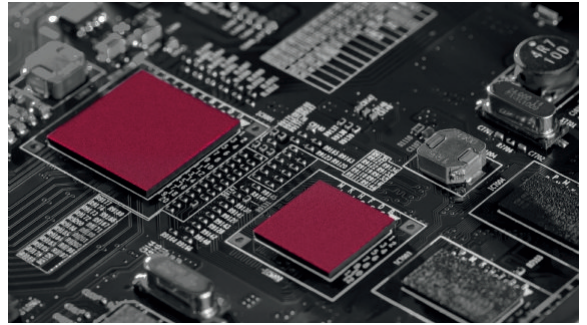


# Tech Law Briefing

March 2022



## Digital Markets Act (DMA): political agreement reached

Dear Reader,

European Union (EU) stakeholders reached a provisional political agreement on the Digital Markets Act (DMA), which aims to make the digital sector fairer and more competitive.

The text is almost finalised. The summary below is based on public information provided by the Council of the European Union (as of 28 March 2022).

Please find below our Tech Law Briefing.

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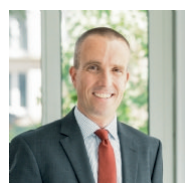
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## I. Aim

The aim of the DMA is to ensure a level playing field in digital platform markets by limiting the market power of "Big Tech". It does so by imposing numerous obligations on large digital companies that are officially designated as "gatekeepers". Affected companies most likely include GAFAM (Google, Amazon, Facebook, Apple, Microsoft), but also other companies such as Booking.com, Salesforce and PayPal could meet the relevant gatekeeper thresholds detailed below.

The DMA aims to ensure that no large online platform that acts as a 'gatekeeper' for a large number of users abuses its position to the detriment of companies wishing to access such users.

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## II. Gatekeepers

The DMA is generally applicable, if a company operating a core platform service reaches certain financial and user thresholds in the EU.

### 1. Financial Criteria

For a platform to qualify as a gatekeeper, it must

either have had an **annual turnover of at least €7.5 billion within the European Union (EU)** in the past three years

or

have a **market valuation of at least €75 billion.**

### 2. Active User Criteria

In addition to the Financial Criteria, it must

have at least **45 million monthly end users**

and

at least **10,000 business users established in the EU.**

### 3. Platform Criteria

Purported gatekeepers must also control one or more core platform services in at least three EU member states. These core platform services include online marketplaces and app stores, search engines, social networks, cloud services, advertising services, voice assistants and web browsers.

### 4. Emerging Gatekeepers

In order to ensure the dynamic nature of the DMA, a category of '**emerging gatekeeper**' has been added. This will enable the Commission to impose certain obligations on companies whose competitive position is proven but not yet sustainable. The definition of emerging gatekeepers has yet to be published. As such, it is unknown which companies might qualify.

### 5. Exemption for SMEs

To ensure that the rules laid down in the regulation are proportionate, small and medium enterprises (SMEs) are exempt from being identified as gatekeepers, apart from exceptional cases.

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## III. Obligations

Below follows an excerpt of some of the more significant obligations designated gatekeepers must adhere to:

#### **Gatekeepers must:**

- ensure that users have the right to unsubscribe from core platform services under similar conditions to subscription
- for the most important software (e.g. web browsers), not require this software by default upon installation of the operating system
- ensure the interoperability of their instant messaging services' basic functionalities
- allow app developers fair access to the supplementary functionalities of smartphones (e.g. NFC chip)
- give sellers access to their marketing or advertising performance data on the platform

## Gatekeepers must not:

- inform the European Commission of their acquisitions and mergers
  - rank their own products or services higher than those of others (self-preferencing)
  - reuse private data collected during a service for the purposes of another service
  - establish unfair conditions for business users
  - pre-install certain software applications
  - require app developers to use certain services (e.g. payment systems or identity providers) in order to be listed in app stores
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## IV. Fines

If a gatekeeper violates the rules laid down in the legislation, it risks **a fine of up to 10%** of its total worldwide turnover. For a **repeat offence, a fine of up to 20%** of its worldwide turnover may be imposed.

If a gatekeeper **systematically fails to comply with the DMA**, i.e. it violates the rules **at least three times in eight years**, the European Commission can open a market investigation and, if necessary, impose behavioural or structural remedies.

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## V. Potential impact

Many of the obligations imposed on gatekeepers are sourced from previous European Commission decisions against Big Tech, highlighting the relationship between DMA and competition law.

For instance, the obligation to allow app developers fair access to the supplementary functionalities of smartphones (e.g. NFC chip) and the prohibition to require app developers to use certain services (e.g. payment systems or identity providers) in order to be listed in app stores seems to follow pretty much Epic Games position in their dispute with Apple and Google, and will certainly give more freedom to app developers. This might well be the end of the "30 per cent share" imposed by many app stores.

Prohibiting gatekeepers from ranking their own products or services higher than those of others ("self-preferencing") brings the Google Shopping decisions to mind, in which case Google prominently highlighted its price comparison service in the results of its search engine while demoting rivals therein. The Commission is also currently investigating against Amazon for allegedly favouring, to the detriment of third party sellers on Amazon's Marketplace, its own products in the product page's "buy box", i.e.,

the default seller position. "Self-preferencing" of platform operators that assume a dual role, i.e., operate a platform while competing as an individual seller or distributor on that platform, will likely remain a core issue in the time to come.

Increasing competition for ancillary services may be expected. A growing number of other ancillary services, such as delivery, payment or identification services are not part of the gatekeeper's core platform, but are often sold with it. For example, retailers can sell their goods on Amazon's marketplace, and they can pay for Amazon's delivery service or use third party delivery services for shipment. The DMA limits how gatekeepers can use their core platform to promote their ancillary services to the detriment of smaller businesses which do not have their own large platform.

The DMA also restricts the practice of contractually preventing business partners from offering the same products or services under superior conditions elsewhere (so-called price parity or most-favoured-nation clauses). These clauses, utilised in the past by Booking.com and Amazon amongst others, have been a thorn in the eye of competition authorities across Europe and by now been banned in multiple jurisdictions, such as Germany, France and Italy.

Meanwhile, the prohibition to reuse private data collected during a service for the purposes of another service will raise interesting issues, especially since it is at the crossroads with GDPR (and the German Federal Cartel Office's case against Facebook regarding WhatsApp).

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## **VI. Next steps and application**

Final technical work still has to be done; the text should be finalised in the coming days. The provisional agreement reached today is subject to approval by the Council of the European Union and the European Parliament. The regulation must be implemented within six months after entering into force. This means that the DMA should be applicable by late 2022 / early 2023.

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