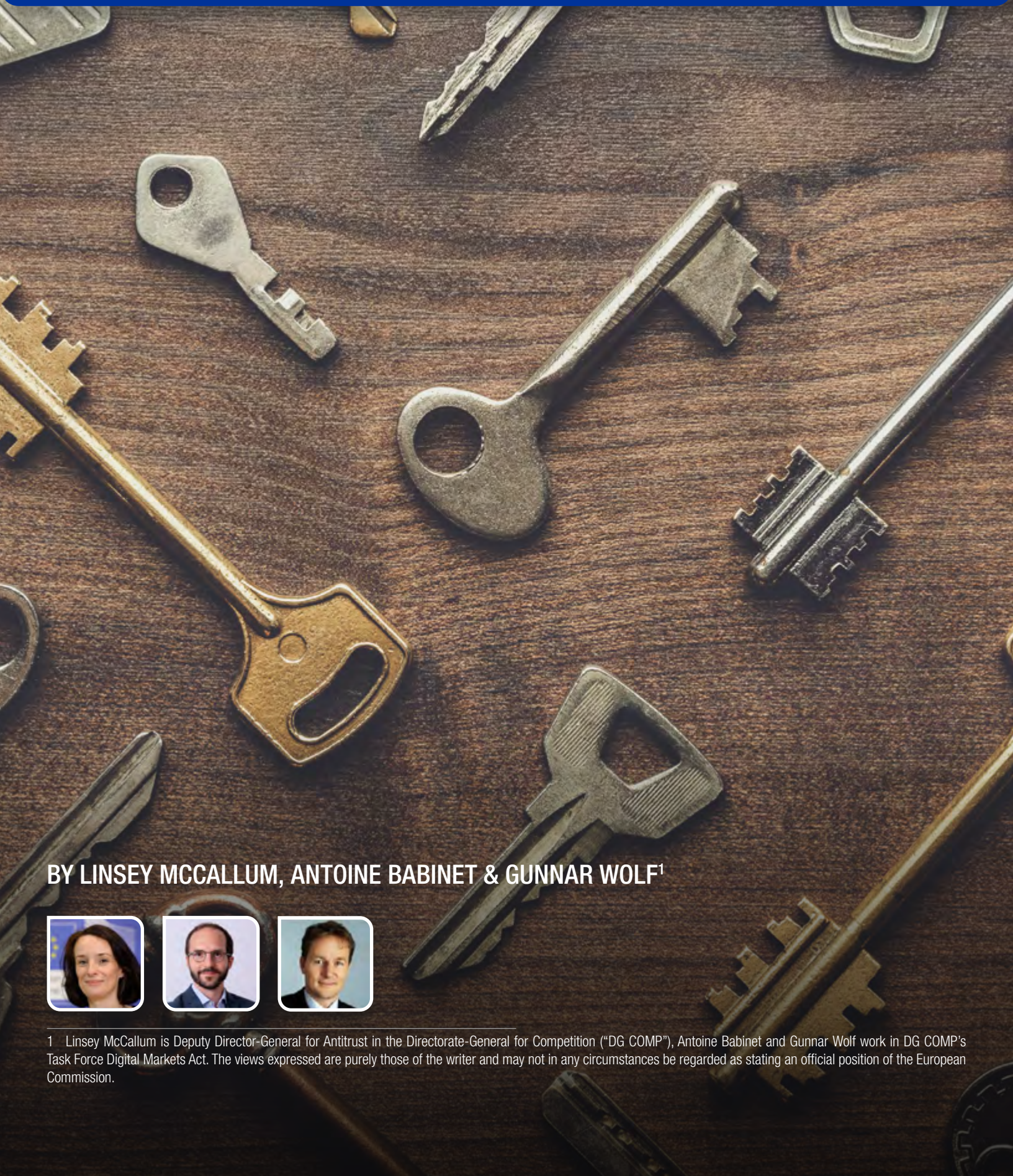
THE DIGITAL MARKETS ACT – KEY ENFORCEMENT PRINCIPLES



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With remarkable speed, the Digital Markets Act ("DMA") completed the legislative process, entered into force and will become applicable as early as May 2024. It is a new regulatory ex ante tool that is different from and complementary to competition law. Its goal is to ensure that digital markets characterized by the presence of gatekeepers are contestable and fair for all businesses in the EU. Companies that might be designated as gatekeepers or that could benefit from the obligations that the DMA imposes on gatekeepers are well advised to familiarize themselves with the text. Companies that offer core platform services must self-assess whether they meet the DMA's quantitative thresholds, which triggers a notification obligation. The qualitative thresholds have a strong presumptive effect that can only be rebutted in exceptional circumstances. Once designated, gatekeepers bear the responsibility to comply with the directly applicable obligations that the DMA imposes on them within six months. The Commission is available to discuss specific compliance proposals. It will involve market participants in order to ensure effective compliance.

I. INTRODUCTION

The Digital Markets Act ("DMA"),[2] the EU's new regulatory tool to tackle the most pressing challenges to contestability and fairness raised by large digital platforms, has moved quickly through the legislative process to take its final shape. On March 24, 2022, the European Parliament and the Council, reached a political agreement on the adoption of the DMA. This agreement ended a 15-month long legislative debate triggered by the European Commission's proposal for a DMA in December 2020. While 15 months may sound like a long time, this is actually a very short time period for reaching an agreement on a completely new and powerful tool to regulate large digital platforms, reflecting the wide political consensus in the EU.

Following this political agreement, the DMA has now been published in the European Official Journal on October 12, 2022 and entered into force on the November 1, 2022.

The DMA has therefore concluded its legislative phase and will move into the enforcement phase. The enforcement timetable that lies ahead is ambitious, since the first wave of quantitative designations of gatekeeper platforms is due to happen around summer 2023. Designated gatekeepers will need to comply with the DMA's obligations in the first quarter of 2024.

Preparations to meet these enforcement milestones are well under way and they will accelerate further in the coming months.

As a reflection of the current state of the DMA, this article takes stock of some of the main final provisions in the DMA (II) and, looking ahead, it discusses a number of key enforcement principles which may guide relevant stakeholders in their interactions with the Commission (III).

II. FINAL DMA ARCHITECTURE

Overall, the EU co-legislators largely preserved the fundamental features of the Commission's proposal for the DMA. In particular, they endorsed the key principle according to which the DMA applies to a defined list of core platform services. They also confirmed that the DMA provides for an asymmetric regulation targeting the source of the problem, namely companies that enjoy an entrenched and durable position as a gateway for business users to reach end users. In the core platform services, market positions have become extremely difficult to contest and this may allow the gatekeepers to engage in unfair practices with respect to business and end users. Accordingly the regulation only applies to such companies, which, under the DMA, can be designated quantitatively or qualitatively as gatekeepers.

With respect to the nature of obligations imposed on these gatekeepers, the co-legislators also preserved the idea that designated gatekeepers have to abide by a limited set of clearly defined obligations, all of which are directly applicable and self-executing. Six months after being designated as a gatekeeper for a particular core platform service, gatekeepers will have to comply with all obligations.

As to the obligations, they also largely remained as proposed by the Commission, albeit with a couple of notable exceptions. For example, a new obligation for interoperability of text messages in messenger services has been included. There is also a staggered implementation clause for interoperability concerning group messages and audio or video calls.

III. KEY ENFORCEMENT PRINCIPLES

It is early days for the DMA; it is not yet applicable, and an enforcement practice will develop over time. Nevertheless, this section will already articulate some initial key enforcement principles reflecting guidance to be found in the text of the DMA and first contacts with stakeholders.

1. The DMA is a regulatory *ex ante* tool different from competition law. This means that competition law concepts and solutions are not applicable as such. Competition practitioners involved in DMA work should therefore take as a starting point the criteria as set out in the DMA and conduct a fresh analysis even on topics where there are partially overlapping competition law precedents.

2 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector (OJ L 265, 12.10.2022, p. 1-66).

For example, it should be clear that the delineation of core platform services is different from the definition of relevant markets in antitrust or merger control law. The Annex to the DMA specifying the methodology for identifying and calculating end and business users for each core platform service listed in Article 2(2) contain some pointers and they differ from the criteria used in market definition assessments. Notably, the DMA sets out as main distinguishing factor the purpose for which a service is used. Unlike in competition law, it does not refer to demand or supply-side substitutability analysis. As a consequence, it is therefore likely that the delineation within the categories of core platform services will differ from the definition of the same markets in competition law cases.

Similarly, while it is clear that certain DMA obligations have been inspired by practices that have been subject to investigation in antitrust proceedings, these obligations constitute independent regulatory provisions whose scope may be different. This means that existing remedies for competition law infringements may not necessarily provide a fully transposable template in terms of how to comply with the DMA's obligations. It can be useful to look at the competition law precedents that inspired a given DMA obligation to understand aspects of the rationale behind that obligation. However, when assessing compliance, gatekeepers need to conduct a fresh assessment based on the obligation as set out in the DMA. They will ultimately need to come forward with compliance measures which are effective in achieving the objectives of the DMA and the relevant obligations.

2. Undertakings offering core platform services must self-assess whether they meet the quantitative thresholds. Article 3 of the DMA sets out a number of quantitative thresholds which, if they are met, give rise to a presumption that an undertaking providing core platform services meets the requirements for being a gatekeeper. It is the responsibility of undertakings offering core platform services to assess whether they meet the quantitative thresholds for one or several core platform services. Failure to notify may result in heavy fines.

In order to provide more clarity, the Commission intends to adopt as part of the DMA's implementing acts a notification form that will set out the information to be provided in notifications under Article 3 of the DMA. This form will be open for public comments towards the end of the year. Its content will in any event reflect the requirements of Article 3 of the DMA and undertakings concerned can therefore already start preparing on this basis.

Moreover, the Commission is available to help undertakings in their self-assessment whether they should notify one or several of their core platform services. The Commission has already engaged in such discussions with a number of potential gatekeepers. These discussions have proved mutually useful, and undertakings concerned that have not yet contacted the Commission are therefore invited to get in touch.

To make the most of the outreach, undertakings should approach the Commission with a complete overview of their core platform services, first estimates of which core platform services may meet the quantitative thresholds and explanations on the methodology used for calculating end and business users. Once the draft notification form is made public towards the end of the year, the Commission will also be available to provide feedback on draft notifications ahead of the formal notification deadline.

3. The DMA provides for a strong presumption in case the quantitative gatekeeper criteria are met. This presumption-based mechanism is intended to ensure the quick designation of undertakings that will most likely meet the gatekeeper requirements under Article 3. Consistent with this, the legislators have made the presumption of designation for a core platform service meeting the quantitative threshold a strong one, which may only be rebutted in exceptional circumstances.

For example, the legislators introduced a test that will allow the Commission to discard rebuttal submissions without an in-depth assessment if these submission *"do not manifestly put into question"* the presumption. On this basis, the Commission may for example discard rebuttal submissions if they are not in line with the guidance in recital 23 of the DMA, which specifies that the Commission should only take into account elements which directly relate to the quantitative criteria and, to the contrary, should discard any *"justification on economic grounds seeking to enter into market definition or to demonstrate efficiencies."*

4. Gatekeepers bear the responsibility to comply with the DMA within the deadline. Article 3(10) of the DMA provides that designated gatekeepers must fully comply with all DMA obligations within six months of their designation. This means that, according to the current timetable, quantitatively designated gatekeepers would have to be fully compliant around March 2024. In light of this deadline, it may be advisable that gatekeepers do not wait until their formal designation to start assessing their compliance with the DMA's obligations. Certain compliance projects involving changes to the gatekeeper's platform infrastructure or other changes to existing services may require significant preparation time. It is therefore advisable that gatekeepers carefully assess the preparation work that they will have to undertake in order to be sure to meet the deadline for compliance.

The DMA foresees that there may be a need for further specification for the obligations listed in Article 6. According to Article 8 of the DMA, a gatekeeper can request such further specification at the earliest after its designation. The Commission will consider whether to engage in such a process having regard to the principles of equal treatment, proportionality, and good administration. This however does not mean that undertakings cannot engage informally with the Commission on compliance with the DMA's obligations before they are designated as a gatekeeper. To the contrary, the Commission welcomes these contacts once there is a sufficient common understanding on the relevant core platform services that may be designated under the DMA.

We invite gatekeepers to engage in a continuous dialogue with the Commission. Compared to antitrust enforcement, this may require a change of mindset, since the question of the legality of a given practice is already answered in the DMA. Discussions should therefore focus on finding effective solutions. Gatekeepers should therefore come forward with concrete proposals and provide all the technical explanations required to assess whether the proposed solution is compliant. The Commission will review these proposals and provide timely feedback.

5. DMA compliance should be a transparent process adequately involving market participants. Market feedback will be key in the Commission's review of proposed or already implemented compliance measures. The DMA deals with highly technical and complex issues and reality checks with players who know the industry will therefore always be required. In this spirit, the gatekeepers should engage with market participants upfront in a transparent manner. It will help them demonstrating how their compliance proposals can be effective in achieving the objectives of the obligation and the DMA.

The Commission will also engage with third parties to hear their concerns relating to the DMA's obligations and tap into their technical knowledge. Third parties are therefore invited to proactively reach out to the Commission. Where possible and for the sake of efficiency, they should consider approaching the Commission with unified positions for the industry they are active in or for a group of relevant players. In addition to individual meetings, the Commission is organizing technical workshops on selected key DMA enforcement topics.

6. The DMA is complementary to the EU competition rules. As explained, the DMA's obligations will only become binding for gatekeepers at the beginning of 2024.

Once the DMA obligations become fully applicable, there will be an efficient system combining the DMA's sector-specific rules to tackle well-identified practices ex ante with the case-by-case application of competition law. Competition law will continue to play an important role, including as an ex post deterrent instrument, for example in relation to new types of conduct by gatekeepers or for new digital services that fall outside of the scope of the DMA. Continued experience from competition law will also be one of the main inputs for keeping the DMA up to date.

This interplay between the DMA and competition law will require coordination between the Commission and national competition authorities to ensure that the most effective tool is used to tackle digital issues. The existing coordination channels function well and will be put to use. In addition, the DMA provides for a number of new coordination mechanisms. In particular, the Member States' relevant authorities will have to notify their national draft decisions with a view to avoid conflicting or overlapping outcomes. The Commission is working on modalities on the future cooperation with the Member States' relevant authorities.

IV. CONCLUSION

In conclusion, the DMA offers significant opportunities to foster innovation and choice in the most important digital markets. The Commission intends to make full use of its powers to improve contestability and fairness to the ultimate benefits of European consumers and SMEs.

As with any new tool, some enforcement challenges can already be foreseen while others will appear as practice develops. The Commission is actively preparing to meet these challenges. To this end, the Commission will rely on all available expertise including by leveraging the complementary experience of the Directorate-General for Competition and Directorate-General for Communications Networks, Content and Technology, working closely with Member States' relevant authorities and specialized regulatory bodies and consulting market players.

Finally, the DMA seeks to address issues in the EU, but it may have an impact on all users around the world. There is therefore a clear need for close cooperation with other jurisdictions working on regulatory initiatives targeting the same issues in order to ensure a high level of consistency and to learn from each other's experience.

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