

Economic Analysis in EU Competition Policy: Current trends and future perspectives

Economic Analysis in the DMA

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1

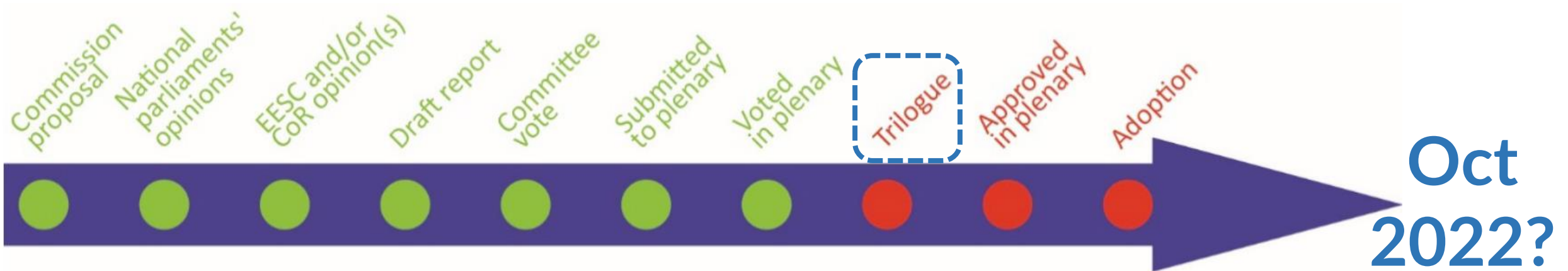
The DMA Timeframe

15 Dec '20: The European Commission publishes the DMA proposal;

25 Nov '21: European Council position;

14 Dec '21: EU Parliament position (Internal Market and Consumers Committee);

25 Mar '22: Trilogue compromise on (leaked) draft agreement.





Where is economics in the DMA proposal?



Google Search

I'm Feeling Lucky

The Economic Background of the DMA *and its Legal Foreground*

The **digitalization spurred innovation** for the benefit of consumers:



New digital services (e.g., marketplaces, fintech);

New distribution methods for existing services (e.g., food delivery, Lyft/Uber).

Features of digital markets:

- **Extreme scale economies:** nearly zero marginal costs to serve additional users;
- **Indirect network effects** among platforms' multiple sides: the largest platforms attracts the most users/advertisers/businesses;
- **Data-driven advantages.**

Competitive outcomes of digital markets:

- **Tipping/winner-takes-all effects** → lack of **contestability** of platforms' market positions;
- Platforms impose the '**rules of the game**' **unilaterally** → issues of **unfairness**.

The DMA targets **contestability** and **fairness** in the digital internal market → legal concepts subject to interpretation.



The DMA focuses on **selected digital products**, so-called “**Core Platform Services**” (Art. 2(2)):

- | | | |
|------------------------------------|---|------------------------------|
| a) Online intermediation; | e) Number-free communication services; | +2 from Trilogue: |
| b) Search engines; | f) Operating systems; | • <u>Web browsers;</u> |
| c) Social networks; | g) Cloud computing; | • <u>Virtual assistants;</u> |
| d) Video-sharing platforms; | h) Online advertising; | |



Art. 17 The Commission can **add further Core Platform Services** after a market investigation.

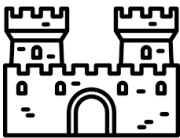



The DMA is further limited to undertakings qualified as **gatekeepers**, which (Art. 3):

- Have a **significant impact on the internal market** (*rebuttably presumed for presence in at least three Member States plus either an annual EU turnover of €7.5 billion or average market capitalization/equivalent fair market value > €75 billion*);
- Are an **important gateway for business users to reach final users** (*rebuttably presumed for > 45 million monthly active end users and > 10.000 business users in the EU yearly*);
- Have/likely will have an **entrenched and durable position** (*rebuttably presumed if meeting the users' threshold for three years*).

Shifting the Competition Law Burden of Proof

The ordinary designation as a gatekeeper depends on **quantitative presumption thresholds**:

 Art. 3(3) **undertakings must monitor the thresholds** for their core-platform services → **notification obligation** when meeting the thresholds (~~+7a anti-circumvention of thresholds~~);

 Art. 3(4) **gatekeeping presumption rebuttal**: although meeting all thresholds, an undertaking may present sufficiently substantiated arguments to demonstrate that, in the circumstances in which the relevant core platform service operates, the undertaking exceptionally is not a gatekeeper;

Arts. 3(6)+15 The 'special' designation as a gatekeeper depends on **qualitative market characteristics** i.e., entry/expansion barriers: size, network effects, data-driven advantages, scale and scope economies, lock-in/switching costs, behavioural biases and single homing, conglomerate or integrated corporate structure...



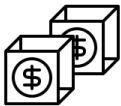
Self-executing in Theory



Keep personal data from a core platform service separated from personal data from other own or third-party services (5a);



Allow price differentiation by business users outside the gatekeepers' intermediation services → *prohibition of wide and narrow price-parity clauses* (5b)



Refrain from tying the gatekeepers' different services together or to business users' services → *multi-channel distribution, no mandatory sign-in, no mandated interoperability of business users' services with gatekeepers' different services* (5c+5ca+5e+5f);



Allow business users to challenge gatekeepers' practices before public authorities (5d);



Disclose ads price information upon request of advertisers and website publishers (5g);

Gatekeepers' Obligations Needing Further Adjustments By the Commission (Art. 6+6a)

- a. Refrain from using business users' data in competition with them;
- b. Allow end users to un-install pre-installed applications and change default settings;
- c.+f. **Allow interoperability** of third-party software/hardware with operating systems/virtual assistants;
- d. Abstain from promoting the own services and demoting competing services → **no self-preferencing**
- e. **Allow end-user to switch** between and **subscribe** to different services using the gatekeepers' core platform services (+ka. **allow effective termination rights** from core platform services);
- g. **Set up performance measuring tools** of the gatekeepers for advertisers and publishers;
- h. Ensure end users' effective data portability + i. **business users' data access**;
- j. **Share online search data under FRAND conditions** with third party search engines;
- k. Provide business users with **FRAND access to app stores, search engines, social networks**;
- 6a. Allow interconnection** among number-free communication apps.

Economics in the Regulatory Dialogue and Enforcement of the DMA



Art. 7 The burden of proving compliance with art. 5-6-6a rests on gatekeepers (presumption of non-contestability and unfairness behind the DMA obligations):

- Art. 7(2a) The gatekeeper can ask the commission for a preventive clearance of its intended compliance measures;
- Art. 8 The gatekeeper can ask the provisional suspension of its obligations upon proof of its endangered economic viability in the EU;
- Art. 9 and 24 The gatekeeper must report its compliance with obligations and remedies.



Art. 30 Due process right of defense and of confrontation are always guaranteed in the administrative enforcement of the DMA (for example, for art. 22 interim measures, art. 23 commitments, art. 25 non-compliance decisions, arts. 16-17 market investigations for systematic non-compliance or updating obligations);



Art. 31c Private Enforcement before national courts;



Art. 35 Review of Commission decisions by the CJEU.

Questions for the Debate

1. **Fairness and gatekeeping** are not economic terms, how do you interpret them in the context of the digital economy?
2. Do you endorse the **DMA's departure from competition law effects-based approach** (e.g., market definition, potential effects) in favour of **legal presumptions** (e.g., gatekeeping status, unfairness of identified practices)?
3. What issue among **gatekeeping designation and DMA compliance** will attract most disputes?
4. What role will **DMA compliance defences** play compared to **Art. 102 TFEU efficiency defenses**?
5. Is there **proportionality between DMA non-compliance fines** ($\leq 20\%$ total turnover) and **competition law ex-post violation fines** ($\leq 10\%$)?
6. The DMA builds on **antitrust experience in the Web 2.0**, will it be **future-proof**?

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Thank you!



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