

COMPLIANCE CRUNCH TIME FOR THE DMA

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While the EU Digital Markets Act (DMA) has been in force since November 2022, it is only now that we are starting to see the pieces come together ahead of the 6 March 2024 compliance deadline for gatekeepers. This article lays out some of the recent developments in relation to the DMA and how economic analysis will likely play a role in forthcoming compliance discussions.

THE SCENE IS SET

During the last few weeks, two developments have started to set the scene regarding enforcement and compliance under the DMA: the Commission has released a draft template for annual compliance reporting under the DMA, and companies have indicated that they meet the quantitative criteria to be identified as potential gatekeepers.

First, on 6 June, the Commission gave a first look at how gatekeepers will be expected to demonstrate that they comply with the DMA when they launched a consultation on a seven-page template for compliance reporting under the DMA.¹ The draft compliance template lays out the minimum information that gatekeepers are expected to provide. This includes evidence verifying compliance with DMA Articles 5, 6, and 7, consultations with end users, and market analysis to estimate the impact of compliance measures.

The consultation period ended on 5 July, and while the responses are not public yet, there have been comments that the compliance template is too broad. For example, the CCIA, Computer & Communications Industry Association, stated that the “compliance assessment should concentrate on specific compliance measures” instead of leaving it up to the gatekeepers to identify the best measures and evidence to put forward.²









Second, on 3 July, seven companies notified the Commission that they meet the quantitative thresholds to be considered a gatekeeper under the DMA.³ The quantitative criteria serve as a shorthand to determine whether the company meets the qualitative criteria for being a gatekeeper. The qualitative criteria are having a sizeable impact on the internal market, controlling an important gateway for business users, and maintaining a strong, entrenched, and durable position (see Figure 1).

¹ https://digital-markets-act.ec.europa.eu/dma-commission-launches-consultation-template-compliance-report-2023-06-06_en

² <https://ccianet.org/news/2023/07/dma-compliance-report-ccia-europe-shares-feedback-with-commission/>

³ https://ec.europa.eu/commission/presscorner/detail/en/statement_23_3674

Figure 1
Quantitative thresholds for gatekeepers under the DMA

 1. A size that impacts the internal market	
	a) Annual turnover in Europe of at least €7.5 billion in the last three years OR fair market value of at least €75 billion in the last financial year
	b) Operations in at least 3 Member States
 2. The control of an important gateway for business users towards final customer	
	a) Provides a core platform service to more than 45 million monthly active end users established or located in the EU
	b) More than 10,000 yearly active business users established in the EU
 3. An entrenched and durable position	
	a) The company met the second criterion during the last three years

Source: European Commission "Digital Markets Act: rules for digital gatekeepers to ensure open markets enter into force"

The seven companies that notified the Commission about potential gatekeeper status include the tech companies commonly referred to as GAFAM: Alphabet, Apple, Amazon, Meta (Facebook's owner), and Microsoft, and in addition ByteDance (TikTok's owner) and Samsung. In addition, Booking.com indicated that it expects to join this list by the end of the year after failing to meet the quantitative thresholds for three consecutive years due to the impacts of the pandemic.⁴

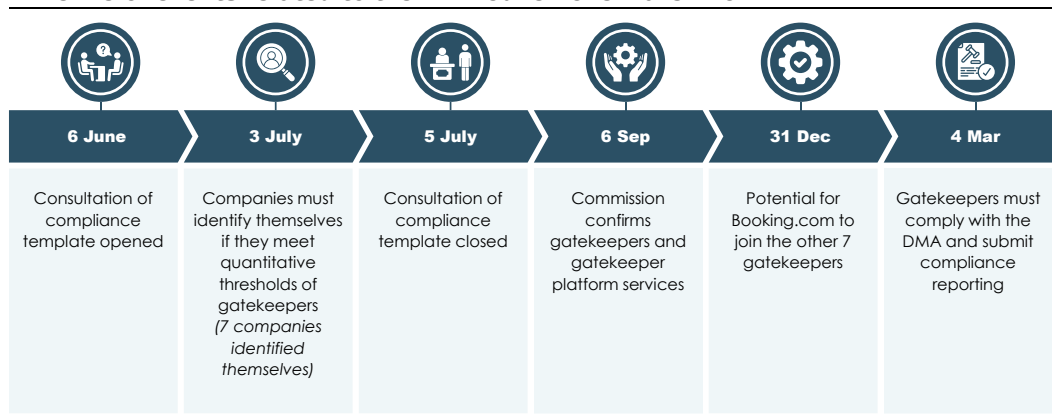
Now the Commission has 45 days to review the submissions of the seven notified potential gatekeepers and designate the gatekeepers for specific platform services. The final list of gatekeepers, to be released by 6 September, may include more or fewer gatekeepers or services depending on the quantitative criteria. For example, ByteDance, owner of TikTok, has stated that it does not believe TikTok meets the overall requirements of a gatekeeper as it is not an "unavoidable platform to conducting online business in the EU," nor is it an "entrenched gateway between consumers and businesses."⁵

In accordance with Article 11 of the DMA, identified gatekeepers will have 6 months after confirmation (i.e. until 6 March 2024) to comply with the DMA and provide compliance reporting in line with the act. This includes complying with several rules that are designated to promote contestability and fairness. From that point forward, gatekeepers will need to provide annual reports of compliance with the DMA for their core platform services.

⁴ <https://www.reuters.com/technology/amazon-google-apple-meta-microsoft-say-they-meet-eu-gatekeeper-status-2023-07-04/>

⁵ Ibid.

Figure 2
Timeline of events related to the DMA June 2023-March 2024



Source: Copenhagen Economics

NEXT STAGE: COMPLIANCE

Economics will play an important role in gatekeepers' compliance with the DMA. The Commission's recent consultation on the draft compliance template mentions the relevance of including economic analysis to assess the effectiveness of gatekeepers' measures to adhere to the DMA.

The compliance template explicitly mentions several instances where data and data analysis will need to be submitted to support gatekeepers' compliance reporting and demonstrate effects on contestability and fairness. For example, Section 2 of the template mentions that gatekeepers should report "any type of market analysis or testing, in particular, A/B testing or consumer surveys". These analyses can be used to assess and evaluate how compliance measures are expected to effectively deliver the objectives of the DMA.

The compliance report leaves it to gatekeepers to put forward the data and analysis they believe is most appropriate to assess effectiveness. This broad definition of data analysis will likely lead to many important economic questions regarding how to measure effectiveness with respect to the DMA's objectives. In addition, gatekeepers will also need to ensure that their analysis is robust and effective since the compliance reports will be subject to review by the Commission.

Gatekeepers should also expect scrutiny on their analysis from third parties. Third parties will have access to the non-confidential versions of the compliance reports. Third-party operators should pay close attention to the measures and reporting that gatekeepers present. In particular, third parties who disagree with the compliance mechanisms proposed by gatekeepers should explain why the gatekeepers' proposed measures are not appropriate and propose alternative benchmarks. For example, a gatekeeper may suggest that measures showing third parties' ability to compete (such as price-cost tests) could be sufficient to demonstrate compliance and contestability, whereas third parties may argue that effectiveness should require market share gains from third parties.⁶

⁶ We have already seen evidence that compliance measures and remedies have been scrutinised by third parties. In September 2017, Google proposed a mechanism to address the Commission's concerns in its Google Shopping decision. Google felt the remedy was sufficient to promote competition by allowing competitors the same right to bid in auctions for adverts in its Shopping Units, but third parties did not think the remedy was sufficient, especially as the proposed remedy required

We expect that the analysis gatekeepers will include in their compliance reports and its scrutiny by the Commission and by third parties in various fora will require an in-depth economic analysis of the various markets involved.

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third parties to change their business models. See, for example, <https://www.reuters.com/technology/exclusive-scores-google-rivals-want-eu-tech-law-used-antitrust-case-letter-2022-10-17/>.