DIGITAL MARKETS ACT:

EU CLOSES IN ON BIG TECH

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The European Union's Digital Markets Act (DMA) is set to establish a concrete list of dos and don'ts for the world's biggest digital platforms when operating in the EU. The European Commission published its legislative proposal for a Digital Markets Act in December 2020, to improve the contestability of digital markets.

In this regard, ensuring increased contestability will improve the ease with which new firms can enter and leave digital markets in the EU by restraining the anti-competitive behaviours of the market's largest and most dominant players while offering consumers greater protections. The DMA accounts for one half of the Digital Services Act Package, with the Digital Services Act (DSA) making up the other part.

In the past, antitrust issues in the EU digital sphere had been addressed with lengthy, drawn-out legal cases - often to the detriment of SMEs. The DMA will introduce ex-ante regulations which place the burden of proof on Big Tech and creates a more level playing field.

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GATEKEEPING THE GATEKEEPERS

With the DMA, the EU seeks to define 'gatekeeper' platforms and, in turn, prohibit these platforms from engaging in unfair practices. These gatekeepers are companies with such high turnover, large user bases and sectoral influence that they have what the EU views as an unfair amount of market dominance.

These gatekeepers are to be defined by qualitative and quantitative criteria which consider a platform's annual European Economic Area (EEA) turnover, average market capitalisation and its number of active monthly end users and business users. When a platform reaches such designation thresholds, it is obliged to notify the European Commission, which shall then adopt a decision as to whether to designate it as a gatekeeper.

This designation brings with it a range of obligations to restrict the dominance of the largest platforms, make the market fairer for smaller businesses, increase consumer choice and strengthen users' control over their data.

To qualify as a gatekeeper, a platform must have an average annual EEA turnover of €7.5 billion based on the last three financial years; have a market capitalisation of €75 billion; have 45 million monthly active users in the EU and 10,000 annual business users. In view of the diverse range of business models within the digital market, the DMA includes an annex with varied user calculation methods dependent on the type of platform in question. Considering these thresholds, only the largest Big Tech players (such as Google, Meta, Amazon, Apple and Microsoft) will be captured within the scope of the DMA. However, other platforms such as Booking.com, Zalando and Alibaba are edging closer to these thresholds and are expected to reach them in the not-so-distant future.

Importantly, the provisions of the DMA prohibit these gatekeeper platforms from favouring their own services above those of another platform. In this regard, the DMA will stop dominant platforms from carrying outranking practices and self-preferencing their own products and services above those of another company.

This is particularly important for smaller businesses which may rely on larger platforms in some way. For example, within the framework of the DMA, a search engine would be required to produce fair and organic search results instead of unfairly pushing its own products and services, or sponsored search results, to the top.

Gatekeepers are to be prohibited from combining data from different services without user consent. This rule is relevant for platforms such as Meta which may have access to a user's data across multiple services such as Facebook, WhatsApp and Instagram.

> *"Gatekeepers are obliged to provide users with the ability to remove any pre-installed apps on a device. In short, gatekeepers are obliged to carry out their business under non-discriminatory conditions towards other companies.*

REGULATION ACROSS DIGITAL MARKETS

An important caveat of the DMA is that it shall apply to the 'core platform services' provided or offered by gatekeepers.

These core platform services are to include online intermediation services, search engines, social networking services, video-sharing platforms, interpersonal communication services, operating systems, cloud computing systems, advertising services, web browsers and virtual assistants.

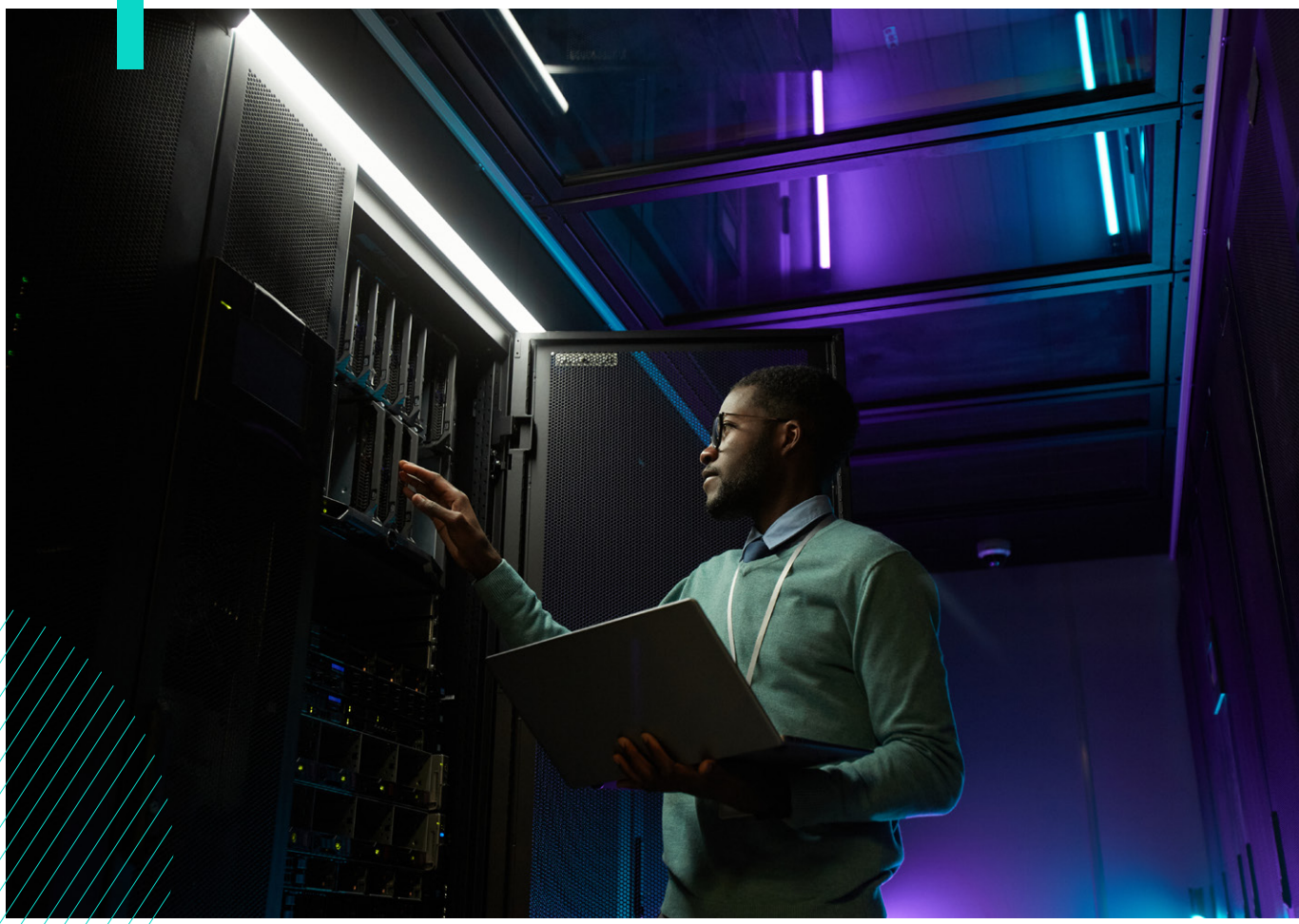
Social media platforms, app stores and search engines will be required to apply non-discriminatory conditions to other companies, while operating systems will be obliged to allow users to use alternative app stores and not necessarily that of a gatekeeper. For example, an iPhone user would be able to download apps from outside of the Apple App Store. This provision of the DMA has drawn concern from Apple. The company's vice-president of software engineering, Craig Federighi, has said that allowing Apple users to engage in 'sideloading' (accessing third-party apps) could lead to cybersecurity issues.

Unsurprisingly given the high designation thresholds, SMEs are to be exempt from being classified as gatekeepers. However, SMEs or larger companies may be viewed as 'emerging gatekeepers' by the European Commission and receive and abide by certain obligations. While not addressed in the articles of the DMA text, these emerging gatekeepers are referred to in the text's recitals as platforms which may 'enjoy an entrenched and durable position' within their market in the near future. To prevent such platforms from growing their market dominance to uncompetitive levels, the Commission may impose restrictive measures on these platforms, be they permanent or temporary.

The European Commission will handle the enforcement of the DMA, with the authority to issue fines to platforms flouting the regulation. The Commission may impose fines of up to 10% of the platform's total worldwide turnover in the preceding year to gatekeepers which breach the legislation.

In cases where a gatekeeper repeatedly violates the rules, the Commission can increase fines to 20% and in cases of continued infringements (three violations within an eight-year period) the Commission may open a full market investigation and impose behavioural or structural remedies.

Given that the DMA will be applying rules to the entire digital market, the European Commission has announced provisional plans to recruit between 100 and 120 new staff to handle the task. However, the Parliament's lead negotiator on the DMA, Andreas Schwab MEP, believes that an even higher number of staff will be required.



UNRESOLVED ISSUES

While inter-institutional negotiations on the DMA moved relatively quickly and appeared to strike a happy medium among co-legislators, establishing provisions in two areas, targeted advertising and interoperability, proved difficult.

The issue of targeted advertising, the practice of processing personal data to tailor advertisements to individual users, remained contentious throughout negotiations. Some policymakers argued that while the practice can be abusive when used by large platforms, it is a necessity for smaller businesses trying to find a customer base. Despite this, there was widespread agreement among negotiators that targeted advertising towards minors by larger platforms should be banned. However, during inter-institutional negotiations on the file, co-legislators decided that the provisions which would prohibit targeting minors would be moved from the DMA to the DSA, with the DMA instead focusing more strongly on user consent in relation to data.

The provisions ensuring interoperability, the practice which allows for the exchange of information between differing software and computer systems, within the DMA are also not as all-encompassing as initially planned. Within the agreement, only the interoperability of messaging services will be established. This means that encrypted messages can be sent across differing messaging platforms, but the institutions have yet to establish the technical details of how this will work. Co-legislators have agreed, however, to continue to assess interoperability and to establish a greater scope in this area, particularly regarding social networks.

WHAT HAPPENS NEXT?

The European Parliament approved the final, consolidated DMA text during its Plenary session on 5 July 2022, while officials in the Council of the EU approved the text shortly after on 18 July 2022. The DMA was officially published in the Official Journal of the EU on 12 October 2022, with the legislating entering into force 20 days later.

However, the rules of the DMA will only become applicable six months after the text's publication in the Journal and after this, platforms are to be granted an additional six-month readjustment period to comply with new guidelines once designated as a gatekeeper. Considering this, it's reasonable to assume that we won't see gatekeepers designated until mid-2023 with full compliance seen in practice until 2024 – much to the concern of some legislators. But 2024 is still an improvement on the Commission's originally planned enforcement date of 2025.

While the DMA and DSA will bring more fairness to the EU digital market, there remains a transatlantic elephant in the room. Given the current scope of the DMA, only American companies are set to be labelled gatekeepers and have their practices restrained within Europe – something which concerns some US policymakers. The topic has not been discussed during the May 2022 meetings of the EU-US Trade and Technology Council, the transatlantic forum set up between Brussels and Washington D.C. It remains to be seen if a common ground can be struck here.

At Inline, we help businesses to understand and influence policy and regulation. If you are concerned about the impact that this legislation could have on your business, or if you have any questions on the DMA and its provisions, please contact shane.cumberton@inlinepolicy.com

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