EU and national competition laws. The ban on cartels, the prohibition of abuse of a dominant market position, and merger control laws remain generally unaffected by the application of the DMA. However, the DMA prevents Member States' legislators from imposing additional obligations on Gatekeepers beyond those in the DMA to ensure a uniform regulatory framework for core platform services in the EU. There will likely also be a degree of overlap between the EC's enforcement against cases of abuse of dominance under its competition law powers; and its enforcement against Gatekeepers under the DMA, given some practices such as self-preferencing and use of non-public and commercially sensitive data have previously been held by the EC to constitute an abuse of dominance, and are now also to be considered to be an 'unfair practice' under the DMA.

It also appears that an undertaking can be penalised under both the DMA and national competition rules for the same infringing conduct. Earlier this year, the Court of Justice confirmed that undertakings can be fined under both national competition rules and sectoral regulation for the same infringing conduct without triggering the *non bis in idem* principle, or the prohibition of double jeopardy.[4] That this judgment would apply in respect of conduct amounting to a breach of both the DMA and national competition rules is, in principle, supported by Recital 11 of the DMA, which affirms that the DMA aims to protect a different legal interest from that protected by national competition rules, and that it should apply without prejudice to their application.

Member States' national competition laws addressing the conduct of large online platforms remain applicable alongside the DMA.[5] This applies for instance to Section 19a of the German Act against Restraints of Competition ("**ARC**"). Section 19a

[4] Case C-117/20 — bpost SA v Autorité belge de la concurrence.

[5] Outside the EU, comparable legislation concerning digital markets has been introduced, for example, in Australia, Japan, the Republic of Korea, the UK, and the US.

ARC applies to companies of 'paramount significance for competition across markets' and provides for a two-step procedure. In a first step, the German Federal Cartel Office ("**FCO**") determines whether a company has 'paramount significance for competition across markets.' Once this determination is made, the FCO can in a second step prohibit that company from certain conduct (including, e.g., certain self-preferential conduct; hindering other market participants by way of pre-installing software or impeding access to customers; bundling of products or services; using data processing to erect or raise barriers to market entry; hindering competition by denying or making interoperability and data portability more difficult etc.).

The Future Landscape for Gatekeepers Providing Core Platform Services

The introduction of the DMA marks a challenging time for Gatekeepers (and emerging Gatekeepers) providing core platform services in Europe — particularly given there is still so much uncertainty as to how the DMA's prohibitions and requirements are to apply in practice. For example, how are search engines to negotiate and agree upon FRAND terms to ranking, query, click and view data with their competitors, and how is such data anonymised? The DMA also presents opportunities for smaller core platform services providers, and business users in their commercial relationships with Gatekeepers.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Boris Bronfentrinker
+44 20 3580 4703
bbronfentrinker@willkie.com

Jens-Olrik Murach
+32 2 290 1827
jmurach@willkie.com

Michelle Clark
+44 203 580 4737
mcclark@willkie.com

Faustine Viala
+33 1 53 43 45 97
fviala@willkie.com

Philipp Girardet
+44 20 3580 4717
pgirardet@willkie.com

Rahul Saha
+44 20 3580 4741
rsaha@willkie.com

Aurel Hille
+49 69 7930 2145
ahille@willkie.com

Ben Gregson
+44 20 3580 4897
bgregson@willkie.com