

THE NEW ERA OF DIGITAL MARKET

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Abstract

The digital services legislative package which consists of the Digital Services Act and the Digital Markets Act became fully applicable on 7 March 2024 and the first positive signs are already starting to appear. These regulations establish a framework for regulating large technology companies, known as gatekeepers, to ensure they do not abuse their market power and to protect users' online privacy and consent. Consumers will have more and better services to choose from, more opportunities to switch providers if they want to, direct access to services and fairer prices. Businesses that depend on gatekeepers to provide their services in the single market will have a fairer business environment. In this article we aim to present the main legislative changes that apply to digital markets, as well as the first measures implemented by the big players such as Google, Apple, Amazon, Microsoft, Meta and TikTok.

Keywords: *DSA; DMA; gatekeepers, advertising; digital marketing; social media.*

JEL Classification: K21, K23.

1. INTRODUCTION

Digital markets benefit from a new regulation composed of two regulations adopted by the European Union, namely the Digital Markets Act - DMA (Regulation EU) 2022/1925 (Digital Markets Act, 2022a), and the Digital Services Act – DSA, (Regulation EU) 2022/2065 (Digital Services Act, 2022b). The two regulations were developed and adopted by the European Union in response to the anti-competitive behaviors of the large digital platforms and out of the desire to create a safer and more transparent digital market (Colombo, 2021).

In recent times, digital platforms such as Amazon, Alphabet, Meta, Apple, Microsoft have taken advantage of their dominant position on the market and sabotaged the economic interests of competitors, consumers and endangered the operation of market mechanisms based on a functional economy. The European Commission intervened to regulate all these imbalances, but also to modernize and standardize the legislation in this field (EU Digital Markets Act, 2024). The legislative package adopted by the European Commission aims to give it the necessary tools to control Big Tech, to restrict the anti-competitive practices of

the important technology players and to force them to allow access to some services to smaller competitors in the market.

Prior to these regulations, the American tech giants were repeatedly sanctioned by the European Commission for anti-competitive practices. For example, Google was fined a record 8.3 billion euros in 2017 for favoring its own shopping service on its search engine over consumers, using its dominant position. In 2023 Google was accused of overcharging consumers through illegal restrictions on the distribution of apps on Android devices and unnecessary fees for transactions made in the Play Store. As a result, the Commission imposed a fine of 700 million dollars and forced the company to facilitate the download of applications on Android devices from sources other than the Play Store. Under the deal, Google also agreed to make changes to how Android works in the US, such as allowing developers to implement an alternative billing method for in-app purchases (Larouche and De Streel, 2021).

Apple was recently fined more than \$1.8 billion by the European Commission for abusing its dominant market position in the distribution of music streaming applications to iPhone and iPad users ("iOS users") through the App Store. Taking advantage of the fact that Apple is currently the only provider of an App Store where developers can distribute their apps, it restricted developers from informing consumers about alternative and cheaper music services available outside the Apple ecosystem and from providing any instructions on how to subscribe to such offers. The commission found that Apple's conduct lasted for almost ten years and caused iOS users to pay significantly higher prices for music streaming subscriptions because of Apple's high commission. Thus, users were left without alternatives and had to subscribe only to Apple Music, to be able to listen to their favorite artists (Apple Company, 2024).

The Meta company was fined 1.2 billion euros for violating data protection rules in the European Union. As the personal data of more than 533 million Facebook users in more than 100 countries was found on a hacker's website, the Data Protection Commission of Ireland imposed this fine, pointing out that this data transfer would allow those in the American government to access Europeans' information (Meta's Consumer Profiling Techniques Digital Markets Act, 2023).

In France, the Microsoft company was fined 60 million euros by the data protection authority, because on the Microsoft Bing search engine, the procedure of refusing cookies is not as simple as that of accepting them and did not put in place a simple system for users to refuse cookies. Google and Facebook have also previously been fined for similar practices.

Therefore, the new regulations are intended to limit the unfair practices of businesses that act as gatekeepers in the online platform economy.

2. DIGITAL MARKET ACT (DMA)

2.1. General presentation

The Digital Market Act has become the new regulatory framework for the digital economy. Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 began to apply from the date of May 2, 2023 (Digital Markets Act, 2022). In fact, from the very moment of the launch of the draft regulations, many debates were born on their side (Fernández, 2021).

According to art. 1 paragraph (2), the Regulation applies to "essential platform services provided or offered by access controllers to commercial users established in the Union or to end users established in the Union or located in its territory, regardless of the place of establishment or residence of the access controllers and regardless of the law normally applicable in relation to the provision of the service". At the same time, by "essential platform service" we must understand, according to art. 2(2) of the Regulation any of the following:

- online mediation services (letter a);
- online search engines (letter b);
- online social networking services (letter c);
- platform services for sharing video materials (letter d);
- interpersonal communication services that are not based on numbers (letter e);
- operating systems (letter f);
- web browsers (letter g);
- virtual assistants (letter h);
- cloud computing services (letter i);
- online advertising services, including any advertising network, advertising exchanges and any other advertising intermediation service, provided by an enterprise that provides any of the essential platform services listed in letters (a)-(i) (letter j).

"Gatekeeper" means an enterprise that provides essential platform services. As a result, the European Commission published the list of 19 operators identified as being in the sights of European legislation, namely Alibaba AliExpress, Amazon Store, Apple AppStore, Bing, Booking.com, Facebook, Google Play, Google Maps, Google Search, Google Shopping, Instagram, LinkedIn, Pinterest, Snapchat, TikTok, Twitter, Wikipedia, YouTube and Zalando.

The regulation establishes a set of objective conditions to qualify an enterprise as a gatekeeper. Companies that operate one or more of the so-called "essential platform services" listed in the DMA are considered access controllers, if they meet the following legal requirements imposed in art. 3(1):

- are large enough to have an impact on the internal market;
- provide an essential platform service that represents an important access point through which commercial users reach end users;
- are in a solid and sustainable position in terms of its operations or is foreseeable to be in such a position soon.

A legal presumption is also regulated that companies are considered gatekeepers if: they have achieved an annual turnover in the Union or its average market capitalization/equivalent fair market value is greater than or equal to EUR 7.5 billion in each of the last three financial years; controls an important channel through which user firms connect with end consumers (where the company provides an essential platform service monthly to more than 45 million active end users established or located in the EU and annually to more than 10,000 of active commercial users established in the EU) and have a solid and sustainable position; if the company has met the second criterion in the last three years (Cennamo *et al.*, 2023).

2.2. Obligations set for gatekeepers

The new regulations establish a series of obligations for gatekeepers that they must comply with in the activity they carry out. The European legislator classified them into two broad categories: obligations to do something and obligations not to do.

Thus, they must allow business users to promote their free title offers and enter into contracts with their customers outside of their platforms; enable end users to access and use, through the platform, content, subscriptions, components or other items using a commercial user's software application; allow third parties to interoperate with the gatekeeper's own services in certain specific situations; to allow business users to access the data they generate in using the gatekeeper's platform, etc. (Hoffmann *et al.*, 2024).

In the category of obligations not to do, include those such as: not to technically restrict users from uninstalling any pre-installed software or application if they wish to do so; not prevent consumers from connecting to companies outside their platforms; not treat the services and products offered by the gatekeeper itself more favorably in the ranking than similar services or products offered by third parties on the gatekeeper's platform; not to use, in competition with commercial users, data that is not publicly available and that is generated or provided by said commercial users in the context of their use of platform services, etc. (Andriychuk, 2023).

To ensure that access controllers comply with the obligations imposed by the DMA, the European Commission can open a market investigation, during which the company concerned is obliged to provide all the requested information. The Commission may request access to, and explanations of, any data and algorithms of undertakings and testing information.

At the end of the investigation, the access controller can propose commitments to the Commission, and the Commission can adopt an implementing act making those commitments binding. If the access controller fails to comply with its commitments, the Commission may issue a non-compliance decision imposing fines not exceeding 10% of its total worldwide turnover in the previous financial year, or up to 20% in the case repeated violations. In case of systematic violations, the Commission is also empowered to take additional corrective measures, such as forcing a gatekeeper to sell a business or parts of it or prohibiting it from purchasing additional services (Knapstad, 2023).

In the future, other undertakings may submit notifications to the Commission under the DMA based on their self-assessment of the relevant thresholds. In parallel, the Commission has already opened four market investigations to assess whether Bing, Edge and Microsoft Advertising and iMessage and iPadOS (Apple) qualify as gatekeepers. In the case of Samsung, the Commission decided not to designate Gmail, Outlook.com and Samsung Internet Browser as core platform services; therefore, Samsung is not designated as a gatekeeper with respect to any core platform services.

3. DIGITAL SERVICES ACT (DSA)

Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC (Digital Services Act) applies throughout the European Union from of 17 February 2024, although some provisions on reporting obligations, independent audits, data sharing and surveillance (including fees), investigation, enforcement and monitoring applied from 16 November 2022.

The new regulation was adopted to better protect consumers against online platforms and social networks, which have several responsibilities. At the same time, these regulations encourage innovation, growth and competitiveness on the EU market, aim to achieve greater transparency, eliminate illegal online content, hate speech and disinformation (Fletcher *et. al.*, 2024).

According to the Regulation, illegal content can include "sharing images depicting child sexual abuse, illegal and non-consensual sharing of private images, online stalking, selling non-compliant or counterfeit products, selling products or providing services in violation of consumer protection legislation, unauthorized use of copyrighted material, illegal offering of accommodation services or illegal sale of live animals".

Users will be able to challenge content moderation decisions and seek redress, through a dispute mechanism or a judicial remedy, while authorities will have access to key data generated by very large platforms, including the algorithms used in recommending content or products, to assess online risks.

Article 16 of the DSA outlines this obligation based on a notification and action mechanism initiated upon notification by any person or entity.

The regulation also includes special rules for very large online platforms (VLOPs) and very large online search engines (VLOSEs) used by more than 10% of the EU's 450 million consumers. VLOP and VLOSE have an obligation to prevent misuse of their systems and may create mechanisms to react quickly and effectively to crises affecting public security or public health. In the event of a crisis, the Commission may require VLOP and VLOSE to assess whether and how their services contribute significantly to this serious threat or are likely to, identify and apply effective and proportionate risk mitigation measures to prevent, eliminate or limit such contributions and report these measures to the Commission.

According to art. 28 of the Regulation, platforms will have to redesign their systems to ensure a high level of confidentiality, security and safety of minors. For example, currently, although the Instagram and TikTok platforms have stipulated in the terms of service provision that they can only be used by people who have reached the age of 13, these provisions can be very easily circumvented, by mentioning another year of birth than the real one. According to point 71 of the DSA Preamble, an online platform can be considered accessible to minors when "its terms and conditions allow minors to use the service, when its service is directed at minors or predominantly used by minors, or when the provider is aware that some of the recipients of its service are minors, for example because it already processes the personal data of the recipients of its service that reveal their age for other purposes". For example, if the provider of the online platform knows that a minor is using its platform, it must not provide targeted advertising or use the minor's personal data for these purposes.

In the European Strategy "Better Internet for Kids" (BIK+), the European Commission stated that it aims to improve the online experience of children, creating a framework that inspires their confidence and desire to learn, play, share, to watch, connect and express. At the same time, he reaffirmed on this occasion his position to support the application of mechanisms that would allow proving the age of children. Online platform providers should not present profiling-based advertisements using the personal data of the service recipient when they are aware with reasonable certainty that the service recipient is a minor (Popescu, 2023).

In Italy, the National Authority for the Protection of Personal Data imposed a limitation on the processing carried out by TikTok regarding the data of users whose age could not be determined with certainty. The decision came because of the death of a 10-year-old girl in Palermo by asphyxiation while participating in a challenge called the "scarf game" ("blackout challenge") on the TikTok social

network. The child tied a belt around her neck with the aim of staying out of breath for as long as possible, while filming with her mobile phone.

In terms of advertising, online platforms must fulfill several obligations. First, each specific advertisement presented to each individual recipient must be flagged (by inserting the mention "Advertising" or "P" or "Product Placement"). Secondly, the natural or legal person on whose behalf the advertising communication is presented and the person who paid for the ad must be presented, when they are different, for example "This advertisement promotes products X" and was paid for by company Y. Also, art. 26 para. (3) and Recital 68 of the DSA prohibit online platform providers from targeting advertisements to users resulting from their profiling.

Regarding transparency related to recommender systems, Recital 70 of the DSA explains that online platforms should constantly ensure that users are properly informed about how recommender systems influence the way information is displayed and can influence how information is presented to them. Platforms will have to provide information on how and the criteria according to which the information is displayed. For example, if we refer to the Booking platform, the algorithm should consider user interests, customer satisfaction, price, customer reviews.

Member States are required to designate one or more competent authorities responsible for the supervision of intermediary service providers and the enforcement of the provisions of the DSA. The Commission will also charge providers of very large online platforms and search engines an annual monitoring fee.

The Commission may impose on the provider of the very large online platform or the very large online search engine fines not exceeding 6% of the total annual worldwide turnover of the previous financial year, if it finds that the provider is in breach of the provisions of the DSA, does not comply with a decision ordering provisional measures or fails to comply with a binding commitment.

4. CONCLUSIONS

The legislative package on digital markets is undoubtedly the European Union's response to the expansion of the American Big Tech giants, who have taken advantage of the naivety of users to acquire a dominant position in the world market and to obviously abuse it. Tired of investigating and imposing fines to no avail, the European Commission resorted to drafting these two regulations, the Digital Market Act and the Digital Services Act, out of a desire to curb and thwart the dark and abusive plans of the American giants.

As a result of the entry into place of these new regulations, the European Commission asked the main online platforms during some workshops for compliance reports with the European provisions.

Amazon emphasized that it does not track customers' browsing activities, nor does it sell its customers' personal data to third parties (as other gatekeepers do). Amazon has implemented prompts asking customers to share consent if they want a personalized experience in their Store and other Amazon services like Prime Video and Audible. With Amazon Ads, advertisers and publisher clients gained real-time access to extensive pricing information. In terms of displaying offers, the criteria that determine the "Recommended Offer", Amazon has specified that the product detail page treats third-party sellers and Amazon retail equally. Customers can be sure they continue to see the most relevant products and the best "Recommended Deal" Amazon has to offer.

For Facebook and Instagram, Meta proposed the pay-or-OK model, which allows users to choose whether they want to consent to their personal data being processed or whether they prefer to pay a monthly subscription fee of €10 without consent.

In Apple's case, the latest iOS 17.4 update was released on iPhones, which, when the user first uses Safari, allows users to choose one of 12 different browser options as their default browser. The user is forced to scroll down to select their preferred browser which will then become the default; selection does not automatically trigger the download of that alternative browser if it is different from Safari. In addition, Apple has completely opened the distribution of alternative applications in its ecosystem. Thus, users will have three options to download applications to their iPhone devices: through an alternative application market, which can only distribute proprietary applications or applications from third-party developers, directly through the web and through the App Store. Regarding the payment system, Apple has implemented alternative payment options, distinct from those through the App Store, where developers' direct users to complete a transaction for digital goods and services on their external web page.

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