# THE DIGITAL MARKETS ACT: CHALLENGES AND OPPORTUNITIES FOR BUSINESS

BY ESTHER KELLY & FIONA GARSIDE[1]





1 Esther Kelly is a partner, and Fiona Garside is a Senior Expertise Lawyer in the Antitrust, Regulation and Foreign Investment Practice at Ashurst LLP. The views and opinions expressed in this article belong solely to the authors. Any errors remain the responsibility of the authors.

# CPI ANTITRUST CHRONICLE DECEMBER 2022



Visit www.competitionpolicyinternational.com for access to these articles and more!




## THE DIGITAL MARKETS ACT: CHALLENGES AND OPPORTUNITIES FOR BUSINESS

*By Esther Kelly & Fiona Garside*

The Digital Markets Act ("DMA") was published in the Official Journal on October 12, 2022 and certain provisions are already in force. The majority of the provisions will enter into force in May 2023 and the first designation decisions are expected in September 2023. The DMA passed through the legislative process relatively quickly, and notably in a shorter timeframe than European Commission investigations into the conduct of digital companies. Duration of investigations was one of the motivating factors behind the DMA, but a balance must be struck between speedy enforcement and protecting companies' rights of defense. European Commission officials, and indeed the text of the DMA itself, have emphasised that the DMA is designed to complement competition law. The two regimes running in parallel will give rise to challenges in deciding which powers should be used for a particular case and the extent to which precedents should be read across, as well as concerns about potential over-enforcement and double jeopardy. However, implementation of the DMA will give rise to opportunities as well as challenges: institutions, companies and advisors will need to work together closely to ensure that the DMA meets its objective of promoting consumer welfare without unduly chilling innovation.

# I. INTRODUCTION

After reaching a political agreement earlier in 2022, the Digital Markets Act ("DMA") was formally adopted by the European Parliament on July 5, 2022 and by the Council on July 19, 2022. The text was published in the Official Journal on October 12, 2022 and certain provisions entered into force on November 1, 2022. A transitional period is expected with most of the remaining articles entering into force on May 2, 2023.

At 66 pages, the document, which the 109-paragraph preamble suggests will apply to a "small number" of companies, runs considerably longer than either the foundational articles of the European competition law regime, or its principal existing substantive regulations. It contains far-reaching obligations related to product design and even internal organization (including relating to a specific compliance function) backed by heavy fining powers.

The DMA has been heralded as a new era of regulatory enforcement in digital markets, an area of increasing regulatory scrutiny and political focus in recent years. Competition law enforcement has been in this field for some time, with high profile investigations and fines at European and national level including record fines in some high-profile cases.

This regulatory and enforcement focus comes at a time of political concern about the role of European companies in the digital space, and questions about the bloc's competitiveness in that sphere as compared to companies originally established in the United States of America.

The dual role of the Executive Vice President of the European Commission, Margrethe Vestager as Commissioner for Competition and responsibility for the strategic policy regarding "Europe Fit for the Digital Age" highlights this significant priority. Commissioner Vestager has emphasized publicly the objectives surrounding this regulatory reform, noting that it is intended to provide a "clear list of dos and don'ts for big digital gatekeepers, based on our experience with the sorts of behavior that can stop markets working well" and to "allow us to act much faster and more effectively, to tackle behavior that we know can stop markets working well." At the same time, the DMA aims to be "future proof" – allowing the European Commission to adapt to new situations in rapidly-evolving markets.[2]

This note will focus specifically on the DMA. However, it bears mention that this new regulatory tool does not exist in a vacuum. Competition law will continue to apply in the sector, the Digital Services Act entered into force in November 2022, and discussions regarding the competitiveness of the sector continue. Recent policy changes that are not specific to the digital markets sector, such as increased use of the referral mechanism under the European Merger Control Regulation 1/2004 also introduce new challenges that will also apply to the digital sector (including to target so-called killer acquisitions). The central procedural regulation for European Competition Law (Regulation 1/2003) is under review, as are the market definition guidelines. The relationship between these various evolving enforcement tools is still to be fully-worked-out and there are various overlaps and tensions between them.

Regulatory intervention and reform in the digital sector seem likely to continue, with the presidents of the European Commission, Council, and Parliament publishing a joint declaration on digital rights and principles as recently as December 15, 2022.[3] This declaration, is apparently intended to "serve as a reference point for businesses and other relevant actors when developing and deploying new technologies. Promoting research and innovation is important in this respect." It emphasizes that "[s]pecial attention should also be given to SMEs and start-ups." Such a publication indicates that, inevitably, digital markets remain high on the European agenda, and that the use of data, regulation of artificial intelligence, and access to so-called online public spaces will remain high on the bloc's agenda.

As such, the DMA fits into an increasingly complex regulatory sphere applicable to digital markets, challenging companies (and their advisors) to rapidly upskill and adapt. Among other things, the risk of possible over-enforcement, the importance of properly defining and establishing consumer benefits, the potential for inconsistent obligations, and possible chilling effects on innovation will need to be taken seriously by all parties.

# II. RESPONSE TO A PERCEIVED "NEED FOR SPEED"

Speed of enforcement is commonly accepted to be one driving force behind the DMA: the duration of competition law proceedings in digital markets has been a constant point of discussion between regulators, companies, and advisors in recent years. The European Commission's

2 Speech by Executive Vice-President Margrethe Vestager: Building trust in technology, October 29, 2020, and Statement by Executive Vice-President Vestager on the Commission proposal on new rules for digital platforms, December 15, 2020.

3 https://digital-strategy.ec.europa.eu/en/library/european-declaration-digital-rights-and-principles.

investigations in the digital sector have taken between approximately two years (Case COMP/AT.39847 *Amazon e-book distribution*) and nine years (Case COMP/AT.40411 *Google Search* (AdSense)).

The legislative process regarding the DMA was relatively fast, taking only 16 months from the European Commission publishing its first draft to agree on the final DMA text. Commissioner Vestager announced "that is really, really fast" for legislation to get through the legislative process.[4] Subsequently, there are a number of stages or gates of enforcement, and an extensive consultative process is expected to adapt the apparently bright line rules of the DMA to the realities of a highly complex and technical industry.

The majority of the DMA provisions (including those on gatekeeper designation) enter into force on May 2, 2023. Companies which meet the quantitative thresholds to be presumed a gatekeeper will then have up to two months to submit a notification to the European Commission. The European Commission will then have 45 working days to decide whether to designate a company as a gatekeeper therefore the first designation decisions are expected in September 2023. Once designated, gatekeepers will have six months to ensure compliance with the DMA's provisions which means that they will need to be able to demonstrate compliance by March 2024 at the earliest.

Compared to some of the longer investigative cases by the Directorate for Competition, the DMA might therefore appear to accelerate likely enforcement. However, two notes of caution bear mention. First, regarding companies' rights of defense, and second, regarding the likelihood of litigation (and ensuring consequences for legal certainty).

- **Rights of defense under the DMA**. There is an inherent tension between the "need for speed" and effective, proportionate enforcement that respects companies' rights of defense. The European Commission has suggested that clearly defined procedural rules will enable quick decisions. A balance must be struck to ensure that companies' rights of defense are preserved and to properly assess the impact of any enforcement activity, especially in fast-moving markets where remedies may be unnecessary or obsolete by the time they are imposed.

  The draft procedural regulation will be critical in this regard, and indeed appears to outline more limited rights of defense than competition practitioners would be familiar with.[5] It remains to be seen how much of this draft will survive (a relatively short one-month) consultation and input from concerned parties. The principal novelties for competition practitioners will be the provisions on access to documents, oral hearings, and questions over the role of the hearing officer. The draft is also particularly prescriptive as to the format of submissions (in a manner that appears to draw more from practice before the European Courts than before the European Commission).

  The draft implementing regulation foresees that "at least" those documents specifically cited in the European Commission's preliminary findings will be provided by default. Any additional documents will be listed, and the burden will shift to companies to submit substantiated requests to review them (unless such documents contain no information identified as confidential). Presumably, this approach is intended to avoid delays relating to redaction of confidential information in documents (as such discussions between the European Commission and third parties are commonly referred to as a delaying factor). However, the burden on companies may be substantial, and the justification process challenging depending on the level of detail about a document provided in the European Commission's list (with the risk of companies facing a kind of "preuve diabolique" when seeking access to documents identified as confidential in whole or part). It remains to be seen whether such provisions survive the consultation period, particularly when there are, in article 7 of the draft, relatively strict provisions as to timelines for the provision of proposed non-confidential versions.

  Practitioners may be divided about the provisions regarding an oral hearing. Such procedures have pros and cons for the targeted companies, on the one hand allowing a direct appeal to the European Commission hierarchy, on the other, providing an opportunity for complainants or competitors to "throw stones" at the target in real time. The inability of investigated companies to opt for such a hearing may, however, gives rise to concern.

  The absence of a reference to a hearing officer is likely to raise questions. The hearing officer typically plays an important role in competition proceedings, including in relation to disputes over access to file. Given the more complex access to file procedure foreseen in relation to the DMA, this role would be even more critical.

4 Remarks by Executive Vice-President Vestager for the political agreement on the Digital Markets Act, March 25, 2022, available here: https://ec.europa.eu/commission/presscorner/detail/en/speech_22_2042.

5 https://digital-strategy.ec.europa.eu/en/news/commission-launches-public-consultation-implementation-digital-markets-act#:~:text=On%20Friday%2C%20the%20Commission%20launched,applying%20on%202%20May%202023.

- **Litigation and the supposed "need-for-speed"**. As regards litigation, it appears quite possible that the DMA will unleash a new wave of litigation on both sides of the "gatekeeper" line. In the first instance, not only may companies appeal their designations, either in relation to one or multiple markets, but there may be challenges to the legal basis of the DMA itself (which is not without controversy). Any finding of infringement would present another opportunity for challenge. One might also imagine companies that are not designated instigating appeals for failure to act regarding their competitors or intervening in existing litigation brought by the gatekeepers themselves.

  An explosion of litigation under the DMA may prove a significant burden on the already-over-worked EU Courts, where 1,720 cases were brought in 2021 (an increase of 136 over the previous year).[6] Duration of proceedings before the EU Courts remains a topic of controversy, particularly in competition law cases – this situation seems unlikely to be improved if there is a significant increase in litigation concerning a new and complex regulatory text.

## III. A COMPLEX AND WIDE-RANGING REGIME

As noted above, the DMA was apparently designed to provide additional legal certainty for companies while facilitating quicker enforcement by providing a clear list of "do's and don'ts" based on the European Commission's experience of competition law enforcement in the digital sector. Commissioner Vestager has suggested that the "tools are actually quite simple" but has acknowledged that enforcement will be "complex" particularly as regards the relationship with competition law.[7]

Caution regarding the potential for legal certainty and clarity offered by the DMA is arguably merited. Among others, at least four areas bear note: (a) the wide range of activities potentially caught by a literal interpretation of the DMA combined with a common list of obligations; (b) the deceptive simplicity of the thresholds for gatekeeper identification; (c) the relationship with (a constantly evolving) competition law; and (4) the relationship between the DMA and merger control enforcement.

- **The wide range of activities potentially caught by a literal interpretation of the DMA makes a single list of prohibited conduct an interesting enforcement challenge**. The DMA's principal limiting feature is its restriction to gatekeepers, defined as those involved in a Core Platform Service ("CPS") of which there are no less than ten defined in Article 2 and ranging from operating systems to search engines and virtual assistants.

  In reality, of course, this broad scope presents a number of challenges, both practical (in terms of compliance) and procedural. A gatekeeper may offer all, some, or only one of the relevant CPSs and will need to make submissions regarding, and be designated in respect of each of those individually. This may not happen at the same time, despite that the fact that certain obligations might imply changes to the design of multiple products and interactions between those same products.

  Likewise, the CPSs do not all offer the same functionality or service to customers, nor are they necessarily funded in the same way. However, the DMA provides that the same basic obligations will apply regardless of the type of CPS concerned. In reality, of course, the devil will be in the details. How self-favoring might look for a search engine is not necessarily the same as how it might look for a cloud computing system. The wide-ranging scope of the services covered by the DMA, combined with the detailed list of obligations is likely to raise a number of challenges in implementation (which might have been debated differently and extensively under a traditional competition law-based assessment). As noted below, the ongoing consultation with the European Commission is presumably intended to mitigate these concerns, however, the potential impact of the DMA on the core features of products, as well as the lead-time needed to design for compliance, is likely to remain a challenge. As a result, companies may be faced with difficult choices about how and when to attempt to design for compliance and whether to work on multiple alternatives in parallel, with related costs. Time and money that might otherwise have been spent on new or innovative offerings may need to be redirected to regulatory compliance, particularly in a challenging economic period.

- **The thresholds included in the DMA raise various questions in practice**. The preamble to the DMA anticipates that it will apply to a "small" number of "large" companies. However, there is considerable flexibility in its drafting, which raises questions as to which companies may, at some point, be designated. This, in turn, raises legal certainty challenges, particularly considering the positive notification obligations that the DMA imposes.
  Several points bear mention:

6 Annual Report of the Court of Justice of the European Union (2021). Available at: https://curia.europa.eu/panorama/2021/en/index.html.

7 Statement by Executive Vice-President Vestager on the Commission proposal on new rules for digital platforms, December 15, 2020.

First, the wide range of activities defined as CPS might be interpreted as applying beyond the commonly anticipated target companies. This leaves considerable legal uncertainty for large organizations that have digital-related activities but are not traditionally thought of as players in that sector. Time will tell how enforcement proceeds in this space, and consultation with the European Commission is likely to be critical.

Second, reliance on market capitalization as a threshold for the presumption of gatekeeper status is an interesting choice. Market capitalization is a moveable threshold, and one that will shift based on market volatility and risk appetite. As share markets move, a question arises as to whether a company may meet the thresholds to be presumed a gatekeeper on one day and not on another.

Third, outside of the financial thresholds, the European Commission has significant discretion in designating a company a gatekeeper. A notion that arguably sits uncomfortably with the positive obligations imposed on companies to self-identify. Again, it seems that early and proactive engagement with the European Commission may be critical. However, there is, once more, an inherent tension with the supposed need for speedy enforcement, limited public and private resources, and such a complex and iterative process.

- **Competition law and the DMA:** A constantly evolving relationship? As noted, the DMA draws inspiration from a number of concepts established in the context of competition law, while arguably untethering those to some degree from foundational notions of that discipline, such as dominance under Article 102 of the Treaty on the Functioning of the European Union ("TFEU"). Likewise, the DMA shifts to a prospective form of assessment, with considerable notification obligations imposed on certain companies.

  As time goes on, and litigation is pursued, competition law – including the concepts transported into the DMA – as well as precedent regarding the DMA will continue to evolve. Two significant questions then arise. First, how will evolving jurisprudence affect these parallel regimes? Second, what is the risk of double jeopardy?

- **Parallel jurisprudence**. Competition law will continue to apply in parallel to the DMA: Commissioner Vestager commented that "the DMA will not replace antitrust enforcement."[8] Recital 10 of the DMA notes that it "aims to complement the enforcement of competition law" and "should apply without prejudice to Articles 101 and 102 TFEU, to the corresponding national competition rules and to other national competition rules relating to unilateral conduct that are based on an individualised assessment of market positions and behaviour." Recital 11 highlights that the objectives of the DMA and competition law are complementary but distinct: competition law aims to preserve undistorted competition on any given market while the DMA seeks to ensure markets where gatekeepers are present are and remain contestable and fair. The DMA is a more targeted and specific regulation.

  It seems, therefore, inevitable, that the EU Courts will be faced with questions that relate to similar obligations under parallel regimes. For example, self-preferencing cases appealed under Article 102 alone and separate matters pursued under the DMA. Advisors and companies will be faced with challenging decisions when it comes to advising on compliance to the extent that these parallel regimes might begin to diverge.

Commenting on the Statement of Objections sent to Apple in relation to practices regarding Apple Pay, Commissioner Vestager commented that the "investigation will inform the future application of the Digital Markets Act."[9] The read across from DMA jurisprudence to competition law, however, may be more problematic as those decisions will be made in the specific context of regulating digital gatekeepers, and one which is arguably untethered from critical notions such as dominance and effect on competition in individual cases.

- A risk of double jeopardy? Some conduct might be sanctionable under the DMA or under Article 102. European Commission officials may therefore be faced with a choice as to how to proceed towards enforcement, a choice that may face challenge before the courts.

  The risk of double jeopardy or at least inconsistent application therefore becomes a live one to be avoided. Recital 73 was added to the DMA to encourage the European Commission to avoid duplicative proceedings: "the Commission should take into account

8 Speech, Commissioner Vestager, Fordham's 49th Annual Conference on International Antitrust Law and Policy, "Antitrust for the digital age," September 16, 2022, available here: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_5590.

9 Remarks by Executive Vice-President Vestager on the Statement of Objections sent to apple over practices regarding Apple Pay, May 2, 2022, available here: https://ec.europa.eu/commission/presscorner/detail/en/speech_22_2773.

any fines and penalties imposed on the same legal person for the same facts through a final decision in proceedings relating to an infringement of other national or EU rules." This reflects recent case law of the Court of Justice of the European Union ("CJEU") on the *ne bis in idem* principle. Traditionally, the CJEU considered whether the objectives pursued were the same or different and additional penalties could apply where the CJEU concludes the legislative instruments pursued different objectives. However, in March 2022, the CJEU held that the key is whether the material facts (meaning the facts and identity of the wrongdoer) of the case are identical (Case C-117/20 *bPost*).

Coordination with national competition authorities will also be crucial. Although the DMA indicates that national governments should not create their own specific sectoral regulation for gatekeepers, it accepts that competition law enforcement will continue to apply.

- **Merger control and the DMA**. As has been widely reported, digital markets are an area in which discussion has focused on so-called "killer acquisitions"; and where debate has raged as to whether and how to address such situations. The European Commission's policy brief on the topic, summarizing recent and future practice, provides interesting insights on the topic.[10]

- Finally, the European Merger control thresholds have not been revised, although certain national authorities have taken a different approach. The DMA requires gatekeepers to inform the Commission of acquisitions if "the merging parties or the target" are involved in the provision of "platform services or any other services in the digital sector or enable the collection of data." The question is then what is the purpose of this notification and what might be the consequences. It is commonly thought to be a complement to the recent guidance on Article 22 of the EU Merger Regulation (relating to the ability of national competition authorities to refer matters to the European Commission). This provision arguably significantly expands the European Commission's possible role in the review of relatively small transactions in the digital sector and is likely to be the subject of continued challenges before the Courts, as well as increased legal uncertainty for companies.

## IV. A NEW CONSULTATIVE PARADIGM?

Consultation procedures have long held a valued role in the relationship between the European institutions and private entities. In the case of the DMA, given its inherent complexity, speed of enactment, and need to technical application, this process continues at pace. These official European-level discussions complement a wide range of public and private discussions among actors in the field.

Specifically, the European Commission is holding a number of workshops, the first of which took place in early December 2022 to seek feedback from interested parties on how implementation of the DMA should evolve. The first of these consultations took place on December 5, 2022 and related to self-preferencing.[11] Materials from the event have been published online, including presentations submitted by various companies in the digital sector and a video recording of the discussions.[12]

Despite the challenges from a competition law perspective that such meetings might provide (including as to confidential information), they appear to have been broadly welcomed and companies/advisors will await the outcomes and evolution of this process with interest. Without doubt, they will be accompanied by extensive private discussions between key players and the European Commission.

Competition law enforcement has, historically, combined both openly adversarial and more clearly consultative or conciliatory processes. Indeed, the same cases have not infrequently combined both approaches. Article 102 cases have been closed in various ways, including by formal decisions and fines, formal commitments, and more informal or commercial concessions.

This new consultative approach, however, provides an opportunity for companies to actively shape the future of enforcement in digital markets and plead their case on challenging technical issues before enforcement becomes an issue. The next few months will therefore be a fascinating and critical time for all those involved in the sector.

10 European Commission, Directorate-General for Competition, Beaudouin, Y., Genevaz, S., Mernagh, S., et al., *Competition policy brief. Issue 2, December 2022*, European Commission, 2022, https://data.europa.eu/doi/10.2763/29297.

11 https://competition-policy.ec.europa.eu/dma/dma-stakeholders-workshop_en.

12 https://competition-policy.ec.europa.eu/dma_en.

# V. CONCLUSIONS

The DMA represents a new era of regulatory enforcement for actors in the digital space. As Commissioner Vestager mentioned, we find ourselves at "the frontier of a new kind of regulation."[13] The far-reaching regulation presents many complex challenges, not all of which can be briefly addressed.

Remaining questions involve the provisions on circumvention, the definition of a durable position and its similarity to or difference from the traditional dominance standard, and the capacity of all concerned (not least European institutions) to resolve open questions by the time that companies are required to fully comply.

One thing is clear: implementation of the DMA will be challenging, complex, and full of risks and opportunities for all involved. Institutions, corporates, and advisors will need to work closely together to ensure that the DMA does indeed benefit European consumers without chilling innovation, reducing customer value, infringing the rights of defense, or resulting in a degree of over enforcement that chokes up the EU Courts and reduces access to justice. The European Commission's recent initiatives towards transparency, consultation, and openness to ideas from business are encouraging in this regard.



13 Speech by Margrethe Vestager on defending competition in the face of disruption by Practical Law Competition, May 2022.

CPI COMPETITION POLICY® INTERNATIONAL

# CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.