Anatomy of a regulation: the Digital Markets Act

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*The Official Journal of the European Union of 12 October 2022 contains the highly anticipated publication of the Digital Markets Act[1], one of the cornerstones of the European Commission's future legislative framework ("*A Europe fit for the digital age*") to strengthen Europe's digital sovereignty. The Digital Markets Act, which will partially enter into force between 1 November 2022 and 25 June 2023, is emerging as a pioneering regulation that will regulate the power that big tech, acting as gatekeepers, exercises over the digital market.*

1 // INTRODUCTION AND LEGISLATIVE FRAMEWORK OF THE DMA

On 5 July, the Plenary Session of the European Parliament approved the **Digital Markets Act** (**DMA**), which was finally published in the Official Journal of the European Union on 12 October 2022. The Digital Markets Act (DMA), for the first time, defines under strictly objective criteria the conditions for a large online platform to be considered as a "gatekeeper" and, on that basis, set out a number of obligations to ensure a business environment that guarantees "*more services for consumers*". In other words, the aim is a more competitive environment in the digital sphere, which is currently dominated by large technology companies. Along with the DMA, the Parliament also gave the green light to the **Digital Services Act** (**DSA**), which will establish obligations for digital service providers (such as social networks or marketplaces) to control the dissemination of illegal content and disinformation on the internet.

Both regulations were supported by a large majority of the European Parliament (in the case of the DMA, 588 votes in favour, 11 votes against and 31 abstentions; while the DSA had 539 votes in favour, 54 against and 30 abstentions). This concludes a legislative process that began over a year and a half ago, following the proposal for regulation presented by the European Commission in December 2020, and which found its definitive impetus on 24 March, thanks to the political agreement reached between the European Parliament and the Council (representing the 27 Member States) in the trilogue phase.

Both the DMA, which is the subject of this report, and the DSA are part of a much broader legislative package launched by the European Commission: "**A Europe fit for the digital age**" and which is one of the Commission's six political and legislative priorities for the period 2019 - 2024. Alongside these two regulations, the Commission plans to approve other regulations such as the European Data Strategy, the Regulation on Artificial Intelligence, and the European Strategies for Cybersecurity and Industry, among others. Through these regulations, the European Commission seeks to pave the way for what it calls the "Digital Decade", consolidating its digital sovereignty and establishing its own pioneering rules, so as not to follow those set by others. The focus: data, technology and infrastructure.

In the context of such a declaration of intent by the European Commission, the DMA is one of the **cornerstones** of this new legislative framework and, above all, of the digital sovereignty to which the European Union aspires. To this end, the executive power of the EU considers it essential to promote market rules so that European innovators and start-ups can compete on equal terms with other technological giants and, in this way, promote their development.

These rules will also be uniform. The DMA is adopted as a **regulation** and not as a directive. This means that the DMA is binding in its entirety and directly applicable in all EU countries from its entry into force, without the

1 Regulation (EU) 2022/1925 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.

need for transposition into national law. This facilitates harmonisation and avoids regulatory fragmentation and dispersion within the internal market, as stated in Recital 9 of the regulation, without excluding "*the possibility of applying to gatekeepers within the meaning of this Regulation other national rules which pursue other legitimate public interest objectives*".

2 // EXECUTIVE SUMMARY AND LEGAL ANALYSIS OF THE DMA

2.1. Purpose, scope and thresholds

1. The DMA aims to ensure the proper functioning of the internal market by guaranteeing, on the one hand, the **contestability** and **fairness** of markets in the **digital sector** and, on the other hand, by ensuring that business users and end users can participate in digital markets under such conditions. The DMA therefore aims to:
    a. Provide business users and end users with regulatory safeguards against **unfair practices** by gatekeepers.
    b. **Address national fragmentation** of digital markets; a classic problem with European digital regulation.
    c. Prevent the adoption by gatekeepers of **different business models and commercial practices** depending on the State receiving the services.
2. The DMA **does not replace** arts. 101[2] and 102[3] of the TFEU, nor Regulation (EC) No 139/2004[4], nor other national competition laws, but actually complements them.
3. **Nor does it replace material legislation** that may apply concurrently, such as legislation on data protection, intellectual property, services, audiovisual media services and consumer protection.
4. To this end, the DMA regulates, by establishing a series of obligations, the **core platform services** provided or offered by **gatekeepers** to **business users established in the EU or to end users established or located in the EU**, but irrespective of the place of establishment or residence of the gatekeepers and of other laws that may apply[5]. In this respect:
    a. The following are **core platform services**:
        i. Online intermediation services;
        ii. Online search engines;
        iii. Online social networking services;
        iv. Video-sharing platform services;
        v. Number-independent interpersonal communications services;
        vi. Operating systems;
        vii. Web browsers;
        viii. Virtual assistants;
        ix. Cloud computing services;

2 "*The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market* […]".

3 "*Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States* [...]".

4 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "EC Merger Regulation").

5 Art. 1.2. DMA.

x. Online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services if provided by an undertaking providing any of the above services.

b. The follow are considered **gatekeepers**:

i. Undertakings with a **significant impact on the internal market**, defined as those with an annual EU turnover of ***€7,500,000,000*** or more in each of the last three financial years, or with a market capitalisation in the last financial year of ***€75,000,000,000***. In addition, they must provide the same core platform service in at least three Member States.

ii. Undertakings providing a **core platform service that is an important gateway** for business users to reach end users, which refers to those that in the last year have had at least ***45 million monthly active end users*** established or located in the EU and at least ***10,000 yearly active business users*** established in the EU, identified and calculated in accordance with the Annex to the DMA.

// How is the number of users calculated? //

The Annex to the DMA sets out a methodology for calculating active end users and active business users for each core platform service. For this purpose, it uses the concept of unique users, which are only counted once during a specified period of time:

» one month for active end users; and

» one year for active business users, regardless of the number of times they interact with the service in question.

- **Active end users in signed-in or logged-in environments**: the undertaking will need to submit aggregate anonymised data on the number of unique end users for each core platform service.
- **Active end users outside signed-in or logged-in environments**: the undertaking will need to submit such data in an anonymised form on the basis of criteria such as IP addresses, cookie identifiers, radio frequency identification tags or similar.

// Who controls the number of users? //

Section A of the Annex of the DMA states that it is the responsibility of each undertaking to achieve as accurate an approximation as possible. This data will need to be notified to the European Commission within two months of the date on which these thresholds were reached.

The European Commission will have 45 working days to issue its designation decision, in which it will designate the undertaking concerned as a gatekeeper, and state which of its specific services will be covered[6].

iii. Undertakings that have an entrenched and durable position in terms of their operations, i.e. where the above thresholds were met in each of the last three financial years, or where this is likely to happen in the near future.

6 Art. 3.3 and art. 3.9 DMA.

c. **Business users**[7]: are natural and legal persons who, acting in a commercial or professional capacity, **use core platform services** to supply products or provide services to end users, or use such services in the course of supplying products or providing services to end users.

d. **End users** are natural and legal persons who use core platform services and who **do not do so as a business user**.

2.2 Obligations of gatekeepers

1. The DMA imposes a number of obligations[8] on companies that fall within the scope described above.
2. These obligations are divided into (i) **generic obligations**; (ii) **obligations that can be specified on a case-by-case basis**; and (iii) a generic **interoperability** obligation. These obligations may only be suspended in very specific cases.
3. It highlights, in general terms, the obligation to allow **interoperability of number-independent interpersonal communications services**, i.e. text messaging between end users, exchanges of images, voice messages, videos and files, end-to-end voice calls and video calls, among others[9].
4. Failure to comply with the obligations will result in the imposition of **penalties** on the gatekeepers who do not comply.

2.3 General obligations for gatekeepers (art. 5)

1. **Refrain from:**

- processing personal data of end users using third party services that make use of the core platform services of the gatekeeper;
- combining personal data from the relevant core platform service with personal data from any further core platform services or from any other services provided by the gatekeeper or with personal data from third party services;
- cross-using personal data from the relevant core platform service in other services provided separately by the gatekeeper;
- signing end users in to other services of the gatekeeper to combine personal data;
- preventing business users from offering the same products or services to end users;
- requiring end users to use an identification service, a web browser engine or a payment service or technical services of the gatekeeper that support the provision of payment services, such as payment systems for in-app purchases, of that gatekeeper;
- requiring business users or end users to subscribe to or register with any further core platform services as a condition of using any of the core platform services.

2. **Allow:**

- business users, free of charge, to communicate and promote offers, to end users acquired through its core platform service or through other channels and to conclude contracts with those end users;
- end users, through its core platform services, to access and use content, subscriptions, features or other items by means of a business user's software applications.

7 This definition is similar to that provided for in Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, which should be seen as one of the immediate precursors of the DMA.

8 Arts. 5, 6 and 7.

9 Art. 7.

3. **Provide:**

- each advertiser to which it supplies online advertising services, or third parties authorised by advertisers, on request, free daily information on the performance of each advertisement (especially in terms of price and fees);
- each publisher to which it supplies online advertising services, or third parties authorised by the publishers, at the publisher's request, free daily information on each advertisement displayed on the publisher's inventory.

2.4 Specific obligations for each gatekeeper (art. 6 DMA)[10]

1. **Refrain from:**

- using non-publicly accessible data generated or provided by business users in the context of their use of, or in support of, the relevant core platform services (including click, search, view and voice data);
- treating services and products offered by the gatekeeper itself more favourably, in ranking and related indexing and crawling, than similar services or products of third parties;
- restricting the ability of end users to switch between different software applications and services accessible through the gatekeeper's core platform services;
- setting general conditions for terminating the provision of a core platform service that are disproportionate.

2. **Allow:**

- end users to easily un-install any software application from that gatekeeper's operating system. This includes making it possible to easily change the default settings of the operating system, the virtual assistant and the web browser of the gatekeeper;
- the installation and effective use of third-party software applications or software application stores that use or interoperate with its operating system, provided that it is technically reasonable to do so;
- service providers and hardware suppliers to interoperate free of charge and effectively with the same hardware and software features accessed or controlled through the operating system or virtual assistant listed in the designation decision that are available for the services or hardware provided or supplied by the gatekeeper, including for interoperability purposes.

3. **Provide:**

- advertisers and publishers with access to the gatekeeper's performance measuring tools and to the data needed for advertisers and publishers to carry out their own independent verification of the advertisements inventory;
- end users with effective portability of data provided by the end user or generated through the activity of the end user in the context of the use of the relevant core platform service;
- business users and third parties authorised by a business user, free of charge, effective, high-quality, continuous and real-time access to aggregated and non-aggregated data; as well as the use of such data, including personal data, provided or generated in the context of the use of the core platform services or services provided together with the relevant core platform services;
- third-party undertakings providing online search engines, upon their request and on an anonymised basis, access on fair, reasonable and non-discriminatory terms to data on rankings, queries, clicks and views in relation to free and paid search generated by end users on its online search engines;
- business users fair, reasonable and non-discriminatory general conditions for access to its software application stores, online search engines and online social networking services.

10 Art. 8.2 allows the Commission to adopt, ex officio or at the request of a gatekeeper, specific conditions: "The Commission may adopt an implementing act, specifying the measures that the gatekeeper concerned is to implement in order to effectively comply with the obligations laid down in Articles 6 and 7. That implementing act shall be adopted within 6 months from the opening of proceedings pursuant to Article 20 in accordance with the advisory procedure referred to in Article 50(2)."

2.5 Anti-circumvention measures

1. Article 13 contains a number of measures aimed at **preventing gatekeepers from taking measures that go against the content of the DMA**, primarily to prevent a gatekeeper from segregating, dividing, or separating services through contractual or technical means.

2. It also imposes an obligation not to degrade the core platform services provided to business or end users, including a **prohibition on subverting autonomy and decision-making or free choice** through the structure, interface or design of the platform.

3. Failure to comply with these measures will result in the **initiation of proceedings by** the Commission, potentially leading to corresponding penalties.

2.6 Administrative and market rules

1 Gatekeepers are required to **notify the Commission of** any concentration within the meaning of Regulation (EC) 139/2004 where the resulting undertaking provides core platform services, any other services in the digital sector or where data collection is enabled[11].

2. On the other hand, the DMA establishes a procedure that empowers the Commission to carry out all kinds of **investigative procedures**, including, inter alia, to designate a gatekeeper or to investigate systematic non-compliance[12]. In this respect, article 24 provides for interim measures "*in case of urgency due to the risk of serious and irreparable damage for business users or end users of gatekeepers*".

3. The penalty regime[13], manifested by the Commission adopting an implementing act, consists of:

Fines for undertakings and, where applicable, gatekeepers, of up to 1% of their total worldwide turnover in the preceding financial year.	Fines for gatekeepers of up to 10% of their total worldwide turnover in the preceding financial year.	Fines for gatekeepers of up to 20% of their total worldwide turnover in the preceding financial year.
• Failure to comply, in general terms, with reporting obligations. • Obstruction of investigation initiated by the Commission.	• Failure to fulfil obligations. • Non-compliance with remedies. • Non-compliance with interim measures. • Non-fulfilment of other legally binding commitments.	Where the Commission has found in a non-compliance decision that a gatekeeper has committed the same or a similar infringement of an obligation in relation to the same core platform service as had already been found in a non-compliance decision taken during the previous eight years, or a similar infringement.

4. In addition, Article 31 provides that the Commission may adopt a decision imposing on undertakings - including, where appropriate, gatekeepers and associations of undertakings - periodic penalty payments not exceeding **5% of the average daily worldwide turnover** in the preceding financial year.

3 // NEXT STEPS AND ROLE OF NATIONAL AUTHORITIES

The DMA will start to apply in full approximately six months after its entry into force, as it is provided that it will enter into force in phases, while the first gatekeepers are being designated, between 1 November 2022 and 25 June 2023.

As a first step in its implementation, the European Commission will determine which undertakings will be classified as gatekeepers. In this respect:

11 Art. 14 DMA.
12 Arts. 16 to 19 DMA.
13 Art. 30 DMA.

- The undertakings themselves will check whether they comply with the quantitative thresholds defined in article 3 of the DMA by providing the Commission with this information.
- The Commission will then, on the basis of this information and/or following a market investigation, designate which companies are considered to be gatekeepers.
- After being identified and designated, gatekeepers will have six months to start complying with their obligations under the DMA. However, for gatekeepers who do not currently have an entrenched and durable position (but are expected to have one in the short/medium term), only those obligations necessary and appropriate to ensure that the undertaking does not obtain such a position by unfair means will apply to them.

Moreover, the agreement reached during the last trilogue phase ensures that the regulation can be quickly adapted to new market realities. This allows the Commission to adopt **delegated acts to extend the obligations or to develop certain articles**; acts that the European executive power can begin to develop with the entry into force of the regulation (20 days after its publication in the OJEU) and without the need to wait for the six months established to begin its application. Among them, and as regards the incorporation of new practices or core platform services, the Commission will have to submit a legislative proposal.

This, together with the automatic application of the regulations in national law, leaves the Spanish authorities with little room for manoeuvre and little involvement in the development and implementation of the DMA in Spain, in contrast to its role in the transposition of directives. Despite this, it is worth highlighting the role played by the Ministry of Economic Affairs and Digital Transformation, through the **Subdirectorate-General for Improved Regulation, Business Support and Competition** (under the Secretariat of State for the Economy and Business Support), which has led Spain's position on the proposed regulation in the Council for all these months.

Together with the Ministry, the **National Commission on Markets and Competition (CNMC), through the Department for the Promotion** of Competition, has also been playing a decisive role, for example, in the participation in the Commission's public consultation phase, shortly before it issued its regulatory proposal. Back then, in the autumn of 2020, the CNMC called for the national authorities to be able to apply the regulatory instrument to be designed, establishing "*clear rules for the distribution of this competence between the Commission and each Member State*". In their view, the CNMC, as an independent authority in Spain, should bring together these competences.

Lastly, the final version of the DMA recognises the role of the national authorities, notably in its articles 37 and 38, who from October (the expected date of entry into force of the regulation) will have to work in close cooperation with the Commission, and coordinate their enforcement measures to ensure a coherent, effective and complementary application of the available legal instruments applied to gatekeepers.

In short, in the words of the European Commissioner for Competition and main driving force behind this regulation, Margrethe Vestager, the DMA is a major step forward with a clear objective: "*fair markets also in digital*". According to the Commissioner, "*gatekeepers will now have to comply with a well-defined set of obligations and prohibitions. This regulation, together with strong competition law enforcement, will bring fairer conditions to consumers and businesses for many digital services across the EU.*"

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