Return to Contents

The EU Digital Markets Act: new rules for platforms

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After being postponed twice, the European Commission (Commission) published its draft Digital Markets Act (DMA) on 15th December 2020, in revised form — the EU's Regulatory Scrutiny Board having objected to earlier iterations. The DMA takes the form of a regulation as the Commission seeks to ensure maximum alignment among Member States. The proposed "Digital Services Act" (DSA) was published on the same day.

The proposals in the DMA focus on the largest platforms – mostly US-based at this juncture – and seek to redress perceived power asymmetries between platforms, their business users and end users - as well as issues around general market structure - to ensure markets remain "fair and contestable". The Commission's concern is that existing competition law enforcement is too slow and cumbersome to rectify problems before markets "tip" irrevocably in favour of the strongest players.

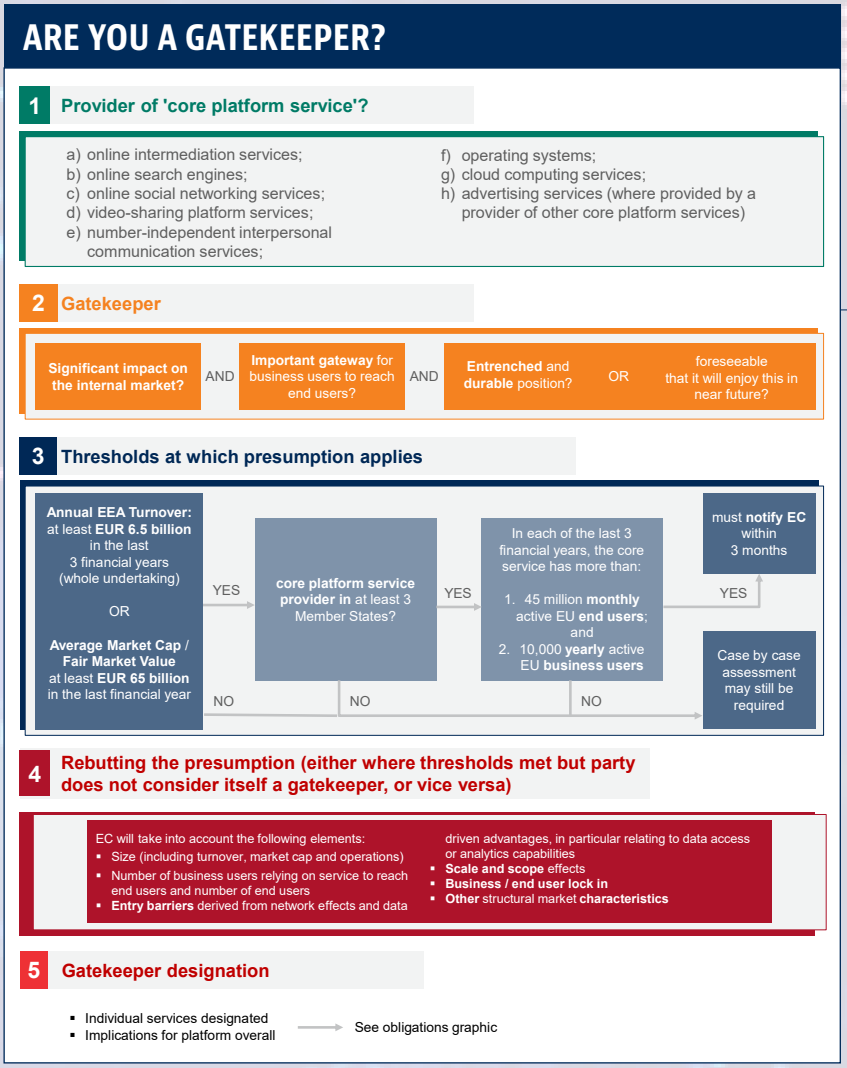
Prior controversial proposals for a standalone "New Competition Tool" (NCT), akin to a market investigation power, have been "folded" into the main text of the DMA and been made more limited in scope than originally proposed.

Unlike the parallel DSA, which builds on – and materially expands some – existing e-commerce rules, the DMA introduces a somewhat disparate list of obligations – largely not already present in any form in existing law. Instead, the DMA is best characterised as the Commission seeking to legislate to achieve the same outcomes as the Commission has tried to achieve via competition actions it has brought against key platforms, most of which are still unresolved or under appeal.

Scope

If passed, the DMA will apply to "gatekeepers" which provide "core platform services". Core platform services are defined to include: online intermediation, online search engines, online social networking, video-sharing platforms, number-independent interpersonal communication services, operating systems, cloud computing services, and advertising services. Most of these terms are defined in other pieces of EU legislation such as the AVMS Directive, the Copyright Directive, the new European Electronic Communications Code, or the Platform to Business Regulation. The three elements of the gatekeeper definition will be presumed satisfied where certain quantitative thresholds are met. "Emergent gatekeepers" are also caught, where it is foreseeable that a service will meet the criteria in the near future.

The presumptions are rebuttable in either direction: platforms can argue they are not gatekeepers despite meeting the thresholds; or they may be deemed gatekeepers by the Commission nonetheless. The designation applies to both the specific service and the corporate group overall (with obligations mostly applying to the specific service in question). The onus is on the platform to self-assess, but the Commission says a "market investigation" will be launched to confirm statuses in some cases.



Click to enlarge

What obligations apply under the DMA?

Gatekeepers will then be subject to new obligations in respect of how they operate specific services, with a limited number of obligations applying to the whole undertaking.

Obligations range from those seeking to:

- govern relationships between platforms and their business users – including a number intended to facilitate competition via other channels, aimed at reducing perceived exploitation by platforms, or preventing discrimination between the platform's own and competing services operating over the "gatekeeper" service;
- prevent lock in or to help promote new entry – including through promoting end user choice, data portability or interoperability, and obligations stipulating business user or third party access to data;
- address perceived issues around collation of data across ecosystems: including requiring end user consent for data to be combined across services, and an annual disclosure requirement on profiling techniques used; and
- enhance transparency between platforms and advertisers specifically.

The reader will note some overlap, and expansion of, some requirements that already exist to some extent under the GDPR and the P2B Regulation in particular.

Further, gatekeeper undertakings are required to inform the Commission of any intended merger involving another provider of core platform services or of any other services in the digital sector – irrespective of whether the normal EU Merger Regulation or national merger filing thresholds are met.

This is a material new requirement, and comes on top of the UK's recently announced plans to introduce new notification requirements for several industries, including many that might also be covered by this proposed new DMA requirement in the EU.

Emergent gatekeepers will be subject to a narrower pool of obligations (i.e., only those necessary to prevent them from achieving an entrenched and durable position), and it will be possible for all gatekeepers to request suspension of obligations or exemption for public interest reasons.

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Penalties

Potential fines for non-compliance will be significant (up to 10% of worldwide total turnover), with periodic penalty payments also an option. Structural remedies (including break-up) may be available for systematic non-compliance (i.e., three incidents of non-compliance or fining decisions in the last five years) where behavioural remedies would not suffice and "where there is a substantial risk that systematic non compliance results from the very structure of the undertaking concerned". Interim measures will be possible on a prima facie finding of infringement. This is also particularly significant, with the Commission having the power to exert early pressure on target enterprises. Given the number of Commission enforcement actions overturned on appeal in recent times, this is of particular note.

Investigative powers

While the mooted concept of a standalone "NCT" market investigation tool has been axed, there is provision for various – defined in scope – "market investigations" amongst the DMA proposals: to confirm gatekeeper definition, to investigate systematic non-compliance, and to investigate new core platform services and practices (i.e., to ascertain if the regulation needs updating).

Investigative powers include the power to request information (including to mandate a response), the power to carry out interviews, and dawn raids.

What next?

There is likely to be at least 18-36 months before these proposals pass into law, during which time Member States, the European Parliament and other stakeholders will have a chance to feed in their views. The European Parliament's Internal Market and Consumer Protection ("IMCO") Committee has been designated as the main Parliamentary committee for both the DMA and DSA, with identity of the Rapporteur yet to be published at date of writing. Introductory materials prepared by the Commission for discussion with IMCO are available **here**. Details of relevant Council working groups were yet to be released at time of writing.

We suspect there will be significant push back on a range of issues, from:

- **The substance itself –** whether there's a need at all for this type of regulation (given the existence of competition law, P2B Regulation, the Copyright Directive, GDPR, etc) and, even if there is, whether the regulation takes the right form (more on which below);
- **Definitional issues –** although the Commission says delegated acts will provide more detail, the gatekeeper tests and thresholds afford the Commission a wide margin of appreciation: what is the meaning of "significant" market impact where thresholds aren't met, how should one predict enduring power, and why should activities over only three Member States suffice to clinch this regime;
- **Procedural issues –** including how the mandatory merger notification will work and how much information the Commission will demand to see - in particular relating to deal "rationale";
- Mapping out how this legislation will sit alongside existing sectoral rules and other legislation, in particular data privacy.

A key point of contention will be the "do's and don'ts" approach to defining obligations.

- Articles 5 and 6 currently read like a "who's who" of cases the Commission has tried to bring under Article 102. It's backwards looking and oddly specific in some respects. Obligations are not arranged thematically, according to ends sought, and appear disparate.
- In other aspects, the list appears overarching – for instance, the apparent blanket ban on various forms of self-preferencing. The Recitals point to the harm self-preferencing causes to competing business users, but do not leave space for a case by case assessment of what will often be highly complex facts. While the UK's parallel approach (in recent CMA Advice to the government on new legislation in this field) recognises the need for differentiated obligations in light of firms' differentiated business models, the EU proposal advances catch-all obligations – albeit conceding that Article 6 obligations "may be susceptible" to further refinement as between the parties and Commission.
- The proposed regulation is also premised on the idea that the Commission can define what a well-balanced market should look like. Tipping of the market in favour of one player is presumed harmful in all instances.

Further, interaction with Member States – and other wider initiatives in this sector – will be complex:

- While describing the regulation as "harmonising", the Commission is careful to note that the DMA is "without prejudice" to Member States' ability to legislate against undertakings "other than gatekeepers" or even to impose additional obligations on gatekeepers.
- It remains to be seen how national initiatives will seek to align themselves with the new DMA, or whether Member States will press ahead with their own national solutions. Revisions to German competition law (see our alert on this **here**) contain a number of substantive overlaps with the DMA, in particular the new provisions addressed to "undertakings with paramount significance for competition across markets", which empower the FCO to prohibit specific practices by such firms.
- In the meantime, the proposed new UK regime, while equivalent in many respects to the DMA, is not identical, notably introducing "high level principles" (in addition to narrowly defined rules), which may result in a divergent approach further increasing complexity around compliance issues.
- Accordingly, at this stage, there is a real prospect of different regimes applying across Europe.

However, case by case enforcement under Article 102 might be predicted to drop, as firms comply with the new regulatory regime.

As for the DSA, see our separate article in this publication **here** for an overview, and **watch this space...**