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EU Regulation of Digital Gatekeeper Platforms Set to Be Adopted

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Introduction

The European Union has reached political agreement on its landmark Digital Markets Act (DMA) legislation. The EU-wide DMA will apply *in addition* to competition law rules and targets the largest digital platforms. The legislation which introduces a broad-based regulation of digital markets should be formally adopted in the coming weeks and will enter into force at the beginning of 2023.

The DMA is one of the most important pieces of economic legislation in the EU of recent times. It will impose a broad set of upfront, legally binding conduct obligations (dos and don'ts) on companies operating in the EU whose products are determined to be an important gateway for businesses to reach consumers (gatekeepers). The DMA's impact in European digital markets will be significant both because of the scope of the products that will be covered and because of the number of obligations that will apply.

It is not only gatekeepers who need to take note. All companies operating in the digital space need to be fully attuned to the implications of the DMA as it will likely impact their commercial activities directly or indirectly. They will need to implement a multi-faceted plan in relation to product design, commercial strategy and engagement with public authorities. They will also need to take account of the interplay between the DMA and other competition and regulatory initiatives, both within Europe and globally. Companies whose products are caught by the DMA will need to ensure that they comply with all of the relevant obligations, whilst companies which are not caught by the DMA will need to adjust to the changes in the commercial environment that the DMA will lead to.

What is new?

There has been broad agreement between EU Member States and the European Parliament on the principles of the DMA ever since the European Commission proposed the legislation in December 2020. Recent discussions have focussed on: (1) the turnover and market capitalization thresholds that would apply for companies to be subject to the DMA; (2) which products would be covered; (3) the precise nature of certain obligations; and (4) how the DMA would be enforced. On these points:

- The quantitative thresholds for a company to be caught have increased from an annual turnover of €6.5 billion in the European Economic Area (EEA) to €7.5 billion, and from a global market capitalization of €65 billion to €75 billion.
- Browsers and virtual assistants have been added as products to which the DMA's obligations will apply.
- Some of the obligations which gatekeepers will have to comply with have been broadened, notably as regards: (1) interoperability between messaging services; (2) a requirement to have a consumer choice screen upon an end user's first use of a search engine, a virtual assistant or a browser; (3) an extension of the "most-favoured-nation" parity clause provisions; and (4) a requirement to have fair

Related People

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access conditions for search and social networks (this obligation previously applied only to app stores).

- Whilst the European Commission will ultimately remain responsible for DMA enforcement, EU Member State competition authorities will play a supporting role.

Why should your company care?

The DMA will regulate the behaviour of so-called gatekeepers that operate "core platform services" which have a significant impact in the EU market. A company can be designated as a gatekeeper for one or more core platform services. The DMA contains a broad list of what are core platform services but the DMA's obligations would only apply if a core platform service is an important gateway for business users to reach end users in the EU. The main way in which such designation will occur is via quantitative thresholds based on: (1) company size (EEA turnover and global market capitalization); and (2) product reach (number of active end users and active end users in the EEA for each core platform service).

Once a core platform service is designated as a gatekeeper, it must comply with every DMA obligation that can apply to that product. There are 18 obligations in total, some of which are imprecise and cover a wide variety of different provisions including data access, interoperability, and self-preferencing.

Gatekeepers should care because they will need to comply with the relevant obligations. Because gatekeepers are not specifically defined, companies should check if their products might be caught, either now or in the future and if so, what they should do. If not, your company may still be affected, either because it is doing business with a gatekeeper or because some obligations are imprecise and may lead to a number of consequences – intended and unintended – in digital markets. The DMA is an attempt to rapidly implement broad-based regulation and it will lead to a high degree of uncertainty in digital markets for years to come.

The following Gibson Dunn lawyers prepared this client alert: Christian Riis-Madsen, Nicholas Banasevic, and Mairi McMartin.

Gibson Dunn's lawyers are available to assist in addressing any questions that you may have regarding the issues discussed in this update. For further information, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Antitrust and Competition practice group, or the following:

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