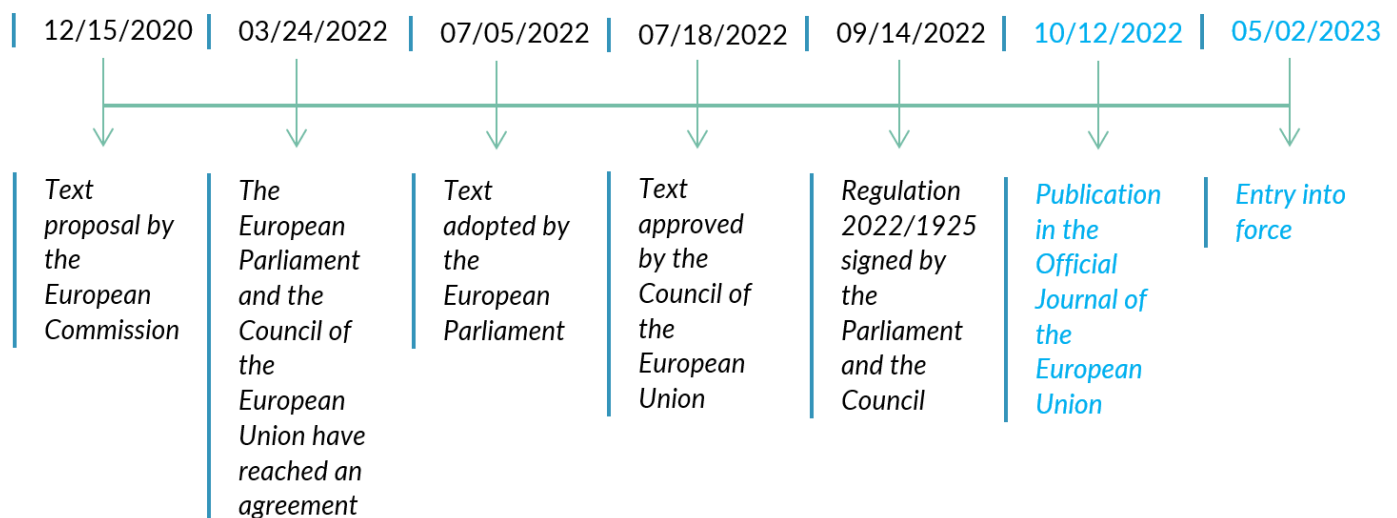


# The project to reform the European digital space is coming to an end: Digital Markets Act (DMA) will come into force on May 2, 2023.

November 4, 2022

Regulation 2022/1925 or [Digital Markets Act \(DMA\)](#) was published on October 12, 2022 in the Official Journal of the European Union and will come into force on **May 2, 2023**. It is an ambitious legislation that aims to ensure more fairness in the competition of the digital sector, by setting up *ex ante* rules against the major "gatekeepers" of the online platform market.



## What is the legal regime introduced by the DMA?

### • BACKGROUND

The DMA is part of a major reform project led by the European Commission, since the end of 2020 with a legislative package including:

- i. **Digital Markets Act or DMA Regulation** (published on October 12, 2022)
- ii. **Digital Services Act or DSA regulations** (published on October 27, 2022)  
→ [An article on the subject is already available on Steeringlegal.com](#)

The objective of this legislative package is to modernize the legal framework of the European digital space, which has remained unchanged since the entry into force of the [directive on electronic commerce of June 8, 2000](#). Indeed, over the last decades, the business models of digital technologies and services have greatly evolved and the need to regulate the European digital space has become apparent.

This legislative package must allow the establishment of a legal framework adapted to the economic footprint of the digital market giants. It also aims to introduce measures to protect users but also, at the same time, support innovation in the digital economy.

More specifically, the DMA's goal is to ensure that large platforms that position themselves as "gatekeepers" for a large number of end users do not abuse that status by preventing companies that wish to do so from accessing those same users.

In addition, as stated in Article 1 of the DMA, the objective is to establish "*harmonized rules to ensure contestability and fairness for all undertakings in the Union's digital sector where access controllers are present, to the benefit of user undertakings and end-users*".

- **DEFINITION OF THE ACCESS CONTROLLER**

A "gatekeeper" is a company that provides essential platform services to users (companies or natural persons) established within the European Union, allowing companies using these same services to reach a large number of end users located throughout the European Union.

The gatekeeper is also able to connect many enterprise users to many end users through its services, and this connection allows it to take advantage of benefits such as access to vast amounts of data in various business areas.

It is precisely because it offers a large number of user companies access to their end-users, throughout the European Union and in different markets, that the access controller has a major weight in the internal market.

Specifically, the DMA targets intermediation services (application stores such as the App Store and Google Play Store), search engines, social networks (Facebook, Twitter, Instagram, etc.), video sharing platforms (YouTube, etc.), online messaging systems, operating systems, *cloud* services, advertising services, web browsers and virtual assistants (Siri, Google Now, etc.).

- **CRITERIA FOR APPOINTING ACCESS CONTROLLERS**

The DMA has created a new legal category of digital actors through the concept of "gatekeepers". However, not all gatekeepers fall within the scope of the new legislation, as the DMA introduces additional criteria.

The aspiration of the European legislator is to target operators who are unavoidable, because of their significant size in the market for the provision of certain digital services. It is to these players that it is necessary to impose specific obligations.

In any case, the DMA mainly targets GAFAMs (Google, Apple, Facebook, Amazon, Microsoft) without explicitly targeting them.

Section 3 of the DMA sets out three quantitative and cumulative criteria.

It is the size of the gatekeeper that triggers regulation, not its market position. Although the size of a company can be taken to imply a certain amount of market power, this does not necessarily imply that competition is deficient. It can therefore be noted that the European legislator's intention was to favor objective and quantitative criteria, rather than criteria linked to a prior study of a player's position on a market, which are more complex to implement and less predictable.

### **What are the three cumulative criteria for DMA?**

- i. **The gatekeeper must have significant weight in the domestic market.**

The criterion is met if the company has achieved:

- Annual sales in the European Union of at least 7.5 billion Euros for each of the last three fiscal years;  
Or if its average market capitalization or fair market value equivalent reached at least 75 billion Euros during the last fiscal year;
  - And that it provides the same essential platform service in at least three member states.
- ii. **The gatekeeper must provide a critical platform service that is a major access point for end-user companies to reach their end users.**

The criterion is met if the company provides an essential platform service that in the last fiscal year:

- Counted at least 45 million monthly active end users based or located in the European Union;
- And counted at least 10,000 active user companies per year based in the European Union.

- iii. **The gatekeeper must have a strong and sustainable position in its business, or is likely to have such a position in the near future.**

The criterion is met if the criteria in (ii.) have been met in each of the last three years.

**What about companies covered by the DMA that have a complex business, being active in many services at the same time and playing different roles?**



The DMA has chosen a "per service" approach. This consists of identifying the services for which the company concerned has a position of access controller, in order to apply the DMA to them.

The choice of this method will certainly give rise to application issues for companies that provide different intertwined services, for which they occupy different strategic positions in the digital market.

The first consequence of this approach is that a company is designated as a "gatekeeper" by the European Commission as soon as it provides at least one essential platform service that meets the criteria of the text. Although it will only be subject to the obligations of the DMA for the services identified in the European Commission's designation decision, it will be designated as an "access controller".

• **OBLIGATIONS**

The DMA places *per se* obligations on *a priori* access controllers listed in [Articles 5, 6 of the DMA](#) and specific obligations listed in [Articles 7, 14 and 15](#) (concerning interoperability, notification of acquisition projects and auditing respectively):

	 <b>PROHIBITIONS</b>	 <b>OBLIGATIONS</b>
ARTICLE 5 DMA	<ul style="list-style-type: none"> <li>▪ <b>Process, cross-reference, combine</b> personal data without end-user consent</li> </ul>	<ul style="list-style-type: none"> <li>▪ <b>Promotion</b> of offers and customer <b>contact</b> via platforms of other access controllers by user companies</li> </ul>
	<ul style="list-style-type: none"> <li>▪ <b>Prevent, restrict</b> the freedom to report the behavior of access controllers</li> </ul>	<ul style="list-style-type: none"> <li>▪ <b>Communication, offer</b> or <b>conclusion</b> of <b>contracts free of charge</b> by user companies with end users already acquired</li> </ul>
	<ul style="list-style-type: none"> <li>▪ <b>Limit the use of</b> third-party identification, browser and payment system services</li> </ul>	<ul style="list-style-type: none"> <li>▪ <b>Access</b> to subscriptions, offers, or content via a third-party application, if acquired other than via the gatekeeper</li> </ul>
	<ul style="list-style-type: none"> <li>▪ <b>Condition of access:</b> registration to other services of the platform</li> </ul>	<ul style="list-style-type: none"> <li>▪ <b>Transparency</b> of advertising space and audience measurement rates for advertisers</li> </ul>
ARTICLE 6 DMA	<ul style="list-style-type: none"> <li>▪ <b>Discriminate</b> against competing vertical business users and <b>use</b> their non-public data</li> </ul>	<ul style="list-style-type: none"> <li>▪ <b>Uninstall, change</b> default settings of pre-installed applications (except essential applications)</li> <li>▪ <b>Installation, use</b> of software applications or third-party or inter-operator application stores</li> <li>▪ <b>Access by</b> business users and ancillary service providers to the same operating system features, and to interoperate with those features</li> </ul>
	<ul style="list-style-type: none"> <li>▪ <b>Discriminate</b> through search algorithms</li> </ul>	<ul style="list-style-type: none"> <li>▪ <b>Free information</b> to advertisers and authorized third parties on the performance of ads posted</li> <li>▪ <b>Effective, free access to</b> aggregated or non-aggregated <b>data</b> provided or generated in the course of the use of the relevant essential platform services by users</li> </ul>
	<ul style="list-style-type: none"> <li>▪ <b>Prevent, limit</b> the change of applications and services by end users</li> </ul>	<ul style="list-style-type: none"> <li>▪ <b>Effective, free and real-time portability of</b> user activity data</li> <li>▪ <b>Search engines:</b> fair, reasonable, and non-discriminatory access by business users to search-related rankings, queries, clicks, views, software application stores, online search engines, etc.</li> </ul>
		<ul style="list-style-type: none"> <li>▪ <b>Unsubscribe</b> without undue difficulty</li> </ul>

- **PENALTIES**

According to [Article 30 of the DMA](#), a gatekeeper who fails to comply with the obligations of the regulation to which he is subject, risks a fine of up to 10% of his annual worldwide turnover. In the event of a repeat offence, the amount is 20% of the annual worldwide turnover.

When violations persist (i.e., 3 or more times in 8 years), then corrective measures, either structural or behavioral, may be taken against the gatekeeper and the European Commission may initiate a market investigation.

- **ROLE OF THE EUROPEAN COMMISSION**

The European Commission has the sole authority to enforce the DMA. In its role, the Commission will be assisted by an Advisory Committee and a High-Level Group. The national competition authorities of the Member States are empowered to investigate possible infringements and to forward them to the Commission.

The Commission also conducts market surveys, the purpose of which is to identify critical platform service providers that have not met all thresholds but should be considered gatekeepers.

If a gatekeeper meets the criteria for the DMA, then it must come forward to the Commission, which will then have 45 days to adopt a designation decision.

- **OUTLOOK**

In conclusion, it is important to emphasize the willingness of the European legislator to adapt its legislation over time, given the numerous and constant changes in the digital sector. Indeed, article 53 of the DMA provides that every three years, the European Commission will evaluate the regulation to determine whether it is necessary to modify its rules.

- The IP/IT/Data department of Steering legal -

---

**Stéphanie BERLAND**  
Associate Lawyer  
[sberland@steeringlegal.com](mailto:sberland@steeringlegal.com)  
+33 6 81 45 05 01

**Leslie HERAIL**  
Lawyer  
[lherail@steeringlegal.com](mailto:lherail@steeringlegal.com)  
+33 6 32 31 52 37

**Sabrina AJILI**  
Paralegal  
[sajili@steeringlegal.com](mailto:sajili@steeringlegal.com)  
+33 1 45 05 96 99

---