10 THINGS YOU NEED TO KNOW ABOUT THE DIGITAL MARKETS ACT

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Is your company operating in the digital space? Now that the **Digital Markets Act** (DMA) is published, here are the 10 things you need to know about it that could directly or indirectly impact your commercial operations:

WHAT IS THE DMA AND WHEN IS IT COMING INTO FORCE?

The Digital Markets Act forms part of the European Commission's new regulations governing conduct in the digital space and enters into force on **1 November 2022.** The new regime will take effect 6 months later - on **2 May 2023.**

It aims to designate "gatekeepers" and regulate their activities in the digital space to ensure "fair and open digital markets" and to prevent unfair practices.

HOW WILL THE DMA BE ENFORCED?

Although there will be cooperation with national authorities, the EC will be the sole enforcer of the DMA. The EC will be assisted by the Digital Markets Advisory Committee (DMAC) and a high-level group composed of European officials and networks. The DMA task force commenced with a team of 20 and is expected to increase by 20 members each year, resulting in a team of around 80 people by 2025.

WHO CAN BE DESIGNATED AS A GATEKEEPER?

A "gatekeeper" is a company that operates a core platform service (CPS) – including online intermediation services (such as online marketplaces or app stores) search engines, social networking, operating systems, video sharing platform services, cloud services, advertising intermediation services and virtual assistants. To be caught by the new rules, a firm operating a CPS must have a significant impact on the EU internal market, operate one or more gateways to customers, and enjoy or expect to enjoy an "entrenched and durable" position in its operations.

The quantitative thresholds to qualify as a gatekeeper have been set to (a) EUR 7.5 billion EEA turnover over the last 3 years or market capitalisation of EUR 75 billion over the last year; (b) a firm must provide 1 or more CPS in at least 3 Member States and at least 1 of its CPS must have had more than 45 million monthly active end-users and 10, 000 yearly business users, within the EU in the last financial year.

To satisfy the requirement for an "entrenched and durable position", gatekeeper firms must have achieved criteria (b) in each of the last three financial years.

These quantitative thresholds only constitute a presumption that an undertaking providing CPS has a significant impact on the internal market and should be designated as a gatekeeper. Consequently, the EC can designate as such any undertaking that is not meeting the thresholds following a market investigation.

In its impact assessment, the EC previously noted it would expect that only 10 to 15 gatekeepers would meet the threshold criteria, with other sources now estimating 20 gatekeepers. It will be possible for a company to have more than one CPS designated as a gatekeeper platform.

Companies with CPS that meet the gatekeeper thresholds will have two months from May 2023 to notify the EC. The DMA task force will then have two months to make a decision designating the CPS as having gatekeeper status. Designated gatekeepers will have a max of 6 months after the designation decision to ensure compliance with the obligations.

WHAT ARE THE GATEKEEPER'S CORE OBLIGATIONS?

Once designated as a gatekeeper, the obligations will apply immediately and gatekeepers must be in compliance within 6 months after their designation (Article 5). Among the obligations:

- → Gatekeepers are prohibited from:
  - → Imposing **unfair conditions** of use on businesses and consumers.
  - → **Self-preferencing:** gatekeepers will be unable to treat services and products offered by itself more favourably in ranking than similar services or products offered by third parties on the gatekeeper's platform.
  - → **Combining and cross-using an end user's personal data** obtained from different online services operated by that gatekeeper or from a third party service unless the end user has given explicit consent.
  - → Preventing users from **side loading other applications or uninstalling pre-installed applications** (including in-app payment or web browsers).
- → Gatekeepers of number-independent interpersonal communication services (NIICS) must make their basic functionalities (i.e. end-to-end messaging and calls) interoperable upon request by a third party provider. This is to allow users of different platforms to exchange messages across different messaging services.

WHAT ABOUT ACQUISTIONS?

The DMA makes an explicit connection between the requirement for gatekeepers to provide information on any intended mergers and Article 22 of the EU's merger control rules (which allows Member States to refer transactions to the EC that do not meet either national or European notification thresholds and might not have been notified before a national competition authority). The EC will also be able to temporarily block intended acquisitions if there is systemic non-compliance with the DMA by the gatekeeper.

WHAT ARE THE FINES FOR NON-COMPLIANCE?

The final text establishes the level of fines for non-compliance at 10% of the gatekeeper's worldwide revenue, and 20% of the worldwide revenue in cases of repeat infringements. *(Article 30).*

REQUESTS FOR MARKET INVESTIGATIONS

If a gatekeeper systematically fails to comply with the DMA (i.e. violates the rules three times in eight years) the EC can open a market investigation and, if necessary, impose behavioural or structural remedies. *(Article 18)*

When 3 or more Member States consider that there are reasonable grounds to suspect that a CPS provider should be designated as a gatekeeper, they may request that the EC open an investigation. Within 4 months of the request, the EC shall examine whether there are reasonable grounds to open the market investigation. *(Article 41)*

CAN GATEKEEPERS OFFER COMMITMENTS OR MODIFY THEIR OBLIGATIONS?

Gatekeepers cannot modify their obligations under the DMA. Commitments can be offered by gatekeepers but only in the framework of systematic non-compliance. *(Article 25)*

However, gatekeepers may request that the Commission engage in a process to determine if the measures they intend to implement are in compliance with the DMA.

THE DMA LOOKING FORWARD

In terms of future proofing, the EC is empowered to adopt delegated acts in order to supplement only existing obligations. Any addition to the list of practices of a CPS (or removing a CPS) would have to go through the ordinary legislative procedure.

WHAT ABOUT OTHER DIGITAL LEGISLATION?

The EU digital agenda remains packed. The EU is in the process of finalizing other legislation that will reshape the digital economy and has already finalized the Digital Services Act. At a national level, many jurisdictions are also joining the digital discussion – for example, Germany (ex-ante Digitalization Act).

The EU competition law rules will continue to apply and the prospect of concurrent enforcement, whether at Member State or EC level, remains a possibility for gatekeeper firms.

Outside of the EU, the US is also active in the digital legislative space with Senator Klobuchar's American Innovation and Choice Online Act (AICO) becoming the first in a series of US legislative proposals seeking to tackle "Big Tech" to gain partisan support. AICO would effectively ban dominant digital companies from giving their own products preference over their competitors.

The future of the UK's approach to digital markets is set out in the Government's Digital Strategy, which contemplates (among other things) a new digital Code of Conduct regime for the largest digital firms, enforced by a specialist unit within the Competition and Markets Authority. Although the UK Government established a specialist a Digital Markets Unit (DMU) in April 2021, the DMU has only been operating in shadow form since then and will not have any formal enforcement powers until new legislation is adopted. In May 2022, the Government announced its intention to publish a draft bill, although the precise timing for this is unknown. Simultaneously, the UK is also debating the Online Safety Bill and the Financial Conduct Authority (FCA) recently launched a discussion paper on the potential competition impacts of "Big Tech" in the retail financial services industry.

If you are operating in the digital space and want to know more about how the DMA and these other digital and data legislation can impact your operations directly or indirectly, please speak to **Andrew Hockley, Dave Anderson, Victoria Newbold, Julie Catala Marty, Sandy Aziz, Anna Blest** or your usual BCLP contact.

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