

Digital Market Act (DMA) – the end of the application of Art. 102 on digital gatekeepers?

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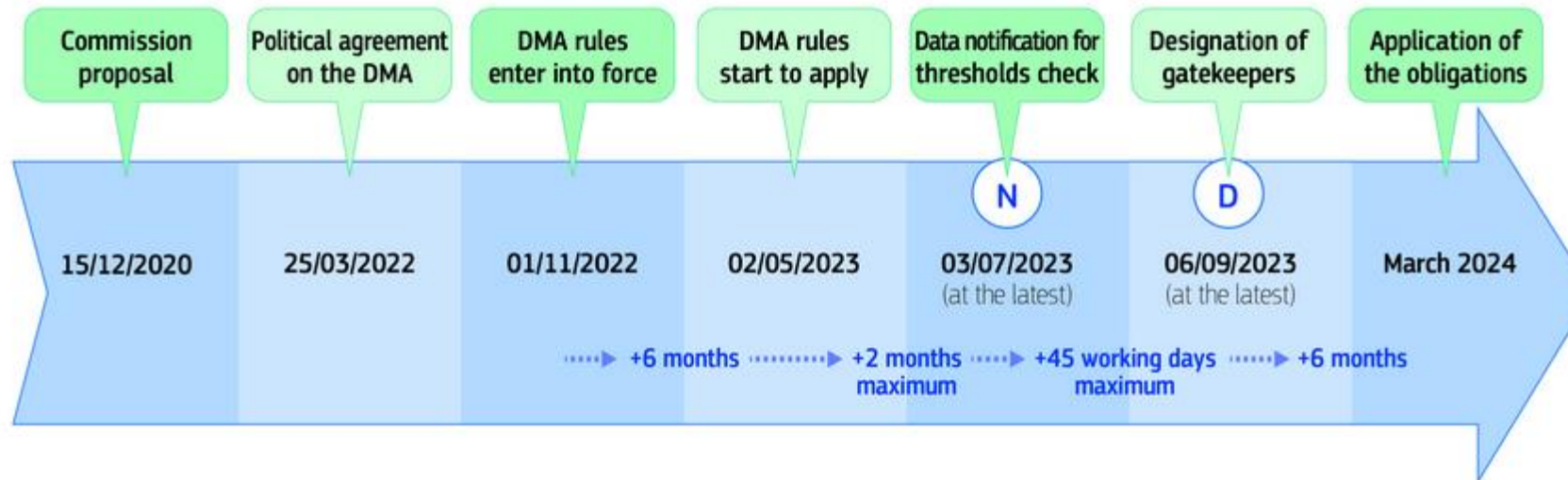
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Digital Market Act

- Regulation 2022/1925 of 14 September 2022
- Legal basis: Art. 114
- Entry into force: 1 November 2022
step-by-step: self-assessment, designation, obligations

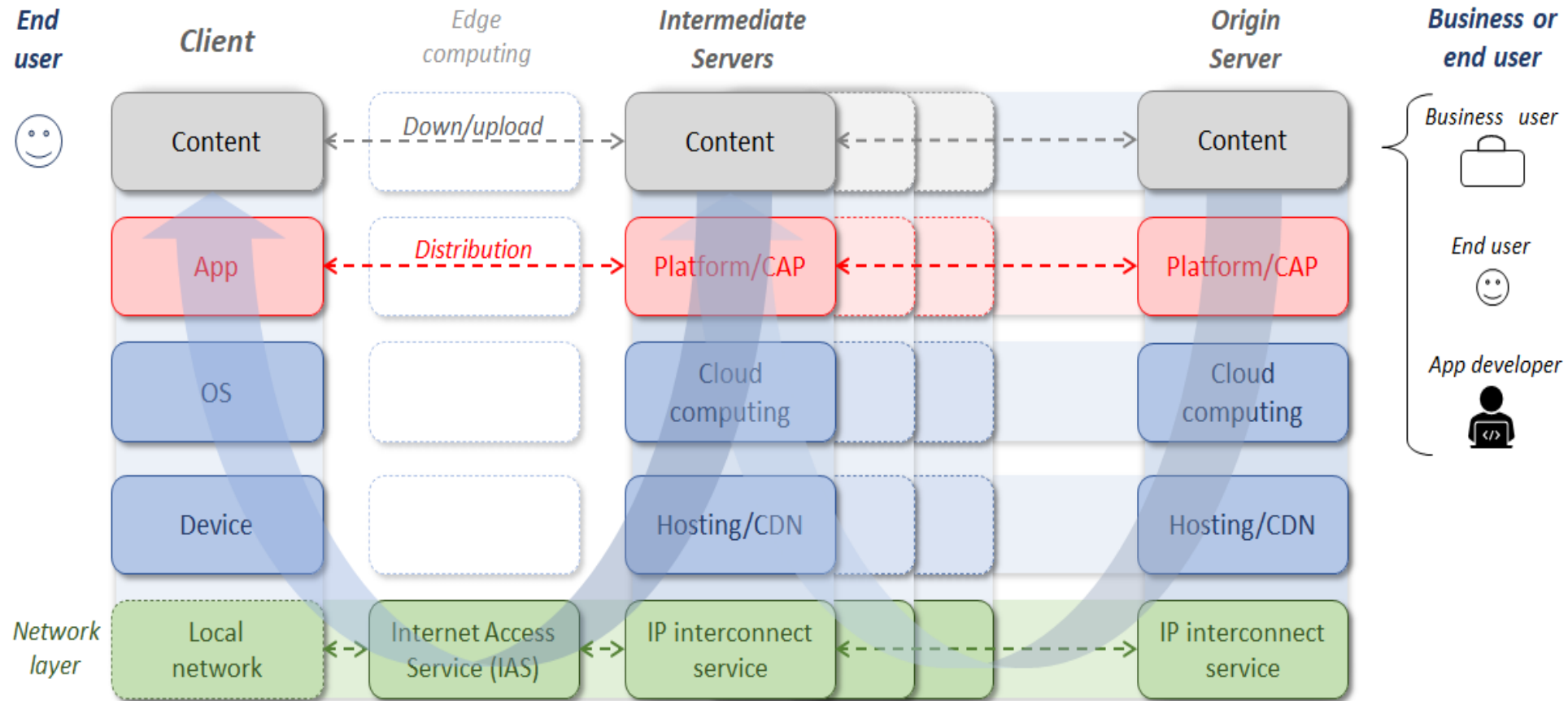


Timeline for Digital Markets Act



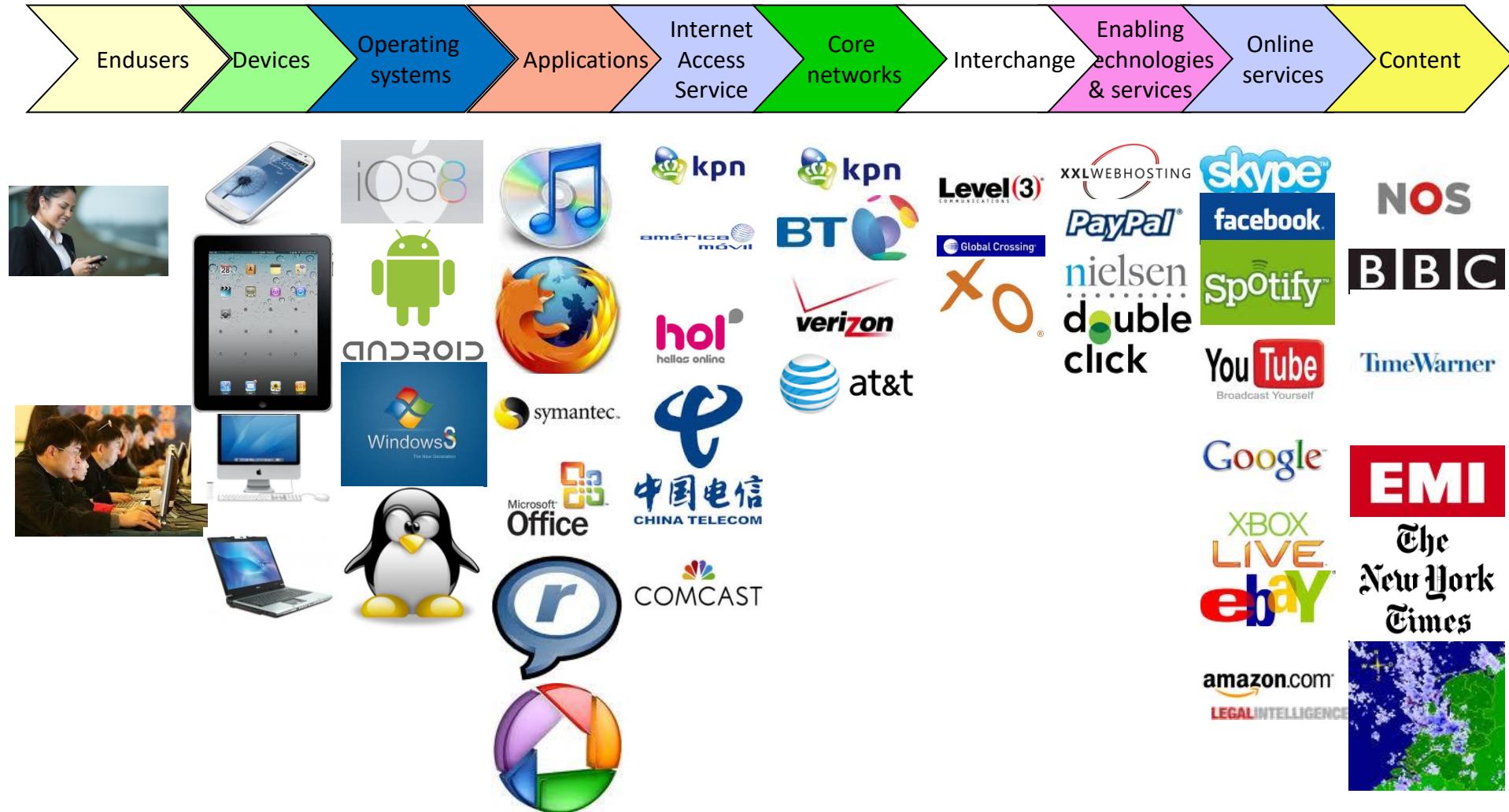
Source: competition-policy.ec.europa.eu

Positioning – internet ecosystem



Source: draft Berec report/Figure 2 – Two-dimensional model of the internet ecosystem, BoR (22) 87

Positioning - the 'internet value chain'



Goal

- Ensuring contestability in the digital market
- Ensuring fairness for business users
- Protecting end-users from potential abuses of power

See also preparatory documents (2020): Impact Assessment DMA and Impact Assessment New Competition Tool (NCT)

Why is competition law insufficient?

- Market processes incapable of ensuring fair economic outcomes with respect to core platform services
 - Art. 101 and 102 is related to certain instances of market power and anti-competitive behaviour
 - Enforcement is ex post, after extensive investigation of very complex facts on case-by-case basis

*Competition law does not address effectively the challenges to the effective functioning of the internal market posed by conduct of gatekeepers **that are not necessarily dominant in competition-law terms** (recital 5 DMA)*

*Articles 101 and 102 TFEU and the corresponding national competition rules concerning anticompetitive multilateral and unilateral conduct as well as merger control have as their objective the protection of undistorted competition on the market. **This Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market.** This Regulation therefore aims to protect a different legal interest from that protected by those rules and it should apply without prejudice to their application (recital 11 DMA)*

- DMA is complementary to competition law but reflects competition law cases and enforcement power.

Designation – ‘three criteria test’

Core Platform Services with important gateway

➤ **CPS:**

- a. Online intermediation services (*GAFA+**)
 - b. Online search engines (*Google, Microsoft*)
 - c. Online social network services (*Facebook*)
 - d. Video-sharing platforms (*Youtube*)
 - e. Number independent interpersonal communications services (*WhatsApp*)
 - f. Operating services (*Windows, iOS*)
 - g. *Web browsers (Chrome)*
 - h. *Virtual Assistents (Siri, Alexa)*
 - i. Cloud Computing service (*Azure, Google*)
 - j. Online advertising services (*Google, Fb*)
- (* examples)

➤ **Important gateway**

- > 45 million monthly *active* end users and
- > 10.000 yearly active business users (Annex!)

Significant Impact

➤ **Annual turnover** > Eur. 7,5 billion in each of the last three financial years

OR

➤ **Average market capitalisation** or its equivalent fair market value > Eur 75 billion in the last financial year

➤ AND

- Same core platform services in > **3 Member States**

Entrenched and durable position

➤ Now or in the near future

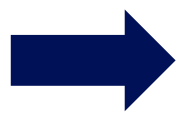
➤ Thresholds 45 mio monthly active users and 10.00 yearly active business users > 3 years

Rebuttable presumption: by sufficiently substantiated arguments, followed by market investigation (< 5 months, art. 5(5)/17)

... but not decisive

- If the 'three criteria test' is not fulfilled: company providing CPS may be designated taking into account:
 - Size, including turnover/market capitalisation, operations, position of company
 - Number of business users/end-users
 - Network effects and data driven advantages
 - Scale and scope effects (i.e. as result of use of data)
 - Lock-in business users/end-users
 - Conglomerate corporate structure/vertical integration
 - Other structural business/behaviour characteristics
- After market investigation
 - Including planned concentrations in digital sector (CPS/data)

Dominant position?



Designation always need to refer to specific CPS, publication & review every 3 year
Power to delegated acts EC to supplement/adjust thresholds

Detailed obligations

Black

1. Don't: Cross-using/combining personal data (5.2, Facebook (WhatsApp case))
2. Don't: Preventing business users to use 3rd party online intermediation services (5.3, Amazon e-book –MFN clauses)
3. Do: Allow business users to promote offers and conclude contract with end-users (5-4, App-stores)
4. Do : Allow end-users to use software applications of business users (5-5)
5. Don't: Preventing users to raise issues of non-compliance (e.g. to national courts) (5-6, indications based on complaints)
6. Don't: requiring use/incorporation of web browser or payment service (5.7, Digital ID Facebook/Google)
7. Don't: bundling of CPS services (5-8, Google Android/Microsoft Explorer)
8. Do: Providing information on prices to advertiser/publishers concerning on-line advertisements (5-10/5-11, Google AdTech)

9. Do: notify any intended concentration if target provide CPS, other digital services & enable collection of data (14)
 - a. Before implementation
 - b. Irrespective of applicable merger control

Grey

1. Don't: Using non-public data in competition with business users (6-2, Amazon Market Place)
2. Do: Allow to un-install software applications (6-3. Microsoft (tying)/Google Android)
3. Do: Allow third party software applications (6-4, Apple App Store)
4. Don't: Self-preference/ranking/indexing themselves favorably (6-6, Google Search Shopping/Amazon Buy Box)
5. Don't: Restricting switching of end-users (6-7, Furman report)
6. Do: Allow interoperability with software/hardware (6-7, Apple Pay)
7. Do: Provide access to advertisers on performance measuring tools (6-8, CMA report)
8. Do: Provide data portability (6-9, different studies)
9. Do: Provide access to data provided for/generated in the context of the use of the CPS (6-10, Apple Wallet/Pay)
10. Do: Provide access to third party providers of online search engines to ranking/click data (Frاند, 6-11)
11. Do: FRAND access by business users to app stores (6-12, Apple store)
12. Don't: Apply disproportionate termination clauses for CPS (6-13)

13. Do: interoperability of number-independent interpersonal services (7) – step-by-step implementation (e.g. voice/video calls)

.....applicable to designated CPS

- List obligations is based on cases/practices in the past or reports
 - Full set black list is applicable, also if not directly directed to designated CPS is
 - Implementing act as regard grey list (art. 8)
 - Future proof?
- No direct link with concrete market failure
 - Difference with ex ante regulation in telecom law
 - Proportionality?
 - Innovation?
- Compliance to obligations as of June 2024 (six months after designation, art. 3(9))
 - Suspension in exceptional circumstances/reasons of public health and public security by Implementing Act (art. 9/10)

Enforcement by EC

Compliance

- By provider:
 - Self-assessment of criteria for designation and notification (3-3)
 - Set up of compliance organization by gatekeeper (28)
 - E.g. compliance Officer
 - Possibility to verify with EC whether measures are sufficient with respect to compliance to obligations
 - Discretionary power EC
 - Duty to report compliance measures (11)
- EC:
 - Implementing act
 - Non-compliance decision (art. 29)

Powers

- Commission may use investigative powers before opening procedures (20)
 - Request for information (21)
 - Carry out interviews (22, inform NCA)
 - Inspections (23, written authorization)
 - Interim measures (24)
 - Making commitments binding (25)
 - Monitoring, assistance NCA (26)
 - Non-compliance decision (29)
 - Fines (30): 10%, but 20% if recurrence in 8 years; 1% (max 5 years)
 - Periodic penalty payments (31): 5% (max 5 years)
- Binding commitments possible after consultation third parties
- Behavioural or structural remedies in case of structural non-compliance
 - Including prohibition to enter into concentration

NCA

- Enforcement on the basis national competition law provided that
 - a. Unilateral conduct of companies concerns other companies than gatekeepers
 - b. Consists of imposing further obligations on gatekeepers
 - c. Duty to inform EC prior to enforcement
 - Except for application of national merger control rules
- Investigation on possible non-compliance of art. 5-7 DMA;
- Duty to inform EC before taking first investigative measure
- If EC starts non-compliance proceedings, NCA are relieved from enforcing, and should inform EC on findings to support EC as 'sole enforcer'

Market investigations

Designation of gatekeepers (17)

- Discretionary power of EC to examine whether a CPS provider should be designated
 - if not meeting quantitative criteria (max 12 months)
 - if not yet enjoying entrenched and durable position (some of obligations can be imposed to prevent gatekeeper to achieve position by unfair means)
- To examine substantiated arguments against designation (max 5 months)
- In case of delegated acts (49)

Systematic non-compliance (18)

- Max 12 months
- May result in implementation decision and remedies to maintain/restore fairness and contestability
- Consultation interested third parties

New services/practices (19)

- Review of imposed remedies (18-3)
- In case of new services/practices (art. 19) to decide whether list of CPS should be extended (max 18 months)
 - Taking into account 101/102 findings
 - Consultation
 - Duty to inform EP & Council with proposal to amend DMA-Act or draft supplementary delegated act.
- At the request of 3 or more Member States
- As a result of cases on the basis of art. 101/102

Some observations

➤ Role of competition law?

- Full application of Art. 101 and 102 on conduct that is not covered by the obligations
- Application of Art. 101 and 102 for conduct that is also prohibited in the DMA still possible, but does not seem very likely
 - If applied, this may also be influenced by DMA regulation (cf. C-152 Deutsche Telekom (Slovak Telecom) and effects of regulation on application of essential facilities doctrine)
- Limited role of national competition authority (cooperation, no enforcement of non-compliance)

➤ Delegated Acts: conferred power to EC, (too?) broad

➤ Market investigations

- Criteria still unclear. Market definitions?

➤ Detailed enforcement provisions

- Effect on evaluation 1/2003? New competition tool (NCT)? Overlap other regulations on digital markets, like DSA?

Thank you!



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