

Competition Policy and Big Tech: The European Approach

The Digital Markets Act Proposal

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Competition law in the European Union

Based on two Articles of the Treaty on the Functioning of the European Union

- Article 101 addresses anti-competitive agreements and concerted practices that may affect trade between members states or reduce competition in the common market
- Article 102 aims to tackle the abuse of dominant positions

Consensus that in fast changing digital markets new rules are needed

Digital Markets Act (DMA)

Proposed by **European Commission** in December 2020

Requires approval by

- **European Council** (representing member states)
- **European Parliament** (elected representatives)

Note

- DMA will be part of legislation for **Digital Single Market** to enhance coherence and legal certainty (legal basis: Article 114 on Harmonization)
- It is **not part of competition law**, which would require unanimous vote by all member states

Objective of Digital Markets Act

- Ensure contestable and fair markets in the digital sector across the Union
- Where **gatekeepers** are present
- By means of uniform rules

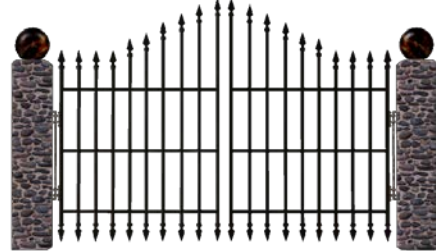
Proposed DMA Designation Process (Art 3)

3 designation criteria (¶1):

- a) Significant impact on internal market
- b) Operates core platform service (CPS) which is an important gateway for business users to reach end users
- c) Entrenched and durable position (or in foreseeable future)

NB CPS defined in Art 2, but can be added to over time (Art 17)

Measures (¶6): size, #users, entry barriers, scale and scope effects lock-in, etc



Identify 'relevant' CPS which satisfy Art 3(1b) (¶7)

Criteria presumed to be satisfied if (¶2):

- a) EEA Turnover \geq EUR 6.5bn in last 3 years and provides (CPS) in \geq 3 member states.
- b) >45 M active end users AND >10 k active business users in EU
- c) Thresholds in b) held for last 3 years.

NB Thresholds can be adjusted over time (¶5):

Potential for Rebuttal (¶4)

Proposed obligations for core platform services

Two lists of obligations (black list and grey list)

Art 5: seven obligations that apply to relevant core platform services

Art 6: eleven obligations susceptible to further specification

Note

- List of obligations seems backward looking, based on previous antitrust cases not on general principles
- General application (one-size fits all)

Proposed DMA architecture around obligations

Seven Art 5 Obligations:
simply apply to relevant
core platform services

Eleven Art 6 Obligations:
are susceptible to further
specification (see Art 7)

Notes:

- Fines can be imposed for breach (including for period prior to 'specification') (Art 26)
- New obligations can be added over time (Art 10), following market investigation (Art 17)
- Suspension possible if services non-viable in EEA
- Exemption on narrow PI grounds
- No other objective justification possible (except Art 6.1j&k)

If Commission considers measures taken are not compliant, it can specify alternative measures (¶12).

Or gatekeeper can request determination on whether measures are *effective* ¶15).

Specified measures must be *effective* in achieving the objectives of the obligation and *proportionate* in the specific circumstances of the gatekeeper and the relevant services (¶15).

Proposed DMA obligations (for relevant CPS)

	Article 5	Article 6
Restricting tying or self-preferencing	<ul style="list-style-type: none"> No tying from CPS to ID services (5.e) No tying from CPS to other CPS (5.f) 	<ul style="list-style-type: none"> Allow un-installing of apps, <i>unless essential to OS/device</i> (6.1b) Allow 'side loading' of third party apps or app stores, <i>unless threatens integrity</i> (6.1c) No self-preferencing in rankings (6.1d)
Data use/sharing	<ul style="list-style-type: none"> No data fusion without user consent (5.a) 	<ul style="list-style-type: none"> No use of non-public data generated by the activity of business users to compete against those business users (6.1a) Data sharing obligation: real-time, free of charge data to be provided to business where generated through their activity, albeit only where relevant consumer consent (6.1i) Data sharing obligation: FRAND access to search data (6.1j)
User mobility	<ul style="list-style-type: none"> No MFN/parity clauses (5.b) No anti-steering (5.c) 	<ul style="list-style-type: none"> No technical restriction of switching or multi-homing across apps using OS (6.1e) Access and interoperability for business users and ancillary services to OS should be as for proprietary ancillary services (6.1f) Provide real-time data portability (6.1h)
Ad transparency	<ul style="list-style-type: none"> Price transparency (5.g) 	<ul style="list-style-type: none"> Performance transparency (6.1g)
Fair conduct	<ul style="list-style-type: none"> No prevention of complaints to public authorities (5.d) 	<ul style="list-style-type: none"> FRAND access to app stores (6.1k)

Enforcement

- Obligations supposed to be self-enforcing
- Too few resources
- Limited role for national competition authorities

Overall assessment

- Step in the right direction
- With room for improvements