



## BRUSSELS À JOUR

# Unboxing 2023: The DMA is About to Happen – 4th Advent

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report on the latest  
developments from  
the European capital of  
competition law.

After the first three editions of our four-part Brussels à Jour December issue have provided you with food for thought on recent developments in the fields of cartels, State aid, and Merger Control, Christmas Eve and New Year's Day are just around the corner. So maybe time – best with some Christmas cookies to spur your creativity – to come up with some resolutions for 2023? While we know this is a touchy subject for many, the Commission's ambitions for the new year are pretty clear: 2023 will bring the long-awaited Digital Markets Act (“DMA”). It will apply from 2 May 2023 on and is about to reshape the regulatory framework for the digital tech industry. Today, we provide you with an overview of the DMA enforcement roadmap for 2023.

### The Commission's DMA Enforcement Roadmap at a Glance

The first task on the Commission's DMA enforcement agenda will be the designation of so-called “gatekeepers”. Gatekeepers are undertakings providing so-called “core platform services” (e.g., search engines, social networks, or operating systems, among others) if they meet certain quantitative thresholds in terms of turnover, market capitalization, and number of end and business users (Article 3(2) DMA). If they do, they have to notify the Commission within two months after those quantitative thresholds are met, and provide the Commission with information to assess the thresholds for each of their core platform services.

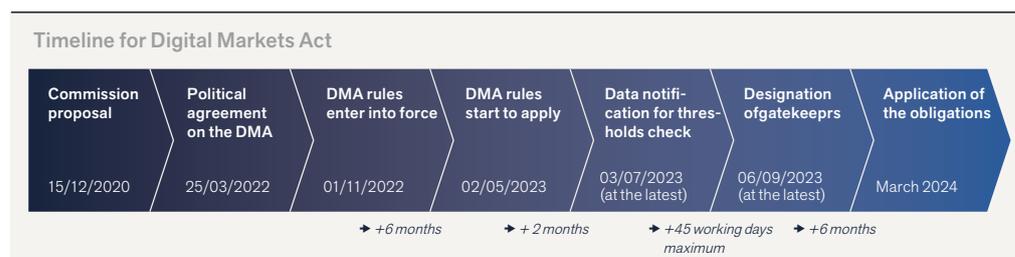
The notifying undertaking can present, with its notification, arguments to demonstrate that it, although it meets the quantitative thresholds, does not meet the substantive gatekeeper criteria, i.e., it does not have a significant impact on the internal market, does not provide a core platform service that is an important gateway for business users to reach end users, and/or does not enjoy an (actual or future) entrenched and durable position.



It is expected that the Commission will complete the first gatekeeper designation proceedings in August/September 2023. Following the Commission’s gatekeeper designation decision, gatekeepers have six months’ time to comply with (most of) the Do’s (i.e., obligations) and Don’ts (i.e., prohibitions) outlined in the DMA.

These concern, for example, issues such as: Interoperability between gatekeepers’ platforms and third party services, processing of data, communication between business users and end users, ban on self-preferencing the gatekeepers’ own services over third-party services, granting users free choice to switch from gatekeepers’ to competitors’ services, or FRAND access to core platform services for business users, among others.

Furthermore, gatekeepers must (immediately upon the designation decision) inform the Commission about intended M&A transactions involving targets active in the digital space or enabling the collection of data, even if the transaction is not notifiable under the European Merger Control Regulation (“EUMR”). The information provided will enable the Commission to reach out and potentially encourage EU member states to request a referral under Article 22 EUMR.



Source: European Commission, [https://competition-policy.ec.europa.eu/dma\\_en](https://competition-policy.ec.europa.eu/dma_en)

### Let's Talk Procedure – the Draft DMA Implementing Regulation

On 9 December 2022, the Commission published its draft DMA Implementing Regulation<sup>1</sup>. It is intended to set the procedural framework for the application of the DMA, including aspects regarding the gatekeeper designation process, guidance on the format of submissions and information that the Commission expects gatekeepers to provide, as well as gatekeepers’ procedural rights. Stakeholders can provide feedback on the draft DMA Implementing Regulation until 9 January 2022. The adoption of the DMA Implementing Regulation is planned for the first quarter of 2023.

The draft DMA Implementing Regulation takes inspiration from the EU Merger Control procedure. For example, like the Form CO in merger cases, the draft DMA Implementing Regulation provides for a Form GD regarding the gatekeeper designation notification. The Form GD calls for detailed information to enable the Commission to assess whether the quantitative gatekeeper thresholds are met. The Commission encourages undertakings concerned to submit a pre-notification draft Form GD well before the notification deadline. Like in EU Merger Control proceedings, notifying undertakings will, during the pre-notification process, likely need to deal with information requests from the Commission before it confirms the completeness of the Form GD (only a complete Form GD will start the 45 working days review period).

<sup>1</sup> [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13540-Digital-Markets-Act-implementing-provisions\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13540-Digital-Markets-Act-implementing-provisions_en)



On the other hand, the draft DMA Implementing Regulation draws from European Court procedures in that it imposes stringent page limits on submissions made by the gatekeepers. For instance, the page limit for the Form GD is 50 pages per core platform service; for submissions to rebut the gatekeeper status, the draft DMA Implementing Regulation only allows for 25 pages. Given the complexity of such submissions, it is obviously difficult to meet these page limits. The Commission only allows derogations if the notifying undertaking can show that “it is objectively impossible to deal with particularly complex legal or factual issues within the relevant page limits” (Article 4 draft DMA Implementing Regulation).

The Commission’s apparent intent to set out a rapid process comes with significant limitations to the gatekeepers’ right to be heard: In addition to the page limits, the draft DMA Implementing Regulation does not provide for the opportunity of an oral hearing, and in contrast to the EU Merger Control procedure, gatekeepers cannot turn to a Hearing Officer for an independent review of the matter. All in all, the draft DMA Implementing Regulation raises questions whether it sufficiently ensures a fair process for gatekeepers.

#### **Let’s Talk Substance – the Commission’s Interactive Approach to DMA Enforcement**

The Commission has announced to host a series of workshops with stakeholders to hear their views on various aspects regarding the implementation of the DMA, such as what measures would be sufficient to comply with and what technical issues arise from the DMA rules. On 5 December 2022, the first workshop was held on the self-preferencing ban (Article 6(5) DMA). The recording and presentations are available on the Commission’s website<sup>2</sup>. The topic for the next workshop will be announced in early 2023. It is still unclear whether the Commission will, at some point, adopt guidelines on substantive DMA issues; in any event, for such guidelines the Commission will presumably need to first get some case work experience.

#### **The Great Reshuffle – the Commission Gets Ready for the DMA Enforcement**

Implementing the DMA requires, no doubt, a great deal of time and effort – not only from large digital undertakings, but of course also on the part of the Commission. DG COMP and DG CONNECT will equally share the burden of the DMA’s enforcement, with the former being responsible for legal and administrative matters and the latter for technical issues. This goes in hand with the shared responsibility between Commissioners Margrethe Vestager and Thierry Breton.

The Commission is currently in the process of assembling and structuring its DMA squad. Recent talk of the town is that Alberto Bacchiega has been approved as head of a new “Directorate J”. Bacchiega is a well-experienced Italian economist who is currently heading Directorate C at DG COMP, responsible for Information, Communication and Media. Directorate J will consist of three units responsible for DMA enforcement and also investigations into digital tech companies under traditional competition rules. Reportedly<sup>3</sup>, one unit will be headed by Thomas Kramler (currently head of DG COMP’s

<sup>2</sup> [https://competition-policy.ec.europa.eu/dma/dma-workshops\\_en](https://competition-policy.ec.europa.eu/dma/dma-workshops_en)

<sup>3</sup> [https://content.mlex.com/#/content/1435228?referrer=search\\_linkclick](https://content.mlex.com/#/content/1435228?referrer=search_linkclick)



unit C.6 responsible for antitrust investigations in the e-commerce and data economy sector), another unit will be headed by Lucia Bonova (who until recently was part of Vestager’s advisor team), while the head of the third unit is still vacant.

The Commission is also still on the search for a “Chief Technology Officer”, who will oversee DG COMP’s tech-related work. The Commission’s doubled-down approach towards Big Tech is also emphasized by the recent opening of its Silicon Valley Office in San Francisco. The office is headed by Gerard de Graaf, who was involved in the legislation process of the DMA and its sister regulation, the Digital Service Act.

It is apparent that the Commission will also need to hire additional workforce: In its original DMA draft proposal<sup>4</sup> from 2020, the Commission expected to need 80 additional full-time staff for the handling of the DMA. Some, including Parliament’s DMA rapporteur Andreas Schwab, suggested<sup>5</sup> that the Commission would need to recruit about twice as much.

The Commission is the sole enforcer of the DMA; at the same time, the DMA provides for close cooperation and coordination between the Commission and EU Member States’ national competition authorities (“NCAs”). Where provided by national law, NCAs may also conduct investigations into potential breaches of DMA rules and report their findings to the Commission. However, it remains to be seen how much help the Commission will actually get (and want) from NCAs; all the more so considering that resources of NCAs are bound by national cases, not least complex proceedings against digital tech firms under traditional competition laws or new rules for digital companies such as Section 19a of the German Act Against Restraint of Competition, which was introduced in in 2021.

*Thanks for reading Brussels à Jour! We hope you enjoyed our countdown to Christmas and to the winter break. A very merry Christmas from our team and, as always, don’t forget to follow us on LinkedIn for more of your favorite EU competition law topics!*

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<sup>4</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52020PC0842>

<sup>5</sup> [www.euractiv.com/section/digital/news/commissioner-hints-at-enforcement-details-as-eu-parliament-adopts-dsa-and-dma/](https://www.euractiv.com/section/digital/news/commissioner-hints-at-enforcement-details-as-eu-parliament-adopts-dsa-and-dma/)