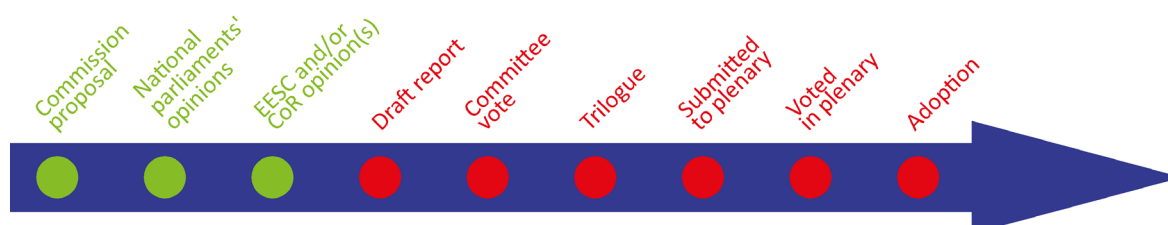


# Digital markets act

## OVERVIEW

In December 2020, the European Commission published a proposal for a regulation on contestable and fair markets in the digital sector, otherwise referred to as the digital markets act (DMA). The proposed legislation lays down harmonised rules aimed at regulating the behaviour of digital platforms acting as gatekeepers between business users and their customers in the European Union (EU). This approach entails a shift from ex-post anti-trust intervention to ex-ante regulation, and would enshrine within EU law a set of ex-ante rules that would radically change how large digital platforms are allowed to operate in the EU. While there seems to be strong support for this approach in the EU, a number of issues regarding the designation of gatekeepers, the design of ex-ante obligations and prohibitions, and enforcement mechanisms have already been raised. As the EU lawmakers, Parliament and Council will now assess whether the Commission's proposal is an appropriate response to the challenges identified and work towards defining their positions on the proposal.

<b>Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)</b>		
<i>Committee responsible:</i>	Internal Market and Consumer Protection (IMCO)	COM(2020) 842 15.12.2020
<i>Rapporteur:</i>	Andreas Schwab (EPP, Germany)	2020/0374(COD)
<i>Shadow rapporteurs:</i>	Evelyne Gebhardt, (S&D, Germany) Andrus Ansip (Renew, Estonia) Virginie Joron (ID, France) Marcel Kolaja (Greens/EFA, Czechia) Adam Bielan (ECR, Poland) Martin Schirdewan (The Left, Germany)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
<i>Next steps expected:</i>	Publication of draft report	



## Introduction

Whereas online platforms – such as social media and e-commerce platforms – play an increasingly important role in people's social and economic lives, current EU rules on digital services date back two decades and have remained largely unchanged since the adoption of the e-Commerce Directive in 2000 ([Directive 2000/31/EC](#)). On 15 December 2020, the European Commission presented a [digital services act package](#), with two draft pieces of legislation: a [digital services act](#) (DSA) and a [digital markets act](#) (DMA), designed to create a fairer playing field and make online platforms more accountable for the content posted on them.<sup>1</sup> If adopted, the new rules will enshrine within EU law a set of ex-ante rules that will radically change how gatekeeper platforms can operate in the EU.

## Existing situation

In order to tackle the competition issues raised by large online platforms, the EU has launched a series of **antitrust proceedings** in recent years (e.g. the [Google Android](#) and [Amazon](#) cases) and reflected on how to **adapt EU competition law tools** to level the playing field in the digital environment.<sup>2</sup> The EU also adopted a [Platform-to-Business Regulation](#), in force since July 2020, establishing new rules for transparency and redress mechanisms for businesses using online platforms' services. However, despite these initiatives, a number of recent reports and studies have shown that a few large platforms are increasingly becoming **online gatekeepers**.<sup>3</sup> These gatekeepers control key channels of distribution, notably because of: strong **network effects** (i.e. users are more likely to value and choose platforms with a large user base); their **intermediary role** (i.e. between sellers and customers); and their ability to access and collect **large amounts of data** (e.g. users' personal and non-personal data and competitors' sales data).

Against this backdrop, EU policymakers have considered a shift from ex-post antitrust intervention to ex-ante regulation. This new approach is driven by the fact that existing EU competition rules do not deal adequately with market failures resulting from the behaviours of digital gatekeepers, notably because [Article 101](#) and [Article 102](#) investigation procedures require a specific analysis that can only take place ex-post (i.e. after a competition problem has emerged) and may take too long. Furthermore, antitrust rules are ill suited to cases of structural competition problems because of the economic features of these markets (i.e. tipping markets).<sup>4</sup>

In other regions of the world too, the market power of large platforms is coming under increasing scrutiny. In the United States (US), a number of states have recently [sued](#) Google for anticompetitive conduct in the advertising sector and the Department of Justice has [filed](#) a complaint relating to Google's dominance on the web search marketplace and associated advertising business. China, meanwhile, is [considering](#) legislating to curb the monopolistic power of technology giants such as Alibaba. In the United Kingdom (UK), a dedicated Digital Markets Unit is being [set up](#) to introduce and enforce a new code to govern the behaviour of dominant platforms.

## Parliament's starting position

The European Parliament has long [advocated](#) revision of the EU digital rules applicable to digital platforms, and adopted three seminal resolutions addressing this issue in October 2020. A [first legislative resolution](#) (based on an Internal Market and Consumer Protection (IMCO) Committee own-initiative report) called on the Commission to impose ex-ante regulation on large platforms with a gatekeeper role in the digital ecosystem and an effective institutional enforcement mechanism. A [second](#) legislative resolution (based on a Legal Affairs (JURI) Committee own-initiative report) recommended that the Commission impose a set of content management and transparency obligations on certain categories of platform having a gatekeeper role for access to content or information. A [third](#) resolution (based on a Civil Liberties, Justice and Home Affairs (LIBE) Committee own-initiative report) called on the Commission to address the challenges posed by new technologies and to ensure legal clarity and respect for fundamental rights. Finally, Parliament adopted a [resolution](#) on competition policy in June 2020, calling on the Commission to assess the

possibility of imposing ex ante regulatory obligations where competition law is not enough to ensure contestability in these markets.

Parliament's legislative initiative resolutions adopted pursuant to [Article 225 of the Treaty on the Functioning of the European Union \(TFEU\)](#) include detailed provisions that Parliament would like to see enshrined in EU legislation. This 'indirect' [right of initiative](#) does not create an obligation on the Commission to propose the legislation requested, though it requires the Commission to give reasons for its decision not to submit the requested proposal. The Commission President, Ursula von der Leyen, has however [pledged](#) to submit a legislative proposal if Parliament votes on such an initiative.

Furthermore, a range of Parliament studies have emphasised the need to address the impact of digital gatekeepers in the digital single market<sup>5</sup> and suggested that taking common EU action to provide for specific ex-ante regulation regarding gateway platforms would be beneficial for the internal market.<sup>6</sup>

## Council and European Council

In its June 2020 [conclusions](#) on shaping Europe's digital future, Council supported the Commission's intention to explore ex-ante rules to ensure that markets characterised by large platforms with significant network effects, acting as gatekeepers, remain fair and contestable for innovators, businesses and new market entrants. Furthermore, in its [conclusions](#) of November 2020, Council stressed that rules for online platforms with a gatekeeper role should be considered. At Member State level, meanwhile, a broad consensus has emerged in recent years on the need to update and harmonise the EU rules applicable to online platforms,<sup>7</sup> and ways to shape legislation in this area have been discussed. In October 2020, France and the Netherlands issued a [joint discussion document](#), explaining why, when and how in their view intervention on platforms with a gatekeeper position should take place.

## Preparation of the proposal

The Commission ran a public [consultation](#) from June to September 2020 to assess how best to ensure online safety, fairness, and a level-playing field in the digital economy; it garnered more than 2 000 replies. In addition, the Commission consulted on adopting ex-ante regulatory instruments for [gatekeepers](#) and on a possible [new competition tool](#) to address structural competition problems in both digital and non-digital markets. Together with a number of legal and economic [studies](#), these replies fed into the European Commission's [impact assessment](#), which concluded that a few large platforms control access to digital markets. This leads to extreme dependencies of many businesses on these platforms, with evidence of negative effects on effective competition and on the contestability of the markets concerned. The Commission highlights three problem clusters.

### Weak contestability

Some of these gatekeepers exercise control over entire digital ecosystems that existing or new operators cannot contest, irrespective of how innovative and efficient they may be. As a result of this weak competitive pressure, there is a risk that these markets do not – or will not – function well and do not deliver the best outcome for consumers in terms of prices, quality, choice or innovation. To substantiate its claim, the Commission points at an unprecedented trend of growing [market concentration](#), the existence of entry barriers in digital markets where gatekeepers are present and the fact that such gatekeepers may reach an entrenched market position that is hard to contest and that they can further expand through the creation of ecosystems.<sup>8</sup>

### Unfair gatekeeper practices vis-à-vis business users

Businesses are increasingly dependent on these gatekeepers, which in many cases leads to gross imbalances in bargaining power and therefore results in unfair practices being imposed on business users, and small and medium-sized enterprises (SMEs) relying on the platforms to reach their customers.

A wide range of such practices have been identified<sup>9</sup> including: the imposition of **anti-steering** provisions (i.e. preventing business users from directing their consumers to alternative offers other than those provided on the platform); **lock-in strategies** (such as imposition of the platform's identification services); **self-preferencing** practices (i.e. unfairly favouring own products and services to the detriment of competing businesses); mechanisms to **limit or refuse access to data** collected by gatekeepers (e.g. an app store limiting the information that third-party app providers receive about their subscribers, lack of meaningful interoperability to access such data); imposition of **unfair terms of access** upon business users (e.g. prices or bundling offers); and mechanisms to **limit access or interoperability** of the platform's services/functionalities (e.g. operating system) with the services offered by business users.

The Commission's research has shown that such practices are more frequently implemented for what are referred to as '**core platform services**' (**CPS**) such as (i) online intermediation services (e.g. marketplaces and app stores); (ii) online search engines; (iii) social networking sites; (iv) video sharing platform services; (v) number-independent interpersonal electronic communication services; (vi) operating systems; (vii) cloud services; and (viii) advertising services.<sup>10</sup>

## Legal uncertainty for market players

Finally, the Commission concludes that there is increasing regulatory fragmentation of the online platform space in the EU and that coordination among national legislators appears to be insufficient. Such fragmentation creates compliance costs that are particularly harmful for smaller platforms as well as for start-ups, and results in legal uncertainty detrimental to all players.<sup>11</sup>

In January 2021, Germany [approved](#) a reform of its national competition law to introduce ex-ante rules for large digital platforms. The new rules gives the German competition authorities (i.e. the Bundeskartellamt) the power to impose a set of rules on platforms considered of paramount significance for competition across markets. The first legal [proceeding](#) based on new rules has been launched to assess if linking Oculus's virtual reality products and Facebook's social network could constitute an abuse of a dominant position.

## The changes the proposal would bring

### Legal basis

The Commission has put forward a proposal for a [regulation on contestable and fair markets in the digital sector \(digital markets act – DMA\)](#) on the basis of Article 114 TFEU to prevent divergences from hampering the free provision of cross-border digital services and to guarantee uniform rights and obligations for business and consumers across the internal market.

### Objectives

The DMA has two main objectives.<sup>12</sup> The first is to ensure that digital markets in which gatekeepers operate are and remain **contestable**, namely that other market operators can impose competitive pressure on such gatekeepers. The second is to ensure **fairness** and a **level playing field** for players on digital markets in the EU. To that end, the draft DMA entails a shift from ex-post antitrust intervention to ex-ante regulation.

The DMA proposal **departs from a classical competition** policy approach. While antitrust law is primarily concerned with the protection of undistorted competition, ex-ante regulation embraces a different set of objectives (i.e. contestability and fairness) and entails a reversal of the burden of intervention since the approach no longer consists of assessing the behaviours of a company ex-post but rather in providing a precise definition of expected or prohibited behaviour up front.<sup>13</sup>

## Gatekeeper designation

The draft DMA designates 'gatekeepers' as providers of 'core platform services' (CPS) that satisfy **three cumulative criteria**. Accordingly, 'gatekeepers' are entities that (i) have a significant impact on the EU internal market; (ii) operate one or more important gateways to customers; and (iii) enjoy or are expected to enjoy an entrenched and durable position in their operations (Article 3).

The draft DMA establishes a **rebuttable presumption** for qualifying as a gatekeeper. A company that operates a 'core platform service' would be required to notify the European Commission upon meeting all the pre-defined quantitative thresholds for turnover, market capitalisation, and their number of European consumer users and business users, unless it submitted substantiated arguments to demonstrate the contrary. Furthermore, following a **market investigation**, the Commission could determine that smaller companies – that do not meet the quantitative thresholds – nevertheless qualify as emerging gatekeepers given foreseeable market developments.

The Commission would be empowered to adopt **delegated acts** to specify the methodology for determining and adjusting the quantitative thresholds (Article 37). Member States would participate via the **digital markets advisory committee** supporting the Commission in market investigation (Article 32) and at the request of at least three of them the Commission would be bound to open such an investigation to determine if a 'core platform service' should be designated as a gatekeeper (Article 33). The DMA would apply to 'core platform services' provided by gatekeepers for business or end users established or located in the EU, even where such gatekeepers were established outside the EU. While the Commission expects that only **10 to 15 gatekeepers** would be identified based on such quantitative thresholds, the basis of this estimate is questionable given the leeway left to the regulators and it could be that a larger number of companies will fall within the scope of the DMA.<sup>14</sup>

## Obligations and prohibitions

Companies identified as gatekeepers would need to implement a range of obligations and prohibitions. Accordingly, the draft legislation sets out **dos** and **don'ts** – defined in the light of the past antitrust experience in the EU – and spells out two distinct sets of requirements.

Article 5 imposes **a list of directly applicable requirements** on gatekeepers that provide 'core platform services'. These include the following prohibitions and obligations:

- to refrain from **combining personal data** from different sources;
- to allow business users to offer end-users the same services through third-party intermediation services at different conditions than those offered through the gatekeeper intermediation (e.g. prohibition of **most favoured nation clauses**);
- to allow business users to promote offers and conclude contracts with end users regardless of whether they use the gatekeepers' CPS and allow end users to access and use content without using the gatekeeper's CPS (i.e. prohibition of **anti-steering practices**);

### Gatekeeper designation quantitative thresholds

The **impact on the internal market** is presumed to be fulfilled if the company achieves an **annual turnover** in the European Economic Area (EEA) equal to or **above €6.5 billion** in the last three financial years, or where its **average market capitalisation** or equivalent fair market value amounted to **at least €65 billion** in the last financial year, and it provides a core platform service **in at least three Member States**; and

the **control of an important gateway** for business users towards final consumers is presumed to be fulfilled if the company operates a core platform service with more than **45 million monthly active end users** established or located in the EU and more than **10 000 yearly active business users** established in the EU in the last financial year; and

the **entrenched and durable position** is presumed to be fulfilled if the company met the other two criteria in each of the **last three financial years**.



- to refrain from stopping business users from raising issues with relevant public authorities in relation to gatekeeper practices;
- to refrain from imposing some **bundling and tying practices** on business or end users (e.g. require business users to use, offer or inter-operate with gatekeeper services);
- to provide advertisers and publishers with information concerning the price paid by the advertiser and publisher and remuneration paid to the publishers.

Article 6 imposes on gatekeepers a **list of requirements that need to be specified** – following a dialogue with the gatekeeper – as they potentially apply in different ways. These include the obligations below:

- refrain from **using competitors' data** to compete with them (i.e. data generated through the activities of business users);
- allow, more broadly, end users to **un-install any pre-installed software** applications;
- allow, more broadly, the **use of third-party software application and systems**;
- implement **interoperability** (i.e. allow business users and providers of ancillary services, e.g. payment services, to access and interoperate with the gatekeeper);
- refrain from treating gatekeeper or allied products and services more favourably in **ranking** and apply **fair and non-discriminatory access** (FRAND) conditions to such ranking;
- refrain from technically restricting **customer switching** (i.e. between different apps and services to be accessed with the gatekeeper's operating system);
- provide advertisers and publishers, free of charge, with **access to the performance measuring tools** of the gatekeeper and related information;
- provide business users with continuous and real-time **data portability** (i.e. for data generated by both business and end users in the context of the use of the CPS);
- provide third-party providers of online search engines with access on FRAND terms to ranking, query, click and view data in relation to search generated by end-users on online search engines of the gatekeeper;
- apply fair and non-discriminatory general (FRAND) conditions of access for business users to its software application store.

Furthermore, gatekeepers are subject to two **general obligations** (Article 12 and Article 13):

- to inform the Commission about any **intended concentration** involving another provider of a 'core platform service' or of any other services provided in the digital sector; and
- to submit (on an annual basis) to the Commission an independently audited description of any **techniques deployed for profiling consumers** that the gatekeeper applies to or across its core platform services.

However, '**emerging gatekeepers**' (i.e. gatekeepers that do not yet enjoy an entrenched and durable position but will do so in the foreseeable future) would only be subject to a limited set of obligations and prohibitions necessary to ensure that the market remains contestable (Article 15(4)).

## Enforcement, sanctions and relationship to competition law

The European Commission would be the competent regulatory body to implement and enforce the DMA and to that end would be granted **new powers to conduct market investigations** and take **decisions on non-compliance** with the obligations and prohibitions. In implementing the DMA, the Commission would be assisted in its decisions by the **digital markets advisory committee** (DMAC), composed of representatives of EU Member States. The Commission would have the power to adopt **interim measures**, impose and accept **binding commitments** upon and from gatekeepers, and impose **finances** (Articles 22 to 29). Furthermore, in cases of **systematic non-**

**compliance**, which requires (i) three non-compliance decisions within five years and (ii) the strengthening or extension of the gatekeeper position, the Commission may impose more stringent behavioural or, if needed, **structural remedies** (Article 16).

While, under the draft text, Member States could not impose further obligations on gatekeepers by way of laws, regulations or administrative action for ensuring contestable and fair markets, the DMA is 'without prejudice' to the application of Articles 101 and 102 and national competition laws (Article 1(6)). As a result, conduct that infringes both the DMA and competition law would be subject to parallel actions and national competition authorities and courts remain competent to address conduct that infringes the DMA under national or under EU competition law.

## Advisory committees

The Committee of the Regions (CoR) recently adopted an [opinion](#) on platform regulation in the context of the collaborative economy and its [opinion](#) on the DMA is expected in June. The European Economic and Social Committee (EESC) adopted its [opinion](#) on the DMA on 28 April 2020. The EESC believes that the provisions on market investigation into non-compliance must be strengthened in terms of both the time lag and penalties, that all gatekeepers should be required to establish a legal representative in the EU, and that the notions and institutional design proposed should be clarified.

## National parliaments

The deadline for the submission of [reasoned opinions](#) on the grounds of subsidiarity was 7 April 2021. The Czech Parliament [notes](#) that the proposals do not take sufficient account of the monopoly position of multinational internet players, the interoperability of user data, the protection of user data by means of encryption, the right to anonymity and the protection of consumers against identity theft.

## Stakeholder views<sup>15</sup>

BEUC, the European Consumer Organisation, [stresses](#) that more focus should be put on consumer protection, for instance by making it easier and quicker to impose behavioural and structural remedies for non-compliance. Similarly, a coalition of civil society organisations and digital rights defenders believes that the draft proposal does not adequately protect end users against gatekeepers' exploitative practices and [calls](#) on the European Parliament and Council to work on more ambitious solutions to stimulate the emergence of alternative platforms.

The European Tech Alliance (EUTA), representing the major European digital companies and start-ups, [pleads](#) for a narrow definition of gatekeeper to ensure digital start-ups' growth and scale up is not compromised. The Developers Alliance also [warns](#) of imposing too rigid a regulation that would chill investment and have a detrimental impact on innovative products and services. The European DIGITAL SME Alliance, representing European small and medium-sized information and communication technology enterprises [urges](#) lawmakers to strengthen the ex-ante interoperability requirement for dominant gatekeepers in order to cover core consumer services such as instant messaging and social media. The Information Technology Industry Council (ITI), representing the biggest technology companies, [argues](#) that due process safeguards should accompany the broad investigative and enforcement powers afforded to the Commission. For instance, the decision to impose structural remedies should also be subject to strict due process standards and to judicial review before its application, given the remedy's seriousness and the likely irreversibility of a structural remedy. The association representing cloud infrastructure service providers in Europe [wants](#) to include some software publishers in the definition of gatekeeper and to create obligations that curb unfair licensing practices in this area.

BEREC, the Body of European Regulators for Electronic Communications, [welcomes](#) the proposed ex-ante regulations but proposes some amendments for ensuring swift, effective and future-proof enforcement of the new rules. BEREC stresses that the obligations are built mainly around practices

that have already been identified or investigated in the past and warns that this approach may prove to be **too backward looking** in a digital environment that is evolving quickly. BEREC proposes to adopt under the DMA the approaches already used under telecoms regulations, including the possibility for the competent authorities to tailor remedies on a case-by-case basis and provide such authorities with the appropriate mandate to collect relevant data from gatekeepers and market players and continuously and actively monitor the digital services. BEREC considers that it is essential to include a dispute resolution mechanism. BEREC finally argues that the implementation and enforcement of the DMA should be left to national authorities that have the appropriate expertise and resources, and proposes the establishment of an independent advisory board of national authorities to improve coordination and harmonise national authorities' action.

## Academic views

### DMA objectives and legal basis

There is **strong support** among academics for ensuring the contestability of digital markets and fairness in business relationships, given the main concerns that have been raised by recent reports on the functioning of digital markets.<sup>16</sup> However, critics warn that the DMA would likely have a **chilling effect on research, development and innovation**.<sup>17</sup> It has also been stressed that 'contestability' and 'fairness' are largely left undefined in the draft text, leaving significant room to the Commission and other regulators to adjudicate what is 'fair' in commercial disputes, re-write agreements with suppliers, and protect favoured industries.<sup>18</sup> Furthermore, some commentators point out that for Article 114 TFEU to be a **valid legal basis** for the DMA, the draft proposal would require important adaptations to ensure harmonisation of national laws and respect for the principle of proportionality and for companies' fundamental rights, and to reduce the Commission's margin for discretion.<sup>19</sup>

### Designation of gatekeepers

The process for designating gatekeepers as proposed in the draft DMA has been criticised. For some competition experts, there is a risk that such a process based on quantitative criteria may capture platforms that satisfy the quantitative thresholds owing to their size but do not act as gatekeepers.<sup>20</sup> Against this background, the **designation mechanism could be improved** to ensure that it only those targets platforms that are necessary gateways between business users and their customers and are creating a real dependency for business partners.<sup>21</sup> Furthermore, because the gatekeeper concept is a new concept enshrined in EU law, commentators propose to **enhance legal predictability** through the adoption of a delegated act or guidelines on how to use and assess the proposed indicators.<sup>22</sup> In addition, BEREC [recommends](#) that the DMA should not restrict the possibility to regulate platforms that have a significant gatekeeping role but that are potentially only active in one Member State.

### Definition of ex ante obligations and prohibitions

Some possible shortcomings in the Commission's approach to identify obligations and prohibitions imposed on gatekeepers (i.e. dos and don'ts) have been highlighted. Some competition experts ask for **more flexibility** when it comes to imposing obligations on gatekeepers. They argue for a very limited black list (Article 5) of prohibited behaviours (with detailed obligations) and a grey list (Article 6) containing obligations that are more generally drafted and based on well-established theories of harm under competition law.<sup>23</sup> A Joint Research Centre (JRC) study also proposes to refine the Commission's approach and create a black list of forbidden behaviours and a grey list of practices that are in principle considered anti-competitive but for which a pro-competitive justification is possible, with the gatekeeper bearing the burden of proof for that **efficiency defence**.<sup>24</sup> The procedure for updating obligations (24 months for a market investigation after officially starting the procedures plus delegated act plus individual proceedings against companies)



is too time-consuming according to some scholars, who propose instead to introduce a rule that enables the Commission to take **interim measures**.<sup>25</sup>

## Data portability, interoperability and data-sharing obligations

The DMA imposes a range of obligations in order to reduce gatekeepers' exclusive control over the data they collect. However, the exact scope and implementation of the rules on data portability, data sharing and interoperability could be further specified.

**Data portability** under the DMA seems to have a broader scope than the GDPR's right to data portability and it would ensure additional forms of portability, including portability of non-personal data for business users and real-time and continuous portability.<sup>26</sup> However, the implementation of data portability runs into a number of technical, legal and economic obstacles (e.g. loss of context once data assets are ported from the original platform, need to obtain consent from natural persons to port personal data). Against this backdrop, lawmakers are invited to look at the feasibility of implementing an alternative to data portability, which would be to grant individuals 'in-situ rights to access end user data'. Under such scenario, rather than transferring the individual data from the gatekeeper to another business user, the business user could run third-party algorithms on the data resident on the gatekeeper's server, without direct access to individual data.<sup>27</sup> EU lawmakers could also clarify how the rules enshrined in the DMA interplay with the GDPR<sup>28</sup> and how they will interact with intellectual property law and trade-secret protection.<sup>29</sup>

Some scholars have [stressed](#) that the scope of the **data-sharing obligation** under the draft DMA does not provide a structural solution to the lack of data sharing because the scope of this obligation is restricted to search data and to a few large online platforms acting as gatekeepers. They call on EU policymakers to adopt a more detailed institutional framework to enforce the data-sharing obligation possibly with the creation of a European data-sharing agency or a data-sharing cooperation network.<sup>30</sup>

Finally, several proposals have been made to complement the rules on **interoperability**. The European Data Protection Supervisor (EDPS) [recommends](#) introducing minimum interoperability requirements to be imposed on gatekeepers and the implementation of technical standards drawn up at EU level. Another proposal has also been made to use a three-step approach to determine the degree of interoperability necessary, taking into account the potential negative impacts on social networks and on users (such as the risk for privacy) and leaving flexibility for national regulators and agreements between platforms.<sup>31</sup>

## Enforcement, compliance and judicial review

A set of recommendations have been made to boost DMA enforcement. These include setting up a **compulsory notification procedure** (enabling companies to make commitments) instead of the proposed self-assessment and providing the Commission with the **power to impose additional obligations on gatekeepers more quickly** (e.g. after an infringement decision) and to withdraw obsolete obligations (e.g. phasing out the sunset clause).<sup>32</sup> In addition, some scholars stress that enforcement depends too heavily on the European Commission and advocate stronger involvement of private parties, independent bodies and the Member States in enforcement.<sup>33</sup> In this context, a new regulatory ex-ante regime for platforms comprising both pro-competitive interventions and an **enforceable code of conduct** for gatekeeper platforms has been recommended.<sup>34</sup>

Furthermore, while there are strong arguments for concentrating enforcement powers in the Commission (size of the gatekeepers and the EU-wide effect of their conduct), the independence of the EU regulator, the extent of their powers and the interplay with competition law investigations and national regulators need to be better clarified.<sup>35</sup> One way would be to **differentiate more clearly between implementation and enforcement processes** and rely on expertise at Member State level.<sup>36</sup> BEREC also [recommends](#) including **dispute resolution mechanisms** in the DMA

proposal and believes that an advisory board of national independent authorities should be set up to support the EU competent authority and provide technical expertise and guidance.

Other commentators have warned of the **need to ensure a judicial review** of the DMA. For some, there is a risk that regulators could use the DMA provisions to bypass the legal requirements of Article 102, developed over decades under the scrutiny of the CJEU, since the Commission can impose the same behavioural obligations under the DMA as under competition law, but without having to prove likely anticompetitive effects.<sup>37</sup> In addition, the fact that the DMA gives the Commission substantial leeway (for instance to define which firms qualify as gatekeepers, by stipulating the criteria) could impede the effectiveness of the judicial review of Commission decisions by the Court.<sup>38</sup>

## Interaction with competition law

Given that the DMA covers companies and practices that could at the same time fall within the scope of Articles 101 and 102 TFEU, strong coordination mechanisms between the application of the DMA and that of competition law provisions are necessary.<sup>39</sup> Some scholars also point to lacunae in EU merger rules, as the draft DMA provides only for an obligation for gatekeepers to inform the European Commission of any planned deals (Article 31). They call for explicit changes to merger rules in order to protect EU companies against [killer acquisitions](#) or the acquisition of nascent competitors.<sup>40</sup>

## Legislative process

In Parliament, the DMA has been assigned to the IMCO committee, which has appointed Andreas Schwab (EPP, Germany) as rapporteur. The Committees on Industry, Research and Energy (ITRE) and on Economic and Monetary Affairs (ECON) are associated committees ([under Rule 57](#) of Parliament's rules of procedures) and will be involved in the drafting of the IMCO reports and trilogue negotiations.

As the EU lawmakers, Parliament and Council will now assess if the Commission's proposal is an appropriate response to the challenges identified and will each work towards defining their own position on the proposal, the first step in the EU's interinstitutional legislative process.

## EUROPEAN PARLIAMENT SUPPORTING ANALYSIS

Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, [Collection of studies for the IMCO Committee – Digital Services Act](#), May 2020.

EPRS, [Regulating digital gatekeepers](#), briefing, December 2020.

EPRS, [Online platforms: Economic and societal effects](#), study, March 2021.

EPRS, Digital services act, [European added value assessment](#), October 2020.

EPRS, [Digital Services Act Pre-legislative synthesis of national, regional and local positions on the European Commission's initiative](#), November 2020.

EPRS, Initial appraisal of the Commission impact assessment, forthcoming.

## OTHER SOURCES

[Contestable and fair markets in the digital sector \(Digital Markets Act\)](#), European Parliament, Legislative Observatory (OEIL).

## ENDNOTES

- <sup>1</sup> The focus of this briefing is the digital markets act. Please also see the EPRS EU Legislation in progress briefing, [Digital services act](#), March 2021.
- <sup>2</sup> See J. Crémer, Y.-A. de Montjoye and H. Schweitzer, [Competition policy for the digital era](#), 2019.
- <sup>3</sup> See Stigler Centre, [Stigler Committee on Digital Platforms: Final Report](#), 2019; J. Crémer, Y.-A. De Montjoye and H. Schweitzer, [Competition policy for the digital era](#), 2019; UK, [Report of the Digital Competition Expert Panel, Unlocking digital competition](#), 2019; German Federal Ministry for Economic Affairs and Energy, [Report by the Commission 'Competition Law 4.0', A new competition framework for the digital economy](#), 2019.
- <sup>4</sup> For a background, see T. Madiega, [Regulating digital gatekeepers](#), EPRS, European Parliament, December 2020. 'Tipping' refers to situation where 'once a firm has obtained a certain advantage over rivals in terms of market share, its position may become unassailable and the market may gravitate towards a situation of dominance or (quasi)-monopoly' because of the presence of specific market features such as network effects, economies of scale and access to data (See European Commission, [impact assessment](#) at pp. 32-34).
- <sup>5</sup> See European Parliament, [Collection of studies for the IMCO Committee – Digital Services Act](#), June 2020. See also [Liability of online platforms](#), Panel for the Future of Science and Technology, European Parliament, February 2021.
- <sup>6</sup> See N. Lomba and T. Evas, [Digital services act](#), EPRS, European Parliament, October 2020.
- <sup>7</sup> See C. Collovà and T. Madiega with C. Morichon and A. Väisänen, [Digital Services Act Pre-legislative synthesis of national, regional and local positions on the European Commission's initiative](#), EPRS, European Parliament, November 2020.
- <sup>8</sup> See [impact assessment](#) at pp. 8-10. The Commission highlights inter alia that the top seven of the large platforms account for 69 % of the total €6 trillion valuation of the platform economy, and that the total net revenues of some of these platforms (of billions of euros) double and triple over a few years.
- <sup>9</sup> See European Commission, [impact assessment](#) at pp. 10-14.
- <sup>10</sup> *ibid.*
- <sup>11</sup> *ibid.* at p 14-15.
- <sup>12</sup> See Article 1(1).
- <sup>13</sup> See F. G'Sell, [The Digital Markets Act Represents a Change in Europe's Approach to Digital Gatekeepers](#), Chicago University Stigler Centre, Promarket, 2021.
- <sup>14</sup> See European Commission, [impact assessment](#) at p 48. See also C. Caffara and F. Scott Morton, [How Will the Digital Markets Act Regulate Big Tech?](#), Chicago University Stigler Centre, Promarket, 2021. The authors argue that these criteria will capture not only the core businesses of the largest players (GAFAM), but perhaps also a few others. They believe Oracle and SAP, for instance, would appear to meet the thresholds, as would AWS and Microsoft Azure while Twitter, AirBnB, Bing, LinkedIn, Xbox Netflix, Zoom and Expedia do not appear to meet the thresholds at present, and Booking.com, Spotify, Uber, Bytedance/TikTok, Salesforce, Google Cloud and IBM Cloud appear to meet some but not others at this point.
- <sup>15</sup> This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'European Parliament supporting analysis'.
- <sup>16</sup> See CERRE, [The European proposal for a Digital Markets Act: A first assessment](#), 2021. See as well EPRS, [Online platforms: Economic and societal effects](#), EPRS study, March 2021.
- <sup>17</sup> See D. J. Teece and H. J. Kahwaty, [Is the Proposed Digital Markets Act the Cure for Europe's Platform Ills? Evidence from the European Commission's Impact Assessment](#), 2021. See also N. Petit, who [argues](#) the DMA should send incentivising market signals and prioritise innovation.
- <sup>18</sup> See K. Jebelli, [The EU Digital Markets Act: Five Questions of Principle](#), February 2021.
- <sup>19</sup> See A. Lamadrid de Pablo and N. Bayón Fernández, [Why the Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It](#), 2021.
- <sup>20</sup> See C. Cennamo and D. Sokol, [Can the EU Regulate Platforms Without Stifling Innovation?](#), Harvard Business Review blog, 2021. See also CERRE above.
- <sup>21</sup> See D. Geradin, [What is a digital gatekeeper? Which platforms should be captured by the EC proposal for a Digital Market Act?](#), 2021.
- <sup>22</sup> See CERRE, above.
- <sup>23</sup> See CERRE, above.
- <sup>24</sup> See Cabral and others, [The EU Digital Markets Act. Publications Office of the European Union](#), Luxembourg, 2021.
- <sup>25</sup> See R. Podszun, P. Bongartz and S. Langenstein, [Proposals on how to improve the Digital Markets Act](#), 2021.
- <sup>26</sup> See I. Graef, [The opportunities and limits of data portability for stimulating competition and innovation](#), *Competition Policy International – Antitrust Chronicle*, Vol. 2(2), pp. 1-8, 2020.

- <sup>27</sup> See Cabral and others, above.
- <sup>28</sup> In this sense, see the [EDPS Opinion 2/2021 on the proposal for a Digital Markets Act](#), 2021.
- <sup>29</sup> See B. Lundqvist, [The Proposed Digital Markets Act and Access to Data: A Revolution, or Not?](#), *IIIC – International Review of Intellectual Property and Competition Law*, Vol. 52, 2021, pp. 239-241.
- <sup>30</sup> See I. Graef and J. Prüfe, [Governance of Data Sharing: A Law & Economics Proposal](#), TILEC Discussion Paper No 001, 2021.
- <sup>31</sup> See [Opinion of the French Digital Council](#), July 2020. A distinction is proposed between 1) social graph interoperability, which would allow the user to maintain the relationships acquired on the previous social network when joining a new one; 2) instant messaging interoperability, which would enable the user on network A to send or receive messages from a user on network B; and c) content interoperability, which would allow the user to view, publish or even interact with content on a third-party social network.
- <sup>32</sup> See G. Monti, [The Digital Markets Act – Institutional Design and Suggestions for Improvement](#), TILEC Discussion Paper, 2021.
- <sup>33</sup> See R. Podszun, P. Bongartz, and S. Langenstein, above.
- <sup>34</sup> See EPRS, [Online platforms: Economic and societal effects](#), EPRS study, March 2021.
- <sup>35</sup> In this sense, see CERRE, above.
- <sup>36</sup> See D. Geradin, [DMA proposal: Should there be a greater role for the Member States?](#), 2021.
- <sup>37</sup> See for instance K. Jebelli, [The EU Digital Markets Act: Five Questions of Principle](#), February 2021.
- <sup>38</sup> See P. Ibáñez Colomo, [The Draft Digital Markets Act: A Legal and Institutional Analysis](#), 2021.
- <sup>39</sup> See C. Fernández, [A New Kid on the Block: How Will Competition Law Get along with the DMA?](#), 2021.
- <sup>40</sup> See C. Caffara and F. Scott Morton above. See also EPRS, [Online platforms: Economic and societal effects](#), EPRS study, March 2021.

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