

# The Regulation of the Digital Markets

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**Abstract:** The introduction of the EU Digital Market Act (draft) provides an important reference for other countries to further strengthen digital market regulation and clarify the responsibilities of digital service providers. This article explains how to regulate digital markets by introducing the contents of the draft EU Digital Market Act (draft), and provides suggestions for other countries to regulate digital markets by referring to the contents of the draft EU digital Market Act (draft). In order to maintain the absolute security of big data, a key factor of production in the national digital economy, countries should take the initiative to adopt digital market regulation measures.

**Keywords:** Digital market regulation production national security.

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## 1. Introduction

The healthy development of digital markets is of great importance to consumers, platforms, and countries. Currently, the monopolistic position formed by large online platforms on the Internet is not conducive to the good development of digital markets. Hence, it is so important that countries have strong regulations of digital markets. This article explains how the digital market can be regulated by introducing the content of the EU Digital Markets Act (Draft). It also provides suggestions for how other countries can conduct digital market regulation by referring to the EU Digital Markets Act (Draft) contents.

## 2. Reasons to focus on the digital market regulation

With the rapid development of digital technology worldwide, many large online platforms have directly or indirectly created monopolies that infringe on the legitimate rights of consumers to receive digital services. Apart from that, the inequality between large online platforms and small and medium-sized online platforms puts small and medium-sized online platforms in a vulnerable position, limiting the healthy development of small and medium-sized online platforms. In short, the monopoly of large online platforms poses a threat to or erodes the security, fairness, convenience, and protection of users' rights. And without solid regulation of large online platforms, it may even affect aspects such as national political security. For example, in the Cambridge Analytica case, on 24 July 2019, the US Federal Trade Commission issued a fine of up to US\$5.6 billion against Facebook and filed an administrative lawsuit against Cambridge Analytica for using deceptive practices to collect personal information from tens of millions of Facebook users and conduct voter analysis. The massive data breach by Facebook over Cambridge Analytics has now been brought to a temporary end. This incident illustrates how the lack of regulation of digital markets can have a negative impact on national political security. For the sake of national data security, the state needs to strengthen the rule of mega platform operators. Necessary data is a central concept in national data security management policy, affecting national security and the public interest. As a core asset of enterprises, big data is a top priority for protection.

Poor handling can lead to serious national security risks and even irreparable damage. Therefore, it is essential that every country takes the regulation of digital markets seriously and adopts a series of measures to regulate them.

## 3. The EU regulation of digital markets - The EU Digital Markets Act (draft)

At present, the antitrust regulation and enforcement model, which emphasizes "case-by-case enforcement" and "ex post facto regulation," has to a certain extent become challenging to adapt to the needs of the rapidly developing digital market. Although the European Commission has imposed ex post facto penalties on large digital platforms that exclude or restrict competition in the market, due to the complexity of cases in the digital field and the difficulty of finding evidence, antitrust investigations carried out by the European Commission in accordance with the law generally take a longer time, which makes it difficult to estimate the damage caused to the relevant market by the infringement and to restore the market structure to the state before the exclusion or restriction of competition occurred. As a result, the EU has begun to actively seek to strengthen its legislation to safeguard equal opportunities for the development of different digital platforms by implementing positive ex-ante rules to eliminate information asymmetries between regulators and regulated subjects and to address the digital divide between them in order to maintain fair competition in the market. On 15 December 2020, the European Commission formally submitted a draft law for digital platforms and large technology companies, the Digital Market Law. The draft law is expected to be adopted by the European Commission on 15 December 2020. Once EU lawmakers and EU countries agree, the EU Digital Markets Act (Draft) could enter into force in 2023. The Digital Markets Act(draft) is primarily aimed at online technology companies that hold a monopoly position in the market, such as Google, Facebook, Apple, Amazon, Microsoft, etc. These companies are also referred to as gatekeeper companies in the EU Digital Markets Act (Draft). The EU Digital Markets Act (Draft) aims to address unfair business practices by "gatekeepers" in the digital marketplace and to promote effective competition in the digital market. In a statement issued by the European Commission's European Executive, Margrethe Vestager, the Digital Markets Act aims

to "ensure that we, as users, have a wide choice of products and services online in a secure way and that businesses operating online in Europe can compete freely and fairly online, as they do offline." As the world's leading advanced economy, the EU is increasingly aware of some of the adverse effects of the expansion and monopolistic posture of large online platforms, while enjoying the benefits of the rapid growth of the digital economy, and the introduction of the EU Digital Markets Act is a clear demonstration of the EU's ambition to become a global leader in digital regulation.

## **4. Key elements of the EU Digital Markets Act(draft)**

### **4.1. Conditions for gatekeepers**

According to the objective criteria set out in the EU Digital Markets Act(draft), it applies to large online platforms that have been identified as playing the role of "gatekeepers." These platforms play a significant role in the digital market due to their size and their role as a medium for business users to reach their customers. These platforms control at least one of the so-called core platform services (online intermediary services, online search engines, online social networking services, video-sharing platform services, non-number dependent interpersonal electronic communication services, operating system services, cloud computing services, and advertising services) and have a large and sustainable user base in several countries within the EU.

The EU Digital Markets Act (Draft) identifies gatekeepers in Articles 2 and 3. According to paragraph 1 of Article 2 of the EU Digital Markets Act(draft), gatekeepers are core platform service providers that satisfy the requirements of Article 3 of the EU Digital Markets Act (draft)and provide a list of the scope of core services. This article clearly limits the scope of application to platforms.

In addition to this, paragraph 1 of article 3 and paragraph 2 of article 3 of the EU Digital Markets Act(Draft) clearly define gatekeepers both qualitatively and quantitatively (i.e., meeting the required criteria), respectively. Specifically, whether the online platform can be recognized as a gatekeeper depends on three main criteria: (i) it has the size to influence the internal digital market. The size criterion for inclusion in the digital market is considered to have been met if the annual turnover achieved by the online platform in the EEA in the last three financial years equals or exceeds €6.5 billion. In addition, if a platform has an average market capitalization or equivalent level of the fair market capitalization of at least €65 billion in the previous financial year, it offers core platform services in at least three Member States. Then it will also be presumed to meet the criteria. These core platform services include online intermediary services, online search engines, online social networking services, video-sharing platform services, interpersonal electronic communication services that do not rely on numbers, operating system services, cloud computing services, and advertising services. (ii) Control over important portals through which goods reach consumers. Large online platforms are considered to meet the corresponding control criteria if they operate a core platform service that establishes more than 45 million monthly active end-users in the EU and has developed more than 10,000 annual active business users in the previous financial year. (iii) It has or will have a lasting and solid position in the digital market. This is presumed to be the case if the online platform has met the other two criteria in each of the last three financial

years. If all three criteria are met, the large online platform will be presumed to be a "gatekeeper" in the absence of solid arguments submitted to the contrary; if all these criteria are not met, the European Commission may, within the scope of the market survey for the designation of a "gatekeeper," assess the specific online platform as a "gatekeeper." If all these criteria are not met, the European Commission may determine the particular circumstances of a given online platform in the context of a market survey and decide whether to identify it as a 'gatekeeper' based on a qualitative assessment.

### **4.2. Procedure for the identification of gatekeepers and transition period**

Once the EU Digital Markets Act(draft) enters into force, the European Commission will identify gatekeepers through the following steps. Firstly, companies should independently check whether they meet the three quantitative criteria for the identification of gatekeepers under the EU Digital Markets Act (draft) and provide relevant information to the European Commission; the European Commission will then identify "gatekeepers" based on the information provided by the company (which may include a strong rebuttal) or a possible market investigation and in accordance with the provisions of the EU Digital Markets Act (draft)."

Once a company has been identified as a "gatekeeper," it will have six months to implement the required and prohibited obligations under the EU Digital Markets Act(draft). Companies that do not yet have a firm and durable market position but are expected to do so in the near future will only be subject to the necessary and appropriate obligations to ensure that they do not acquire such a position in an unfair manner.

It is worth noting the extent to which the procedural guarantees in the EC procedure are compatible with the Charter of Fundamental Rights. In this respect, the EU Digital Market Act(draft) guarantees the right of access to the archives of a core platform service provider subject to a Commission investigation or procedure, as well as the right to express an opinion. However, there is no explicit focus on whether this is sufficient to comply with the right to a fair trial guaranteed by Article 47 of the Charter of Fundamental Rights.

### **4.3. Obligations of gatekeepers**

The EU Digital Markets Act (draft) sets out clear obligations for gatekeepers, including prohibitions and requirements to carry out acts. This article analyses some of these provisions. Under The EU Digital Markets Act (draft)), companies identified as gatekeepers must take specific compliance initiatives on their own initiative: firstly, in certain circumstances, a "gatekeeper" needs to allow third parties to interact with the "gatekeeper's" own services; secondly, a "gatekeeper" is required to companies that advertise on its platform need to be provided with tools to measure the performance of the "gatekeepers" and advertisers and publishers need to independently verify for themselves the information required for advertisements hosted by the "gatekeepers"; Thirdly, "gatekeepers" needs to provide its business users with access to the data generated by their activities on the Gatekeeper platform; Fourthly, "gatekeepers" needs to allow its business users to promote their offers outside the Gatekeeper platform and to enter into contracts with their customers, etc. At the same time, The EU Digital Markets Act (draft) also sets out the things that companies

identified as "gatekeepers" are prohibited from doing. Firstly, a "gatekeeper" company must not gain an undue advantage in rankings for its own services or products compared to those offered by third parties on the platform to which the "gatekeeper" company belongs; secondly, the "gatekeeper" company must not prohibit the "gatekeeper" company from promoting its own services or products compared to those offered by third parties. Gatekeeper" companies may not prohibit users from linking to companies outside the "Gatekeeper" company's platform; thirdly, "Gatekeeper" companies may not prohibit users from uninstalling any pre-installed software or applications.

The EU Digital Markets Act (draft) 's ex-ante regulation of gatekeeper companies will more effectively protect the legitimate interests of market stakeholders and increase the contestability of the market. Overall, ex-ante regulation means not only explicitly prohibiting large platforms from engaging in improper conduct, but also imposing positive ex ante obligations on 'gatekeepers' to promote competition.

#### **4.4. Enforcement bodies**

With regard to the enforcement body, given the cross-border nature of the Gatekeeper and the complementary relationship between digital market law and digital services law, other EU internal market rules and, in particular, competition law, the enforcement powers of the Digital Market Act will also be in the hands of the Commission. In order to carry out its duties, the Commission has a wide range of powers, including investigative, enforcement and monitoring capabilities. Specifically, investigative powers include the power to access information, the power to take statements, and the power to conduct on-site inspections; enforcement powers include the power to issue interim measures, to issue binding undertakings, to issue decisions on non-compliance with obligations, and to impose fines and periodic penalties. The European Commission can require companies to provide the necessary information, access their databases and algorithms, carry out on-site inspections, etc., and request explanations from companies. Member states can request the Commission to conduct market investigations to identify new "gatekeepers."

#### **4.5. Legal responsibilities**

In order to provide a fairer business environment for commercial users of services provided in the Single Market through Gatekeepers, Gatekeepers must comply with the specific obligations set out in the EU Digital Markets Act (Draft), in order to better monitor the implementation of Gatekeepers' obligations under the EU Digital Markets Act (Draft) , the EU Digital Markets Act (Draft) sets out the consequences for gatekeepers who do not comply with their obligations. These include :1 a fine of up to 10% of the company's global annual turnover; 2 periodic penalties of up to 5% of average daily turnover; 3 non-financial remedies. If a Gatekeeper breaches its obligations under the draft EU Digital Marketplace Law, additional remedies may be imposed on the Gatekeeper following a market investigation. These remedies will need to be proportionate to the offense committed, such as divesting part of the business.

A reading of the EU Digital Markets Act (Draft) above shows that the European Commission can impose fines of up to 10% of the year's global turnover and daily fines of up to 5% of the average daily turnover on gatekeepers who breach the new rules. In the case of systemic breaches, the European

Commission can also take additional measures, including structural measures such as requiring gatekeepers to divest relevant assets, provided that such steps are necessary and that there are no alternative, equally effective measures.

In addition to this, EU Digital Markets Act (Draft) can be directly invoked and enforced by the courts of member states. Therefore, if the EU Digital Markets Act (Draft) is successfully adopted, it will be beneficial for subjects who have suffered damage to bring a claim for damages directly against the offending Gatekeeper. It is also worth noting that the EU Digital Markets Act (Draft) does not affect the enforcement of competition law at the EU or Member State level but is merely complementary to competition enforcement. The EU Digital Markets Act (Draft) will only regulate competition law if it is not available or cannot be effectively regulated.

### **5. Possible Issues Arising from the EU Digital Markets Act (Draft)**

The Computer and Communications Industry Association ("CCIA"), an international not-for-profit trade association representing a broad range of communications and technology companies, supports the European Commission's development of a Digital Marketplace Act and has proposed a number of changes. The CCIA has been promoting open markets, open systems, and open networks for nearly fifty years and believes that with these limited amendments proposed by the CCIA, the EU Digital Markets Act (Draft) could better achieve its "objective of enhancing consistency and legal certainty in the online platform environment in order to maintain stability and legal certainty in the internal market " objective. The CCIA believes that the European Commission should give credit to designated gatekeepers for internal compliance mechanisms and internal impact assessments that address, for example, the "contestability" or "fairness" claims of business users when determining any penalties for non-compliance. In addition, the CCIA believes that the draft EU Digital Marketplace Law is an internal market instrument and should therefore avoid extraterritorial jurisdictional issues. Therefore, the EU Digital Markets Act (Draft) should not be extended to protect business users outside the EU. It may be in the EU's legitimate interest to strengthen European suppliers' and business users' bargaining power and provide them with access conditions and other privileged subsidies. However, forcing European platform operators to offer these benefits to business users around the world could make platform business models uneconomic or unsustainable, leading them to withdraw and reduce open market competition.

In addition to the CCIA's recommendations on the EU Digital Markets Act(draft), the Information Technology and Innovation Foundation (ITIF) in the US has also provided its views on the EU Digital Markets Act(draft). In May 2021, ITIF published the report called 'Digital Markets Act: Preventive Antitrust Law in Europe.' The report argues that the EU Digital Markets Act(draft) marks the rise of the precautionary antitrust principle. However, the relevant regulations of the EU Digital Markets Act(draft) also have certain negative impacts, reducing the dynamism and efficiency of business innovation, increasing transaction costs in the digital market, discouraging the continued development of digital markets and fair competition, and affecting the business model and security of the digital ecosystem. The

report focuses on the main controversial issues in EU Digital Markets Act(draft) and makes policy recommendations such as promoting equal competition, independence of legislation and enforcement and focusing on dynamic analysis.

The EU Digital Markets Act (draft) states that "Gatekeepers shall allow merchants on the platform to make sales and conclude contracts to their end-users through the core platform services, regardless of whether the merchant uses the gatekeeper's core platform services in the process; also, for products or services purchased by end-users from merchants through channels other than the gatekeeper's core platform services, the gatekeeper shall allow the end-user to use and access those products or services through the Gatekeeper's core platform services." This provision brings significant benefits to merchants, but can create a headache for platforms in terms of "free riders." The gatekeeper's inability to differentiate between business users based on whether or not they use its core platform services affects the platform's business model and thus limits its investment in innovation.

The EU Digital Markets Act (draft) states that "for each core platform business defined in accordance with Article 3(7) of this Act, the gatekeeper shall not require the merchant to use or provide the gatekeeper's authentication services externally or form an interoperable relationship with the gatekeeper's authentication services in scenarios where the merchant uses that core platform business of the gatekeeper." This provision essentially prohibits merchants on the platform from adopting the platform's authentication system. In practice, data interoperability allows consumers to easily access all services with a single authentication and without the hassle of forgetting their passwords. The regulation ignores consumer interests and the competitive situation in the password management market and is prone to security breaches.

The EU Digital Markets Act (draft) states that "The gatekeeper shall allow merchants on the platform to sell products and services to end-users through third party online intermediary services that are identical to the products and services they sell on the platform and may be sold at a price different from the price sold on the platform." This is known as the "most favored customer clause ban." The purpose of this prohibition is to prohibit gatekeepers from forcing merchants to sell on their platforms at the lowest price. That is, it prevents merchants from making themselves the Gatekeeper's "most favored customer" in their contractual relationship with the Gatekeeper. In this case, if the platform finds that the merchant's price on the platform is higher than its price on other sales channels, the platform is entitled to require the merchant to compensate the end-user for the difference. Therefore, the ban would be detrimental to the consumer's enjoyment of the offer and would result in a lot of additional costs for the platform in terms of time and effort to keep track of price changes in other channels. In addition, a ban would lead to a loss of incentive for gatekeepers to innovate due to a lack of motivation to provide the best possible service. In the long run, the negative impact on the economy is bound to become apparent slowly.

The EU Digital Markets Act (draft) states that "A gatekeeper shall not prevent or restrain a merchant from bringing an action against any act of the gatekeeper before any relevant public regulatory body." From a legal point of view, either party to a contract has the right to conciliate the other party's misconduct by way of amicable negotiation as a

matter of priority, with the failure of conciliation followed by judicial proceedings, both parties have the fundamental right to judicial action. This statute is therefore unnecessary and would cause financial loss and inconvenience to both parties. Furthermore, the assumption that "the gatekeeper must obstruct the judicial process" is unwarranted. At the same time, the legislation has the potential to encourage merchants to disregard contractual commitments and fair competition and instead seek economic rents. The increased cost of legal risk on the platform side will eventually translate into transaction costs and final prices for end-users.

The EU Digital Markets Act (draft) states that "for the core platform services under Article 3(7), the gatekeeper shall provide information to the publisher or advertiser using the gatekeeper's advertising services concerning the price of the relevant advertising posting if requested to do so." The provision is intended to protect traditional news publishers from the impact of internet platforms, but does not address the challenge of information revenue sharing. At the same time, the provision ignores the correlation between the profitability of the advertising side of the platform and its ability to provide a free service.

The EU Digital Markets Act (draft) states that "gatekeepers shall ensure that data generated by the merchant or end-user activities are easily portable, in particular by providing end-users with relevant tools (including tools to support continuous, real-time access to the service) in accordance with the provisions of EU Directive 2016/679." The obligations required by this provision are, in fact, reflected in the GDPR. Nevertheless, the instant access provision is demanding from a technical perspective and controversial at a legal level. For example, how is "instant" defined? As gatekeepers serve hundreds of millions of users, meeting the immediate data and portability requirements of such a large number of users is quite challenging and requires significant computing power. At the same time, this rule is not conducive to the development of SMEs and could lead to a loss of incentive to expand for companies that would otherwise want to do so for fear of restrictions and increased costs.

## **6. Implications of the EU Digital Markets Act for other countries**

The EU Digital Markets Act (draft) aims to address the unfair competitive situation that exists in the digital market, and the bill's promoters emphasize that rule-making in the digital market should not be ceded to businesses, but rather the government should step in. Drawing on the EU's approach to the formulation of antitrust norms and the design of specific mechanisms for enforcement, government regulators in other countries should improve legislation on platform liability and clarify the penalties for breach of obligations; establish an institutional framework that corresponds to the scale of liability, actively implement platform obligations and reduce monopoly conflicts in digital markets; and consolidate the construction of antitrust institutions and improve the level of antitrust enforcement capabilities. In particular, those countries that currently have digital antitrust policy options similar to those of the EU need to learn from the correct provisions of the EU Digital Markets Law (Draft), to understand the EU Digital Markets Law (Draft) comprehensively, and to construct a future path for these countries in the area of antitrust regulation of large online platforms.

For the sake of national data security, other countries will also need to strengthen their regulation of mega-platform operators. Important data is a central concept in national data security management policies, affecting national security and the public interest. As a core asset for businesses, big data is a top priority for protection. Poor handling can lead to serious national security risks and even irreparable damage. Take, for example, the Cambridge Analytica incident. As internet enterprises themselves hold a large amount of data information, some of which is also important or sensitive data, such as users' identity information, track information, video information, etc., making internet enterprises with these data assets a special group of enterprises. Currently, with the successful development of mobile internet in various countries, many emerging internet platform enterprises are growing rapidly and listing in other countries, but the listing will also result in the risk of data security will be greatly increased. When these platform enterprises seek overseas listing, they should strictly follow the relevant laws and regulations of their home countries, implement pre-reviews for network data security, strengthen effective data protection, clarify the responsibilities of data platform enterprises, the construction of data rights, and the establishment of data governance rules, etc., to ensure that the overseas listing of enterprises will not cause problems that endanger national security.

## 7. Conclusion

In conclusion, the introduction of the EU Digital Markets Act (Draft) has undoubtedly provided an important reference for other countries to strengthen digital market regulation further and clarify digital service providers' responsibilities. Countries should draw on the relevant elements of the EU

Digital Markets Act (Draft) to establish a strong regulatory mechanism for online platforms that pose greater social risks, which could appropriately include a flexible combination of support Copra and state-level intervention, thus ensuring that challenging regulation of digital services is effective in all circumstances. It is important to identify the values to follow and the basic principles of digital technologies as soon as possible, to draw bottom lines and boundaries, and to strictly regulate them. In order to maintain national security and effectively guarantee the absolute safety of big data as a critical factor of production in the digital economy, it is important that all countries take the initiative of regulating essential data that is of national importance firmly into their own hands.

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