The Digital Markets Act is here. The journey to compliance begins.

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Introduction

On 12 October 2022, the Digital Markets Act (DMA) was published in the European Union's Official Journal. The DMA will come into force from 1 November 2022 and represents the EU's attempt to make the digital sector "**fairer and contestable**" and address some of the perceived limitations of existing EU competition law. It is a landmark piece of legislation and will result in a range of obligations being imposed on the world's largest digital platforms, labelled "**Gatekeepers**".

Whilst Gatekeepers will have until February 2024 to comply with the DMA's requirements, the list of prohibited practices and obligations will require them to undertake significant changes to their business operations.

In this article, we briefly set out the designation criteria for Gatekeepers, including the range of activities which will be covered by the legislation, known as **Core Platform Services** (CPSs). We then discuss some of the practical implications of the DMA on Gatekeepers, including the challenges of translating the DMA's obligations into business practices and the need to adopt a holistic approach to compliance which captures the interactions between legal, risk and product functions.

Who does the DMA apply to?

The DMA is only intended to directly apply to very large online platforms, so-called Gatekeepers. This designation status will apply to online platforms that provide a CPS (see box overleaf) and meet financial and usage quantitative thresholds, specifically:

- **EU-wide group turnover of €7.5bn** in each of the last 3 years; and
- **>45m monthly EU users, 10k business yearly** users in last 3 years.

Core Platform Services

- online intermediation services (e.g., online marketplaces, app stores);
- search engines;
- social networking services;
- video-sharing platform services;
- number-independent interpersonal electronic communication services (e.g., instant messaging services);
- operating systems;
- web browsers;
- virtual assistants;
- cloud computing services; and
- online advertising services provided by a company providing another CPS.

A firm can challenge its gatekeeper designation, but only a narrow set of arguments, which directly relate to the **quantitative thresholds**, will be considered.

By contrast, the European Commission (EC) can designate a platform as a Gatekeeper even if it does not meet all the above thresholds but operates a CPS and satisfies a set of qualitative conditions.

The competitive dynamics in these CPSs have already been explored by competition authorities, such as through the EC's past infringement decisions and the CMA's market studies into Online Platforms and Digital Advertising and Mobile Ecosystems.

Significant changes will be necessary

The obligations set out within the DMA will require Gatekeepers to undertake significant changes to their operations.

For instance, Gatekeepers may have to review and amend:

- **B2B contractual arrangements**: to ensure that all agreements with third parties exclude prohibited practices, such as exclusive dealing.
- **Terms of access:** to ensure that terms of access to certain CPSs are fair, reasonable and non-discriminatory (FRAND) and allow for effective interoperability. New processes for security checks may also be required.
- **Internal firewalls:** to prevent the combination or cross-use personal data from a CPS with personal data from other services without user consent.
- **Display of products or services**: to evidence the use of "fair and transparent" criteria when presenting other services or products to users.
- **Choice architecture:** online interfaces, including the presentation of choices, should be designed in a way that does not deceive or manipulate users' decision-making.

Furthermore, several Gatekeepers operate multiple CPSs so obligations will apply across a wide range of activities.

Some provisions are straightforward to interpret…

Several provisions within the DMA essentially codify practices which the EC considers to be anti-competitive and should be relatively straightforward to interpret. For example, the DMA prohibits both wide and narrow Most Favoured Nation (Parity) clauses as well as exclusive dealing clauses. For these provisions, the journey to compliance will mainly focus on the **business processes** and controls that are required to ensure ongoing compliance.

Firms captured under the DMA are – by their very nature – large and will already have established processes to comply with regulations that overlap, at least in part, with the DMA, including competition, consumer and data protection laws.

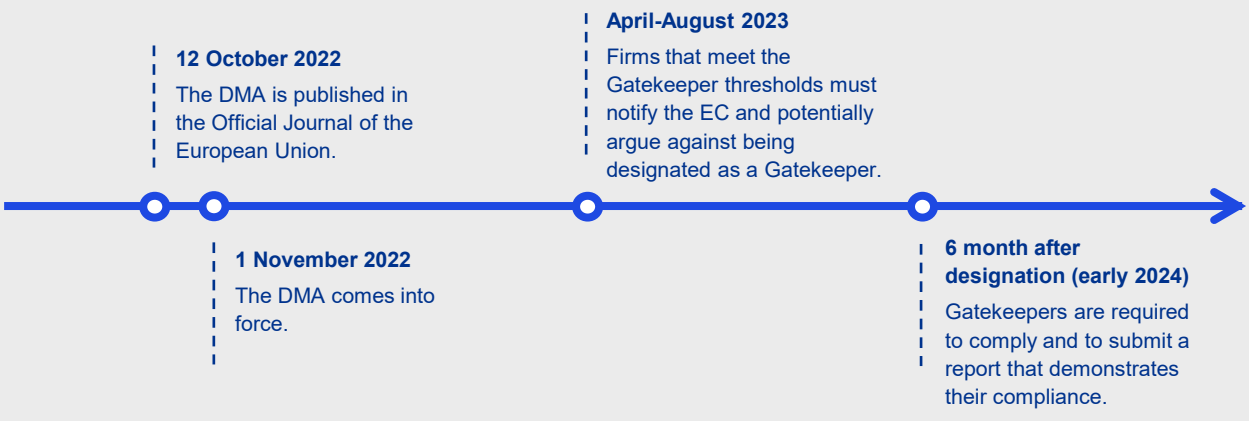
We therefore expect designated firms to build on and formalise existing processes in a way that ensures compliance across regulations without overburdening the business.

…others require a considerable amount of judgement

By contrast, some obligations under the DMA – particularly those in Article 6 – will involve greater judgement in their interpretation and subsequent translation into business practices. For instance:

- **Developing FRAND terms of access** – whilst FRAND commitments often form part of the standard-setting process, their usage in competition cases is less common. Determining an appropriate FRAND rate could involve complex and detailed economic and financial assessments. In addition to pricing considerations, access to relevant data and APIs, which can act as critical inputs in digital markets, are also likely to form part of any compliance assessment.
- **Developing objective criteria to avoid preferential treatment**, i.e. ensuring that Gatekeepers supply their business users on the same or equivalent terms as they do their own downstream services. Whilst "equal treatment" principles have been adopted in past remedial measures, such as in the *Google Shopping* case, they continue to be subject to scrutiny and criticisms, especially by rival firms, and could give rise to implementation and monitoring challenges.

DMA regulatory timeline



- **Ensuring that online interfaces do not deceive** or impair a user's ability to make informed decisions. While publications, such as the CMA's OCA discussion paper, provide useful guidance, platforms will ultimately need to determine their compliance with these principles. This area is particularly important in light of the provisions on user interfaces that will be coming into force as part of the Digital Services Act, the second key piece of EU legislation that is expected to be published by the end of 2022 and that will apply to platforms more widely.

Whilst the application of judgement will allow Gatekeepers more room for manoeuvre in adapting their business to the requirements, it also makes compliance more uncertain. Their risk processes will therefore need to reflect that uncertainty and proceed with an evidence-based approach. In addition to econometric and financial analyses, outcomes simulation and testing are likely to play a key role in the assessment of business practices.

Conclusions

The DMA is a major attempt by the EU to alter the competitive dynamics in digital markets.

It will have significant implications for the world's largest online platforms and could affect many of their key business practices. Legal, risk and product teams will need to work closely together and can treat this as an opportunity to refresh their risk framework by avoiding duplication when setting up controls and by identifying efficiencies in their risk functions.

Where the application of greater judgement is required, we expect the EC to request detailed information and analysis of Gatekeepers' business and data usage practices. The EC will have a dedicated division responsible for engaging with the detail and enforcing the new obligations. National competition authorities will also play an investigative role. Therefore, firms will need to undertake robust economic analysis and data analytics to evidence their arguments and inform their interactions with the competition authorities.

A pro-active approach to compliance would also allow Gatekeepers, as well as their competitors, to consider the interaction, overlap and possible diversions between the DMA's obligations and other regulations. Gatekeepers may find that adjusting their business globally results in a leaner operating model and prepares them for similar regulations outside of the EU.

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