WT Client Alert

# The Digital Markets Act goes live

**27 April 2023**

## Regulation (EU) 2022/1925, The Digital Markets Act, is set to apply from 2 May 2023

Addressing digital developments and concerns regarding contestability and fairness in the digital economy, the **Digital Markets Act** – an ex-ante regulatory system – entered into force on 1 November 2022 and will apply from 2 May 2023. Designed to complement competition law, the Digital Markets Act lays down prohibitions and obligations for designated gatekeepers that provide a range of “core platform services" and gives the European Commission broad investigative and enforcement powers. Generally speaking, the Digital Markets Act aims to prevent unfair practices by gatekeepers.

## 1 What is a "gatekeeper" ?

The Digital Markets Act ("**DMA**") will apply only to undertakings (i) **providing core platform services** ("**CPS"**) and (ii) that are subsequently designated as **gatekeepers**.

The DMA covers a broad range of **CPS** including "online intermediation services", "online search engines", "online social networking services", "video-sharing platform services", "number-independent interpersonal communications services", "operating systems", "web browsers", "virtual assistants" and "cloud computing services and online advertising services".

An undertaking providing CPS will be designated as a **gatekeeper** if it meets three criteria cumulatively. The criteria are qualitative in nature but are presumed if certain quantitative thresholds are met:

- **The undertaking has a significant impact on the internal market,** which is presumed when (i) the group's annual turnover in the EU was at least €7.5 billion in each of the last three financial years or (ii) its average capitalisation or fair value was at least €75 billion in the last financial year, and it provides services in at least three EU Member States;
- **The undertaking provides a CPS which is an important gateway for business users to reach end users**, which is presumed if a service (i) has more than 45 million monthly active EU end users and (ii) more than 10,000 active EU business users per year; and
- **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, which is presumed if the user-base thresholds above have been exceeded in each of the last three financial years.

Similar to the mechanics within the competition law space, undertakings must self-assess the fulfillment of these criteria. If all thresholds are met, the undertaking must notify the European Commission ("**Commission**") without delay within 2 months after said thresholds are met, whilst providing the relevant information.

Within 45 working days after receiving the information necessary to assess the thresholds, the Commission then designates the undertaking as a gatekeeper. Following their designation, gatekeepers will have six months to comply with the requirements imposed by the DMA.

## 2 Obligations and prohibitions imposed on gatekeepers

The obligations and prohibitions – the "do's" and "don'ts" – that a gatekeeper must consider are listed in detail in Articles 5, 6 and 7 of the DMA, and are heavily modelled after recent competition law cases. The aim is to prevent unfair or deniability practices by gatekeepers. The following are key examples of "do's" and "don'ts":

### 2.1 Examples of "dos"

- **Ease of (un)installation***:* Allow and enable end users to easily uninstall any software applications and allow them to install third party apps or app stores that use or interoperate with the gatekeeper's operating system;
- **Interoperability:** Allow providers of services/hardware effective interoperability with the gatekeeper's own services;
- **Promotion:** Allow business users to promote offers and conclude contracts with the gatekeeper's customers outside the gatekeeper's platform;
- **Information access**: Provide advertisers on their platform with access to the gatekeeper's performance measuring tools and the information necessary for advertisers and publishers to carry out their own independent verification of their advertisements hosted by the gatekeeper.
- **Notify mergers**: Gatekeepers must notify any intended digital or data-related mergers and acquisitions to the Commission

### 2.2 Examples of "don'ts"

- **No spill-over of plattform data**: Gatekeepers are banned from combining/cross-using end users' personal data collected from a CPS with data collected from other services, unless the end user has given their consent;
- **No-self preferencing**: Gatekeepers are banned from ranking their own products or services in a more favourable manner compared to those of third parties;
- **No tying:** Gatekeepers are banned from requiring business users or end users to subscribe to any other CPS belonging to the gatekeeper as a condition for using the services;
- **No MFNs**: Online intermediation services must not restrict business users from offering the same products/services to end users at different prices/conditions on other platforms or their own websites.

## 3 Enforcement

The DMA provides the Commission with similar powers as in the competition law space, in other words, the power to conduct broad market investigations, submit requests for information, carry out interviews of employees and impose interim measures as well as fines and penalties.

In order to enforce the DMA, the Commission has established a new specialized department within the Directorate General for Competition ("**DG Comp**") that will work closely with the Directorate General for Communications

Networks, Content and Technology ("**DG Connect**"). DG Comp is expected to assess the majority of enforcement cases by building on the existing structures for competition cases within the department. DG Connect is likely to focus instead on interoperability issues as well as disputes between publishers and search engines.

Unlike the EU competition framework, the DMA will not be enforced by National competition authorities ("**NCA**") in order to meet the objective of the DMA to harmonise the framework and maximise legal certainty. However, the DMA provides for close cooperation and information exchange between the Commission and NCA through the European Competition Network ("**ECN**"). The advisory committee is made up of experts from the competent authorities within the Member States, including the Austrian Federal Competition Authority ("**AFCA**"),and is chaired by the Commission. Natalie Harsdorf-Borsch (Acting Director General for Competition at the AFCA) was nominated for a two-year period as representative of the ECN to the DMA advisory committee's High-level Group, alongside her Director General counterparts from the Danish, German, Greek, Polish and Spanish competition authorities.

## 3.1 Complementary relationship between DMA and Austrian competition law

With regard to its applicability (see above point 1), the DMA does prevent Member States from imposing additional obligations on gatekeepers by way of laws, regulations or administrative measures for the purpose of ensuring contestable and fair markets.

While the DMA additionally states that it does not, in principle, supersede Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) or the corresponding national competition rules and other national competition rules regarding unilateral conduct, NCAs shall not make decisions which run counter to a decision adopted by the Commission under the DMA. In light of these provisions, there is an open debate as to whether Section 28a of the Austrian Cartel Act ("**ACA**") – stipulating that the Austrian Cartel Court shall determine whether an undertaking active in a multi-sided digital market holds a dominant position – is in conflict with the DMA.

If Section 28a of the ACA were to be considered an "ex-ante" regulatory provision similar to the DMA, the DMA would enjoy primacy of application. In contrast, if Section 28a ACA were to be understood as a (pure) competition law provision, it would (continue to) apply. Section 28a of the ACA ultimately (i) serves to make enforcement of Article 102 TFEU (and its national equivalent) more efficient, (ii) it applies antitrust "logics" with respect to determining whether a company holds a dominant position, and (iii) does not by itself impose obligations on the companies concerned. As such, we believe that Section 28a ACA is not an ex-ante regulation comparable to the DMA and is therefore not in conflict with the latter. Nevertheless, we expect the application of Section 28a ACA to be limited to cases where the DMA is not applicable in the future.

## 3.2 Private enforcement in light of the DMA

The DMA is open toprivate enforcement, which means that natural or legal persons, harmed by gatekeepers that are in breach of the DMA, can go before national courts and sue for damages. Furthermore – in cases of collective harm to customers' interest – Article 42 DMA provides the possibility of class actions.

## 3.3 High penalties for non-compliance

In cases of non-compliance with the DMA, undertakings can be fined inter alia up to **10% of their annual worldwide turnover**, and **20% of their annual worldwide turnover** in cases of repeated infringements.

In addition, the Commission may also impose periodic penalty payments, as well as behavioural or structural remedies, including a ban on M&A activity and possibly even a breakup.

**In conclusion**, the DMA will have a significant impact on digital platform operators. Even though the final rules have been settled, many uncertainties and challenges remain in everyday life that must be faced in order to comply with these new rules.

## 4 Implementing Regulation to the DMA

On 14 April 2023, the Commission published – following a month-long consultation period – its final DMA Implementing Regulation ("**IR DMA**") along with two Annexes. **Annex I** is the proposed Notification Form for gatekeepers ("**Form GD**") and **Annex II** is a guideline that regulates the **format and length of documents** submitted under the DMA. It will begin to apply (together with the DMA itself) from 2 May 2023.

The IR DMA encompasses 12 Articles and addresses a range of procedural aspects concerning the DMA, including gatekeeper designation and core platform service notifications, the opening of proceedings, the right to be heard, and access to the file.

## 5 Outlook

In light of the fact that the DMA's rules will begin to apply on 2 May 2023, and that the regulatory instruments provide a timeframe of two additional months for notification purposes, we expect that the first decisions concerning gatekeeper designations will be issued in September 2023.The Digital Markets Act is part of a broader pact of new regulations drafted by the European Commission for all digital services as well as social media, online marketplaces and other platforms operating in the European Union. The other part of this pact is the "**Digital Service Act**" ( (EU) 2022/2065 of 19 October 2022), an EU-wide applicable regulation that aims to better protect consumers and their fundamental rights online, to create a powerful and clear transparency and accountability framework for online platforms and to promote innovation, growth and competitiveness in the internal market. On 25 April 2023, the European Commission adopted the first designation decisions under the Digital Services Act. The designated companies being so-called "Very Large Online Platforms" include – among others – YouToube, Google, TikTok, Amazon Store, Facebook and Instagram, all of which must fully comply with the special obligations imposed by the Digital Services Act by 25 August 2023.

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