



HIGHLIGHT

DIGITAL MARKETS ACT (DMA): A CONSUMER PROTECTION PERSPECTIVE

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In December 2020, the European Commission proposed a new set of rules in a long-anticipated package falling in line with the European Digital Strategy.¹ The landmark digital package consists of two cross-cutting proposals for regulations, namely the Digital Markets Act (hereinafter, DMA)² and the Digital Services Act (hereinafter, DSA).³ These two flagship pieces of legislation aim to create a safer digital space in which the fundamental rights of all users of digital services are protected, and to establish a level playing field to foster innovation, growth, and competitiveness in the European Single Market and across the globe.⁴ A political agreement on the DMA was reached on 25 March 2022. The European Parliament approved the act on 5 July 2022, and the Council 13 days later. With the beginning of November 2022, the DMA entered into force, and it will be fully applicable in February/March 2024.

Both the DMA and the DSA were presented as “milestones in our journey to make Europe fit for the Digital Age”⁵ and aspire to have a global impact. While the DMA aims to ensure a contestable and fair digital market by imposing a list of obligations on large platforms (gatekeepers), the DSA comprises general rules on the liability of providers of online intermediary services and safeguards their diligence by adopting a layered approach and imposing more extensive obligations on online platforms and large online

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¹ European Commission, Communication C(2022) 4388 final of 30 June 2022 on European Commission digital strategy: Next generation digital Commission.

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 and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

³ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).

⁴ European Commission, *The Digital Services Act Package* digital-strategy.ec.europa.eu.

⁵ European Commission, *Statement by Executive Vice-President Vestager on the Commission Proposal on New Rules for Digital Platforms* ec.europa.eu.



platforms. The former is generally associated with competition law and market access, whereas the latter is commonly linked to consumer protection and liability issues. This *Highlight* takes a novel approach by examining the DMA from a consumer protection perspective. The main objectives of this *Highlight* are therefore to investigate the DMA provisions concerning consumer rights and to identify how the Regulation fits in the broader regulatory context of EU consumer protection. The following questions will be addressed. What is the DMA meant to do for consumers? What are the DMA's achievements and missed opportunities in terms of consumer protection? Is the DMA likely to be a breakthrough regulation or a flop in the history of EU consumer legislation?

Besides the influx of legislative acts in digital law, the year 2022 was also marked by the 50th anniversary of EU consumer legislation.⁶ The beginning of the EU consumer legislation history was linked to the measures taken to complete the creation of the European Single Market and ensure its efficient functioning.⁷ This is because consumer protection was based on the premise that EU citizens should be protected when exercising the freedom of movement of goods and services. As Hans Micklitz has rightly observed, the EU consumer protection has been treated as a spearhead of European economic integration, and consumer legislation thus tends to be market-focused rather than social-focused.⁸ Stephen Weatherill also noted that "a programme presented as an exercise in securing market freedom inevitably involves a sustained commitment to rule making".⁹

The foundation of EU consumer protection and information policy was first laid out in the Council's Resolution in 1975,¹⁰ which was inspired by the "Special Message to Congress on Protecting Consumer Interests", formulated by U.S. President John F. Kennedy in 1962.¹¹ The Resolution listed the following five fundamental consumer rights: *i*) the right to protection of health and safety; *ii*) the right to protection of economic interests; *iii*) the right to claim damages; *iv*) the right to an education; *v*) the right to legal representation.

To ensure the effective exercise of these rights, EU consumer protection was developed throughout the years by harmonizing domestic laws and policies in numerous directives, i.e., the General Product Safety Directive,¹² the Product Liability Directive,¹³ the

⁶ European Commission, *50 Years of Consumer Legislation* commission.europa.eu.

⁷ M Džúrová, 'Consumer Legal Protection in the EU' (2020) SHS Web of Conferences 83 Current Problems of the Corporate Sector 5.

⁸ HW Micklitz, 'European Consumer Law' in E Jones (ed), *The Oxford Handbook of the European Union* (Oxford University Press 2012) 256.

⁹ S Weatherill, *EU Consumer Law and Policy* (Edward Elgar Publishing Limited 2013) 13.

¹⁰ Resolution of the Council of the EU of 25 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy.

¹¹ JFK Library, *Special message to the Congress on Protecting the Consumer Interest* www.jfklibrary.org.

¹² Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety.

¹³ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

Unfair Terms in Consumer Contracts Directive,¹⁴ the Unfair Commercial Practices Directive, the Consumer Rights Directive,¹⁵ and the Digital Content Directive.¹⁶ Thus, the choice of format of the DMA – a regulation instead of a directive – makes it stand out from other legislated acts. Choosing this type of legislation is of the utmost importance, as it guarantees direct applicability of the act in all Member States.

The legal basis for the DMA is found in art. 114 TFEU, which enables the adoption of consumer protection measures via the ordinary legislative procedure for the approximation of the provisions laid down by law, regulation or administrative action in Member States.¹⁷ The DMA is coherent with other EU instruments, including the above-mentioned directives, the P2B Regulation,¹⁸ the General Data Protection Regulation,¹⁹ the EU's consumer law acquis, and its twin legislative act – the DSA.²⁰ Both the DMA and the DSA introduce the most revolutionary and impactful changes in the EU's legal framework for digital service since the adoption of the E-Commerce Directive in 2000.²¹ The E-Commerce Directive harmonised the cross-border provision of online services within the EU and created favourable conditions for businesses operating in the EU's digital sector. During the last two decades, digital technology and business models have evolved so significantly that the key principles and objectives set at the beginning of the 21st century became outdated. Hence, the newest digital package of legislation revises the rules contained in the E-Commerce Directive and addresses new risks and challenges by adopting more adjusted measures and new compliance requirements for digital platforms.

Over the years, consumer protection in the EU has gone through significant changes: the shift from minimum to full harmonisation, the emergence of cooperation in the field of public enforcement and the promotion of ADR in the field of private enforcement, and

¹⁴ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

¹⁵ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

¹⁶ Directive 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

¹⁷ Art. 114 TFEU.

¹⁸ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation service.

¹⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

²⁰ Due to the character limit, this Highlight cannot fully cover the problems of the interaction between the DMA and the DSA and of the DMA's relationship to other EU competition regulations, but the following study elaborating on these issues is recommended: M Gruensteidl, *An Analysis of New Obligations for Online Content Sharing Platforms in the Media Environment under the DSA and DMA* (European Union Law Working Papers No. 72-2022).

²¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

the extension of consumer protection measures to small businesses.²² Moreover, the European Commission became a more visible player in establishing and enforcing consumer law and policy.²³ The DMA fits into this direction as it provides the European Commission with broad investigative and enforcement powers towards gatekeepers.

The main objective of the DMA is “to contribute to the proper functioning of the internal market by laying down rules to ensure contestability and fairness for the markets in the digital sector in general, and for business users and end users of core platform services provided by gatekeepers in particular”.²⁴ The notions of “contestability” and “fairness” are, therefore, presented as the key motives behind the regulation. The recurrent emphasis on the concept of fairness in multiple recitals of the DMA has generated heated debates on whether the DMA is to be thought of as a remedy for the failure of EU’s *ex post* competition law or a broader regulatory ambition to promote fairness beyond competition policy.²⁵ Belle Beems makes convincing arguments that the notion of “fairness” expressed in the DMA seems to go beyond the relevance of the fairness principle for competition law.²⁶ Regardless of the ambiguity of the DMA’s objectives, the concept of fairness is indisputably important from the perspective of consumer protection. In this context, it implies a shift from an economic to normative reasoning, broadening the scope of consumer protection in market regulation.²⁷

The DMA is based on the EU legislators’ belief that unfair practices in the digital sector are particularly common in core platform services due to certain features, including extreme scale economies, strong network effects, an ability to connect many business users with many end users through the multisidedness of the services, lock-in effects, a lack of multi-homing, data-driven advantages, and vertical integration.²⁸ However, the EU legislators also acknowledge that the fact that a digital service qualifies as a core platform service does not in itself give rise to sufficiently serious concerns of contestability or unfair practices.²⁹ It happens only when a core platform service constitutes an important gateway and is operated by an undertaking with a significant impact in the internal market and an entrenched and durable position, or by an undertaking that will foreseeably

²² J Stuyck, 1993 – *Twenty Years Later. The Evolution of Consumer Law in the European Union* (Intersentia 2013) 15.

²³ HW Micklitz, ‘European Consumer Law’ cit. 258.

²⁴ Recital 7 of the DMA.

²⁵ See e.g. A Metzger, H Schweitzer and G Wagner, ‘Taming the Giants: the DSA/DMA Package’ (2021) CMLRev 1001; A Musilis, ‘The Importance of Competition Policy for European “Digital (End) Consumers” in a Digitalized Society’ in V Šmejkal (ed), *EU Antitrust: Hot Topics & Next Steps. Proceedings of the International Conference held in Prague on January 24–25, 2022* (Faculty of Law of the Charles University 2022) 459.

²⁶ B Beems, ‘The DMA in the Broader Regulatory Landscape of the EU: An Institutional Perspective’ (2022) *European Competition Journal* 7.

²⁷ See further R Podszun, ‘The Digital Markets Act: What’s in it for Consumers?’ (2022) *EuCML* 3.

²⁸ Recitals 2 and 13 of the DMA.

²⁹ Recital 15 of the DMA.

enjoy such a position in the near future, that such concerns arise.³⁰ To safeguard the fairness of core platform services, the DMA introduces a targeted set of harmonised rules that applies only to those undertakings that meet these criteria, which are described in detailed quantitative thresholds in art. 3 of the DMA (designation of gatekeepers).

Even though at face value the DMA seems to address the valid issues concerning competition law by introducing a list of obligations for gatekeepers (famously known as a list of dos and don'ts), its provisions remain equally important from the perspective of consumers, who are regarded as "end users" in the DMA's nomenclature.³¹ End users are thought to benefit from the following provisions listed in art. 5: *i*) no processing, combining, and cross-using personal data without specific choice offered or proper consent (arts 5(1)(a), 5(1)(b) and 5(1)(c)); *ii*) no signing in end users to other services of the gatekeeper without a specific choice offered or proper consent (art. 5(1)(d)); *iii*) no preventing other business users from offering the same products or services to end users (art. 5(3)); *iv*) allowing other business users, free of charge, to communicate and promote their offers, as well as conclude contracts with end users (art. 5(4)); *v*) no tying (arts 5(5) and 5(7)); *vi*) no preventing issues of non-compliance from being raised with a public authority (art. 5(6)); *vii*) easy and unconditional subscription (art. 5(8)).

Additionally, art. 6 introduces the following set of obligations, relevant to consumer protection, which may need to be further specified in dialogue with the gatekeepers: *i*) prohibiting the use of data that is not publicly available in competition with business users (art. 6(2)); *ii*) allowing easy uninstallation of software applications on the operating system of a gatekeeper (art. 6(3)) and easy installation and effective use of third-party software applications or application stores (art. 6(4)); *iii*) prohibiting self-preferencing practices (art. 6(5)); *iv*) ensuring easy switching between, and subscription to, different software applications and services (art. 6(6)); *v*) ensuring, free of charge, effective interoperability (art. 6(7)); *vi*) allowing, free of charge, easy data portability (art. 6(9)).

These developments certainly improve consumer rights by providing consumers with a real choice when selecting and using digital services, and by securing their ability to make autonomous decisions. However, they do not necessarily improve their status. This is because the DMA treats consumers as passive recipients in the market rather than independent market actors with active roles.³² Similar to the P2B Regulation, the DMA is primarily focused on platforms and business users, and it does not acknowledge the role of consumers as a key aspect of market regulation. For instance, consumers/end users

³⁰ *Ibid.*

³¹ According to art. 2 (20) DMA, "end user" means any natural or legal person using core platform services other than as a business user. Business users are defined in art. 2 (21) DMA as any natural or legal persons acting in a commercial or professional capacity using core platform services for the purpose of or in the course of providing goods or services to end users.

³² R Podszun, 'The Digital Markets Act: What's in it for Consumers?' cit. 4.

were left out of Recital 33, which explains that, for the purpose of the Regulation, “unfairness” should relate to an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage.³³ This definition opts for a bilateral relation rather than a market-based and consumer-oriented approach. The DMA is therefore rightly criticised for treating consumer protection as a by-product of improvements in the relationship between gatekeepers and business-users.³⁴ Moreover, the European Parliament’s amended version of the act, which named “consumer welfare” as an explicit objective, was not included in the final version of the DMA.³⁵ The degree of engagement of consumers in the institutional and procedural proceedings introduced by the DMA is also marginal. Finally, by settling on the term “end user”, the DMA misses the opportunity to introduce the long-anticipated, updated definition of “consumer”, which could lead to a recalibration of EU consumer law by modernizing the one-size-fits-all fictional model of “average consumer” introduced in the mid-1960s to today’s age of digitalization and sustainability.³⁶ As Vanessa Mak has rightly noted, the reassessment of the consumer image is critically needed to allow EU legislation to keep up with the progressive digitalisation, platformisation and sustainable transformation³⁷ which constitute central themes of the European Commission’s consumer agenda 2020-2025.³⁸ An updated definition that could have been introduced in the DMA would provide a higher level of consumer protection by taking into account new roles that consumers play (i.e. as “prosumers”) and challenges that they face specifically in the digital market (i.e. digital asymmetry, network effects). This could strengthen the Regulation’s capacity to protect weaker parties in a structurally asymmetric data-driven digital market.

To conclude, the adoption of the DMA can be assessed as a turning point in the history of EU digital law but a rather small step in improving the standard of EU consumer protection. Besides its obvious focus on containing market power, the DMA also aims to ensure “fairness” in the digital market. The DMA improves consumers’ rights by increasing interoperability in the market, ensuring easy uninstallation, subscription cancellation, data portability and data transfer, as well as eliminating unfair market practices such as self-preferencing, tying, and tracking users without their proper consent. Thus, the benefits for consumers arise mostly from the more competitive and respectful environment that the DMA aims to create. Yet, at the same time, the DMA treats consumers merely as passive end

³³ Recital 33 of the DMA.

³⁴ R Podszun, ‘The Digital Markets Act: What’s in it for Consumers?’ cit. 3.

³⁵ Amendments adopted by the European Parliament on 15 December 2021 on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act).

³⁶ V Mak, ‘A Primavera for European Consumer Law: Re-birth of the Consumer Image in the Light of Digitalisation and Sustainability’ (2022) EuCML 79.

³⁷ *Ibid.*

³⁸ Communication COM(2020) 696 final from the Commission of 13 November 2020 on New Consumer Agenda: Strengthening consumer resilience for sustainable recovery.

users in the digital market and it does not exploit fully the potential of consumer protection. Overall, the DMA constitutes a valuable piece of legislation from the perspective of consumer protection, but it does not yet fulfil the EU's commitment to a high level of consumer protection, which is expressed in art. 161(1) TFEU and art. 38 of the Charter of Fundamental Rights of the European Union. To achieve that level of EU consumer protection, the EU legislators must recalibrate the image of the consumer and put consumers, instead of the demands of the (digital) market, at the heart of the legislated acts.

