

# The Digital Markets Act: A Bird's-Eye View of a Competition Law Lost Child

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A photograph of a grand architectural detail from a university building. The image shows a large, ornate archway with intricate white carvings and a golden border. At the top of the arch, there is a golden relief sculpture depicting a figure holding a shield. Below the arch, the Latin inscription 'EN DVLCIS PATRIÆ SPEM LAVRV CINGAT VT IPSE' is carved into the stone. The background is a light, neutral color, and a large purple diagonal shape is overlaid on the bottom left corner of the image.

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# I. Introduction



# I. Introduction

- ▶ Regulation (EU) 2022/1955 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
- ▶ In short: The Digital Markets Act (DMA)
  - › Proposed in December 2020
  - › Adopted in September 2022
  - › Entered into force in November 2022
  - › Applicable on May 2<sup>nd</sup>, 2023



# I. Introduction

- I. Introduction
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## II. Legal Basis



## II. Legal Basis

- ▶ Article 114 TFEU
  - › Promotes the functioning of the internal market
  - › Prevent the regulatory fragmentation of the internal market
- ▶ Regulation governing competition in digital markets
  - › But is not a competition law regulation
    - » Vestager: the DMA is “not a competition law instrument” (2021)
  - › If so, probably 103 TFEU
  - › Yet, DMA and competition law cannot be completely disconnected
  - › Hence, the lost child



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### III. The Scope of the DMA

Core Platform Service – Gatekeepers

# The Scope of the DMA – Core platform service



- Governing the behaviour of gatekeepers (art. 2(1)) of core platform service (art. 2(2))

Core platform service	Definition	Example
Online intermediation services	Art. 2(2) Reg. 2019/1150	Apple's App Store
Online search engines	Art. 2(5) Reg. 2019/1150	Google search
Online social networking services	Art. 2(7) DMA	Facebook
Video-sharing platform services	Art. 1(1)(aa) Directive 2020/13/EU	YouTube
Number-independent interpersonal communication services	Art. 2(7) Directive 2018/1972	WhatsApp
Operating systems	Art. 2(10) DMA	iOS
Web Browsers	Art. 2(11) DMA	Google Chrome
Virtual assistants	Art. 2(12) DMA	Alexa
Cloud computing services	Art. 4(19) Directive 2016/1148	Amazon Web Services
Online advertising services	Art. 2(2)(j) DMA	Google Ads



# The Scope of the DMA – Core platform service



- ▶ Why these 10? (Recital 13 and 14 DMA)
  - › Weak contestability
  - › Unfair practice
- ▶ Widespread if:
  - › Intermediation between business users and end users
  - › Network effects
  - › Economies of scale
  - › High switching cost
- ▶ The chosen sectors exhibit these characteristics

# The Scope of the DMA – Gatekeepers



- ▶ DMA only applies to gatekeepers, *i.e.* (art. 3(1)):
  - › It has a significant impact on the internal market (art. 3(1)(a)); presumed if (art. 3(2)(a)):
    - » Union turnover  $\geq$  EUR 7.5 billion in each of the last three financial years; or average market capitalisation or equivalent fair market value  $\geq$  EUR 75 billion in the last financial year
    - » It provides the same core platform service in at least three Member States
  - › It provides a core platform service which is an important gateway for business users to reach end users (art 3(1)(b)); presumed if (art. 3(2)(b)):
    - » Provides a core platform service that (in the last financial year) has at least 45 million monthly active EU end users and 10,000 yearly active EU business users
  - › It enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future (art. 3(1)(c)); presumed if:
    - » The threshold of monthly active EU users and yearly active EU business users were met in each of the last three financial years

# The Scope of the DMA – Gatekeepers



- ▶ If this is the case:
  - › Notification to the EC (art. 3(3))
  - › Then, designation of the undertaking as gatekeeper by the EC in 45 days (art. 3(4))
  - › Regular review of these conditions (art. 4)
  - › The EC lists in the designation decision the core platform service defined as gateways (art. 3(9))
- ▶ Anti-circumvention mechanism (art. 13)
- ▶ *Caveat*: “The Commission shall designate as a gatekeeper, in accordance with the procedure laid down in Article 17, any undertaking providing core platform services that meets each of the requirements of paragraph 1 of this Article, but does not satisfy each of the thresholds in paragraph 2 of this Article” (art. 3(8), §1<sup>st</sup>)

# The Scope of the DMA – Gatekeepers



- ▶ *Caveat* (continuation) (art. 3(8), §2<sup>nd</sup>): “For that purpose, the Commission shall take into account some or all of the following elements, insofar as they are relevant for the undertaking providing core platform services under consideration:
  - a) the size, including turnover and market capitalisation, operations and position of that undertaking;
  - b) the number of business users using the core platform service to reach end users and the number of end users;
  - c) network effects and data driven advantages, in particular in relation to that undertaking’s access to, and collection of, personal data and non-personal data or analytics capabilities;
  - d) any scale and scope effects from which the undertaking benefits, including with regard to data, and, where relevant, to its activities outside the Union;
  - e) business user or end user lock-in, including switching costs and behavioural bias reducing the ability of business users and end users to switch or multi-home;
  - f) a conglomerate corporate structure or vertical integration of that undertaking, for instance enabling that undertaking to cross subsidise, to combine data from different sources or to leverage its position; or
  - g) other structural business or service characteristics”

A photograph of a classical building facade, likely the University of Liège. The image shows a large archway with a Latin inscription. Above the arch is a golden coat of arms. Below the arch is a relief sculpture. The image is partially overlaid by a purple geometric shape in the bottom-left corner and a white geometric shape in the bottom-right corner.

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## IV. The Objectives of the DMA



## IV. The Objectives of the DMA

- ▶ “Although Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) apply to the conduct of gatekeepers, the scope of those provisions is limited to certain instances of market power, for example dominance on specific markets and of anti-competitive behaviour, and enforcement occurs *ex post* and requires an extensive investigation of often very complex facts on a case by case basis. Moreover, existing Union law does not address, or does not address effectively, the challenges to the effective functioning of the internal market posed by the conduct of gatekeepers that are not necessarily dominant in competition-law terms” (Recital 5)



## IV. The Objectives of the DMA

- ▶ “This Regulation pursues an objective that is *complementary* to, but *different* from that of protecting undistorted competition *on any given market* (...), which is to ensure that *markets where gatekeepers are present* remain *contestable* and *fair*, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market” (recital 11)

	Competition Law	DMA
Who?	Any undertaking	Gatekeeper
Where?	Any given market	Markets where gatekeepers are present
What?	<i>e.g.</i> Undistorted competition	Fairness and contestability



## IV. The Objectives of the DMA

- ▶ Contestability: “ability of an undertaking to effectively overcome barriers to entry and expansion and challenge gatekeeper on the merits of their products and services” (Recital 32)
- ▶ Unfairness: “imbalance between the rights and obligations of business users where the gatekeepers obtains a disproportionate advantage” that prevents business users “to adequately capture the benefits resulting from their innovative or other efforts” (Recital 33)
  - › Due to gateway position and superior bargaining power of gatekeepers
- ▶ Intertwining of these objectives: low contestability allows gatekeepers to engage in unfair practices that, in turn, reduce the possibility of business users to contest gatekeepers’ position (recital 34)



# IV. The Objectives of the DMA



## ► Competition law and DMA: different objectives?

Objectives of the DMA	Text of the DMA	Text of competition law
Contestability	“ability of an undertaking to effectively <i>overcome barriers to entry</i> and expansion and <i>challenge gatekeeper on the merits</i> of their products and services” (recital 32)	“effective enforcement of article 101 and 102 TFEU is necessary to ensure (...) more open competitive markets un the Union, in which undertakings <i>compete more on their merits</i> and <i>without company-erected barriers to market entry</i> ” (ECN+ Directive)
Fairness	“Due to their gateway position and <i>superior bargaining power</i> , it is possible that gatekeepers engage in behaviour that does not allow others to capture fully the benefits of their own contributions, and <i>unilaterally set unbalanced conditions</i> for the use of their core platform services” (recital 33)	An abuse of a dominant position “may, in particular, consist in directly or indirectly imposing unfair purchase or selling prices or other <i>unfair trading conditions</i> ” (art. 102(a) TFEU)
Integration of the internal market	See legal basis	See <i>Consten and Grundig v Commission</i> (1966)



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## V. The Obligations of the DMA



# V. The Obligations of the DMA

- ▶ No case-by-case assessment under the DMA:
- ▶ *Per se* prohibitions and obligations (list of do and don't):
- ▶ If an undertaking is designated as a gatekeeper, then it *shall not*:
  - › “require end users to use, or business users to use, to offer, or to interoperate with, an identification service, a web browser engine or a payment service, or technical services that support the provision of payment services, such as payment systems for in-app purchases, of that gatekeeper in the context of services provided by the business users using that gatekeeper’s core platform services” (art. 5(7))

# V. The Obligations of the DMA



- ▶ On the contrary, there are interoperability obligations on gatekeeper
- ▶ The gatekeeper “shall make the basic functionalities of its number-independent interpersonal communications services interoperable with the number-independent interpersonal communications services of another provider offering or intending to offer such services in the Union, by providing the necessary technical interfaces or similar solutions that facilitate interoperability, upon request, and free of charge” (art. 7(1))



## V. The Obligations of the DMA

- ▶ The gatekeeper has to report to the EC how it has implemented the measure to ensure compliance with its obligations within 6 months after its designation as gatekeeper (art. 11(1))
- ▶ The EC may adopt delegated act to keep obligations up-to-date (art. 12)
  - › Delegated act based on a market investigation (art. 19)
  - › Ambition to be future-proof



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## VII. Enforcement and Sanctions

# VII. Enforcement and Sanctions



Enforcement powers	DMA	Regulation 1/2003
To carry out market investigation	Articles 16-19	Article 17
To request for information	Article 21	Article 18
To perform interviews	Article 22	Article 19
To conduct inspections	Article 23	Article 20

Sanction	DMA	Regulation 1/2003
Possibility to adopt interim measures	Article 24	Article 8
Fines	Article 30	Article 23
Periodic penalty payments	Article 31	Article 24

A photograph of a classical building facade, likely a university building, showing a large archway with Latin inscriptions and a coat of arms. The scene is partially obscured by a purple geometric overlay in the bottom-left corner.

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VII. Ne Bis In Idem





## VII. Ne Bis In Idem

- ▶ “Since this Regulation aims to complement the enforcement of competition law, it should apply without prejudice to Articles 101 and 102 TFEU, to the corresponding national competition rules and to other national competition rules regarding unilateral conduct that are based on an individualised assessment of market positions and behaviour” (Recital 10)
- ▶ Upshot? An undertaking designated as a gatekeeper could be subject to proceedings under the DMA and competition law for *the same conduct*



# VII. Ne Bis In Idem

## ► *Bis?*

- › EC's competition law proceedings vs EC's DMA?
- › National competition law proceedings vs EC's DMA?

## ► *Idem?*

- › Same offender: easy to assess
- › Same offence: the facts must be identical (*Nordzucker* § 38)
  - » Same territory?
  - » Same relevant product market?
  - » Same period?

# VII. Ne Bis In Idem



- ▶ Assuming the *idem* condition is satisfied
- ▶ Bpost v. Autorité Belge de la Concurrence (2022)
  - › Does the law provides the possibility of duplicating proceedings?
    - » “Without any prejudice” (art. 1(6))
  - › Does the possibility of duplicating proceedings respect the essence of the rights and freedoms affected? (same objectives?)
    - » In theory, different objectives
    - » In practice, not clear at all
  - › Are the duplicated proceedings proportionate?
    - » This will depend on the coordination between MS and EC



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## VIII. Conclusion

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- ▶ DMA prevents undertakings designated as gatekeepers to engage in some behaviours deemed to decrease contestability and fairness in some markets
- ▶ DMA is not competition law
- ▶ DMA is supposed to be a complementary regulation to competition law
- ▶ DMA might trigger a *ne bis in idem* problem



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## IX. Further Readings

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- ▶ P. Bongartz, S. Langenstein, R. Podszun, “The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers”, *Journal of European Consumer and Market Law*, Vol. 10, No. 2, 2021, pp. 60-67.
- ▶ F. Chirico, “Digital Markets Act: A Regulatory Perspective”, *Journal of European Competition Law & Practice*, Vol. 12, No. 7, 2021, pp. 493-499.
- ▶ P. Larouche and A. de Streel, “The European Digital Markets Act: A Revolution Grounded on Traditions”, *Journal of European Competition Law & Practice*, Vol. 12, No. 7, 2021, pp. 542-560.



## IX. Further Readings

- ▶ B. Beems, “The DMA in the broader regulatory landscape of the EU: an institutional perspective”, European Competition Journal, published online 10 October 2022, [doi.org/10.1080/17441056.2022.2129766](https://doi.org/10.1080/17441056.2022.2129766)
- ▶ A. Ribera Martinez, “An inverse analysis of the digital markets act: applying the Ne bis in idem principle to enforcement”, European Competition Journal, published online 15 December 2022, [doi.org/10.1080/17441056.2022.2156729](https://doi.org/10.1080/17441056.2022.2156729)
- ▶ K. Bania, “Fitting the Digital Markets Act in the existing legal framework: the myth of the ‘without prejudice’ clause”, European Competition Journal, published online 15 December 2022, [doi.org/10.1080/17441056.2022.2156730](https://doi.org/10.1080/17441056.2022.2156730)



# IX. Further Readings



- ▶ J. van den Boom, “What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws”, European Competition Journal, published online 28 December 2022, [doi.org/10.1080/17441056.2022.2156728](https://doi.org/10.1080/17441056.2022.2156728)
- ▶ A. Strowel and W. Vergote, “Digital Platforms: To Regulate or Not To Regulate – Message to regulators: Fix the Economics First, Then Focus on the Right Regulation”, available at [https://ec.europa.eu/information\\_society/newsroom/image/document/2016-7/uclouvain\\_et\\_universit\\_saint\\_louis\\_14044.pdf](https://ec.europa.eu/information_society/newsroom/image/document/2016-7/uclouvain_et_universit_saint_louis_14044.pdf) (*ante* DMA).



## IX. Further Readings

- ▶ A. de Streel (coord.), *The European Proposal for a Digital Markets Act: A First Assessment*, Centre on Regulation in Europe (CERRE), January 2021, available at [https://cerre.eu/wp-content/uploads/2021/01/CERRE\\_Digital-Markets-Act\\_a-first-assessment\\_January2021.pdf](https://cerre.eu/wp-content/uploads/2021/01/CERRE_Digital-Markets-Act_a-first-assessment_January2021.pdf)



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