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# WHITE PAPER

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## Digital Markets Act: European Union Adopts New "Competition" Regulations for Certain Digital Platforms

The European Parliament ("EP") and Council have formally adopted the Digital Markets Act ("DMA") in July 2022, imposing new behavioral obligations on large digital platforms qualifying as "gatekeepers." The final agreement introduces several changes compared to the initial proposal detailed in our January 2021 *Commentary*, the most significant of which are: increase in the thresholds that qualify a business as a gatekeeper; the addition of web browsers and virtual assistants to the list of core platform services; additional behavioral obligations, including an interoperability requirement for messaging services; and new sanctions for systematic violations such as a temporary ban on a gatekeepers mergers and acquisitions.

The European Commission ("EC") initially proposed the DMA in December 2020 with the stated goal of promoting fair and contestable markets in the digital sector. The DMA is an unprecedented shift in the European Union's oversight of large digital platforms. Historically, the EC observed a "law enforcement" approach when addressing the conduct of digital platforms, investigating and sanctioning conduct only when it believed a practice violated EC competition law. The DMA, however, is a more regulatory approach that eliminates the EC's burden to analyze and prove market definition, market power, and efficiencies.

## WHAT IS THE DMA?

As described in our June 2020 *Alert*, "European Commission Considers Expanding Investigative and Regulatory Authority in Digital Sector," the EC launched a public consultation to propose regulations of "very large online platforms" with the goal of "ensur[ing] contestability, fairness and innovation and the possibility of market entry" in online platform markets.[1] The DMA proposal in December 2020 followed years antitrust enforcement at EU- and Member State-levels focused on large digital platforms. Those cases have met with mixed results. Advocates for increased enforcement argued that the existing antitrust laws are inadequate to address the unique antitrust problems they allege large digital platforms present, and that, even if successful, the European Union's efforts have taken too long to achieve.

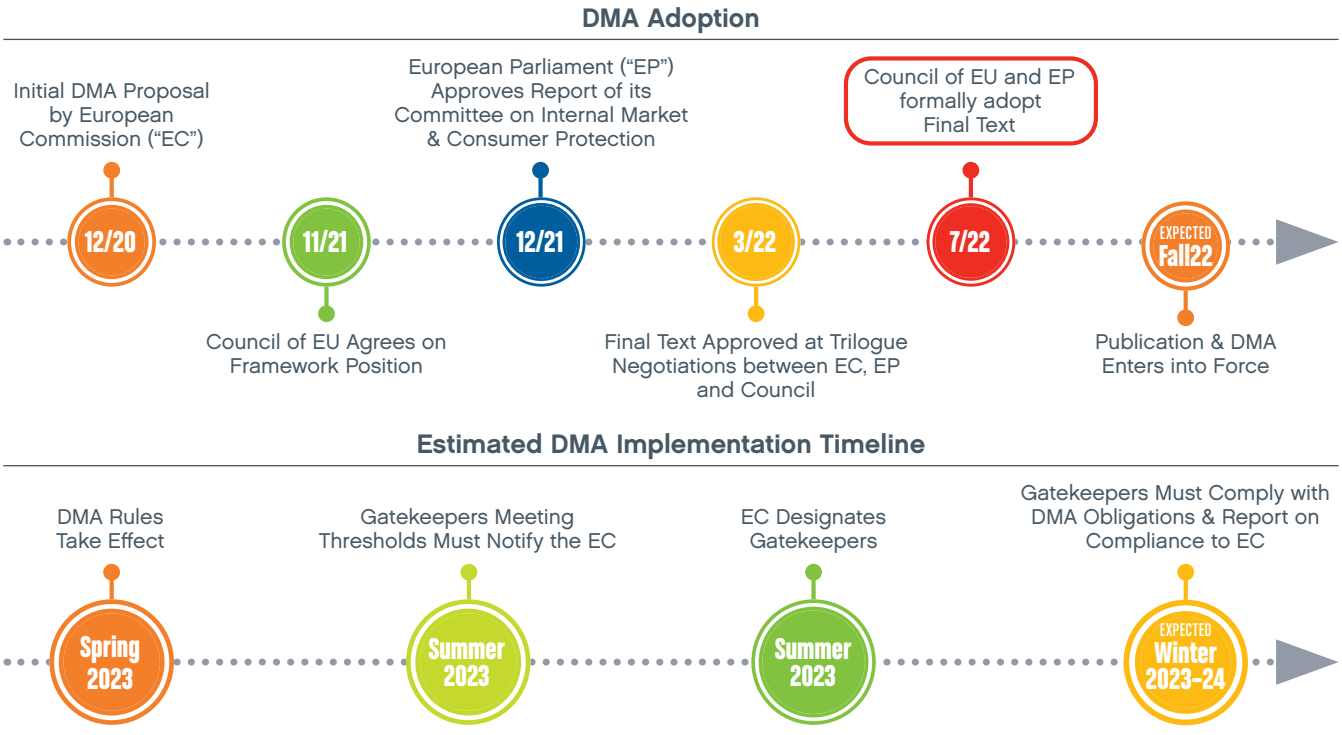
Attempting to solve for those "problems," the DMA would establish far-reaching, behavioral rules automatically applicable to all businesses predesignated as a "gatekeeper." At a conceptual level, gatekeepers are online platforms such as marketplaces, social media, or app stores that "control" access to users, goods, or services. More specifically, the DMA defines "gatekeepers" to include businesses of a certain size, based on various user, revenue, or valuation thresholds, and that provide certain "core platform services," such as online search engines or cloud computing services. The DMA subjects companies designated as gatekeepers to a long list of behavioral dos and don'ts, many of which were the subject of EC and Member State antitrust investigations and litigation against online platforms. The DMA therefore eliminates the EC's obligation to conduct an extensive antitrust investigation required to prove dominance, anticompetitive effects, or adequate remedies.

## WHEN WILL THE DMA TAKE EFFECT?

Approximately 20 months passed between the launch of the DMA proposal and its formal adoption, which is short by EU standards. Now that the EP and Council have adopted the DMA, it will be published in the official journal during fall 2022 and enter into force in spring 2023.

The EC will then undertake a process in which it designates gatekeepers, i.e., the businesses subject to regulation under the DMA. Designated gatekeepers will then have to comply with the new set of rules by early 2024. The implementation of this regulation will undoubtedly be massive and complex. The EC is expected to recruit about 80 to 150 staff to form the unit in charge of DMA oversight.

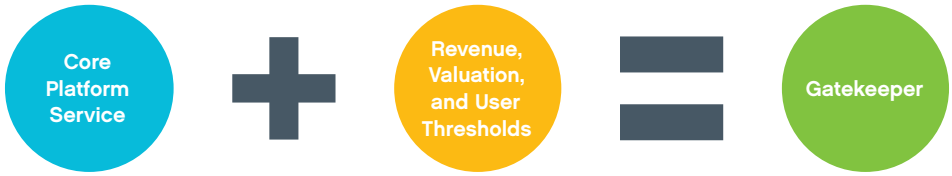
**Figure 1: Anticipated Timelines**



## WHAT IS A GATEKEEPER?

As noted above, at a high level, a gatekeeper is an online provider of "core platform services" such as an online marketplace, search engine, social media outlet, or app store that "controls" access to users, goods, or services. A gatekeeper needs to be designated as such by the EC. The DMA also sets forth certain revenue, valuation, and user thresholds above which a company will be presumed to be a gatekeeper. The aim of the DMA is to prevent a gatekeeper from imposing allegedly unfair conditions for business users and end users of core platform services.

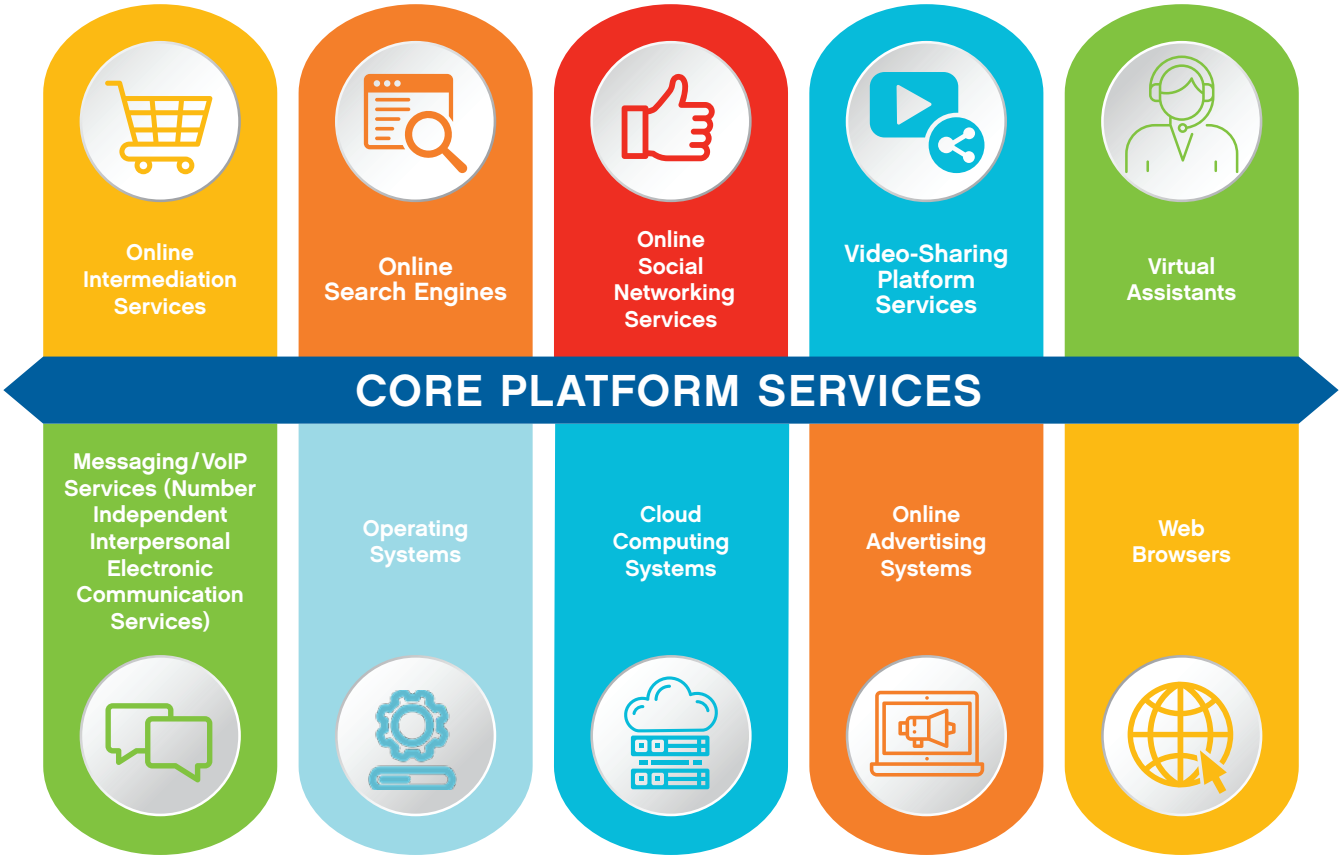
**Figure 2: The Two Prongs of a Gatekeeper**




### What Are Core Platform Services?

The DMA applies only to companies that offer the type of digital services categorized as a core platform service, identified below in Figure 3. The EC developed the list of core platform services based on its view that those services are "most widely used by business users and end users" and because "based on current conditions, concerns about weak contestability and unfair practices by gatekeepers are more apparent and pressing."[2]

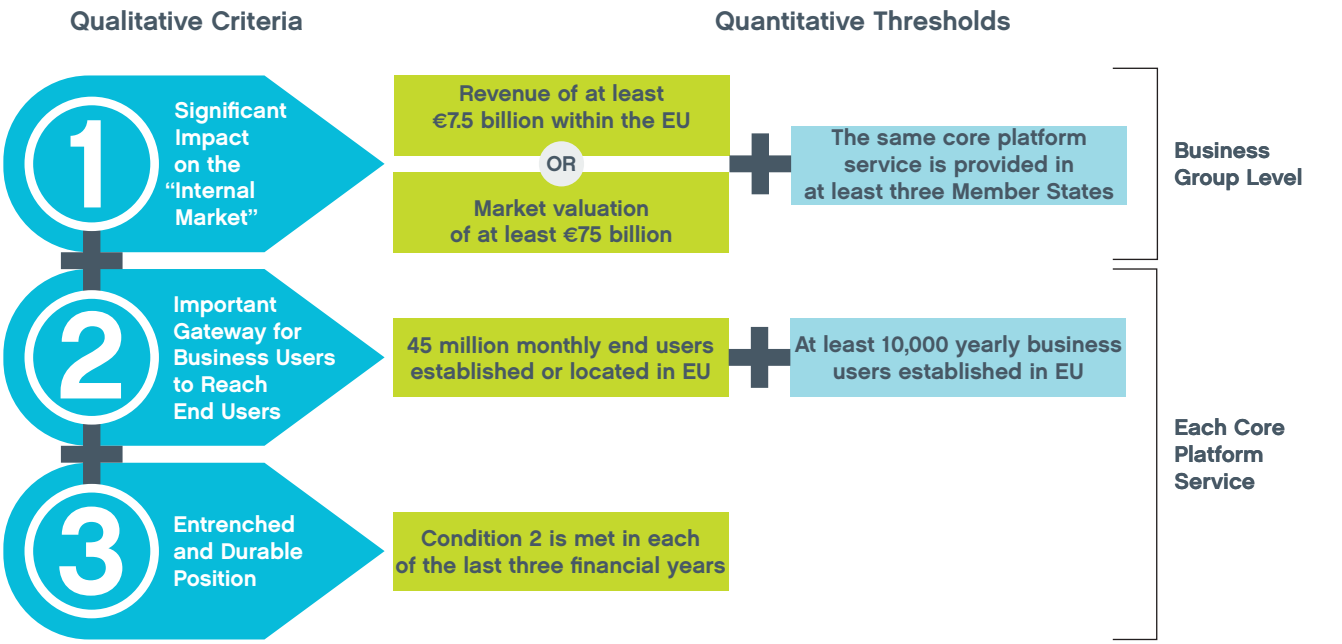
**Figure 3: List of Core Platform Services**



**What Are the Gatekeeper Thresholds?**

Under the DMA, the EC will designate a core platform service provider as gatekeeper if it fulfills three cumulative, qualitative criteria, presumed when the quantitative thresholds in Figure 4 are met. Preliminary expectations are that the DMA could capture the businesses of approximately 10 to 15 companies, most of which are likely to be based in the United States.

**Figure 4: Gatekeeper Qualitative and Quantitative Criteria**




The EC's gatekeeper presumption is rebuttable. Therefore, providers of core platform services that otherwise meet the EC's thresholds will have an opportunity to argue that their business does not meet the qualitative thresholds due to specific circumstances. Conversely, the EC has authority under the DMA to investigate whether a core platform service provider meets the qualitative criteria, even if that provider does not meet the quantitative thresholds, and designate that company as a gatekeeper. The EC may consider factors such as network effects and data-driven advantages, scale and scope effects, business user or end user lock-in, a conglomerate corporate structure, vertical integration prone to cross-subsidization, data combinations, or leveraging, among other criteria.

There are a handful of other rules for potential gatekeepers to consider that will affect the scope and timing of EC regulation.

- As noted above, to qualify as a gatekeeper, a company must provide or offer the core platform service to business users established in the European Union and end users established or located in the European Union. Gatekeeper status therefore is not based upon a company's principal place of business or corporate residence. Thus, the DMA is likely to have an extraterritorial effect as the EC intends for it to apply regardless of a company's location or the law otherwise applicable to the provision of a company's services.
- In some cases, a company may provide several core platform services but have gatekeeper status for only a subset of its services. In those circumstances, the DMA will apply only to those core platform services for which the EC has designated the company as a gatekeeper.
- A company that provides several core platform services will be regulated under the DMA only for the services for which the EC has designated it a gatekeeper, and after such designation has taken place.
- The DMA empowers the EC to modify, over time and under certain circumstances, the list of core platform services, thresholds, and list of obligations to reflect innovation in digital markets.

## WHAT WILL THE EC'S GATEKEEPER DESIGNATION PROCESS BE LIKE?

Once the DMA goes into effect, likely in spring 2023, a company will have two months to notify the EC that it meets the gatekeeper thresholds and, if appropriate, present arguments about why the EC should not designate the company as a gatekeeper. The EC in turn will have 45 working days (instead of 60 in the initial proposal) to make a designation, which is subject to judicial review. A designated gatekeeper then will have six months to bring its core platform services in compliance with the obligations in the DMA and to explain in a report to the EC how it will comply with the DMA, with the EC expecting compliance by early 2024. The EC subsequently will review each gatekeeper designation every three years, to ascertain whether the gatekeeper conditions remain fulfilled.

**Figure 5: EC Designation Process**


## WHAT IS THE IMPACT OF A GATEKEEPER DESIGNATION ON A BUSINESS?

The DMA introduces 22 behavioral obligations to which all designated gatekeepers must comply, in addition to new merger control (Article 14) and audit requirements (Article 15). The behavioral obligations will prevent gatekeepers from pursuing practices that in the EC's views are unfair or that limit the ability of small or new competitors to challenge larger incumbents, even if the conduct does not otherwise violate an existing antitrust law. Critics of the DMA argue that existing competition law is capable of policing any anticompetitive behavior and that the DMA's regulatory approach could stifle innovation or increase privacy and security risks.[3]

Figures 6 and 7 identify the DMA obligations. Obligations under the DMA are either "self-executing" (Art. 5) or "susceptible of being further specified" (Art. 6 and 7). Although gatekeepers must comply with both sets of rules, the list in Article 5 prohibits discrete conduct related to the gatekeeper's dealings with customers or end users that, in the EC's view, a gatekeeper can implement without further guidance. Examples include prohibitions on tying distinct core platform services, most-favored nations clauses, or anti-steering provisions.

In contrast, compliance with Article 6-7 obligations may require further consultation with the EC to interpret the obligation or to develop metrics by which the gatekeeper can measure its compliance. The balance of the Article 6-7 rules cover interoperability with core platform services and access to platform data. While the EC could refuse a request to consult regarding Article 6-7 obligations, the EC expressed a willingness to dialogue with gatekeepers about how to best implement all obligations.

Although the 22 behavioral obligations are a patchwork of stand-alone dos and don'ts, the balance of the obligations can be bucketed to achieve a handful of EC objectives:

- Reducing purported advantages of big data and lowering alleged entry barriers
- Facilitating switching and multihoming
- Ensuring platform or device neutrality
- Preventing lock-in effects
- Prohibiting "leveraging" conduct such as tying, sideloading (not allowing third-party application stores or software to run on an operating system), or limits on gatekeeper ID or payment services
- Promoting transparency

While the EC in theory could apply all of the obligations to all gatekeepers, some are formulated in a way that they will apply only to specific core platform services (e.g., access to search data, messaging interoperability). The impact of the obligations thus may be different depending on the core platform services at stake and the business models pursued by each gatekeeper (e.g., whether they already follow closed or open economic models). The obligations could be summarized as follows:

**Figure 6: DMA Article 5 "Self-Executing" Rules**

| DMA Article | Prohibition / Obligation | |
|---|---|---|
| 5(2) | ✗ | Combination of personal data across platform services or from third-party services without user consent. |
| 5(3) | ✗ | Price parity or most-favored nations ("MFN") clauses. |
| 5(4) | ✗ | Contract terms that prevent business users from doing business with customers outside of the platform ("anti-steering"). |
| 5(5) | ✗ | Restrictions on access and use, on a business user app, to content, subscriptions, features, and other items, even when acquired outside of the platform ("usage restrictions"). |
| 5(6) | ✗ | Restrictions on user complaints about the gatekeeper's services to public authorities or courts. |
| 5(7) | ✗ | Mandatory interoperation with an identification service, web browser engine, or technical service that supports payment services related to services provided by the business user using that gatekeeper's core platform services. |
| 5(8) | ✗ | Tying core platform services. |
| 5(9)–(10) | ✓ | Transparency of prices and fees for online advertising services. |

**Figure 7: DMA Article 6-7 Rules "Susceptible of Being Further Specified"**

| DMA Article | Prohibition / Obligation | |
|---|---|---|
| 6(2) | ✗ | Use of a business user's nonpublic data to compete with that business. |
| 6(3) | ✓ | Easy uninstallation of software applications on an operating system. |
| 6(4) | ✓ | Sideloading: Installation, use, and/or interoperability of third-party software applications or app stores, subject to limited security measures. |
| 6(5) | ✗ | Preferencing products the gatekeeper offers over similar products or services of a third party. |
| 6(6) | ✗ | Restricting end users' ability to switch between different software applications accessed using the gatekeeper's core platform services. |
| 6(7) | ✓ | Nondiscriminatory access to or interoperation with the gatekeeper's hardware or software features. |
| 6(8) | ✓ | For advertisers and publishers, access to the gatekeeper's performance tools and data necessary to verify advertisements of inventory. |
| 6(9) | ✓ | Portability of an end user's data or data generated through the core platform service. |
| 6(10) | ✓ | Access to a business user's data or data generated through the core platform service. |
| 6(11) | ✓ | Fair, reasonable, and nondiscriminatory ("FRAND") access to ranking, query, click, and view data related to free and paid search generated by end users on a gatekeeper's online search engine. |
| 6(12) | ✓ | FRAND general conditions for business users to access software app stores, online search engines, and online social network services. |
| 6(13) | ✗ | Disproportionate conditions when users want to terminate the provision of a core platform service (e.g., in terms of notice period, reasons for termination, or fees). |
| 7 | ✓ | Interoperation of instant messaging, including text messages and sharing of images, voice messages, videos, and other attached files. |

This final version of the DMA contains a number of revisions to the obligations as compared to the initial proposal. The final DMA:

- Prohibits all parity (MFN) clauses, whether wide or narrow. "Wide" clauses prevent a supplier from offering better terms on other intermediation services, while "narrow" clauses prohibit only better offers on the supplier's own online sales channel.
- Grants users the right to unsubscribe from core platform services.
- Extends FRAND access obligations that initially covered only app stores to also cover social media networks and search engines.
- Requires a gatekeepers that sell devices to offer users a choice screen before installing web browsers, virtual assistants, or search engines.
- Obligates a gatekeeper that operates messaging services to provide third-party messaging services the option of interoperating with the gatekeeper's services. The DMA also applies this obligation to group chat and voice and video call services over four years.
- Requires that a gatekeeper establish an internal and independent "compliance function" comprising one or more compliance officers to monitor DMA compliance.

A number of the obligations, such as interoperability obligations, will be complex and costly to implement. Moreover, they raise many technical and practical questions, perhaps most significantly around data privacy and cybersecurity. Likewise, gatekeeper plans for DMA compliance must be considered in light of other EC rules such as the General Data Protection Regulation ("GDPR"), the proposed Data Act (See our February 2022 *Alert*, "European Commission Proposes Legislation Facilitating Data Access and Sharing"), and telecom regulations, among others, that will affect DMA obligations related to data portability, for example.

## HOW IS THE DMA DIFFERENT FROM THE COMPETITION LAWS?

Most of the obligations included in the DMA stem from antitrust case law at both EU and national levels. Therefore, both the DMA and the antitrust laws potentially could apply in parallel, and the DMA states that it does not prevent the application of EU and national antitrust law. The EC also has made clear that it does not see the parallel application of the DMA and antitrust law as a violation of the *non bis in idem* principle set forth in the Court of Justice's decision in C-117/20 *BPost*, which held that it was permissible for the EC to apply telecom and antitrust regulations in parallel to the same conduct. However, the EC's views nevertheless may be challenged in the European courts, depending on the specific circumstances of the case. In the near term, to the extent it has a choice, we expect that the EC will favor application of the DMA over antitrust both because the DMA places fewer legal burdens on the EC and because it will want to develop its authority in this area.

In the area of merger control, the DMA introduces an obligation for designated gatekeepers to pre-report to the EC transactions in which the merging entities or the target provides core platform services or any other digital service or enables the collection of data, even if the transaction does not satisfy the EU merger filing thresholds. That requirement is consistent with the EC's new approach to Article 22 of the EU Merger Regulation, in which national competition authorities can refer, for EC antitrust review, acquisitions involving companies that do not meet the EU or national filing thresholds if the acquisition target might be competitively significant in the future. Under the DMA, the EC will obtain information on gatekeepers' intended transactions and share that information with Member States, so that they, in turn, can request that the EC conduct an antitrust review of gatekeepers' mergers and acquisitions.

## WHO WILL ENFORCE THE DMA, AND WHAT ARE THE PENALTIES FOR VIOLATIONS?

The DMA designates the EC as the sole enforcer of the new law. National authorities may initiate investigations against gatekeepers, in coordination with the EC, which makes enforcement decisions. However, the DMA is not likely to displace the role of national competition authorities in antitrust challenges to gatekeeper conduct as national authorities may still apply national competition law to the conduct of gatekeepers. For example, certain Member States have rules related to "abuse of economic dependence" that some national authorities have attempted to apply to so-called "lock-in effects" in B2B transactions.[4] Likewise, although it is potentially redundant with the DMA, in January 2021, Germany adopted special competition rules for certain digital platforms across multiple markets. The DMA established an advisory group composed of national

regulators (including telecommunications, data protection, competition, consumer protection, and audiovisual) to assist and facilitate the work of the EC.

The EC may assess fines for DMA violations up to 10% of the infringer's worldwide revenue, or up to 20% for a repeated infringement, which is twice the fine for EU antitrust law violations. In the case of repeated violations—i.e., at least three violations in eight years—the EC can impose behavioral or structural remedies, including a temporary ban on certain types of acquisitions or even the breaking up of a gatekeeper. All EC decisions can be appealed before the Court of Justice.

The DMA is a regulation directly applicable in EU Member States and thus entails a risk of private enforcement, in which business and individual plaintiffs may seek remedies under the DMA before national courts in damages or injunctions proceedings. Class action suits based on DMA violations also can be expected, as the DMA is included in the scope of the EU Collective Action Directive.

## CONCLUSION

In the wake of the DMA publication in October 2022, businesses with core platform service operations should assess whether they qualify as gatekeepers under the thresholds, and consider the need to notify their gatekeeper status to the EC. The list of gatekeeper obligations is long, and it may not be clear whether the DMA captures certain business practices. Companies at risk of a gatekeeper designation should evaluate their compliance with the obligations and may consider anticipating the regulatory dialogue with the EC to further ascertain practical implementation of the obligations.

To monitor the DMA implementation, gatekeepers should establish independent internal compliance teams, whose expertise ideally should span across competition, privacy, and potentially telecom or media rules. Besides gatekeepers, all companies supplying or using core platform services should consider the risks and opportunities that the DMA generates, for example in terms of interoperability and access to data.

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## ENDNOTES

1 The DMA builds on the 2019 Regulation on platform-to-business relations ("P2B Regulation"), which established transparency obligations for online intermediation services and online search engines provided to business users. Some have argued that those regulations were insufficient to ensure fair and contestable digital markets and control the allegedly anticompetitive conduct of large online platforms, hence the need for the DMA.

2 *See* Proposal for a DMA.

3 *See, e.g.*, Makan Delrahim, Assistant Attorney General, U.S. Dep't of Justice, Antitrust Div., Keynote Address at Silicon Flatirons Annual Technology Policy Conference at The University of Colorado Law School (Feb. 11, 2019).

4 Rules against "abuse of economic dependence" prohibit one party with superior economic strength from engaging in anticompetitive conduct against a counterparty with a relatively inferior bargaining position. The "lock-in" effect is a disputed argument that a purchaser of a primary product or service has no alternative but to continue purchase products or services (e.g., in an aftermarket) from the same supplier or its designee.

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