Platform do's and don'ts:

EU's Digital Markets Act signals a sea change in digital regulation

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The European Commission has laid out a proposal for a landmark set of ex ante rules governing large digital platforms. The law will be the subject of protracted discussions that determine its final form. But as drafted, the Digital Markets Act ("DMA") proposes to dramatically reshape the legal landscape for tech companies with a new framework that seeks to complement traditional antitrust enforcement with a list of "do's and don'ts" regarding how large online platforms like search engines, online marketplaces, and social media networks are to treat their business partners, competitors, and users. At its core, the DMA seeks to achieve two aims: open competition and fair treatment. How it goes about doing that, and what it might mean for the tech business community and the legal practitioners representing it, is the focus of this article.

Who would be subject to the DMA?

The DMA would seek to target "gatekeeper" providers offering "core platform services." Gatekeepers are online services acting as intermediates between business users and end users.[1] However, not all online platforms would be impacted. Rather, the DMA would treat as gatekeepers only those platforms that have a **significant impact on a market** with an **entrenched and durable position**, or will foreseeably enjoy one in the near future. Core platform services must constitute an **important gateway** for business users to reach end users, which in the preliminary draft is broadly defined to include various types of online services, including search engines, social media networks, video sharing platforms, messaging platforms, operating systems, app stores, cloud computing services, and advertising networks.[2]

How would gatekeepers be designated?

Under the draft DMA, a service can be designated as a gatekeeper in one of **two ways**: quantitative or qualitative. A list of the designated gatekeepers would be published by the Commission.[3]

Under the **quantitative approach**, a showing of a "significant impact on the internal market" would be shown by reference to annual EEA turnover above EUR 6.5 billion or average market capitalisation

[1] Article 2 of the Digital Markets Act; Recital 12 of the Digital Markets Act
[2] In accordance with Article 1(2) of the Digital Markets Act "This Regulation shall apply to **core platform services** provided or offered by gatekeepers to business users established in the Union or end users established or located in the Union, irrespective of the place of establishment or residence of the gatekeepers and irrespective of the law otherwise applicable to the provision of service.", and with regard to Article 2(2) of the Digital Markets Act "**'Core platform service'** means any of the following: (a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communication services; (f) operating systems; (g) cloud computing services; (h) advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by a provider of any of the core platform services listed in points (a) to (g)".
[3] Article 4 of the Digital Markets Act

above EUR 65 billion. Showing an "entrenched and durable position" would be done by having more than 45 million monthly active end users in the EU.[4] Where a provider of core platform services meets all these thresholds, it would have to notify the Commission within three months.[5] However, this presumption could be rebutted by demonstrating that the service does not fulfil the objective requirements for a gatekeeper, though the details of that process (and what specific factors would be considered in the analysis) remain to be clarified.[6]

Under the alternative **qualitative approach**, the Commission could through a market investigation identify as a gatekeeper any provider of core platform services that meets each of the *qualitative* requirements, even if it does not satisfy each of the *quantitative* thresholds. The details of the process and substantive analysis this would entail are unclear, but structural factors relevant to the determination include: the size of the company, its market position, its number of business users, its scale and scope effects in the market, and the presence of user lock-in or other entry barriers derived from network effects and data driven advantages.[7] Critically, a gatekeeper could be designated on the basis that it might foreseeably attain the requisite qualitative indicators in the near future.[8]
The status of a gatekeeper is to be periodically reviewed (at least every two years), with some possibility for intermittent reconsideration.

What obligations would be imposed on gatekeepers?

The obligations imposed on gatekeepers are a series of "do's" and "don'ts" that govern how gatekeepers treat their competitors, business partners, and users. These rules fall into one of two categories.

What may be referred to as a **black list** is shorter and enumerates strict obligations, including:[9]

- **not to combine personal data** sourced from core platform services with personal data from any other services, and **not to sign-in end users to other services** in order to combine personal data, without user consent;
- to **allow business users to offer the same products or services to end users through third party online intermediation services** at prices or conditions that are different (including

[4] In accordance with Article 3(2) "A provider of core platform services shall be presumed to satisfy: (a) the requirement in paragraph 1 point (a) where the undertaking to which it belongs achieves an annual EEA turnover equal to or above EUR 6.5 billion in the last three financial years, or where the average market capitalisation or the equivalent fair market value of the undertaking to which it belongs amounted to at least EUR 65 billion in the last financial year, and it provides a core platform service in at least three Member States; (b) the requirement in paragraph 1 point (b) where it provides a core platform service that has more than 45 million monthly active end users established or located in the Union and more than 10 000 yearly active business users established in the Union in the last financial year".
[5] Article 3(3) of the Digital Markets Act.
[6] Recital 23 of the Digital Markets Act.
[7] Article 3(6) and Article 15 of the Digital Markets Act.
[8] In accordance with Article 15(4) of the Digital Markets Act "When the Commission pursuant to Article 3(6) designates as a gatekeeper a provider of core platform services that does not yet enjoy an entrenched and durable position in its operations, but it is foreseeable that it will enjoy such a position in the near future, it shall declare applicable to that gatekeeper only obligations laid down in Article 5(b) and Article 6(1) points (e), (f), (h) and (i) as specified in the designation decision. The Commission shall only declare applicable those obligations that are appropriate and necessary to prevent that the gatekeeper concerned achieves by unfair means an entrenched and durable position in its operations. The Commission shall review such a designation in accordance with the procedure laid down in Article 4.".
[9] Article 5 of the Digital Markets Act

if **more favourable**) from those offered through the online intermediation services of the gatekeeper;
- to **allow business users to promote offers and conclude contracts with end users** acquired via the core platform service, and to **allow end users** to access and **use** through **the platform**, the content, subscriptions, features or other items (non-acquired via gatekeeper's platform) **by using the apps of a business user**;
- **not to restrict** business users **from lodging complaints** with any relevant **public authority** relating to the gatekeeper's practices;
- **not to require business users to use** gatekeeper's **identification solutions** for services offered on the platform instead of their own IDs;
- **not to require** users **to subscribe to or register** with any **other core platform** services as a condition **for accessing a core platform** service;
- to **provide advertisers and publishers** with **information concerning the paid price** and remuneration for advertising services provided by the gatekeeper.

What could be referred to as a **grey list** is longer and consists of obligations "susceptible of being further specified."[10] This appears to refer to a regulatory dialogue between the Commission and gatekeepers that ensures responsibilities are tailored to the proportionality and effectiveness of the measures.[11] The obligations from the grey list are the following:

- **not to use, in competition with business users, non-publicly available data**, which has been generated through activities of business users and their end users in core platform services;
- to **allow end users to un-install any pre-installed certain software applications** on its core platform service without prejudice to apps essential for the functioning of the operating system or the device;
- to **allow the installation** and use **of third party apps or app stores** and allow them to be accessed by means other than the core platform services (subject to certain limitations);
- **not to rank more favourably services and products offered by the gatekeeper** than similar services or products of third parties (fair and non-discriminatory conditions must be applied to such ranking);
- **not to technically restrict** end users from **switching** between **and subscribing to different apps and services**;
- **to ensure** business users and providers of ancillary services equal **access to, and interoperability with, operating system, hardware or software features** that are used by the gatekeeper to provide any ancillary services;
- **to provide** advertisers and publishers with **access to performance measuring tools** and information necessary to carry out their own **independent verification** of ad inventory;
- **to provide** effective **portability of data** generated by the activity of users, and provide tools to facilitate the exercise of data portability in real-time;

[10] Article 6 of the Digital Markets Act and Recital 58 of the Digital Markets Act: 'it may in certain cases be appropriate for the Commission, following a dialogue with the gatekeeper concerned, to further specify some of the measures that the gatekeeper concerned should adopt in order to effectively comply with those obligations that are susceptible of being further specified. This possibility of a regulatory dialogue should facilitate compliance by gatekeepers and expedite the correct implementation of the Regulation.'
[11] Recital 33 of the Digital Markets Act.

- **to provide business users (free of charge)** with **access and use of data** from the use of the relevant core platform services; and **not to prohibit business users from accessing data**;
- **to provide third-party online search engines with access** on non-discriminatory terms **to ranking, query, click and view data** about free and paid search generated by end users on online search engines of the gatekeeper (subject to adequate data protection);
- **to apply** fair and **non-discriminatory** general **terms and conditions of access** for business users **to** its **app stores**.

There are also **two** separate **stand-alone obligations** for gatekeepers:[12]

- **to inform** the Commission **of any** intended **concentration** involving another provider of core platform services or of any other services provided in the digital sector (irrespective of any other merger control rules);
- **to submit** an independently **audited description of any techniques for profiling of consumers** applied on a core platform service.

The Commission may **suspend a specific obligation for compliance** with any of the above rules in case-specific instances, but the circumstances contemplated in the current draft are limited to situations where the gatekeeper demonstrates that compliance with that specific obligation would endanger the economic viability of its business.[13] **Exemption of a specific obligation** is also possible on the very limited grounds of public morality, public health and public security.[14]

The Commission may amend its do's and don'ts list by opening **market investigations** into **new services and new practices**.[15]

How would the DMA be enforced?

The Commission may conduct **market investigation** against a gatekeeper for **systematic non-compliance** with the obligations which has further strengthened or extended its gatekeeping market position.[16] The Commission may then impose any **behavioural or structural remedies**.[17]
To aid in its responsibilities, the DMA grants the Commission a broad set of **investigative, enforcement and monitoring powers**, including:

- **carrying out proceedings** to adopt compliance, non-compliance and fining decisions;[18]
- **requesting information**, including databases and algorithms;[19]

[12] Article 12 and Article 13 of the Digital Markets Act.
[13] Article 8 of the Digital Markets Act.
[14] Article 9 of the Digital Markets Act.
[15] Article 17 of the Digital Markets Act.
[16] Article 16 of the Digital Markets Act.
[17] In accordance with Recital 64 of the Digital Markets Act "Structural remedies, such as legal, functional or structural separation, including the divestiture of a business, or parts of it, should only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. Changes to the structure of an undertaking as it existed before the systematic non-compliance was established would only be proportionate where there is a substantial risk that this systematic non-compliance results from the very structure of the undertaking concerned."
[18] Article 18 of the Digital Markets Act.
[19] Article 19 of the Digital Markets Act.

- **carrying out interviews and taking statements**;[20]
- **conducting on-site inspections**;[21]
- **ordering interim measures** in case of imminent risk of serious and irreparable damage for users;[22]
- **accepting commitments** to resolve proceedings,[23] and **monitoring obligations and measures**;[24]
- **adopting non-compliance decisions**, including the power to impose cease-and-desist orders and fines.[25]

What are the proposed penalties for failing to comply?

Fines of up to **10% of total turnover** can be imposed if the **gatekeeper fails to comply** with obligations, measures (including interim ones) or commitments **intentionally or negligently**.[26]

The Commission may also impose fines of up to **1% of total annual turnover** (**or in some circumstances up to 5% of average daily turnover**) for failure to: comply with commitments or decisions, provide information or data, notify concentrations, submit user profiling reports, permit on-site inspections, or rectify incorrect information provided.[27]

What does the DMA mean for tech businesses?

The DMA is still in draft form. Most agree that it will take most of 2021 and perhaps beyond to finalize the law. Therefore, much is subject to change as public consultation and other deliberations occur. Even once it becomes law, initial enforcement in specific cases is expected to wind its way through the General Court.

Nevertheless, the core tenets of the legislations are quite clear and its current draft says much about the EU's direction when it comes to regulating tech markets. Tech businesses and their practitioners would be wise to anticipate these developments and already start preparing for a new normal in the legal landscape. Some practical takeaways to consider include:

- The **DMA will apply to companies that are based abroad**, so long as they reach sufficient scale among users in Europe to be deemed a gatekeeper. This will require companies to take a global view of legal compliance, regardless of where they are headquartered. This might include, for example, having to set up regional or even worldwide internal policies and practices based on the requirements set out in the DMA.
- The DMA will **reach beyond the few so-called "Big Tech" companies** that are usually discussed in the context of antitrust enforcement and regulation of online platforms. Tech companies of varied sizes and notoriety will need to take heed of the new rules. This may be especially relevant for earlier-stage companies with very fast growth, which could be caught

[20] Article 20 of the Digital Markets Act.
[21] Article 21 of the Digital Markets Act.
[22] Article 22 of the Digital Markets Act.
[23] Article 23 of the Digital Markets Act.
[24] Article 24 of the Digital Markets Act.
[25] Article 25 of the Digital Markets Act.
[26] Article 26(1) of the Digital Markets Act.
[27] Article 26(2) and Article 27 of the Digital Markets Act.

off guard by the DMA's requirements. Strategic planning that takes into account the DMA would need to occur for any tech business that could in the foreseeable future cross the quantitative or qualitative thresholds for a gatekeeper.

- Compliance with the DMA would go beyond ensuring market conduct consistent with the law to include certain **ongoing reporting and notification requirements** that are not the typical duties associated with competition law compliance. This may require staffing dedicated personnel (with assistance from outside counsel) to ensure ongoing compliance. It might also require a shift in mind-set to one that is more proactive and regulatory in nature than might usually be associated with avoiding competition law enforcement risks.
- The do's and don'ts will draw from enforcement actions and ongoing investigations by competition law enforcers. The potential for **overlap with antitrust enforcement** could create new challenges and risks for companies which are subject to the DMA's do's and don'ts but lacking the usual recourse available in antitrust enforcement. It would also mean that requirements which usually could only arise after protracted proceedings and appeals could become effective much quicker. For in-house departments and their outside counsel, competition law and the DMA will become inextricably linked, such that advising one's client on the risks associated with one will require knowledge of the other.
- The market investigation tools that the DMA would create for the Commission could result in a **constantly-evolving set of do's and don'ts** for gatekeepers to follow. The prospect that the requirements would be subject to being updated, eliminated, or expanded will require a real-time approach to legal compliance that is responsive to any changes. Processes for translating new developments in the law into action on the ground by the business would need to be streamlined. Compliance would need to be quicker and more responsive than is normally required to keep in step with developments in traditional competition law enforcement.
- A company's classification as a gatekeeper under the DMA will be public information. In-house legal departments (supported by local counsel around the world) will, therefore, need to identify and anticipate the **worldwide implications of being classified a gatekeeper** under the DMA. This might include expanded exposure to regulations, civil (private) litigation, or government investigations in major jurisdictions around the globe. A coordinated approach to assessing these risks will be needed.
- The DMA, as proposed, carries with it **significant potential monetary sanctions for non-compliance**. This will put an added premium on putting in place an effective internal approach to ensuring compliance with the rules. Structural remedies, which could potentially take the form of legal, functional or structural separation of businesses, are intended as a last resort, but their potential inclusion in the DMA signal the firmness of the Commission in its efforts to rein in certain market conduct online.

The exact scope and scale of the DMA is subject to change, and with it the broader implications of the law's passing. But it should not be overlooked that tech businesses and the legal community have time in the coming months to provide their input into the legislative and rulemaking process. Given that the DMA will set the tone not only for tech regulation in Europe but is almost certain to influence the direction taken by other major jurisdictions around the world, the moment is ripe for voicing one's views on the course of this historic law as it is still being drafted.

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