DIGITAL MINDS | URÍA MENÉNDEZ

Client briefing

COMPETITION AND EU LAW

DIGITAL LAW

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The Digital Markets Act

> **After more than a year of debate, and pending its formal adoption, the Digital Markets Act is one of the first initiatives to globally regulate the power of large companies in the digital sector (designated "gatekeepers"). This regulation, which defines the obligations and prohibitions applicable to gatekeepers, will apply alongside European and national competition law.**

On 24 March 2022, the European Parliament and the Council reached a provisional agreement on the text of the proposed Regulation on contestable and fair markets in the digital sector ("**DMA**"). The new rule introduces an *ex ante* regulation that seeks to ensure "fair and open digital markets" by targeting digital platforms that act as gatekeepers. It also seeks to address the European Commission's ("**EC**") concern that existing enforcement powers (mainly under Article 102 TFEU) are insufficient, slow and have limited effect in deterring potentially anti-competitive practices in rapidly evolving digital markets.

The agreement, which came 18 months after the EC's proposal and following informal trialogues, is awaiting formal approval by the co-legislators. In the meantime, the (almost) final text of the DMA has recently been leaked and the EC itself has explained the essential aspects of the regulation following the changes agreed in the inter-institutional negotiations.

It is worth mentioning the criticism that the DMA has received – mainly from Big Tech companies – from the moment the initial proposal was made, which continues to date. The main criticisms are that the DMA (i) would create unnecessary privacy and security vulnerabilities for users (alleging, for example, that it endangers the encryption of messages), (ii) would prohibit platforms from charging for intellectual property (to which they allocate significant investment), (iii) would reduce the utility of products from a user perspective, and (iv) does not clearly explain how companies can avoid the heavy fines set out in the regulation.

1. *EX ANTE* REGULATION OF DIGITAL GATEKEEPERS

The DMA will apply to undertakings that are designated as gatekeepers according to objective criteria set out in the regulation. As a precondition to qualify as a gatekeeper, an undertaking must provide at least one of the types of services considered "core platform services": online intermediation services (e.g. online marketplaces, app stores or intermediation services in sectors such as mobility or energy), online search engines, social networks, video-sharing platforms, number-independent interpersonal electronic communication services, operating systems, cloud services, advertising services (ad networks, ad

exchanges and other ad intermediation services), web browsers and virtual assistants (the latter two were not included in the EC's initial proposal).

In addition, a rebuttable presumption is established that the core platform service provider is a gatekeeper if it fulfils all of the following three requirements (Article 3):

(i) it has a significant impact on the internal market due to its size (presumed if the undertaking has an annual turnover in the European Union ("**EU**") of EUR 7.5 billion or more in each of the last three financial years, or if its average market capitalisation or 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);

(ii) it controls an important gateway for business users to reach their end users (presumed if the undertaking operates a core platform service with at least 45 million monthly active end users based or located in the EU and at least 10,000 annual active business users based in the EU in the last financial year); and

(iii) it holds an entrenched and durable position (presumed if the undertaking met the other two criteria in each of the last three financial years).

If a given undertaking does not fulfil one of these requirements, the DMA allows the EC to assess that undertaking's specific situation through a market investigation and decide whether to qualify it as a gatekeeper on the basis of a qualitative assessment.

Gatekeepers will be subject to a number of obligations (Articles 5 and 6) in order to, according to the EC, enable other undertakings to compete in the market on the merits of their products and services, thereby facilitating innovation. These obligations include refraining from the following prohibited practices (some of which have been modified or added following recent negotiations):

(i) using business users' data when the gatekeeper competes with those business users on its own platform;

(ii) classifying the gatekeeper's own products or services in a more favourable manner in comparison to similar products of third parties ("self-preferencing");

(iii) requiring app developers to use certain services of the gatekeeper (e.g. payment systems, identity providers and/or search engines) in order to be listed in the gatekeeper's app stores;

(iv) tracking end users outside the gatekeeper's core platform service for the purpose of targeted advertising, without the end users having given effective consent to this; and

(v) using the personal data of users of a third-party service when that third-party service uses the gatekeeper's platform (a deviation from the EC's initial proposal, which prevented gatekeepers from tracking users who have withheld their consent when they visit websites that are part of the gatekeeper's advertising networks).

The DMA also introduces another series of obligations aimed, among other things, at

(i) allowing users to uninstall any application that is not essential to the functioning of an operating system or device;

(ii) ensuring that third-party applications and app stores can ask users to change their default settings (although, under the Council's proposed changes, gatekeepers are allowed to apply "duly justified" security requirements to third-party applications); and

(iii) ensuring the interoperability of the gatekeeper's hardware and software with those of third parties.

Finally, the DMA requires gatekeepers to inform the EC of any planned concentration in which the merging entities or the target of concentration provide core platform services or any other services in the digital sector or enable the collection of data, irrespective of whether the concentration must be notified to the EC or the national competition authority. This provision, coupled with the EC's recent change of policy on referral of transactions under Article 22 of Regulation (EC) 139/2004 on merger control, will strengthen the scrutiny to which transactions in the digital sector will be subject in the future.

2. CONSEQUENCES OF NON-COMPLIANCE

In the event of non-compliance, the DMA foresees the possibility of imposing fines of up to 10% of the undertaking's total worldwide annual turnover, or 20% in the case of repeated infringements, and periodic penalties of up to 5% of the undertaking's average daily worldwide turnover.

The EC can also impose behavioural remedies to the extent that they are proportionate to the infringement committed and necessary to ensure compliance with the DMA. Exceptionally, the EC can require structural remedies if, following a market investigation, it is established that the gatekeeper has systematically infringed the DMA, and there are no equally effective behavioural remedies.

3. PRACTICAL APPLICATION OF THE DMA FOLLOWING ITS ENTRY INTO FORCE

The DMA is complementary to European and national competition law rules. It seeks to address practices conducted by gatekeepers that either (i) escape the existing EU competition law enforcement rules, or (ii) cannot always be effectively addressed by these rules due to the systemic nature of certain practices, as well as the *ex post* and case-by-case nature of competition law. The DMA therefore does not limit the EU's ability to intervene *ex post* by applying existing European and national competition rules.

Once it has been formally adopted, the DMA will enter into force 20 days after its publication in the Official Journal of the EU and will become applicable six months later. As a first step in implementing the DMA, the EC will examine whether undertakings providing core platform services can qualify as gatekeepers under the regulation and, for that purpose,

(i) undertakings will have to verify themselves whether they meet the quantitative thresholds set in Article 3 and, if they do, will then have to provide the EC with information in this regard;

(ii) the EC will then designate undertakings that meet the DMA thresholds as gatekeepers on the basis of information provided by the undertakings (subject to possible substantiated rebuttal) and/or following a market investigation;

(iii) undertakings will have to comply with the obligations established in the DMA within six months of being designated a gatekeeper. For gatekeepers that do not yet hold an entrenched and durable position, but which are expected to do so in the near future, only those obligations that are necessary and appropriate to ensure that the undertaking does not achieve such a position through unfair means will apply.

The DMA is undoubtedly a potential source of litigation in national courts. The very designation of undertakings as "gatekeepers" could itself lead to disputes, for example. Although the DMA introduces prohibitions and imposes obligations, greater clarity is needed regarding its practical application by gatekeepers (unsurprisingly, some of the obligations introduced in the DMA are expected to be developed through subsequent delegated acts).

4. STATUS OF THE DIGITAL SERVICES ACT

The DMA is part of a package of draft legislation that also includes the so-called Digital Services Act ("**DSA**"). Ever since the EU's existing internet legal framework was adopted two decades ago, new and innovative business models and services have emerged, such as social networks and online marketplaces. The European framework, which is based on Directive 2000/31/EC (known as the e-Commerce Directive), was transposed into Spanish law by Law 34/2002 on information society services and e-commerce, and has been the central regulation to date. However, as these internet businesses have developed, new and critical issues have arisen, especially in relation to the role and responsibilities of service providers as intermediaries in these new businesses.

Case law has been unable to interpret and accommodate the existing legal framework to this new environment and, in this context, the EU proposed a major regulatory package in 2020, including the DSA[1] as well as the DMA.

The DSA aims to establish new harmonised rules on providing internet intermediary services in the EU, setting out the following:

- **A framework within which intermediary service providers are exempt from liability (if they meet certain conditions).** In line with previous legislation, an intermediary may be exempt from liability if illegal content is hosted or transmitted on its service. The conditions for the exemption to apply depend on the type of intermediary service provided, although they largely hinge on the intermediary service provider not being directly involved in the illegal content in such a way that it is aware of, or has control over, the content.

[1] Proposal for a Regulation of the European Parliament and of the Council on a single market for digital services (Digital Services Act) and amending Directive 2000/31/EC.

- **A set of rules on specific due diligence obligations,** which aim to prevent illegal content and vary significantly depending on the type of intermediary service provider concerned. In this regard, they distinguish between categories of intermediaries such as "mere conduit" providers, caching-services providers and data hosting providers, which comprise online platform providers and include a sub-category of very large online platforms. Intermediaries must moderate content, carry out their intermediation activity in a transparent way, cooperate with the authorities and courts or set up contact points, among other obligations.
- **Rules on implementing and enforcing the DSA,** for instance, in relation to how competent authorities are to cooperate and work together.

On 23 April 2022, the European Parliament and the EU Member States announced that they had finally reached an agreement on the DSA, subject to both sides formally approving it. Once approved, the DSA will apply directly in all Member States (as it is a regulation). The deadline within which these new obligations are to be enforceable is 15 months after it enters into force or from 1 January 2024, whichever is later, except for certain categories of intermediaries (very large platform services or search engines) who will only have four months to comply.

We will analyse this very important regulation in greater detail once the consolidated text is made public.

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