Delphi

The Digital Markets Act – new rules for providers of digital services

Felix Makarowski / Senior Associate / Advokat, **Amanda Bos Ekman** / Associate

1. Introduction

The Digital Markets Act[1] ("**DMA**") was published in the Official Journal of the European Union on 12 October 2022 and enters into force on 1 November 2022. The DMA starts to apply from 2 May 2023, at which point the European Commission (the "**Commission**") will start designating undertakings as gatekeepers. Once an undertaking has been designated as a gatekeeper, it must comply with all obligations and restrictions set out in the DMA within six months from the date of the designation decision.

The DMA is an *ex-ante* regulation – aimed at tackling certain abusive practices by large undertakings before they occur, rather than using the existing competition law tools in Article 102 of the Treaty on the Functioning of the European Union. Undertakings that have been designated as gatekeepers face fines of up to 10 percent of their total worldwide turnover if they are found to breach the obligations and prohibitions of the DMA, and up to 20 percent of their total worldwide turnover revenue in case of repeat non-compliance.

2. Key takeaways

- The DMA contains a set of obligations and restrictions for undertakings that have been designated as gatekeepers under the DMA. The obligations and restrictions set out in the DMA target certain behaviours that the Commission has previously considered to constitute abuse of dominance by large undertakings in the tech sector. The purpose of the DMA is to prevent gatekeepers from engaging in certain behaviours, rather than bringing enforcement action on these undertakings after the behaviour has taken place.
- In cases of non-compliance with the DMA, the Commission may impose fines on a gatekeeper of up to 10 percent of its total worldwide turnover in the preceding financial year, and up to 20 percent in case of repeat non-compliance. This is in line with the fines the Commission may impose in cartel cases and in cases concerning abuse of dominance. To ensure effective enforcement of the DMA, the Commission is granted far-reaching investigatory powers which include, *inter alia*, a right to conduct dawn raids.
- The Commission is the sole enforcer of the DMA. The role of national competition authorities is limited to initiating investigations into non-compliance and to assisting the Commission in its investigations. In addition, undertakings may initiate private enforcement action against gatekeepers in national court.

[1] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

3. Gatekeepers

3.1 *Introduction*

The DMA sets out obligations and prohibitions targeted at "gatekeepers." Gatekeepers are undertakings that provide a "core platform service" and which have been designated as gatekeepers by the Commission. The Commission may designate an undertaking as a gatekeeper by adopting a decision. In the designation decision, the Commission must also indicate which of the services provided by the gatekeeper that are considered to be core platform services.

3.2 *Designation of gatekeepers*

Under the DMA, the assessment of whether an undertaking should be designated as a gatekeeper is conducted based on three qualitative criteria set out in Article 3(1) of the DMA. These qualitative criteria are tied to quantitative criteria set out in Article 3(2) of the DMA that, if met, give rise to a presumption that the qualitative criteria have been fulfilled. The designation criteria are:

- The undertaking has a significant impact on the internal market. This qualitative criterion is presumed to be met where the undertaking achieves an annual turnover in the European Union ("**EU**") equal to or above EUR 7.5 billion in each of the last three financial years, or where the undertaking's average market capitalisation or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year, and it provides the same core platform service in at least three EU Member States.

- The undertaking provides a core platform service which is an important gateway for business users to reach end users. This qualitative criterion is presumed to be met where the undertaking provides a core platform service that in the last financial year has at least 45 million monthly active end users established in the EU or where the undertaking is located in the EU and has at least 10 000 yearly active business users established in the EU.

- The undertaking enjoys an entrenched and durable position in its operations, or it is foreseeable that it will enjoy such a position in the near future. This qualitative criterion is presumed to be met where the user number thresholds above have been met in each of the last three financial years.

For an undertaking to be designated as a gatekeeper all three qualitative criteria must be fulfilled. However, an undertaking can be designated as a gatekeeper even when all the quantitative criteria have not been met. In such cases, the assessment is made based on seven separate criteria including, *inter alia*, the size of the undertaking, the number of business users using the core platform service to reach end users and the number of end users, business user and end user lock-in, and other structural business or service characteristics. In carrying out this assessment, some or all of the seven separate criteria may be considered, depending on their relevance to the undertaking providing the core platform service under consideration.

If all of the quantitative criteria of Article 3(2) are met, an undertaking is required to notify the Commission within two months after those thresholds are met. In its notification, the undertaking can provide arguments that, due to the circumstances in which the relevant core platform service operates, the undertaking does not satisfy the qualitative requirements. The Commission will take these arguments into consideration in its decision whether to designate an undertaking as a gatekeeper or not.

Where the quantitative criteria of Article 3(2) are not met, the Commission may conduct a market investigation for the purpose of examining whether an undertaking meets the qualitative requirements set out in Article 3(1) or in order to identify the core platform services to be listed in the designation decision. In such cases, the Commission must follow the procedure for market investigations for designating gatekeepers set out in Article 17. The Commission shall strive to conclude such market investigations within 12 months from the date the market investigation is opened.

3.3 *Core platform services*

A key concept of the DMA is the concept of "core platform services." The designation of gatekeepers is tied to core platform services and the obligations and prohibitions of the DMA are only applicable to core platform services provided by gatekeepers. Article 2(2) of the DMA provides an exhaustive list of the core platform services:

- online intermediation services;
- online search engines;
- online social networking services;
- video sharing platform services;
- number-independent interpersonal electronic communication services;
- operating systems;
- web browsers;
- virtual assistants;
- cloud computing services; and
- online advertising services including any advertising networks, advertising exchanges and any other advertising intermediation services provided by an undertaking providing any of the core platform services listed above.

Although the list is exhaustive, Article 19 allows for core platform services to be added to or removed from the list after a market investigation by the Commission, following which the Commission has to send a legislative proposal to the Council and Parliament.

3.4 *Comment on the scope and application of the DMA*

The obligations of the DMA are only applicable to undertakings that have been designated as gatekeepers, insofar as they provide core platform services. The DMA is not applicable to other undertakings than those that have been designated as gatekeepers. Neither is the DMA applicable to services provided by gatekeepers that have not been listed in a Commission designation decision. As such, the obligations and prohibitions of the DMA may be applicable

to only a limited number of services provided by a gatekeeper (i.e. core platform services), while the remaining services provided by a gatekeeper may fall outside the scope of the DMA. Distinguishing between core platform services and other services provided by gatekeepers will therefore be of crucial importance in the application of the DMA.

4. Obligations and prohibitions for gatekeepers

4.1 *Introduction*

The core of the DMA can be found in Articles 5–7. These Articles contain the obligations and prohibitions imposed on gatekeepers in their provision of core platform services. These obligations and prohibitions are summarised below.

4.2 *Obligations*

The DMA obliges gatekeepers to:

- allow business users to use their platforms to promote offers to and conclude contracts with end users (Article 5(4));
- allow end users to use a business user’s software applications to access and use content, subscriptions, features and other items through the gatekeepers’ platform services, including where the end users acquired such items from the relevant business user without using the core platform services of the gatekeepers (Article 5(5));
- ensure transparency on prices and fees of their advertising services, as well as giving business users access to advertising performance data (Articles 5(9)–(10), 6(8));
- allow end users to uninstall pre-installed software and allow for the installation of third-party equivalents on electronic devices using the gatekeepers’ operating systems (Articles 6(3)–(4));
- ensure effective interoperability of both hardware and software operating systems Article 6(7));
- provide access to, and effective portability of, data generated through their core platforms to users (Articles 6(9)–(10));
- apply fair, reasonable, and non-discriminatory (FRAND) general conditions of access for business users to their software application stores, online search engines and online social networking services (Article 6(12));
- ensure effective interoperability of the basic functionalities of instant messaging services, such as text messaging, voice and video calls and sharing of for example images, videos and files (Articles 7(1)–(2)).

4.3 *Prohibitions*

The DMA prohibits gatekeepers from:

- processing end users’ personal data collected from third-party services for the purpose of providing online advertising services without obtaining prior consent from the end users (Article 5(2)(a));

- reusing personal data collected during the provision of the gatekeepers' services for the purposes of another service without obtaining prior consent (Article 5(2)(a)–(c);
- preventing business users from offering their products and services under different prices and conditions on their own online sales channels or on third-party platforms (Article 5(3));
- preventing users from making complaints to public authorities (Article 5(6));
- requiring users to use certain platform services (e.g., payment systems, identification services, web browser engines or technical services) (Article 5(7));
- requiring users to register/subscribe to other core platform services as a condition to use any of the core platform services (Article 5(8));
- using non-public data generated by business users while using the gatekeepers' core platform services to compete against such business users (Article 6(2));
- treating own products or services more favourably than those of others when providing ranking services (Article 6(5));
- restricting end users from switching between different apps and services (Article 6(6));
- establishing disproportionate termination conditions for business users; (Article 6(13)).

4.4 *Updates to the list of obligations and prohibitions*

Under the DMA, the Commission may update the list of obligations and prohibitions by adopting so called "delegated acts" (supplementary legislative acts stemming from the DMA). Such delegated acts must be based on a market investigation and be targeted at addressing anti-competitive or unfair practises by gatekeepers in their provision of core platform services.

4.5 *Corresponding user rights*

Where the DMA imposes an obligation or a prohibition on gatekeepers, the DMA should be considered to create a corresponding right for business users and end users. For instance, the DMA prohibits gatekeepers from requiring business users to use the payment system of the gatekeeper for in-app purchases. In such case, the business user has a right to use its own payment system or the payment system of a third-party provider for in-app purchases. Where this right is being restricted by a gatekeeper, the business user may file a complaint with the Commission or enforce its right through the national courts (see further sections 6.1 and 6.3 below).

5. Other compliance obligations

5.1 *Introduction*

In addition to the obligations set out in Articles 5–7, the DMA contains additional compliance obligations that must be observed by gatekeepers.

5.2 *Reporting*

Under Article 11, a gatekeeper is obligated to provide the Commission with a report describing the measures implemented to ensure compliance with its obligations under Articles 5–7. The report must be submitted to the Commission within six months after the Commission's designation decision. The report must be written in a detailed and transparent manner. In addition, the gatekeeper must publish and submit to the Commission a non-confidential summary of the report. The report and the non-confidential summary must be updated at least annually.

5.3 *Obligation of an audit*

Under Article 15, a gatekeeper must submit an independently audited description of any techniques for profiling of consumers that the gatekeeper applies to or across its core platform services. The description must be submitted to the Commission within six months after the Commission's designation decision. The gatekeeper is also obligated to make an overview of the description publicly available. The audited description and overview must be updated at least annually.

5.4 *Obligation to inform about concentrations*

Under Article 14, gatekeepers are obligated to inform the Commission of any mergers and acquisitions where the merging entities, or the target company, provide core platform services or any other services in the digital sector or enable the collection of data. The gatekeeper shall inform the Commission of any such transactions between signing and closing of the transaction.

The obligation for gatekeepers to inform the Commission of certain transactions runs parallel to the existing merger control regimes under EU and national law. Gatekeepers must thus inform the Commission of relevant transactions regardless of whether the thresholds for notifying the transaction to the Commission or to a national competition authority respectively are met or not. The Commission will pass on the information received from the gatekeeper to the national competition authorities, who may use the information to request the Commission to examine the transaction pursuant to Article 22 of the EU Merger Regulation.[2]

[2] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

5.5 *Compliance function*

Under Article 28, gatekeepers are obligated to maintain a compliance function, independent from its operational functions, to monitor the gatekeeper's compliance with the DMA. The compliance function is to report to the management body of the gatekeeper and raise concerns where risks of non-compliance arise.

6. Enforcement

6.1 *Enforcement by the Commission*

The Commission is the sole enforcer of the DMA. It has the power to adopt a non-compliance decision, should a gatekeeper not comply with Articles 5–7 and to combine such a decision with a fine of up to 10 percent of the gatekeeper's total worldwide turnover. Should the gatekeeper commit the same or a similar infringement again within eight years from the adoption of the non-compliance decision, the resulting fine may be as high as 20 percent of the turnover. If needed, the Commission may impose periodic penalty payments of up to 5 percent of an undertaking's average daily worldwide turnover, in order to compel it to comply with a decision.

In cases of systematic infringements - where the Commission has issued at least three non-compliance decisions within eight years - the Commission may impose additional behavioural or structural remedies. This could include obliging the gatekeeper to sell all of or parts of a business, or prohibiting it from further acquisitions of companies in the digital sector.

To ensure effective enforcement of the DMA, the DMA grants the Commission the same investigatory powers as it has in cartel case investigations and investigations concerning the abuse of dominance. These investigatory powers include the right to request information from undertakings and the right to carry out interviews and take statements. The Commission is also empowered to carry out dawn raids in investigations concerning potential non-compliance with the obligations and prohibitions under the DMA. Should the undertaking fail to comply with the administrative procedures or information obligations, the Commission may impose fines of up to 1 percent of an undertaking's total worldwide turnover.

6.2 *Enforcement by national competition authorities*

National authorities do not have any enforcement rights of their own under the DMA. However, national authorities may conduct investigations into possible non-compliance by gatekeepers with Articles 5–7 of the DMA, within its own territory. In such cases, the national authorities must inform the Commission of the investigation. The Commission may then choose to open its own proceedings. If the Commission chooses to do so, the national authority is relieved of its possibility to continue its investigation.

6.3 *Private enforcement*

Under the DMA, undertakings may initiate private enforcement action against gatekeepers in national courts. Because the DMA is a regulation, the provisions of the DMA are directly applicable in the EU Member States. To limit fragmentation between the application of the DMA by the Commission and by the national courts, DMA contains provisions on co-operation

mechanisms between the Commission and the national courts, as well as on the duty for national courts to pay respect to Commission DMA decisions.

Under the DMA, consumers may bring representative action against infringements by gatekeepers of the DMA that harm or may harm the collective interests of consumers.

7. Final remarks

Although the DMA enters into force on 1 November 2022, it will take time until all the obligations and prohibitions of the DMA are fully applicable to gatekeepers. The DMA will start to apply on 2 May 2022, before which the Commission may not designate any undertakings as gatekeepers. After an undertaking has been designated as a gatekeeper, it will have an additional six months from such designation until the obligations and prohibitions of the DMA become applicable to the gatekeeper. As such, it will take at least a year before the DMA has fully entered into force.

For those who have been following the Commission's abuse of dominance cases over the past decade, the core obligations and prohibitions imposed on gatekeepers will largely be familiar. The DMA is an extensive piece of legislation that codifies many of the Commission's cases into law and adds additional compliance obligations for gatekeepers. The aim of the DMA is to improve competition and ensure fair conditions in the digital sector. However, as stated above, it will take time until the DMA has fully entered into force. We will therefore have to wait a while until we see how effective the DMA is in achieving its stated aims. Only time will tell how aggressively and effectively the Commission will enforce the DMA.

Felix Makarowski / Senior Associate / Advokat
felix.makarowski@delphi.se +46 709 25 25 27

Amanda Bos Ekman / Associate
amanda.bos.ekman@delphi.se +46 767 72 00 18

Delphi

delphi.se