

Digital platforms regulatory is already a reality

The Digital Markets Act is about to be approved in the European Union and is expected to impact other jurisdictions

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This article is a translation and an update of an article published in "Jota", in Portuguese, in December 2021 - "[Com o DMA, regulação de plataformas digitais já é realidade](#)".

At the end of November 2021, the [Internal Market and Consumer Protection Committee of the European Parliament approved the draft Digital Markets Act](#) (DMA) by an absolute majority, with 42 votes in favor, two against, and one abstention. After the recent approval of a new text, the project will be voted on in the plenary of Parliament, then will be negotiated with the European Council still in the first half of 2022.

Despite the long European debate on the regulation of “digital markets”, the Brazilian debate is still incipient on the subject. We here present a first explanation of the Digital Markets Act and its driving ideas.

What is DMA?

The DMA is an European regulatory project presented in 2020 and aims to ensure a greater degree of competition in the European Union digital markets, preventing the abuse of power by large digital companies and allowing the entry of new agents. In other words, in favor of a fairer and more competitive market, the goal of the bill is to prevent unfair practices and guarantee contestability in this market.

As an *ex-ante* legislation, applied before damage or violation occurs, the bill seeks to achieve this objective through an asymmetric regulation. In other terms, a regulation that only affects some platforms – in this case, the so-called gatekeepers.

According to the DMA, gatekeepers are companies that offer “core platform services”, which range from social networks (such as Facebook and Instagram), to search engines (such as Google), operating systems (such as Android), and video sharing services (such as YouTube). In all cases, they must have a significant impact on the European domestic market:

they operate in one or more gateways for customers and enjoy an entrenched and durable position in their operations.

Whether a company falls into the category of a gatekeeper is determined by qualitative and quantitative criteria¹. These criteria, however, are only presumptions: even if companies meet the established thresholds, they can contest the position of gatekeeper through sufficient and grounded indicators that prove the presumption wrong.

Likewise, it is possible that the European Commission justifiably designates a digital platform providing a core service as a gatekeeper even if it does not reach the established thresholds. When framed as a gatekeeper, the platform is subject to some obligations.

What are the obligations imposed by the DMA?

These platforms are subject to a list of 18 obligations, which include duties (“do’s”) and prohibitions (“don’ts”). Some previous cases scrutinized by competition authorities, such as Google and Booking in the European Union, inspired the obligations assigned by the DMA. As explained by economist Tommaso Valletti, this is a choice of simplification, so to speak, in the face of the failures of the traditional competition law framework.

For example: on the list of “**do’s**” gatekeepers must: allow and technically enable end-users to uninstall pre-installed software applications; ensure compatibility of third-party apps with the gatekeeper operating system and allow those apps and app stores to be accessed by other means; provide advertisers with pricing information and publishers with compensation information, and provide both, free of charge, with access to gatekeeper performance measurement tools and the information needed to perform their ad inventory check.

Among the obligations on the list of “**don’ts**”, gatekeepers must refrain from: combining personal data from their core services with personal data from other services of theirs or third parties; enrolling end-users in others of their services to combine personal data; restricting commercial users from bringing complaints related to gatekeeper practices to public authorities; bundle their core service with identification services or with core gatekeeper services; to rank its products and services more favorably than competing third-party products and services (for example, banning *most favored nation* clauses and ensuring services under fair and non-discriminatory conditions).

The Act also imposes restrictions on the so-called *killer acquisitions*, mergers motivated by the exclusion of potential competitors. These obligations are attempts to address problems such as the lack of balance between the rights and obligations of gatekeepers and their commercial users and competitors, which leads to a lack of transparency, lack of contestability, and undermines value creation (long-term efficiency).

Application of DMA

The DMA foresees the application of the rules in a centralized way by the European Commission, in cooperation with the national competition authorities of the European countries. Fines range from 4% to 20% of the companies' total revenue.

These rules complement but do not exclude the incidence of competition law. In other words, the proposal establishes *ex-ante* regulation to minimize the harmful structural effects of unfair practices without limiting the *ex-post* intervention capacity of competition law.

DMA context

The initiative is part of a bigger context of confronting anti-competitive practices perpetuated in digital markets. In recent years, several competition authorities, sharing efforts with academia and the legislature, have produced reports on the competitive issues and challenges generated by the digital economy, seeking to deal with the growing economic power of large technology companies. From these studies and debates, initiatives to regulate large platforms emerged.

In the [United Kingdom](#), the data protection authorities (Information Commissioner's Office, ICO) and the competition authority (Competition Markets Authority, CMA) published a joint document encouraging inter-institutional cooperation on digital market topics. The country also created the Digital Regulation Cooperation Forum (DRCF), which brings together competition, data protection, communications, and financial services authorities. In the [United States](#), five bipartisan bills were proposed in the context of the Antitrust Subcommittee, which in 2020 completed a 16-month investigation into the state of competition in the digital marketplace and the unregulated power wielded by Amazon, Apple, Facebook, and Google. Overall, the projects aim to ensure stricter control over the expansion of digital platforms, regulate mergers and acquisitions criteria, and promote a more favorable environment for competition.

[China's](#) State Administration for Market Regulation (SAMR) has also published proposed guidelines for regulating large platforms. Among the objectives of the guide are the protection of fair competition and the rights and interests of consumers, the promotion of scientific and technological innovation, and more standardized management of Internet platforms.

The international scenario is moving towards the regulation of digital platforms. DMA is a symptom and evidence of a profound change in the mindset of regulators. It is a bet on a regulatory strategy that escapes traditional canons. Undoubtedly, it is an action that may inspire legislative movements in Latin America in the coming years.

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¹Specifically, (i) if the company to which it belongs achieves an annual turnover in the European Economic Area (EEA) equal or above EUR 7.5 billion in the last three financial years, or where the average market capitalisation or the equivalent fair market value of the undertaking amounted to at least EUR 75 billion in the last financial year, and it provides a core platform service in at least three Member States; (ii) if it provides one or more core platform services each of which has more than 45,000 monthly end users established or located in the EEA and more than 10,000 yearly business users established in the EEA in the last financial year.