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PERSPECTIVE

What does the EU Digital Markets Act mean for the tech sector?

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On March 25 the European Commission (EC) launched non-compliance investigations against a number of tech companies into alleged non-compliance with the EU's Digital Markets Act (DMA), the relevant provisions of which had only just entered into force. It also opened a further preliminary investigation under the same legislation against some others. These moves made global headlines beyond the usual narrow tech regulatory sphere and go to the heart of the business models of the companies in question. But what is the DMA, what are its aims and what is its potential impact, both on the companies it regulates and on other players in the markets concerned?

What is the DMA?

The DMA is EU-wide tech regulation that draws upon and supplements existing antitrust law and is one of the most significant recent pieces of economic legislation in the EU. The DMA has in part been driven by at least a perception that traditional antitrust law in the EU is too slow or too narrow to deal with what are seen to be significant structural issues in the digital economy, and in practice, many of its provisions are inspired by past and ongoing antitrust cases. The DMA targets the largest digital "platforms," and seeks to address what the EU considers to be market imbalances between those platforms, their business users and end users.



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The DMA has the stated aim of achieving "fairness" and "contestability" in the markets concerned and imposes a broad set of upfront legally binding conduct obligations ("dos and don'ts") on companies whose products are determined to be an important gateway for businesses to reach consumers - via the all-important designation as a "gatekeeper." The impact of the DMA in the European market will be signif-

icant given in particular the range of products and services that are or will be covered by such designations and the associated obligations to which they are subject.

Designation as a gatekeeper

A company can be designated by the EC as a gatekeeper for one or more of its "platform" products which intermediate between consumers and business users. These

are called "Core Platform Services" (CPSs). The main way in which such designation occurs is via presumptions based on quantitative thresholds in relation to: (1) company size (company-wide EU revenue of €7.5 billion or €75 billion market capitalization and CPSs in at least three EU Member States); and (2) product reach over three years (at least 45 million monthly active users and 10,000 business

users in the EU for each CPS). On 6 September 2023, the EC designated six companies as gatekeepers for 22 CPSs - including in relation to key products and services such as search, marketplaces, app stores, operating systems, social networks and online advertising.

The DMA's obligations

Once a CPS is designated as a gatekeeper, it must comply across the EU with every DMA obligation that can apply to that product out of a list of 22 obligations. These entered into force on March 7, 2024. The obligations are diverse and extensive and relate to issues such as a ban on most-favored-nation clauses, a ban on preferencing one's own products in search rankings, obligations to allow competing products to achieve interoperability, obligations to share data with competitors or customers, and obligations in relation to competing apps and app stores.

Some obligations are deemed to be straightforward and can be automatically implemented, for example via contractual clauses such as a prohibition on most-favored-nation clauses, whilst for others which are more complex, such as in relation to ensuring interoperability and sharing data, the compliance solution needs to be tailored according to the specifics of the product and market concerned. Tellingly, and unlike antitrust law, all obligations need to be automat-

ically complied with - there is no possibility for a substantive assessment that would lead to an exemption (with very limited exceptions on the grounds of public health or public security).

Enforcement

The EC is responsible for the enforcement of the DMA and will have broad investigative and enforcement powers. Fines of up to 10% of a company's global turnover can be levied for non-compliance with any obligation and up to 20% for repeated infringements, and there is also a possibility to break companies up or ban certain acquisitions in case of systematic non-compliance. The swift beginning of enforcement action referred to at the beginning of this article seems to demonstrate the EC's determination to act quickly and to be seen to be doing so.

What does the DMA mean in practice?

The impact of the DMA will be felt most immediately by the companies that have been designated by the EC as gatekeepers, or that may be designated soon. Simply, in light of the extensive range of their core products that are deemed to be CPSs by the EC under the DMA and the significant number of obligations that apply to each of these products, the DMA will have a very significant impact in terms of compliance effort, but also potentially in terms of product design and associated commercial implications.

Outside of so-called "gatekeepers," the DMA will impact companies that are not formally designated but operate in impacted markets or platforms. The fact that the products of the designated gatekeepers, who may be customers, partners or competitors, will be

regulated will influence the overall commercial environment and all companies in these markets should therefore pay heed to the potential implications for them, and the commercial strategies that they pursue as a result.

Finally, there is the less tangible but broader potential policy effect. In recent years, the so-called "Brussels Effect" - an observed policy development whereby EU legislation and regulation serves as a model for regulation in other jurisdictions - has entered global regulatory parlance. The DMA is one of the EU's flagship pieces of tech regulation, and it is clear that it is already influencing the debate in other jurisdictions worldwide - other countries are watching the DMA with a close eye and considering whether to adopt similar legislation well outside the EU's borders.

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