

DMA - AN OPPORTUNITY FOR SMALL PLATFORMS
OR A CHALLENGE FOR EUROPEAN LEGISLATION AND
LARGE PLATFORMS?

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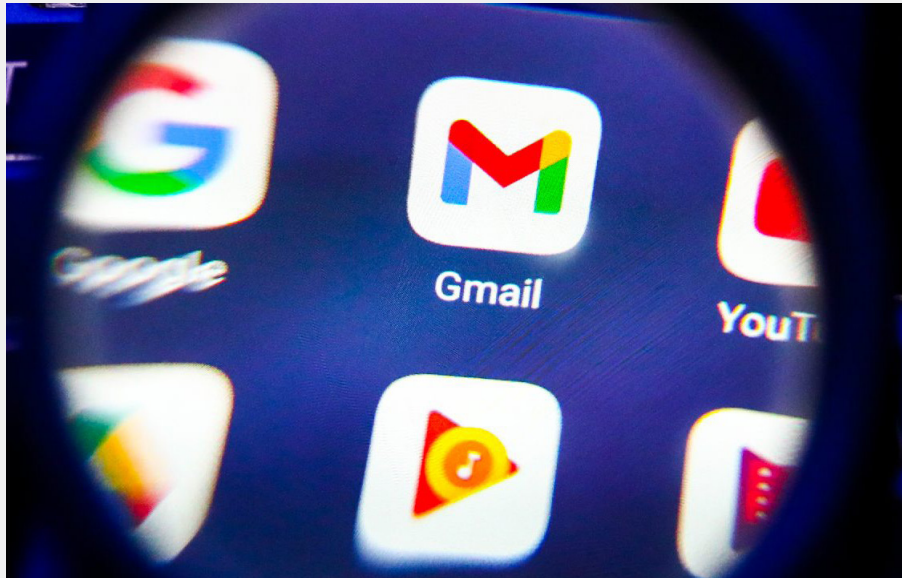
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The fact that the last 20 years have been marked by the expansion of digital markets has undoubtedly contributed to the “enthronement” of leading companies in dominant positions all over the planet, created issues of effective competition enforcement regulations and the obvious need for more comprehensive and better regulation of the markets themselves.

The applicable regulations of the European Union (EU) have not proven to be effective instruments for the complex challenges of the modern age and the European Commission (Commission), being EU's executive body, had to take certain radical steps towards proposals concerning both the creation of new and the modernization of existing regulations to create adequate answers to the hasty evolution of the digital world.

The Digital Markets Act, i.e. Regulation (EU) 2022/1925 on competitive and fair markets in the digital sector and amending Directives EU 2019/1937 and EU 2020/1828 (DMA) represents the embodiment of all the Commission's efforts in this sphere and after less than three years of consideration, the DMA will enter into force on 1 November 2022. However, its application will be postponed until 2 May 2023.

This six-month, so-called transition period should enable the harmonization of the operations of all leading companies with DMA's provisions and during its term, the Commission will not perform any actions contained in DMA's provisions.

Before stepping into a more detailed analysis of the most important DMA's provisions, it is important to note that ratio legis is given in the very introduction of the Commission's proposal, where, among other things, is stated that digital services in general, and online platforms in particular, play an increasingly important role in the economy, providing new business opportunities in EU and facilitating cross-border trade.

Precisely, the characteristics of digital services such as almost zero marginal costs for adding business or end users, strong network effects, the possibility of connecting a large number of business users with many end users, a significant degree of dependence among users, lock-in effects, etc. in combination with the unfair conduct of service providers can lead to a significant undermining and challenging of the core services of a certain platform as well as to endangering the fairness of the commercial relationship between the providers of such services and their business users and end users, a rapid and far-reaching reduction in the choice of business users and end users in practice, and finally, the provider of those services can be put in a privileged position of the so-called Gatekeeper.

DMA aims to prevent the world's leading companies in the world of the IT industry from abusing their dominant position by imposing mandatory required behaviours that will guarantee the establishment of an open market.

Some of the most common core platform services provided by Gatekeepers are online intermediation services (Apple's Play Store or Google Play), online advertising services (Google ads), social network services (Facebook), the so-called online markets, cloud computing services (Amazon Web Services), online search services (Google Search), video sharing platform services (YouTube, Daily Motion), communication services (WhatsApp), operating systems (Android, Windows, iOS), internet browser services (Google Chrome, Opera, Internet Explorer, etc.).

WHAT IS A GATEKEEPER?

For a particular entity to be considered a Gatekeeper in the sense of the provisions of DMA, it must meet the following conditions:

- has a significant impact on the internal market;
- is a provider of the core platform service, which is important for business users to reach the end users of the service;
- enjoys or in the future can be expected to enjoy an “entrenched and permanent position” in the market.

The seriousness of the Commission’s intention to regulate the digital market as adequately as possible is also reflected in the setting of additional, quantitative thresholds in order to facilitate the identification of a certain entity as a Gatekeeper.

A presumption of significant influence on the internal market exists if the entity achieves an annual turnover in the EU of at least EUR 7.5 billion in each of the last three financial years or if its global market value is at least EUR 75 billion in the last financial year and provides the same core platform services within at least three countries.

Furthermore, an entity is considered to provide core platform services important for the passage of business users to end users, if the core platform service has at least 45 million monthly active end users established or located in the EU and at least 10,000 active business users per year in the EU territory.

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Finally, an entity is deemed to enjoy or will enjoy an entrenched and permanent position in its business if its core platform services have achieved all aforementioned conditions for the last three financial years.

In the case of meeting the above-mentioned conditions and thresholds, the Gatekeeper is obliged to inform the Commission about it without delay, i.e. no later than within two months from the day when the thresholds were reached. To such an entity, unless it proves otherwise, the Commission grants Gatekeeper status, which will be evaluated every three years.

Gatekeepers' obligations and powers of the Commission

DMA stipulates a whole range of Gatekeeper's obligations, which can be divided into two large groups:

1. obligations and prohibitions that must be observed without exception (provided in Article 5 of DMA), whereof, among others, the most important are the following:
 - prohibition of combining personal data from the services with data collected through other services of the same Gatekeeper or a third party;
 - prohibiting business users from offering the same products or services to end users through third-party online intermediary services at prices and terms different from those offered by Gatekeeper;
 - prohibition of direct or indirect prevention of end users from initiating any protection procedures with the respective authorities; and
 - prohibition of requiring end users or business users to subscribe to, or register for any other service as a condition of accessing, registering, or using any of the Gatekeeper services.

2. obligations that are subject to further specification by the Commission (stipulated under Article 6 of the DMA), which also include:
 - the obligation to refrain from using any data that is not publicly available and that was generated by the activities of business users;
 - the obligation to allow end users to uninstall any pre-installed software applications on their underlying service without prejudice to Gatekeeper's ability to restrict such uninstallation with respect to software applications that are necessary for the operation of the operating system;
 - obligation to provide access to Gatekeeper's performance measurement tools and information needed by advertisers and publishers to perform their own independent verification of ad inventory to advertisers and publishers, at their request and free of charge, etc.

In addition to its status as the primary enforcer of the provisions of DMA, the Commission will also have a broad spectre of powers to sanction “unfair conduct” by Gatekeepers. If the entity, considered as Gatekeeper, does not comply with the obligations stipulated under DMA, the Commission is authorized to impose fines of up to 10% of the Gatekeeper's total turnover achieved in the previous financial year. Regardless of the imposed fines, the Commission may impose a new fine of up to 20% of the total worldwide turnover if the Gatekeeper repeatedly violates the same DMA obligation.

Additionally, if Gatekeeper continues to systematically violate DMA's provisions, the Commission may prohibit it from merging with other entities for a certain period.

Of course, the Commission also has several other powers such as ensuring compliance with DMA's provisions, requests for information, market studies, inspection supervision, and likewise.

CRITIQUES AND EXPECTATIONS

Despite the growing number of critiques directed at this regulation, with the main argument being “punishing the world’s most successful companies for their accomplishments”, DMA undoubtedly represents a rather ambitious and revolutionary undertaking designed with the aim of improving competition protection, establishing “fairer” market, and improving the consumers’ position as end-users of services.

Hence, can be perceived as a long-awaited and much-needed “step forward” when it comes to the modernization of European legislature in the sphere of digital business.

Of course, in the upcoming period, the Gatekeepers, smaller companies looking to join the race, as well as the end-users of services will come across all the practical consequences of DMA’s provisions implementation and will be able to form their own stance on whether DMA represents just another one in a series of EU legal utopias or a complete game-changer in the world of digital business regulation.

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