On Topic

The complexity and practical challenges of implementing the new DMA

Ief Daems*

Abstract: While the DMA potentially brings predictability and leverage for companies and consumers interacting with large online platforms, it also raises a significant number of questions in terms of its application, scope and implementation. This article discusses which platforms the DMA applies to and what the consequences are of being designated as gatekeeper. It also assesses whether the DMA is as simple a tool as many hoped it would be.

Keywords: DMA, Digital Markets Act, enforcement, online platforms, gatekeeper

1. Introduction

With the Digital Markets Act (DMA), the European Union has sought to respond to political pressure and criticism that the European Commission's competition enforcement in the digital sector is too slow and often toothless. The DMA establishes a list of *ex ante* obligations that online platforms designated as 'gatekeepers' will need to comply with. The new legislation is expected to be published in the Official Journal in September or October of this year, and will apply as of March–April 2023.[1]

While the DMA potentially brings predictability and leverage for companies and consumers interacting with large online platforms, it also raises a significant number of questions in terms of its application, scope and implementation. This article discusses which platforms the DMA applies to and what the consequences are of being designated as gatekeeper. It also assesses whether the DMA is as simple a tool as many hoped it would be.

2. To whom does the DMA apply?

2.1. Qualitative gatekeeper designation criteria

The DMA will require the Commission to designate as 'gatekeepers' undertakings that: (i) have a significant impact on the internal market, (ii) provide a core platform service that is an important gateway for business users to reach end users,[2] and (iii) enjoy, or are predicted to enjoy in the near future, an entrenched and durable position in its operations.[3] These are the so-called *qualitative* gatekeeper designation criteria.

From a conceptual perspective, it is interesting to note that these qualitative gatekeeper designation criteria do not address all elements that Recital (1) DMA associates with the function of online platforms. Recital (1) DMA describes online platforms as 'enabling businesses to reach users throughout the Union, […] facilitating cross-border trade and […] opening entirely new business opportunities to a large number of companies in the Union to the benefit of consumers in the Union'. The qualitative gatekeeper designation criteria operationalize the first aspect of this description, i.e. 'reaching users', while arguably leaving aside the aspects of 'facilitating trade' and 'opening new business opportunities'. It is thus not required for a core platform service to generate business opportunities or form the basis of a commercial transaction to fall within the scope of the qualitative gatekeeper definition.

2.2. Quantitative presumption thresholds

In addition to the *qualitative* criteria, Article 3(2) DMA sets out a number of *quantitative* criteria that serve as presumptions. When an undertaking providing a core

* Ief Daems is Legal Director EMEA at Cisco, and Chair of the Association for Inhouse Competition Lawyers (ICLA). The views expressed in this article are his own, and should not be attributed to or be interpreted as those of his employer or any other third party.

1 A draft version of the Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (DMA) adopted by the European Parliament on 5 July 2022 is available at: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0270_EN.html (accessed 24 August 2022). In this article, all references to the DMA are to this draft.

2 A list of core platform services is included in Article 2(2) DMA, namely online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communication services, operating systems, web browsers, virtual assistants, cloud computing services and online advertising services that are linked to another core platform service.

3 Article 3(1) DMA.

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platform service meets these thresholds, it will be presumed to meet the qualitative gatekeeper designation criteria.

While the first part of the quantitative thresholds aims to establish whether a platform is presumed to have 'a significant impact on the internal market',[4] the second limb considers a core platform service to be an 'important gateway for business users to reach end users' where in the last financial year it had 'at least 45 million monthly active end users established or located in the Union and at least 10 000 yearly active business users established in the Union'.[5] The Annex to the DMA sets out the methodology for calculating these user figures. However, the suggested methodology can lead to significant difficulties in practice.

In practice, accurately capturing 'unique end users' that do not log into a platform service may not be an easy task and potentially be subject to a significant margin of error.

In relation to *active end users*, the Annex requires platforms to submit 'data about the use of core platform services from signed-in or logged-in environments'.[6] In addition, '[i]n the case of core platform services which are also accessed by end users outside signed-in or logged-in environments, the undertaking shall additionally submit aggregate anonymized data on the number of unique end users of the respective core platform service based on an alternate metric capturing also end users outside signed-in or logged-in environments, such as internet protocol addresses, cookie identifiers or other identifiers such as radio frequency identification tags […]'.[7] In practice, accurately capturing 'unique end users' that do not log into a platform service may not be an easy task and potentially be subject to a significant margin of error. Collecting data based on IP addresses or using cookie identifiers may also raise questions from a privacy perspective.

The number of *active business users* is to be determined 'at the account level with each distinct business account associated with the use of a core platform service provided by the undertaking constituting one unique user of that respective core platform service'.[8] Presumably, this definition is to be interpreted as each customer account counting as one unique business user, irrespective of the number of seat licences that the customer may hold, as long as the same business account is used. But it would be helpful for this to be confirmed and clarified.

Furthermore, the Annex does not clarify how to define whether an end user is 'established or located in the Union' and whether a business user is 'established in the Union'. This is not an easy point to establish. For *businesses*, the location of an office may serve as the initial reference. However, larger companies may have multiple subsidiaries, branches or offices, some within and others outside the EU. It may not be obvious whether those business users are to be considered based inside or outside the EU. Also for *end users*, defining geographic scope may be complex, in particular when the user is not asked to provide location information when signing into the platform, or when the platform provider is not tracking such data in the ordinary course of business.[9] Data may often only be available at global level, and even if country-by-country data (needed to calculate EU-wide data) is available, it may not be highly accurate.

In its Section E, the Annex aims to further clarify the concepts of active end users and active business users for each of the ten types of core platform services. One general comment in this regard is that the concept of business vs. end users may not always be easily applicable to the different core platform services identified to fall within scope of the DMA. For example, the differentiation between business and end users may make sense for platforms that bring together professional sellers and consumer buyers, or professional providers and consumer users. However, it is not immediately clear how this concept applies, for example, to number-independent interpersonal communication services. For number-independent interpersonal communication services, the Annex refers to the active end-users as the 'number of unique end users who initiated or participated in any way in a communication through the number-independent interpersonal communication service at least once in the month' while referring to active business

4 The presumption applies if the platform 'achieves an annual Union turnover equal to or above EUR 7,5 billion in each of the last three financial years, or where its average market capitalisation or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year, and it provides the same core platform service in at least three Member States' (Article 3(2)(a) DMA).

5 Article 3(2)(b) DMA.

6 Para B.1.a of the Annex to the DMA.

7 Para B.1.b of the Annex to the DMA.

8 Para C. of the Annex to the DMA.

9 For example, to avoid that tracking IP addresses raises privacy concerns, an undertaking could choose to track abbreviated IP addresses, only making country identification information available. However, not all undertakings will have set up their systems in this matter.

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users as the 'number of unique business users who used a business account or otherwise initiated or participated in any way in a communication through the number-independent interpersonal communication service to communicate directly with an end user at least once during the year'. However, in this context, who is the business vs. end user? An undertaking may use the platform exclusively or largely for communications between its employees or as a tool to communicate with other businesses. Are those users to be counted as end users or not? Is there potentially not a significant overlap between business and end users, and would that overlap not put into question the existence of network effects on two-sided markets that the DMA seeks to address? Furthermore, it is highly unlikely that companies offering communication platforms will have visibility about how their customers are using the communication services, i.e., whether they use it to communicate internally, with other business users, or with end users. Another example of a core platform service where it is difficult to apply the distinction between end users and business users is cloud computing services.

There are therefore many outstanding questions around the definition of business users and end users and the method of calculating user numbers.

There are therefore many outstanding questions around the definition of business users and end users and the method of calculating user numbers. In practice, these questions will have to be discussed in close coordination with the Commission, and hopefully the Commission can provide further guidance on these definitions soon.

2.3. Self-reporting

If an online platform meets the quantitative presumption criteria explained above, it is required to self-report and notify the Commission without delay, and in any event within two months after the relevant thresholds have been met.

If, based on the data provided by the undertaking, the Commission agrees with the assessment, it will adopt a designation decision identifying the core platform services that fall within the scope of the DMA. In principle, the Commission has 45 working days (just over two months) after having received the complete notification to issue a designation decision.

The DMA also allows the Commission to designate a gatekeeper when it believes the online platform meets the qualitative criteria, even if the quantitative thresholds have not all been met.[10] In order for the Commission to make its assessment, it may request the undertaking in question to provide input, including on turnover, number of users, network effects and data driven advantages, the company's conglomerate structure, etc. If the company does not comply with the investigative measures, the Commission may take a decision on the basis of 'the facts available'.[11]

2.4. Rebutting the presumptions

Undertakings that offer platform services that meet the quantitative thresholds, but do not believe those platform services should be included in a designation decision, can seek to rebut the presumption laid out in Article 3(2) DMA. However, the burden a company would need to overcome is high. The rebuttal is indicated to only be available 'exceptionally', and if the arguments put forward 'are not sufficiently substantiated because they do not manifestly call into question the presumptions', the Commission may reject the arguments without having to carry out any further investigation.[12]

In addition, the Commission seems to enjoy a lot of leeway when assessing rebuttal arguments. For example, when describing how parties could seek to rebut the presumption that they have a 'significant impact on the internal market' and what type of evidence they may wish to bring forward, the DMA states explicitly that '[a]ny justification on economic grounds seeking to enter into market definition […] should be discarded, as it is not relevant to the designation as a gatekeeper'.[13] This is a pretty bold statement. While it can be appreciated that the Commission does not want to enter

10 Article 3(8) DMA.

11 Article 3(8) sub-para 4 DMA.

12 Article 3(5) DMA (emphasis added).

13 Recital (23) DMA states: 'In its assessment of the evidence and arguments produced, the Commission should take into account only those elements which directly relate to the quantitative criteria, namely the impact of the undertaking providing core platform services on the internal market beyond revenue or market cap, such as its size in absolute terms, and the number of Member States in which it is present; by how much the actual business user and end user numbers exceed the thresholds and the importance of the undertaking's core platform service considering the overall scale of activities of the respective core platform service; and the number of years for which the thresholds have been met. Any justification on economic grounds seeking to enter into market definition or to demonstrate efficiencies deriving from a specific type of behaviour by the undertaking providing core platform services should be discarded, as it is not relevant to the designation as a gatekeeper [emphasis added].'

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into a fully-fledged Article 102 TFEU assessment, it is worrying that a core platform service provider cannot put forward the economic justifications that it believes are important to rebut the presumptions, or at least that the Commission is likely to ignore such arguments.

Moreover, as mentioned above, the DMA requires the Commission to take a designation decision quickly, i.e. within 45 working days after receiving a complete notification. This deadline also applies to platforms that seek to rebut the presumption of a gatekeeper designation, but whose arguments are in the Commission's view 'not sufficiently substantiated because they do not manifestly call into question the presumptions'.[14] Accordingly, once the DMA applies, there may only be a short amount of time available to collect the information to rebut the relevant presumptions – in particular bearing in mind that the Commission will require a number of weeks to draft and internally approve a gatekeeper designation decision. In this regard, it is also noteworthy that the Commission does not make reference to procedural due process provisions in case it considers the arguments brought forward by the potential gatekeeper aiming to rebut the relevant presumptions to be 'not sufficiently substantiated'. It appears that only if the platform 'does present such sufficiently substantiated arguments manifestly calling into question the presumptions',[15] will the Commission revert to a market investigation procedure under Article 17(3) DMA. In that case, the Commission 'shall endeavour to conclude the market investigation within 5 months' and 'communicate its preliminary findings […] to the undertaking concerned within 3 months'.[16] This procedure does not seem applicable in case the Commission does not consider the rebuttal arguments to be 'sufficiently substantiated' – which raises the question whether undertakings will be given any insights why the Commission has come to such conclusion. Admittedly, the purpose of the presumptions is exactly to avoid the generalized need for lengthy discussions. But for reasons of due process, it would be helpful if the Commission also outside the procedure of Article 17(3) DMA provided reasons before dismissing rebuttal arguments, and allowed the parties to respond.

2.5. Informal consultation

Those undertakings that remain unsure about whether or for which of the core platform services they meet the relevant quantitative criteria, or that are potentially concerned that the Commission could consider them a gatekeeper under the qualitative criteria, can choose to informally consult the Commission. In early June, Olivier Guersent, Director General at DG COMP, indicated that his services were already in close contact with a number of online platforms that are seeking to engage with the Commission to discuss the DMA. Thomas Kramler, head of unit at DG COMP, confirmed that the scope of the core platform services to be covered was part of those conversations, and the subject of intense discussions between the Commission and gatekeepers.

Any approach towards the Commission to discuss gatekeeper designation issues will need to be carefully considered.

However, any approach towards the Commission to discuss gatekeeper designation issues will need to be carefully considered. On the one hand, the application of the DMA may potentially have far-reaching consequences, and any outreach to the Commission should not be taken lightly. On the other hand, with the short deadlines for gatekeeper designation decisions, platforms will not want to be taken by surprise and potentially lose valuable time to prepare for the collection of evidence seeking to rebut the quantitative thresholds or to prepare for compliance with the DMA in case the Commission decides it applies. If there is a fair chance that a platform offering is caught, it may be wise to consider reaching out and verifying the scope of the DMA with the Commission.

3. What are the consequences of being designated a 'gatekeeper'?

The DMA seems to be placing a strict compliance standard on gatekeepers: a gatekeeper has to ensure that the obligations of Articles 5–7 DMA are 'fully and effectively' complied with.

All online platforms that are designated as gatekeepers under the DMA will need to comply within six months

14 Article 3(5) DMA.
15 Article 3(5) DMA.
16 Article 17(3) DMA.

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after designation with the obligations listed in Articles 5 and 6 DMA. Moreover, Article 7 DMA includes specific obligations for gatekeepers with regard to interoperability of number-independent interpersonal communication services. The DMA seems to be placing a strict compliance standard on gatekeepers: a gatekeeper has to ensure that the obligations of Articles 5–7 DMA are 'fully and effectively' complied with.[17] The compliance measures shall be effective not only in achieving the objectives of the specific obligation, but also the objectives of the DMA overall.[18] Moreover, the gatekeeper shall 'ensure and demonstrate compliance' with its obligations.[19]

A gatekeeper can request that the Commission adopt implementing acts that specify the measures that the gatekeeper must implement in order to effectively comply with its obligations *under Articles 6 and 7 DMA*. Such a request must include a reasoned submission explaining the measures that the gatekeeper intends to implement or has implemented. However, the Commission enjoys discretion as to whether to engage in this formal process with the gatekeeper, which also involves seeking views from interested third parties.[20] If it does, the Commission shall adopt such implementing acts within six months from the opening of proceedings. The gatekeeper can, however, not issue a request for the Commission to open proceedings to determine the measures required to effectively implement the obligations *under Article 5 DMA*. The reason for this difference seems to be linked to the idea that the measures for Article 5 DMA are sufficiently clear and should not lead to reasonable doubt as to what is required to comply with them, while there may be justifiable uncertainty as to how to implement the obligations under Articles 6 and 7 DMA. It can be questioned, however, whether the legislator's assumption that the Article 5 obligations are sufficiently obvious is correct.

When the Commission is concerned that the gatekeeper may be seeking to circumvent its obligations under Articles 5–7 DMA,[21] it has the possibility to open proceedings on its own initiative to clarify the obligations listed under Articles 5–7 DMA.

In the case of the opening of proceedings, the Commission has foreseen a procedure whereby the Commission shall communicate its preliminary findings to the gatekeeper within three months from the opening of the proceedings and publish a non-confidential summary of those findings to allow interested third parties to provide comments.

In addition to the obligations identified in Articles 5–7, the DMA also provides that the gatekeeper shall inform the Commission prior to its implementation of any intended concentrations where the merging entities or the target of a proposed transaction 'provide core platform services or any other services in the digital sector or enable the collection of data'.[22] The Commission will share this information about intended concentrations with the relevant authorities at Member States level, and also publish a list of acquisitions of which it has been informed on an annual basis. Even though the DMA indicates that in this context the Commission shall take account of 'the legitimate interest of undertakings in the protection of their business secrets',[23] it remains to be seen whether this would be sufficient to keep entire transactions confidential. Furthermore, it is also indicated that Member States may use the information received to request the Commission to examine the proposed transaction pursuant to Article 22 of the EU Merger Regulation (EUMR).[24] The obligation to inform the Commission about intended transactions may therefore have significant consequences for gatekeepers' M&A activities, and the significant uncertainties caused by the new Article 22 EUMR referral policy will need to be taken into close consideration in particular for these transactions moving forward.[25]

4. Is the DMA the *simple* enforcement tool that some had hoped for?

One of the aims of the DMA is undoubtedly to bring some simplicity in the enforcement of critical obligations for large online platforms. The concept is simple: when online platforms meet a number of criteria, they need to comply with certain obligations. However, the practical application of the DMA will be less straightforward than initially presented. This has already been recognized by Director-General Guersent when he indicated at a conference earlier this year that the implementing regulation that the Commission will develop to provide guidance will be 'quite a challenge'.

As mentioned above, the scope of application of the DMA is already subject to intense discussions between

17 Article 13(3) DMA.
18 Article 8(1) DMA.
19 Article 8(1) DMA.
20 Article 8(3) DMA.
21 By means of the practices described in Article 13(4)–(6) DMA.
22 Article 14(1) DMA.
23 Article 14(4) DMA.
24 Article 14(5) DMA.
25 For an overview of practical concerns in relation to the Commission's Article 22 policy, see ICLA's paper on the European Commission's new approach to Article 22 EUMR referral mechanism (Oct 2021), available at: http://competitionlawyer.co.uk/ICLA/Documents_files/211012%20-%20ICLA%20Position%20Paper%20on%20Art.%2022%20Guidance.pdf (accessed 24 August 2022).

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potential gatekeepers and the Commission. Platforms may seek to rebut the gatekeeper qualification. They can also request the Commission to open proceedings to review the practical implementation of the obligations laid out in Articles 6 and 7 DMA. It is also not unlikely that some platforms will seek to appeal the Commission's designation decision or potential implementing act to the CJEU. With the CJEU recently having spoken up for the rights of defence in competition enforcement cases such as *Intel*[26] and *Qualcomm*,[27] it may be interesting to see what the outcome of such cases could be. As one commentary put it recently, the '[Qualcomm] judgment reminds us, perhaps at the right time (I also have the DMA in mind now), that procedure and rights of defence should not be afterthoughts, for they are what make public enforcement sound, effective and legitimate'.[28]

There also have been voices raising more fundamental questions about the legality of the DMA, notably questioning compliance with human rights.[29] Questions about the right to a fair trial have in the past been raised in relation to DG COMP's traditional competition enforcement proceedings. While the DMA is imposing *ex ante* obligations, the Commission is at the same time provided with a significant degree of discretion to determine whether online platforms should be designated as gatekeepers or not, and how some of the far-reaching obligations need to be implemented. Furthermore, some of the checks-and-balances processes (like a review by the Hearing Officer in competition enforcement cases) are not present in the DMA process. Quite the opposite, the Commission is allowed to take decisions within short periods of time, sometimes based on 'facts available', and it can exercise significant discretion to determine whether to engage in discussions with actual or potential gatekeepers or not. At all times, gatekeepers are subject to threats of hefty fines if they do not comply with their obligations.

As a result, the implementation of the DMA will not be a straightforward exercise for the companies concerned, but also not for the European Commission. It will require significant resources just to deal with the procedural aspects of discussions with a small number of online platforms.

Apart from the procedural complexity, the DMA will bring a significant amount of substantive complexity due to the nature of issues that it is seeking to address. The obligations that the DMA sets for gatekeepers may also directly impact privacy and security safeguards of their core platform services. Leaving aside whether the obligations are warranted on substance, they without any doubt have far-reaching effects. Companies have developed systems based on privacy- and security-by-design principles, often following years of internal development. Companies do not take decisions around privacy and security lightly and will try to create a high standard of protection to avoid the significant commercial as well as reputational damage that result from privacy or security breaches. Seeking to significantly change within six months security and privacy features that have been built for many years undoubtedly raises the risk that 'things may go wrong'.[30]

It is therefore critical that the Commission assigns a sufficiently large number of individuals that have the right level of expertise, including from a privacy and security perspective, with practical business and technical expertise. It will be difficult for the Commission to match the expertise that companies have developed internally, at least at the initial stages. Just as an example, Andrea Coscelli, the then Chief Executive of the UK Competition and Markets Authority, indicated in June this year that his experience with the open banking initiative has shown that implementing interoperability requirements is 'really hard work' with at one point more than 100 people working full time on the project.[31]

In the interest of the protection of those privacy and security safeguards, it is critical to develop and encourage an open dialogue between the gatekeepers and the Commission case teams that implement the DMA.

In the interest of the protection of those privacy and security safeguards, it is critical to develop and encourage an open dialogue between the gatekeepers and the Commission case teams that implement the DMA. It can only

26 Case C-413/14 P *Intel v. European Commission*, ECLI:EU:C:2017:632.

27 Case T-235/18 *Qualcomm v. European Commission*, ECLI:EU:T:2022:358.

28 See https://chillingcompetition.com/2022/06/27/case-t-235-18-qualcomm-v-european-commission-part-i-procedure/ (accessed 24 August 2022).

29 See, e.g., https://europeanlawblog.eu/2021/06/24/digital-markets-act-beware-of-procedural-fairness-and-judicial-review-booby-traps/ (accessed 24 August 2022).

30 See https://www.neweurope.eu/article/the-digital-markets-act-is-a-security-nightmare/ (accessed 24 August 2022).

31 See https://content.mlex.com/#/content/1384975?referrer=email_dailycontentset&dailyId=9c80df4174e645659b94f00d8255b81b (accessed 24 August 2022).

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be hoped that the Commission is aware of the risks involved and carefully listens to concerns that are brought forward. The initial draft DMA proposed by the Commission and the various amendments brought about during the legislative process seem to indicate that *speed* is one of the legislator's main concerns. This is leading to a tendency in the DMA to limit discussions with parties and granting the Commission significant discretion so that gatekeeper's questions and concerns – whether justified or not – do not stall compliance with the DMA. The Commission should be very careful that this desire for speed does not compromise existing privacy and security standards of the platforms or potential gatekeepers' due process rights.

Furthermore, ensuring that offered solutions are workable in practice and that they enhance competition and innovation in the market necessitates that the Commission engage not just with the gatekeepers, but with the broader affected industries. For example, in relation to the interoperability obligations imposed under Article 7 DMA, it is important that open standards are being used to define interoperability between different number-independent interpersonal communication services. Interoperability obligations do not only impact the gatekeeper as such, but the consumer experience of the interoperating services offered by a potentially large number of competing services providers. It should not be for the gatekeeper to define the terms based on which it will provide interoperability, but rather for the wider set of industry and other stakeholders to collaborate in defining open standards that all can access and adhere to.

Whether or not one agrees with the scope of application and the obligations imposed by the DMA is no longer a relevant question. The DMA will become reality soon. It is now for the Commission to ensure that it applies the DMA in a manner that produces positive results for businesses and consumers, provides the contestability and fairness that the Commission is hoping for and guarantees privacy and security safeguards moving forward. Due to the significant complexity of the legislation, both from a procedural as well as a substantive perspective, as well as the lack of expertise that the Commission may initially encounter, it is critical for all sides involved to listen to each other with an open mind set, coordinate and strive to find the right solution.

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