



**STRENGTHENING THE REGULATORY CAPACITY OF ISRAEL
IN THE FIELD OF TELECOMMUNICATIONS,
WITH A FOCUS ON SERVICE PROVISION
OVER NETWORKS OWNED
AND OPERATED BY OTHERS**

חיזוק היכולת הרגולטורית של ישראל בתחום התקשורת בדגש על אספקת שירות
באמצעות רשתות בבעלות ובאחריות אחרים

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Digital Markets Act

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Regulating EU Digital Markets

- The **e-Commerce Directive**, adopted in **2000**, has been the main legal framework for the **provision of digital services** in the EU. It is a horizontal legal framework that has been the cornerstone for regulating digital services in the European single market
- Much has changed in **20 years**. **Online platforms** have created significant benefits for consumers and innovation and have facilitated cross-border trading within and outside the Union and opened new opportunities to a variety of European businesses and traders
- However, some large online platforms act as '**gatekeepers**' of **digital markets**, i.e. they control access to them
- The **Digital Markets Act** aims to ensure proper behaviour on the part of these platforms.
- Together with the **Digital Services Act** (and Data Act), it constitutes one of the core elements of the **European digital strategy** The **Digital Markets Act** aims to ensure proper behaviour on the part of these platforms.
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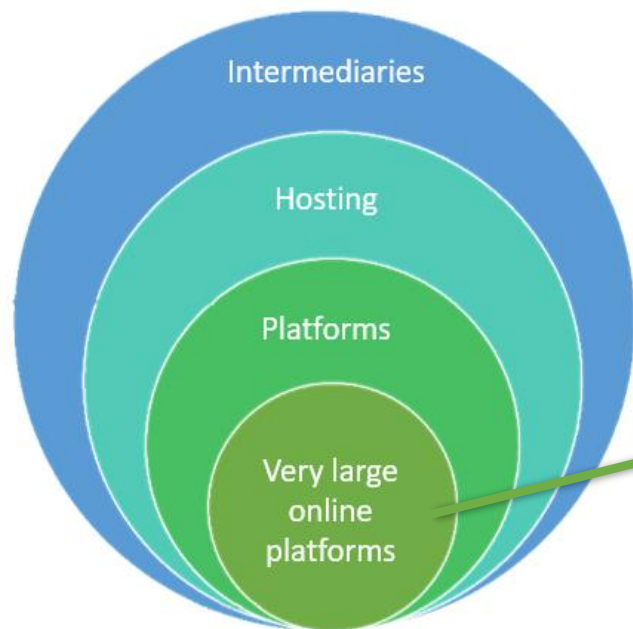
EU DIGITAL STRATEGY

- **Innovation in the domestic market: more opportunities**
- **Legal certainty for businesses**
- **Protecting the rights of business and end users**
- **Global model for regulating digital markets (see GDPR)**

EU Digital Package: intermediary services

Digital Service Act

All the intermediaries



VLOPs: platforms with more than 45 million users in EU

Digital Markets Act

Intermediary = Gatekeeper



- **>45 million active end users per month** **>10 000 active business users per year**
- **Annual turnover \geq EUR 7.5 billion / Capitalization \geq EUR 75 bln**
- **Provides services in at least 3 member states**
- **In the last 3 fiscal years**



DSA & DMA

Digital Service Act

Security and fundamental rights online (e-Commerce Directive update)

- Different regime for intermediaries depending from different social impact
- Country of origin and internal market
- New obligations: editorial responsibility vs. due diligence
 - Liability exemption for intermediaries
- Sanctions and remedies
- Enhanced supervision: national coordinators, European board, direct supervision by EU Commission

Digital Markets Act

Fair and contestable digital markets

- Designation of gatekeepers
 - Quantitative/qualitative
- Internal market: harmonization
- Ex ante obligations. Complementary to antitrust
- Regulatory dialogue
- Full spectrum of sanctions and remedies (behavioral and structural)
- Direct supervision by the EU Commission

DMA: time span

- Following the initial proposal of the European Commission in **December 2020**, the Regulation was adopted by the European Parliament and the Council on **14 September 2022** and was published in the EU Official Journal on **12 October 2022**.
- The Digital Markets Act entered into force on 1 November 2022 and will become applicable on **2 May 2023**.
- **Within two months** of that date (**3 July 2023**), companies providing core platform services will have to notify the Commission if they meet the quantitative thresholds and provide all relevant information. The Commission will then have **45 working days** to adopt a decision designating a specific gatekeeper.
- The designated gatekeepers will have a maximum of **six months after** the Commission decision to ensure compliance with obligations and prohibitions laid down in the DMA.



12 Oct. 2022

1 Nov. 2022

2 May 2023

3 July 2023

6 Sept. 2023

6 March 2024

Official Journal

Effective date

Application

Last date for notification

Last date for designations

Obligations application



How DMA works

- **Companies** will have to assess if they meet the **quantitative thresholds** included in the DMA to identify gatekeepers. They will then have to provide the Commission with information on this.

Deadline: 2 May 2023

- **The Commission** will then designate as “gatekeepers” those companies that **meet the thresholds** in the DMA based on the information provided by the companies (subject to a possible substantiated rebuttal) and/or following a market investigation;

Deadline: 6 Sept. 2023

- Within six months after a company is identified as a “**gatekeeper**”, it will have to comply with the “**DOs**” and “**DON'Ts**” listed in the DMA.

Deadline: 6 March 2024

- For those gatekeepers that do not yet enjoy an entrenched and durable position, but are expected to do so in the near future, only those obligations apply necessary and appropriate to ensure that the company does not achieve by unfair means such entrenched and durable position in its operations



Who is the Gatekeeper

- The DMA establishes a set of criteria to **identify “gatekeepers”**. There are **3 main cumulative criteria** that it only concerns large systemic online platforms.

Size that impacts the internal market	<ul style="list-style-type: none">Annual turnover \geq EUR 7.5 billionCapitalization \geq EUR 75 miliardiProvides services in at least 3 member states
The control of gateway between business users and final consumers	<ul style="list-style-type: none">>45 million active end users per month>10 000 active business users per year
An entrenched and durable position	<ul style="list-style-type: none">if the company met the second criterion in each of the last three financial years



The services

- By virtue of the prominent position that gatekeepers assume, they also acquire the ability to dictate unilateral commercial terms, which are often detrimental to both commercial and end users. As a precondition, these companies need to be designated as **gatekeeper** for at least **one** of the so-called “**core platform services**”

• Intermediation services	• Operating Systems
• Search engines	• Browsers
• Social network	• Virtual assistants
• Video platforms	• Cloud services
• Messaging	• Ad services

- Eight of those services were part of the Commission's initial proposal, two - **virtual assistants** and **web browsers** were added. Such developments include, among others, findings of the sector inquiry into the consumer Internet of Things, which looked into voice assistants, as well as recent enforcement experience and broader developments when it comes to web browsers.

The Obligations: Don'ts (art. 6)

- Under the DMA, companies identified as gatekeepers will be subject to a number of **positive** and **negative** obligations. **Proactively implement** certain behaviours that make the markets more open and contestable (**Do**) and **refrain** from engaging in unfair behaviour (**Don't**).



Don'ts examples:

- Ban** on using the data of business users when compete with them on their own platform;
- Ban** on requiring app developers to use certain of the gatekeeper's services (such as payment systems or identity providers) in order to appear in the gatekeeper's app stores;
- Ban** on ranking the gatekeeper's own products or services in a more favourable manner compared to those of third parties;
- Ban** on tracking end users outside of the gatekeepers' core platform service for the purpose of targeted advertising, without effective consent having been granted.



The Obligations: Do's (art. 5)

Dos examples:

- **Allow** end users to easily un-install pre-installed apps or change default settings on operating systems, virtual assistants or web browsers that steer them to the products and services of the gatekeeper and provide choice screens for key services;
- **Allow** end users to install third party apps or app stores that use or interoperate with the operating system of the gatekeeper;
- **Allow** end users to unsubscribe from core platform services of the gatekeeper as easily as they subscribe to them;
- **Allow** third parties to inter-operate with the gatekeeper's own services;
- **Provide** the companies advertising on their platform with access to the performance measuring tools of the gatekeeper and the information necessary for advertisers and publishers to carry out their own independent verification of their advertisements hosted by the gatekeeper;
- **Allow** business users to promote their offers and conclude contracts with their customers outside the gatekeeper's platform;
- **Provide** business users with access to the data generated by their activities on the gatekeeper's platform



DMA: gatekeepers, services and obligations

- Annual turnover \geq EUR 7.5 billion
- Capitalization \geq EUR 75 miliardi
- Provides services in at least 3 member states
- >45 million active end users per month and
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- In the last 3 fiscal years

• Intermediation services	• Operating Systems
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• Messaging	• Ad services

Data-related

Commercial relations

Mobile ecosystem

Reporting

Access

Transparency

Inter-operability

Tiping



Remedies and sanctions

Infringement Fine	<ul style="list-style-type: none">• 10% of the company's total worldwide annual turnover
Repeated infringement Fine	<ul style="list-style-type: none">• 20% of the company's total worldwide annual turnover• 5% of the company's total worldwide daily turnover
Systematic infringement (no alternative available) Structural remedies	<ul style="list-style-type: none">• sell a business, or parts of it (i.e. selling units, assets, intellectual property rights or brands)• banning a gatekeeper from acquiring any company that provides services affected by the systematic non-compliance



Additional aspects

- It is important to stress that **non-gatekeepers platforms are not subjected to the DMA**, meaning they are free to behave in a way which is prohibited to the gatekeeper: they can therefore take advantage of this “asymmetric” regulation
- In some cases, however, the Commission is empowered under the Digital Markets Act to supplement the existing obligations applicable to gatekeepers based on a **market investigation**, which may translate into a supplementary act (delegated act), or a review of the DMA. This should ensure that the same issues of fairness and contestability are tackled also where the practices of gatekeepers and digital markets evolve.
- In addition to supplementing the obligations, the Commission will be able to designate the **so-called 'emerging' gatekeepers** that are on a clear path to making services tip to their advantage.
- Compared to the traditional antitrust analysis, there is also a **reversal of the burden of proof**, in the sense that it is the platforms that have to prove that they do not fall under the definition of gatekeeper



DMA Enforcement

- **The Commission will be the sole enforcer** of the rules laid down in the Digital Markets Act.
- This centralised enforcement has been justified with s the **cross-border activities of the gatekeepers** and the objective of the DMA to **establish a harmonised framework** with maximum legal certainty for businesses across the entirety of the European Union.
- At the same time, as a part of the supervisory architecture of the Digital Markets Act, the Commission will **cooperate and coordinate closely with competition authorities and courts in the EU Member States**.
- The DMA also envisages that where such competence is provided under the national law, the relevant **national authorities** may conduct investigatory steps in view of determining **noncompliance of the gatekeeper with the Digital Markets Act** and report about their findings to the Commission.



Self executing enforcement to guarantee DMA objectives

- **Innovation in the domestic market: more opportunities**
- **Legal certainty for businesses**
- **Protecting the rights of business and end users**
- **Global model for regulating digital markets (see GDPR)**
- **The Commission will be the sole enforcer** of the rules laid down in the Digital Markets Act.
- This centralised enforcement has been justified with the **cross-border activities of the gatekeepers** and the objective of the DMA to **establish a harmonised framework** with maximum legal certainty for businesses across the entirety of the European Union.
- This solution has been widely criticized, mainly from the National Competition Authorities, even if some form of cooperation and coordination with NCAs and courts in EU member States is considered.
- The DMA also envisages that where such competence is provided under the national law, the relevant **national authorities** may conduct investigatory steps in view of determining **noncompliance of the gatekeeper with the Digital Markets Act** and report about their findings to the Commission.



More critical aspects

- **Relationship with National Competition Authorities.** Complementarity or substitutability between the EU Commission and the National Competition Authorities? Is it correct and acceptable the idea of separating the Digital markets (EU Commission) from the traditional markets (NCA)?
- **New competition tools:** DMA regulates the digital markets with an approach borrowed from the TLC (whatever it means)
- **One size fits all:** while there is a common opinion that any regulator requires a better understanding of the digital ecosystem, the one size fits all approach of the DMA doesn't seem to many critics the best solution. The alleged gatekeepers have different business models, different approaches....
- **Fairness:** no definition, what does it really mean?
- **DOS e DON'T (artt. 5 e 6):** too specific e too vague at the same time
- **Self-preferencing:** any company tends to foster its own business. Is this how the business works or is an anti-competitive behaviour?
- **Self-executing regulation:** are we sure is the best solution for the enforcement
- **Enforcement of national regulations?** E.g. German reform and the new AGCM powers regarding abuse of economic dependence by digital platforms... Are they compliant?



Thank you for your attention

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MEDEA

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