

The EU Digital Markets Act:

The limitation of the market power of BigTech in favour of a competitive digital economy

In February 2020, the European Commission published its vision on "Shaping Europe's Digital Future", which proposed the adoption of a Digital Services Act package in view of mitigating the adverse effects to innovators, businesses, and new market entrants in digital markets caused by entities which due to their scale, essentially act as gatekeepers to said markets.

The package comprises two EU regulations: the homonymous Digital Services Act ("DSA"), primarily focusing on a broader regulation of online intermediaries offering their services in the EU (such as limit illegal and harmful online activities and curb the spread of misinformation); and the Digital Markets Act ("DMA"), aiming more specifically to regulating the aforementioned gatekeepers in view to ensure a fair and competitive digital economy for all actors. The obligations of the DMA have started to become enforceable already as of 7 March 2024 for the first designated gatekeepers.

Application of the DMA

Who does the DMA apply to?

To provide legal certainty and clarity, the DMA imposes obligations on so-called "gatekeepers" providing "core platform services" ("CPS") such as app stores, search engines, social networking services, online intermediation services, advertising services, marketplaces, among others.

Gatekeepers need to be designated as such by the European Commission, based on their mandatory prior notification if they offer a CPS, which is an important gateway for business users to reach end users, and if they have a significant impact on the internal market, and enjoys – or will foreseeably foresee – an entrenched and durable position, in their operations. The DMA sets out (rebuttable) presumptions for these conditions: their significant role is presumed if they are offering services in at least three member states, with an annual turnover in the EU exceeding EUR 7.5 billion in each of the last three financial years, or a market capitalization of at least EUR 75 billion in the previous financial year; the gateway nature of their CPS is presumed where the service is provided to at least 45 million monthly active end users and at least 10,000 business users established in the EU.

Six influential companies have been designated for some of their services: Amazon, Alphabet, Apple, Meta, ByteDance, and Microsoft, totaling twenty-two CPS.

Obligations for Gatekeepers

The regulations imposed on BigTech companies by the DMA have a profound impact, particularly concerning interoperability between services, data usage, and the services offered by these companies and those of the business users of these CPS. For in-



spective, the impacts are significant in terms of turnover, number of users, generated revenue, and operation methods.

Impacts on Business Users

The DMA theoretically offers significant advantages for companies not considered as gatekeepers. As the latter must be less opaque, competition and innovation allow market openness towards other businesses. Those now have more direct and easier access to users, can directly conclude contracts with them without necessarily going through platforms, and can thus negotiate more effectively.

Moreover, this market openness provides more transparent access to data generated by their advertising and activities on gatekeepers' platforms, as well as more effective interoperability.

Business users can benefit from fair treatment and an equal playing field when competing with "gatekeepers" services on their platforms.

Final impact on End-Users

The DMA rebalances the relationships between major platforms and business users, with the end-user being the primary beneficiary and will arguably see practical and concrete consequences as a result of the DMA. In addition to the aforementioned changes, end-users can now enjoy greater rights and transparency regarding their use of services (e.g., freedom to uninstall pre-installed applications and modify default service settings, deciding whether platforms can link their accounts and combine their personal data across different services). Furthermore, they can benefit from a greater variety of offers and services while communicating directly with the business user of the same service.

The DMA in Luxembourg

To avoid forum shopping or unequal outcomes, the European Commission has been designated responsible for monitoring and enforcing the DMA. It is envisaged that the Commission and the National Competition Authority cooperate and coordinate to ensure consistent, effective, and complementary application of the DMA. Thus, it is expected that the Luxembourg competition authority will provide information to the Commission, exchange with it on relevant measures to be taken under the DMA and national competition law, and that the European Commission will keep it informed of designation decisions and market investigations. The Luxembourg authority may also conduct investigations into possible non-compliance with the aforementioned obligations, attend hearings held in Luxembourg, and support any investigation.

Following the implementation of the DMA, Luxembourg will likely be in the center, given that one of its "gatekeepers", Amazon, has its EMEA headquarters in Luxembourg.

Challenges

How is the DMA applied in practice?

The European Commission remains free to designate other gatekeepers, and it must examine at least once a year whether new companies meet the eligibility criteria and then regularly review and adapt the DMA to market developments. Therefore, any company approaching these various thresholds must take the DMA into account in their regulatory risk assessment over their services and in their development plans.

Gatekeeper Designation Challenges

Likewise, the European Commission may see its designations be challenged in court. For example, Meta, Apple, and ByteDance, have appealed against their designations, arguing, for example, that it would force them to disclose confidential and strategic information, or that they do not provide CPS nor meet the thresholds for the definition of gatekeepers. The procedure is still ongoing for these gatekeepers which must in any case comply with the DMA pending the outcome of their challenges.

One-month Anniversary of DMA Application

Changes have already been observed in the business growth of certain business users, user habits, and in the designs and functionalities of gatekeepers' applications and websites. Each gatekeeper was the subject of a compliance workshop before the Commission and the public, during which they had to present their compliance with the Regulation and answer various questions. In addition to participating in these workshops to detect initial flaws, analyzing compliance reports shared by the gatekeepers, and scrutinizing report breaches by whistleblowers, the European Commission is already conducting its own investigations to determine whether the gatekeepers comply with the DMA. At the end of March, the European Commission has requested Alphabet, Apple and Meta, as well as Microsoft and Amazon, to retain specific documents as proof of DMA compliance and has exceptionally granted an extension for Meta's interoperability obligations.

Furthermore, the European Commission opened formal investigations into Alphabet, Apple, and Meta for non-compliance with several articles of the DMA. It will be particularly interesting to see whether the "consent or pay" scheme (i.e., using the site with advertisements or paying a subscription) rolled out by Meta will be deemed compliant with the DMA (given that such issue is debated from a GDPR-perspective).

Administrative fines for non-compliance with the DMA could amount to up to 10% of the company's total annual worldwide turnover in case of a first offense and rise to 20% with additional corrective measures in case of repeat offenses.

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