

## DIGITAL MARKETS ACT: EU REGULATION OF ONLINE GATEKEEPERS REMAINS ON TRACK FOR ADOPTION IN FIRST HALF OF 2022

In December 2020, the European Commission (**Commission**) proposed new legislation to regulate digital platforms, the Digital Markets Act (**DMA**). After a year of debate, the European Parliament (**Parliament**) adopted its amendments at a plenary session on 15 December 2021. That follows the Council of the European Union (**Council**) having adopted its amendments to the Commission's proposal (**Commission proposal**) on 25 November 2021. The amendments demonstrate a remarkable consensus that has emerged in the institutions, and these texts will serve as the basis for "trilogue" negotiations between the Parliament, the Council and the Commission, planned to start in January 2022.

As outlined below, despite some divergences, the institutions remain largely aligned. The draft DMA has escaped the first round of legislative negotiations largely unscathed. At this stage it is difficult to predict which amendments will find their way into the final text, but those topics on which the Parliament and the Council are already aligned are likely to survive the final negotiations. Overall, Parliament has proposed more changes to the Commission's proposal than the Council and is seeking to go further than the Commission's proposal in trying to reign in the power of gatekeeper digital companies, whereas the Council's proposal is closer to the Commission's original text.

Questions about the Commission proposal's legal basis raised following its issuance do not appear to present a serious concern for the institutions, paving the way for its adoption. As a result, agreement on a final text in the first half of 2022 under the French Presidency of the Council, as originally planned, remains realistic, with the prospect that the DMA could apply before the end of 2022.

### Key issues

- The European Parliament and Council recently voted on the European Commission's proposal for a new Digital Markets Act (DMA) and both approved similar changes.
- According to the Parliament, the scope of the proposal should be both narrowed - by increasing the thresholds of application of the DMA and thereby capturing fewer companies - and expanded - by including additional types of services subject to its obligations (web browsers, virtual assistants and connected TVs).
- Council and Parliament agree on shortening the timelines for compliance, as well as extending the timeline for the designation of gatekeeper status.
- Parliament wants new obligations to be imposed on gatekeepers, including on parity clauses, pre-installed applications, interoperability, online advertising and the notification of transactions.
- Council and Parliament confirm the Commission as sole enforcer of the DMA, but want a bigger role for national authorities.
- Parliament proposes higher fines and a merger restriction in cases of systematic non-compliance.
- Council and Parliament will now enter "trilogue" negotiations with the Commission to hammer out a final joint text.
- Adoption of a final text in the first half of 2022 and application by the end of 2022 remains realistic, with designation and compliance following in the first half of 2023.

## **Analysis of main changes proposed by the Parliament and Council**

### **Addition of three activities to the list of core platform services by the Parliament**

The DMA will apply only to digital “gatekeepers” who provide at least one core platform service. The Commission’s initial proposal set out a list of eight 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; cloud services; and advertising services. Parliament’s amendments expand the list to include: (i) web browsers; (ii) virtual assistants and (iii) connected TVs.

### **Changes to the process for designating gatekeepers**

#### **Quantitative thresholds increased**

The DMA is intended to regulate companies designated as digital “gatekeepers”. A company will be considered a gatekeeper if three quantitative thresholds are met (Article 3(2)). Under the Council’s proposal these thresholds are not amended, but the Parliament does propose changes:

- *Significant impact on the internal market:* The Parliament’s amendments would increase the turnover and market cap that a company needs to meet to be presumed a gatekeeper to €8 billion of EEA turnover in the last three financial years (from the Commission’s proposed €6.5 billion) or at least EUR 80 billion market cap (up from the Commission’s proposed EUR 65 billion) in the last financial year and provides a core platform service in at least three EU Member States (unchanged from the Commission’s proposal).
- *Providing a “gateway” core platform service:* The Parliament proposes to specify that a core platform service is an important gateway for business users *and end users* to reach *other* end users, taking into account users located in the EEA (and not just the EU). This amendment would bring into the scope of the DMA consumer to consumer services, such as WhatsApp. A new annex, proposed by both the Parliament and Council, sets out the methodology for calculating the number of end users and business users.
- *Entrenched and durable position on the market:* Pursuant to the Parliament’s proposal this criterion would be met if the thresholds of 45 million monthly end users in the EEA and 10,000 yearly business users in the EEA are reached in each of the last two (rather than three) financial years.

The increased thresholds would ensure that only the largest digital companies are caught. However, the Parliament finally abandoned the idea of limiting the DMA to only those gatekeepers that provide two or more core platform services. Under the proposals of all three institutions the provision of one core platform service will be sufficient to qualify as a gatekeeper under the DMA.

#### **Rebuttal of the presumption**

Both the Council and the Parliament seek to restrict the possibility for an operator of a core platform service that meets the quantitative thresholds to rebut the gatekeeper

presumption (Article 3(4)). Under the Council's proposed amendments, the presumed gatekeeper would need to demonstrate that in the circumstances in which it operates, it "*exceptionally*" does not satisfy the conditions to be designated as a gatekeeper. Recital 23 of the Parliament's amendments contains similar language.

### Shortening of timelines for gatekeepers to comply with the obligations imposed by the DMA

Both Parliament's and Council's amendments would shorten the deadline for gatekeepers to inform the Commission of meeting the thresholds from three to two months (Article 3(3)). In addition, the periodic review of gatekeeper status would take place at longer intervals (Article 4(2)). The Parliament proposes that the status be reviewed every three years, while the Council sets the review at every four years (against two initially proposed by the Commission).

Moreover, the Parliament's amendments would shorten the deadline for compliance with the obligations laid down in Articles 5 and 6, requiring gatekeepers to comply with the DMA "*as soon as possible*" and "*no later than four months*" (instead of the initially proposed six) after designation (Article 3(8)).

Finally, the Parliament proposes to shorten the deadline for the application of the DMA to two months after its entry into force (instead of six under the Commission proposal) (Article 39(2)).

If adopted, these shorter deadlines will put a considerable burden on gatekeepers to ensure timely implementation, as they might be required to comply with obligations in the first half of 2023.

### Expansion (and refining) of the list of Do's and Don'ts

Articles 5 and 6 of the Commission's DMA proposal provide for 18 obligations and prohibitions on gatekeepers. As expected, the Council and (primarily) Parliament proposed to expand the already long list to 22 obligations and prohibitions. It also appears that despite evidently targeting companies with different business models, all obligations will apply to all gatekeepers without tailoring to specific circumstances of an individual gatekeeper.

The key amendments are:

- **Narrow parity (i.e., most-favoured-nation) clauses are prohibited (Article 5(b)):** The Parliament's proposal would require gatekeepers to refrain from restricting business users' freedom to apply more favourable sales conditions not just on other platforms competing with the gatekeeper's platform (wide parity), but also on the business user's direct online sales channel (narrow parity).
- **Tying of core platform services and ancillary services is prohibited (Article 5(e)):** The Commission's proposal prohibited gatekeepers from tying the gatekeeper core platform service with the gatekeepers' identification service. The amendments from Parliament extend this obligation to prohibit tying of a core platform service with an identification service "*or any other ancillary service of the gatekeeper*". This would, among others, also include payment services, in-app payment systems, parcel delivery and freight transport, which the Parliament

proposes to add to the definition of ancillary services (Article 2(14)). The Council's proposal is less ambitious; the prohibition of tying would only be limited to identification and payment services.

- **Tougher regulation on the use of pre-installed applications and default settings (Article 5(gb)):** At the last minute, following an amendment proposed by the European Parliament's Committee on Economic and Monetary Affairs (**ECOM**), the Parliament amended the obligation to allow end users to un-install any pre-installed software applications on a core platform service. Gatekeepers would be obliged to provide users with a choice screen the first time they open any of the pre-installed services and offer the option of changing the default settings.
- **Prohibition of self-preferencing expanded beyond ranking (Article 6(1)(d)):** According to the Commission's proposal, which the Council also follows, gatekeepers would be prohibited from treating more favourably in ranking their products and services compared to those provided by third parties. Under the Parliament's proposal, the prohibition of self-preferencing would not be limited only to more favourable ranking but also to other settings.
- **Interoperability and interconnection obligations are expanded (Article 6(1)(f)):** The Commission's proposal introduced obligations on gatekeeper operating systems to provide business users and ancillary service providers with access to the same hardware and software interoperability as the gatekeeper's own ancillary services. The Parliament proposes to expand that obligation to ensure all business users, providers of services and providers of hardware have the same interoperability available as the gatekeeper's services and hardware, free of charge.  
  
The Parliament would also require gatekeepers to provide interconnection between their own social network services and number independent interpersonal communication services (such as Facebook Messenger) and those of rival providers (Article 6(1)(fa) and (fb)).
- **Business users should be given access to gatekeeper's core platform services on FRAND terms and without self-preferencing (Article 6(1)(k)):** The Commission and the Council texts both foresee the obligation for gatekeepers to ensure fair, "*reasonable*" (added by Council) and non-discriminatory access to gatekeepers' app stores, i.e., access based on so-called FRAND terms. The Parliament, however, proposes to extend this obligation beyond app stores and into all core platform services. Moreover, the conditions of access to these services should not be less favourable than the conditions applied to the gatekeeper's own service.
- **Online advertising:** The Parliament has introduced various changes to the obligations and prohibitions regarding online advertising:
  - Article 5(g): Under the Commission's proposal, gatekeepers were obliged to provide advertisers and publishers to which they supply (digital) advertising services with information concerning the price paid by the advertiser and publisher as well as the remuneration paid to the publisher. The Parliament proposes to expand the information obligation by requiring gatekeepers to also provide information on pricing mechanisms and conditions as well as (aggregated and non-aggregated) performance data.

- Article 6(1)(aa): The Parliament’s proposal has introduced new advertising-related prohibitions under Article 6. Gatekeepers must not use personal data of adults for targeted advertising when no clear, explicit, renewed and informed consent has been given. Importantly, the Parliament would ban targeted advertising by gatekeepers to minors altogether.

The Parliament has also proposed to strengthen the DMA’s anticircumvention provision. Under the amended Article 11(3), a gatekeeper shall not degrade the conditions or quality of any of the core platform services provided to business users or end users who avail themselves of the rights or choices laid down in Articles 5 and 6, or make the exercise of those rights or choices unduly difficult, *including by offering choices to the end user in a non-neutral manner, or by subverting user’s autonomy, decision-making, or choice via the structure, design, function or manner of operation of a user interface or a part thereof.*

#### **Extension of the notification requirements in relation to concentrations**

Under Article 12 of the Commission’s proposal, gatekeepers must inform the Commission (pre-closing) of any M&A activity involving another provider of a core platform service or of any other services provided in the digital sector. The Council’s proposal adds that the notification should also include the description of the undertakings concerned, their activities, a summary of the concentration, and a list of the Member States concerned by the operation.

The Parliament, on the other hand, proposes to expand the notification obligation to any intended concentration, irrespective of whether it is in the digital sector. A proposal from the Parliament’s ECON that gatekeepers be required to provide evidence that the intended concentration would not endanger the contestability of the relevant markets was however rejected.

Both the Parliament and Council propose that the Commission must inform the Member States of all such notifications. The Parliament explicitly adds that the competent national authorities can use the information received to request that the Commission examine the concentration pursuant to Article 22 of the Merger Regulation (Article 12(3a)). This clarification ties into the Commission’s controversial new [guidance](#) on referrals under Article 22 of the Merger Regulation published in April 2021 - see our [briefing](#) on the Commission’s guidance. The changed approach would enable Member States to refer concentrations falling below national thresholds to the Commission although it is worth noting that this is currently under review by the Court of Justice of the EU (case *Illumina v. Commission* [T-227/21](#)).

If adopted, these amendments could further expand Member States’ application of the new referral mechanism, as they would enhance the awareness of Member States of all intended concentrations by gatekeepers and thus increase the ability of these Member States to refer such concentrations under Article 22. The change could thereby bring so-called “killer acquisitions” by gatekeepers within the scope of the Merger Regulation through the backdoor.

### **Increase in the role of the Member States**

Under the Commission's proposal, enforcement of the DMA would rest solely in the hands of the Commission. However, over the course of the past year there have been several public calls from national competition authorities (**NCAs**) to play a bigger role in the enforcement of the DMA, which the Council and Parliament echo in their proposed amendments.

### **National competition authorities provide support to the Commission**

The Council and Parliament would retain the Commission as the sole enforcer of the DMA. However, both institutions envisage a bigger role for NCAs or other competent authorities designated by the Member States. They are entrusted with supporting the Commission in monitoring compliance with and enforcement of the obligations laid out in the DMA (Parliamentary proposal Article 31c(1) and Council proposal Article 24(2)).

To this end, NCAs or other competent authorities are given information-gathering powers (Article 20). The Council also envisages the possibility for the national authorities to assist with conducting on-site inspections (Article 21(2)).

### **Private complaints**

The Parliament has proposed adding a new mechanism for third-party complaints, which was missing from the Commission's proposal (Article 24a). This mechanism would enable any person with a legitimate interest to complain about any practice of a gatekeeper that falls within the scope of the DMA. Those complaints would be directed to the national competent authorities who would assess and report them to the Commission. The Commission would then examine whether there are reasonable grounds to open proceedings.

### **Cooperation and coordination**

The proposals of the Parliament (Article 31d) and Council (Article 32a) are closely aligned with regards to cooperation and coordination between the Commission and the Member States. They envisage that the Commission and the Member States work in close cooperation in order to coordinate enforcement actions.

The Council's proposal includes the possibility for NCAs or other competent authorities to conduct an investigation into a case of possible non-compliance with Articles 5 and 6 of the DMA at their own initiative. They would, however, be required to inform the Commission before taking any formal investigative measures. At the end of its investigation, the national authorities would not be empowered to adopt any enforcement decision. The Commission would also have the possibility to relieve the national authority of its investigation should it wish to conduct its own.

### **European High-Level Group of Digital Regulators**

The Commission's proposal established a Digital Markets Advisory Committee (**DMAC**) (Article 32), tasked with delivering opinions on individual decisions of the Commission. The Council and the Parliament propose to retain this DMAC. However, the Parliament also envisages the creation of a European High-Level Group of Digital Regulators (Article 31a). This expert group would consist of a Commission representative, as well as representatives of the NCAs. Its role would be to assist the Commission by means of advice, expertise and recommendations.

### **Instruction powers of the Member States**

Under the Commission proposal, three or more Member States could ask the Commission to open a procedure for the designation of gatekeeper status (Article 33). The Commission would then need to assess whether there are grounds to open an investigation. The Council and Parliament have proposed to expand this instruction power.

Under the Parliament's amendments, *two* NCAs or other competent authorities would be able to make a request to the Commission. Additionally, these national authorities would not only be able to request an investigation into the designation of gatekeeper status but also request that the Commission investigate situations of non-compliance as well as systematic non-compliance.

The Council amendments still require at least three Member States to make a request to the Commission, but also envisage the possibility to make a request for the designation of gatekeeper status and in instances of systematic non-compliance.

### **Increase in the penalties for non-compliance**

Following the Parliament's proposal, undertakings can expect tougher penalties and fines in situations of non-compliance with the DMA. The Council, on the other hand, left the non-compliance provisions largely untouched.

### **Obligation to establish compliance function**

First of all, under the Parliament's text, gatekeepers would be required to establish an internal compliance function with sufficient authority, stature and resources (Article 24b).

### **Fine increases**

Secondly, the Parliament proposes to empower the Commission to impose fines for non-compliance of up to 20% of total worldwide turnover. The Parliament is also proposing to introduce a *minimum* threshold for fines for non-compliance at 4% of the gatekeeper's worldwide total turnover, for deterrence purposes. Under the original proposal, the Commission could impose on a gatekeeper fines up to a maximum of 10% of its total turnover in the preceding financial year (Article 26(1)).

The setting of a 4% floor for fines, defined by reference to worldwide turnover, would be a novelty in competition enforcement. Some will see this addition as a confirmation of an arms race between competition regulators globally as to who is toughest on big technology companies. The proposal must of course survive the trilogue negotiations but, if adopted, would raise fundamental questions of proportionality in setting fines.

### **Systematic non-compliance**

The Commission's proposal foresaw the possibility of imposing structural remedies on a gatekeeper that had systematically infringed the obligations laid down in Articles 5 and 6. Such remedies would need to be necessary and proportionate (Article 16).

The Parliament's proposal goes further: systematic non-compliance could result in structural remedies irrespective of whether an equally effective behavioural remedy exists, and could also be sanctioned by a temporary merger ban.

The threshold for a finding of systematic non-compliance has also been lowered by the Parliament. Under the Parliament's proposal two non-compliance decisions within a ten-year period would be sufficient for a finding that non-compliance is systematic.

### **Next steps**

The Commission, Parliament and Council will meet in January 2022 to debate their three versions of the DMA.

France has made it a priority of its Presidency of the Council to reach an agreement on the DMA during its six months at the helm. Because there appears to be a political consensus, we expect agreement to be reached in the first half of 2022. The final text would then be published in the Official Journal of the EU and could apply as early as the end of 2022.

While the DMA undoubtedly marks a significant change for companies that will be designated as gatekeepers, its precise impact on digital markets will depend on how it is enforced by the Commission. It also remains to be seen what influence the DMA will have on the application of competition law by the Commission and NCAs in the tech sector.



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