EU-Regulation

DIGITAL MARKETS ACT – PART I
OBLIGATIONS FOR ONLINE PLATFORMS

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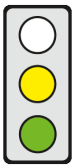
KEY ISSUES

Background: Digital platforms bring benefits for users and create business opportunities. However, as a result of their position between business users and end users, a few large platforms ("gatekeepers") enjoy significant market power which allows them to capitalise on economic dependence and to limit opportunities for competitors to enter the market.

Objective of the Regulation: The Digital Market Act (DMA) is to ensure that competitors can enter digital markets and that relationships between gatekeepers and their users are fair. To this end, the DMA contains obligations for providers of platform services [this cep**PolicyBrief**] as well as enforcement and governance rules [cep**PolicyBrief** to follow].

Affected parties: Gatekeepers and their end users and business users.



Pro: (1) The obligations capture problematic conduct that is often investigated under competition law.
(2) Since competition law proceedings often take a long time, it is beneficial that the DMA generally compels gatekeepers to comply with the obligations.

Contra: The lack of precision regarding the circumstances under which the Commission may declare an undertaking to be a gatekeeper despite not meeting the quantitative thresholds is problematic in view of the principle of legal certainty.

The most important passages in the text are indicated by a line in the margin.

CONTENT

Title

Proposal COM(2020) 842 of 15 December 2020 for a **Regulation on contestable and fair markets in the digital sector**

Brief Summary

► **Background and objectives**

– The Digital Markets Act (DMA) is to ensure contestable and fair digital markets by imposing strict conduct obligations on certain providers of "core platform services" (CPS) defined as "gatekeepers". An undertaking is a provider of CPS if it provides at least one of the following services [Art. 2 (2)]:
  - an online intermediation service, e.g. Amazon Marketplace, Apple App Store;
  - an online search engine, e.g. Google search;
  - an online social networking service, e.g. Facebook;
  - a video-sharing platform service, e.g. Youtube;
  - a number-independent interpersonal communication service, e.g. Skype or WhatsApp;
  - an operating system, e.g. Android or Windows;
  - a cloud computing service, e.g. Amazon Web Services; or
  - an advertising service, if the provider also offers at least one of the CPS mentioned above, e.g. AdSense.

– The DMA proposal contains
  - obligations for certain CPS providers [this cep**PolicyBrief**] and
  - enforcement and governance rules [cep**PolicyBrief** to follow].

► **Gatekeepers**

– A "gatekeeper" is a CPS provider that meets the following criteria [Art. 3 (1), (2)]:
  - It has a significant impact on the internal market, which is presumed if it provides the CPS in three or more Member States and
    - the annual turnover of the undertaking in the EEA in the last three years was at least EUR 6.5 billion or
    - its average market value in the last financial year was at least EUR 65 billion.
  - It operates a CPS that serves as an important gateway for business users to reach end users, which is presumed if the CPS has in the EU more than 45 million monthly active end users and more than 10,000 yearly active business users.
  - It enjoys an entrenched and durable position in providing a CPS or it is foreseeable that it will enjoy such a position in the near future, which is presumed if the aforementioned user numbers were met in each of the last three financial years.

– A CPS provider that meets the quantitative thresholds must notify the Commission thereof [Art. 3 (3)].

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– The Commission must declare the provider a gatekeeper unless the provider shows by indicators that despite meeting the quantitative thresholds, it does not fulfil the criteria [Art. 3 (4), (6)].
  - Indicators relevant for that purpose include the size of the CPS provider and entry barriers for competitors.
– Based, inter alia, on those indicators, the Commission can, after a market investigation, declare a provider to be a gatekeeper if it fulfils the gatekeeper criteria without meeting the quantitative thresholds [Art. 3 (6); Recital 25].
– Obligations for gatekeepers only apply to those CPS for which they fulfil the gatekeeper criteria [Art. 5, Art. 6].

► **Obligations for gatekeepers [Art. 5]**

– A gatekeeper must [Art. 5 (a)-(g)]
  - refrain, unless the end user has consented, from
    - combining personal data gained through the CPS with personal data from any other service of the gatekeeper or with personal data from third-party services, and
    - automatically signing in end users to other services of the gatekeeper in order to combine personal data;
  - allow
    - business users to offer the same products or services to end users through third-party online intermediation services under different conditions to those offered through the intermediation services of the gatekeeper;
    - business users to make offers to end users acquired via the gatekeeper's CPS and to conclude contracts with them regardless of whether such contracts are concluded using the gatekeeper's CPS, and
    - end users to access and use, through the gatekeeper's CPS, services of a business user – such as music streaming subscription – acquired outside the gatekeeper's CPS;
  - refrain from restricting business users from raising issues with public authorities about practices of gatekeepers;
  - refrain from requiring business users that offer a service using the gatekeeper's CPS to use, offer or interoperate with an ID service of the gatekeeper;
  - refrain from making registration with another CPS a condition for access to its own CPS if the other CPS
    - is operated by a gatekeeper or
    - has in the EU more than 45 million monthly active end users and more than 10,000 yearly active business users; and
  - provide advertisers and publishers – i.e. those who provide advertising space – upon request with information concerning the price paid by the advertiser and publisher for the gatekeeper's advertising services and the remuneration paid to the publisher for the publishing of a given advertisement.

► **Obligations for gatekeepers susceptible of being further specified by the Commission [Art. 6, Art. 7]**

– A gatekeeper must [Art. 6 (1) (a)-(k)]
  - refrain from using – when competing with business users of its CPS – any data not publicly available that is generated or provided through activities by those business users or their end users;
  - allow end users to uninstall pre-installed apps;
  - allow the installation and effective use of third-party apps and app stores using its operating system and allow access to these apps and app stores by means other than its own app store;
  - refrain from treating its own services and products more favourably than similar services and products of third parties in ranking services, and apply fair and non-discriminatory conditions to such rankings;
  - refrain from technically restricting the ability of end users to switch between and subscribe to different apps and services that are accessed through its operating system;
  - allow business users and providers of ancillary services, e.g. identification or payment services, access to and interoperability with the operating system, hardware and software features that are used by the gatekeepers' own ancillary services;
  - provide advertisers and publishers, upon request and cost-free, with access to its performance measuring tools and the information necessary to carry out their own verification of where the ad was displayed;
  - provide business and end users with portability of the data generated through their activity, in particular with tools for end users to facilitate exercise of data portability through continuous real-time access;
  - provide business users cost-free with effective, high-quality, continuous and real-time access to data that is provided for or generated by them and their end users in the context of the use of the CPS and enable them to use these data;
  - provide any third-party providers of online search engines with access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data that were generated by end users on online search engines of the gatekeeper, anonymised where appropriate; and
  - apply fair and non-discriminatory general conditions of access for business users to app stores.
– Following a dialogue with the gatekeeper concerned, the Commission can specify what measures the gatekeeper must take to ensure effective compliance with these obligations [Art. 7 (2)].

- **Applicability of the rules and information obligations**
  - If compliance with a specific obligation would, due to exceptional circumstances, endanger the economic viability of a gatekeeper, the Commission may, upon request, suspend a specific obligation (Art. 8).
  - Gatekeepers must inform the Commission of any intended merger or acquisition involving another provider of digital services [Art. 12 (1)].

Statement on Subsidiarity by the Commission

Digital players, notably those targeted by the DMA, operate across borders. Thus, the problems to be solved arise across borders and affect several Member States.

Policy Context

The DMA builds on the Commission's consultations on the "New Competition Tool" and the "ex-ante regulatory instrument for large online platforms with significant network effects acting as gatekeepers" (see cep**Input** of 24 November 2020). Together with the Digital Services Act (see cep**Study**; cep**PolicyBriefs** to follow), which was released on the same day, the DMA forms part of the Commission's proposal on new rules for digital platforms.

Legislative Procedure

15 December 2020	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Directorates General:	DG Communications Networks, Content and Technology,
Committees of the European Parliament:	IMCO (leading), Rapporteur: Andreas Schwab (EPP Group, Germany)
Federal Germany Ministries:	Economic Affairs (leading)
Committees of the German Bundestag:	Economic Affairs (leading)
Decision-making Mode in the Council:	Qualified majority (acceptance by 55% of Member States which make up 65% of the EU population)

Formalities

Competence:	Art. 114 TFEU (Internal Market)
Type of Legislative Competence:	Shared competence (Art. 4 (2) TFEU)
Procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Assessment

As a rule, the larger the CPS provider is – i.e. the more products and services or other content are offered on its platform and the more customers there are – the more efficiently it can connect suppliers and customers. This can lead to even more suppliers and customers using the CPS. Such network effects are usually beneficial for suppliers and customers, but they can also lead to one large CPS provider dominating the market. **The** resulting **market power might be used by the CPS provider to** increase prices and **obstruct market entry by competitors** (see for a discussion cep**Input** of 24 November 2020). **The aim of the DMA to ensure contestability and fairness** – i.e. to prevent exploitation of economic dependence – **in digital markets, is therefore appropriate**.

The thresholds proposed by the Commission to determine whether a CPD provider is a gatekeeper ensure that only very large CPD providers are declared gatekeepers. **The obligations** imposed on gatekeepers **capture problematic conduct that is often investigated under competition law** without limiting the otherwise welfare-enhancing practices of gatekeepers. **Since competition law proceedings often take a long time, it is beneficial that the DMA generally compels gatekeepers to comply with the obligations.** This increases the contestability of digital markets and reduces the possibility for gatekeepers to exploit economic dependencies. It is appropriate that some obligations can be specified by the Commission, because depending on the business model of a gatekeeper, compliance with these obligations may require different measures from different gatekeepers. The dialogue between the gatekeeper and the Commission can avoid imposing obligations on gatekeepers that would be technically disproportionately burdensome.

On selected conduct obligations: The obligation to allow business users to sell their products or services on other platforms under different conditions facilitates market entry and subsequent growth for other platforms.

The prohibition to make a registration with another CPS a condition for access to its own CPS prevents gatekeepers

from tying their services. Such tying would further entrench the already large market power of CPS providers in both markets. However, the quantitative thresholds of 45 million monthly active end-users and more than 10,000 annually active business users are too high: they do not prevent a gatekeeper from transferring its market power to another market where it has so far only limited market power.
The obligation to allow the installation of third-party apps and app stores by means other than the gatekeeper's app store and to allow the interoperability of ancillary services with its operating system prevents a gatekeeper from excluding competitors from the market, e.g. by denying third-party providers access to its app store. This obligation is key for the functioning of other DMA obligations. As the duty to allow the uninstallation of pre-installed apps would be ineffective without the duty to allow the installation of third-party apps or app stores. Because end users might have no choice but to use the gatekeeper's pre-installed apps if the installation of third-party apps or app stores is not possible.

Legal Assessment

Legislative Competence of the EU

The DMA is rightly based on the internal market competence (Art. 114 TFEU).

Subsidiarity

Unproblematic, as gatekeepers by definition operate across borders.

Compatibility with EU Law in Other Respects

The obligations imposed on gatekeepers interfere with the freedom to conduct a business [Art. 16 Charter of Fundamental Rights of the European Union (CFR)]. However, for the reasons set out in the economic assessment, the interference serves a legitimate goal – ensuring contestability and fairness in digital markets – and does so in an appropriate manner. Notably, the quantitative thresholds are high enough to capture only the biggest CPS providers so that the DMA avoids overburdening smaller undertakings Thus, Art. 16 CFR is not violated.
However, **the lack of precision regarding the circumstances under which the Commission may declare an undertaking to be a gatekeeper despite not meeting the quantitative thresholds is problematic in view of the principle of legal certainty**. While flexibility is needed in the fast-paced digital economy, **guidelines on how the Commission may carry out such an assessment are necessary**. Notably, it should be clarified whether the Commission can declare smaller providers of CPS that are entrenched in niche markets to be gatekeepers.
The DMA and the General Data Protection Regulation (GDPR) have different aims: The objective of the DMA is to ensure contestable and fair digital markets while that of the GDPR is to harmonise the protection of personal data of natural persons, thereby ensuring the free flow of personal data within the EU. For this reason, the DMA complements and goes beyond the GDPR. By contrast with Art. 20 GDPR, the DMA's right to data portability [Art. 6 (1) (h)] covers data of business and end users regardless of whether or not the user is a natural person. In addition, while the GDPR merely provides for a right to receive one's own personal data in a structured, commonly used and machine-readable format, the DMA gives rise to a right to continuous and real-time access. Furthermore, by prohibiting the combination of personal data stemming from different services, without consent [Art. 5 (a)], the DMA also goes beyond the GDPR, which provides further grounds that make the processing of data lawful, such as legitimate interests of the data controller.

Summary of the Assessment

CPS providers might use their market power to obstruct market entry by competitors. The aim of the DMA to ensure contestability and fairness in digital markets is therefore appropriate. The obligations capture problematic conduct that is often investigated under competition law. Since competition law proceedings often take a long time, it is beneficial that the DMA generally compels gatekeepers to comply with the obligations. The lack of precision regarding the circumstances under which the Commission may declare an undertaking to be a gatekeeper despite not meeting the quantitative thresholds is problematic in view of the principle of legal certainty. Guidelines on how the Commission may carry out such an assessment are necessary.