European Commission Proposals to Regulate the Digital Sector

Updated on 2021.03.11

Johan Vandromme

KIM & CHANG

Digital Services Act / Digital Markets Act

Introduction

The EC released 2 long-awaited legislative proposals: the Digital Services Act ("DSA") and Digital Markets Act ("DMA") that would significantly increase it's regulatory oversight of online platforms

<u>Background</u>:

- **Perception: Enforcement gap**
- **Reflection: global – when/what conduct of an on-line platform is anticompetitive**
- **Promotion: Fair and open markets and the fair processing of personal data**
- **Modernisation: 2000 e-Commerce Directive (DSA)**

<u>Looking Ahead</u>:

- **Empower the EC, if adopted.**
- **Fundamental shift towards prevention over cure**
- **Intended to complement existing competition rules!**

Digital Services Act / Digital Markets Act

Scope

The Digital Services Act (DSA) is intended to regulate online services:

- Modernizes the long overdue update of the e-Commerce Directive 2000/31/EC;
- Introduces new EU-wide transparency and content-related obligations on providers of intermediary services. Aims also at the comprehensive protection of users' fundamental rights online;
- Extent of these obligations will depend on the type of services that the company provides as well as the size of its user base.

The Digital Markets Act (DMA) is intended to tackle the economic power of large online platforms.

- Includes new ex ante regulation, prohibiting and requiring certain behaviour for large online platforms acting as gatekeepers, to prevent actual harm to the markets.
- Introduces a new tool giving the EC the power to conduct market investigations to identify gatekeepers and to impose remedies on these to address their systematic non-compliance with the new rules.

Proposal for a Digital Services Act

Introduces a series of new harmonised EU-wide obligations for digital services :

More safety for users:

- Rules for the removal of illegal goods (counterfeit or copyright infringement), services or content online (including new procedures for faster removal of illegal content, e.g. hate speech).
- Safeguards for users whose content has been erroneously deleted by platforms;

Increasing transparency of platforms:

- Wide-ranging transparency measures, including on online advertising and on the algorithms used to recommend content to users;
- New obligations for very large platforms to take risk-based action to prevent abuse of their systems;

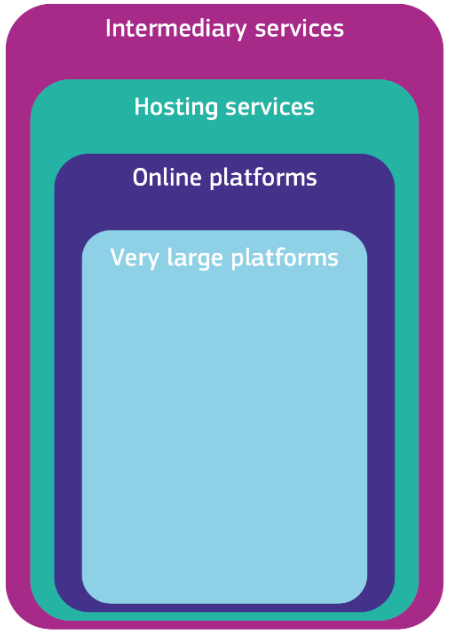
Increased enforcement:

- New powers to scrutinize how platforms work, incl. by facilitating access to key platform data for researchers;
- New rules on traceability of business users in online market places, to help track down sellers of illegal goods or services;
- Innovative cooperation process among public authorities to ensure effective enforcement across the EU

Which providers are caught/covered by the DSA

Introduces a series of new harmonised EU-wide obligations for digital services :

The Digital Services Act includes rules for online intermediary services, with obligations for different online players matching their role, size and impact on the online ecosystem.



- **Intermediary services** offering network infrastructure: Internet access providers, domain name registrars, including also:
- **Hosting services** e.g. cloud and webhosting services, including also:
- **Online platforms:** bringing together sellers and consumers, e.g. online marketplaces, app stores, collaborative economy platforms and social media platforms.
- **Very large online platforms:** pose particular risks in the dissemination of illegal content and societal harms. Specific rules will be applicable to platforms reaching more than 10% of 450 million consumers in Europe.

Proposal for a Digital Services Act

Obligations:

All providers of intermediary services would have to:

a) Administrative: establish a single point of contact to facilitate direct communication with EBDS and EC;
b) Transparency: comply with reporting obligations in relation to the removal and the disabling of information considered to be illegal content or contrary to the providers' terms and conditions

Specific due diligence obligations apply to hosting services and online platforms. In particular, all online platforms (including social networks, content-sharing platforms, app stores, online marketplaces, online travel, and accommodation platforms), except the smallest, would be required to:

a) set up complaint and redress mechanisms and out-of-court dispute settlement mechanisms
b) cooperate with trusted flaggers and take measures against misuse/abuse notices;
c) inform competent enforcement authorities of any information giving rise to a suspicion of serious criminal offense involving a threat to the life or safety of persons;
d) vet the credentials of third-party suppliers;
e) publish reports on the removals and the disabling of information considered to be illegal content or contrary to their terms and conditions;

Proposal for a Digital Services Act

f) ensure greater advertisement transparency by letting users know "in a clear and unambiguous manner and in real time" that they are viewing an ad, who is behind the ad and be given "meaningful information about the main parameters used to determine" why they were targeted.

Extra Obligations on "very large online platforms":

a) assess and mitigate the "systemic risks stemming from the function & use of their services" :
   i. the spread of illegal content (child sexual abuse material or illegal hate speech, and the conduct of illegal activities);
   ii. the impact on the exercise of fundamental rights (freedom of expression & information, the right to non-discrimination, and the right to private life; and
   iii. the intentional, oftentimes, coordinated manipulation of the platform's service that can affect public health, civic discourse, electoral processes, public security, and protection of minors;

b) comply with strict transparency reporting obligations, share relevant data with authorities, independent auditors, and vetted researchers on how they comply with the rules;

c) set out in their T&C's "in a clear, accessible and easily comprehensible manner" the main parameters used in their recommender systems (if they are using one);

d) compile and make publicly available a repository containing various information about the content, display, and recipients of ads

e) appoint "one or more" **compliance** officers – who will need to cooperate with the European Board for Digital Services (EBDS) and the European Commission.

Proposal for a Digital Services Act

Enforcement under the Digital Services Act:

Fines:

Failure to comply with the DSA could result in maximum fines of up to 6% of the company's total turnover, depending on severity, length & recurrence of violations. In addition to fines, the Commission would be able to enforce the regulation through:

- (i) periodic payments that can be of up to 5% of the average daily turnover in the preceding fiscal year
- (ii) interim measures, requiring the company to immediately cease the violations.

Enforcement powers: the Commission's enforcement powers would:

- allow it to also conduct its own investigations following complaints or upon a request from a digital service coordinator or advice from the Board.
- include "strong investigative and enforcement powers to allow it to investigate, enforce and monitor certain of the rules laid down in this Regulation."
- extend from conducting dawn raids and investigations to obliging companies to hand over "data-bases and algorithms of undertakings" and interviewing employees.

Proposal for a Digital Services Act

New roles for Member States:

Enforcement:

- DSA delegates **most enforcement** powers to competent EU Member State authorities (sector regulators). However, the EC will have exclusive authority over the “very large online platforms”.
- Must name a **digital service coordinator** to act as a single contact point for the Commission and take part in a new advisory group — the **European Board for Digital Services (EBDS)**.
- If the EBDS finds that a “very large online platform” has failed to comply with the rules, such platform would be required to come up with an “action plan” to address the violations of the regulation.

Digital Markets Act

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Proposal for a Digital Markets Package

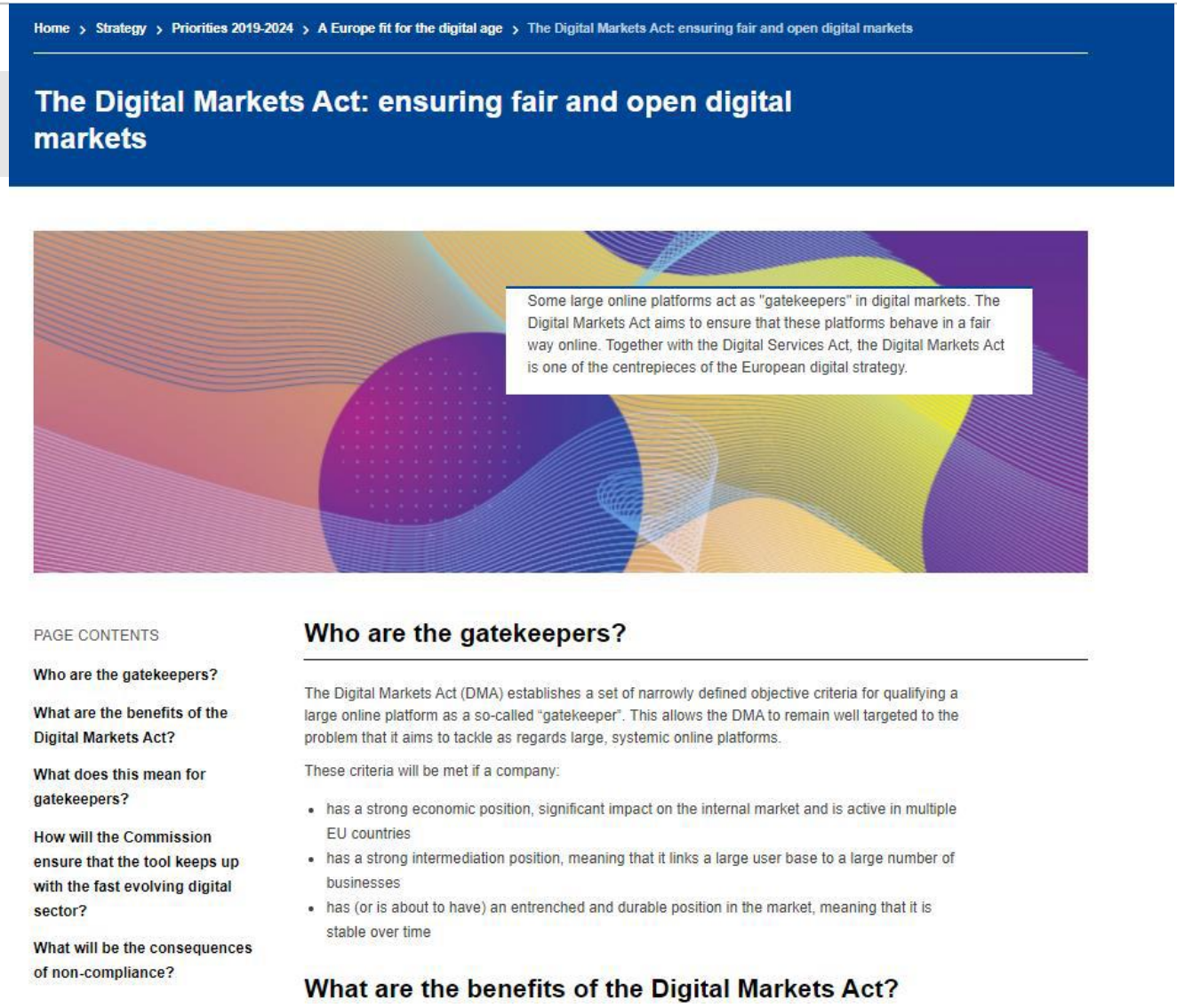
Objective, Legal basis and Scope:

- **Objective** of the proposal is to ensure **fair** and **contestable** digital markets in the EU.
  ⇨ According to recital 10, this objective is **complementary** but **distinct** from the goal pursued by competition law, namely the protection of undistorted competition on the market.
- **Legal basis** for the proposal is Article 114 TFEU (internal market).
  ⇨ This means the proposal will follow the **ordinary** legislative procedure where Council and EP co-legislate. The legal form chosen is that of a **Regulation** (meaning there will be no need for MSs to take any implementing acts once the Regulation enters into force).
- **Harmonisation measure:** Article 1(5) precludes Member States from applying any **further** obligations to gatekeepers for the purpose of ensuring contestable and fair markets.
  ⇨ However, they may still set rules to pursue other legitimate public interests.
- **Scope**: Whereas the Digital Services Act is horizontal, and applies to all players, the obligations envisaged in the DMA apply specifically to so-called "**gatekeepers**" only. This is the **central concept** of the DMA.

Proposal for a Digital Markets Act

Objective, Legal basis and Scope:

- New suite of ex ante rules
- Applies to «Gatekeepers» which operate «core platform services»
- Extensive list of do's and don'ts
- Uniform rules across the EU enforced by the Commission
- Ex-post competition law rules continue to apply



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The Digital Markets Act: ensuring fair and open digital markets

Some large online platforms act as "gatekeepers" in digital markets. The Digital Markets Act aims to ensure that these platforms behave in a fair way online. Together with the Digital Services Act, the Digital Markets Act is one of the centrepieces of the European digital strategy.

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Who are the gatekeepers?

What are the benefits of the Digital Markets Act?

What does this mean for gatekeepers?

How will the Commission ensure that the tool keeps up with the fast evolving digital sector?

What will be the consequences of non-compliance?

Who are the gatekeepers?

The Digital Markets Act (DMA) establishes a set of narrowly defined objective criteria for qualifying a large online platform as a so-called "gatekeeper". This allows the DMA to remain well targeted to the problem that it aims to tackle as regards large, systemic online platforms.

These criteria will be met if a company:

- has a strong economic position, significant impact on the internal market and is active in multiple EU countries
- has a strong intermediation position, meaning that it links a large user base to a large number of businesses
- has (or is about to have) an entrenched and durable position in the market, meaning that it is stable over time

What are the benefits of the Digital Markets Act?

Proposal for a Digital Markets Act

Core Platform Services – Scope

- Online intermediation services (incl. market places, app stores, etc.)
- Online search engines
- Online social networking services
- Video sharing platform services
- Number independent interpersonal communication services (Messaging)
- Operating systems
- Cloud computing services, and,
- Advertising services (incl. ad intermediation).

Commission has power to add further services

The DMA regulates CPS rather than the company → A platform can be designated as a gatekeeper for one or more CPS (e.g. search and social networking). → It also means that the obligations under the DMA would not apply to *all* of the platform's activities, just to those designated under the DMA

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Who are Gatekeepers?

Qualitative Criteria - Provider of core platform services shall be designated as gatekeeper if it:	If these Quantitative Thresholds (Art 3.2) are met, the Qualitative criteria are presumed to be fulfilled:
▪ has a **significant impact on the internal market**	<u>Size of undertaking test</u> ▪ Annual EEA turnover of at least €6.5bn in the last 3 financial years or average market cap or equivalent fair market value of at least **€65bn** ▪ Provides a core platform service in at least **3 Member States**
▪ operates as **an important gateway for business users to reach end customers**	<u>CPS test</u>: ▪ **> 45m monthly active end users** in the EU and ▪ **> 10,000 yearly active business users** in the EU
▪ enjoys (or is expected to enjoy) **an entrenched and durable position in its operations**	▪ Meets the above thresholds of an **important gateway in the last 3 financial years**

Proposal for a Digital Markets Act

Designation as a Gatekeeper

Φ: Gatekeepers "carry an extra responsibility to conduct themselves in a way that ensures an open online environment that is fair for businesses and consumers."

Process:

- Companies to self assess – notify the Commission within **3 months**
- Designated Gatekeepers to comply **within 6 months** from designation (while they can apply for a suspension of particular obligations, the EC will only grant this exceptionally, and in light of circumstances that lie beyond the control of the firm).

Rebuttable Presumption:

- DMA allows for flexibility; these quantitative criteria are not final. Companies that fulfil the quantitative criteria can still rebut the presumption that they are gatekeepers (open for judicial review in the CJEU).
- Yet the Commission may still designate an undertaking as a gatekeeper where it satisfies the "size of undertaking" test but falls short of the "CPS" test. It may do so, for example, in relation to digital platforms that *'are foreseen to enjoy an entrenched and durable position in the near future'*. Only after a market investigation may the Commission decide to impose some of these requirements.

Proposal for a Digital Markets Act

Obligations as a Gatekeeper - "Self executing" obligations (art. 5)

To prohibit practices that are unfair or limit the contestability of markets, gatekeepers shall:

Do:

- Allow business users to promote offers and conclude contracts with customers - at prices or conditions that are different from those offered through the gatekeeper - outside the gatekeeper's platform (*prohibition of MFN clauses* – (5.b)
- Allow end users more (and freer) access to products and services via the Platform, and provide business users with high quality, real time access to data that they generate through their business on the Platform (5.c)
- Provide advertisers and publishers, upon their request, with information concerning the price paid *by* the advertiser/publisher (and the remuneration paid *to* the publisher, for a given ad and for each of the relevant advertising services provided by the gatekeeper (5.g)

Don't:

- Combine personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or from third-party services, unless the end user has been presented with the choice and provided consent in the sense of the GDPR (5.a)
- Prevent business users from raising issues with relevant public authorities in relation to gatekeeper practices (5.d)
- Require business users to use, offer or interoperate with an identification service of the gatekeeper in the context of services offered by the business users using the core platform services of that gatekeeper (5.e);
- Require business- or end users to subscribe to or register with any Gatekeeper services as a condition to access, sign up or register to any of its core platform services (5.f)

Proposal for a Digital Markets Act

Obligations as a Gatekeeper - "Susceptible to be further specified"(art 6)

Art 6(1) is a long list with 11 types of proposed obligations incumbent upon gatekeepers. Key provisions:

Do:

- Allow users to un-install any pre-installed software or apps if they wish so – 6.b; (*Bundling: inspired from the Microsoft case?*)
- Allow installation & effective use of 3rd-party apps or app stores (subject to certain carve-outs) and to not technically restrict end-users from switching between and subscribing to apps/services accessed under a gatekeeper's OS – 6.c;
- Allow business users and providers of ancillary services access to and interoperability with the gatekeeper's own OS used for its ancillary services – 6.f; (*Interoperability potentially huge for Apple?*)
- Provide advertisers/publishers w/access to the performance measuring tools of the gatekeeper and the information necessary for advertisers/publishers to carry out their own independent verification of the ad inventory – 6.g;
- Provide business users with high quality, continuous, real time access and use to data that they generate through their business on the Platform – 6.i;

Don't:

- Use data obtained from business users to compete with those business users, unless the data is publicly available (6.a); (*data silos – Inspired from the Amazon investigation?*)
- Treat more favorably in ranking products/services offered by the gatekeeper itself or by any 3rd party belonging to the same undertaking compared to similar products/services of 3rd parties and apply FRAND conditions to such ranking (– 6.d); (*Self-preferencing – Inspired from the 2017 Google Shopping case?*)
- Restrict the ability of end-users to switch between and subscribe to different software applications and services to be accessed using the OS of the gatekeeper, including as regards the choice of ISP for end-users (– 6.e);
- Restrict effective portability of data generated through the activity of a business user or end user and provide tools for end users to facilitate the exercise of data portability, in line with the GDPR, incl. by the provision of continuous and real-time access (6.h);

Proposal for a Digital Markets Act

Market investigation function

- Was initially announced last summer as part of the "New Competition Tool" draft/discussions.
- It is significant that the proposals have been dialled-back on initial calls for a "New Competition Tool" allowing the Commission to conduct wide-ranging market investigations and impose remedies. This proposal was subject to widespread criticism and has now been **dropped**.
- Instead, the remnant was "folded" into the DMA (dixit EVP Vestager) and the Commission will have the flexibility (and power) to conduct **market investigations** for any of the following purposes :

  i. to proactively investigate providers of core platform services that do not meet the quantitative criteria (Art. 15)

  ii. to investigate systematic non-compliance with the gatekeeper 'dos and don'ts', incl. to consider whether the business investigated should be subject to behavioural and/or structural remedies (Art. 16); and

  iii. to revise and update the scope of what constitute "core platform services" or add new practices that should be prohibited by the DMA (Art 17).

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What else?

A Merger Notification system – but not a fully-fledged review process

- Gatekeepers would also need to keep the Commission appraised of any contemplated mergers or acquisitions involving another provider of core platform services or of any other digital services, regardless of whether the transaction is reportable under the EUMR or EU Member States' merger control rules.
- While this is solely an obligation to provide information, the provision, in tandem with the Commission's proposed use of the referral mechanism under Article 22 of the EU Merger Regulation, opens up the prospect of the Commission using the information to exercise more oversight over tech transactions that would otherwise fall outside the Commission's jurisdiction (as well as other national competition authorities.

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Investigative and Enforcement Powers

- The Commission takes the lead with stringent enforcement powers to ensure the effective implementation of the rules. Similar to Antitrust, the Commission will have wide-ranging investigatory powers:
  - Art 16 (market investigation into systematic non-compliance)
  - Art 19-21 (RFI, interviews, taking statements, on-site inspections)
- Consequences of non-compliance:
  - Art 22 (Interim Measures: to prevent an urgent risk of serious & irreparable damage for business users / end users)
  - Art 23 (Commitments)
  - Art 26 (Fines : 10% of annual worldwide turnover)
  - Art 27 (Periodic penalty payments: 5% of daily worldwide turnover)
- EC dotes itself with a significant novel power for enforcement, in relation to "**repeat offenders**" who **systematically** do not comply with art 16. Gatekeepers will be deemed to have engaged in systematic non-compliance where the EC has issued 3 non-compliance or fining decisions against them within a 5-year period.
  - In this case, the EC can open a market investigation and impose behavioural/structural remedies on the gatekeeper. It should only resort to the latter where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the gatekeeper than divestment.

Proposal for a Digital Markets Act

Relationship between DMA and rules in Member States

- Commission takes the lead. The proposal seems not to leave much space to national authorities, save for providing for a "Digital Markets Advisory Committee" that will assist the Commission.
- Legal basis for the draft DMA is Art. 114 TFEU (i.e. functioning of the Single Market) with the full intent on harmonising the regulation of "gatekeepers" across the EU, **raising questions as to the legality of equivalent national rules**.
- According to Art. 1(5), Member States are precluded from applying **further** obligations to gatekeepers for the purpose of ensuring contestable and fair markets. However, they may still set rules to pursue other legitimate public interests.
- This is likely to give rise to significant debate as the legislative process continues (Member States will debate and co-adopt as part of the Council of Ministers.
- Some Member States are in the process of drafting (or already have e.g. Germany adopted) national provisions for platforms (The "Digitalisation Act" which came into force on 19 Jan 2021).

Proposal for a Digital Services Act / Digital Markets Act

Legislative Proposal

Co-decision Procedure:

- EP/Council: avg. timeline for approval of legislation following adoption by the Commission is 18 m.

Ambient Temperature

- EU proposal in line with with, and bolstered by, similar moves in other jurisdictions (e.g. the UK, Germany, Japan, and Australia)
- Lobbying efforts / fierce debates / intense negotiations – will lead to amendments
- Potentially lengthy – not expected to come into force before 2023

Obstacles and hurdles:

- Potentially unfavourable views from the tech/platform industry
- Discordances with/within the European Parliament
- Divergent views from/within the Member States
- Geopolitical divergence (esp. the new Biden Administration)

Proposal for a Digital Markets Act

Key Takeaways - DMA

Philosophical:

- The EC's contribution to a debate over the last few years in the competition world that the existing competition enforcement toolbox is not sufficient to address the potential harm to competition posed by the world's largest digital platforms (fragmentary and reactive).
- A more forward-looking approach is required in dynamic tech markets. DMA can be seen as a form of ex-ante competition regulation similar to what already exists in sectors e.g. energy or telecoms.

Practical:

- Enforcement will be the responsibility of the European Commission rather than national regulators. The Commission will enjoy powers similar to those available to regulators under the DSA, including power to investigate complaints, require provision of information and carry out on-site inspections.
- Sanctions/remedies for breach are greater than in the case of the DSA: the Commission will be able to impose fines of up to 10% of the company's total worldwide annual T/O (as opposed to 6%), and in the case of systemic infringements, it will be able to impose additional behavioural or structural remedies such as requiring divestiture of parts of a business.