

Shaping the Future of Tech: Latest Updates on the Digital Markets Act

The Digital Markets Act (the “DMA”) is a ground-breaking EU regulation¹ that imposes *ex ante* obligations on large online platforms offering certain “core platform services” (“CPSs”)² (the so-called “gatekeepers”).³ Such obligations increase significantly the regulatory burden of designated companies, and have a tremendous impact on key aspects of their businesses for they pertain, *inter alia*, to data access and usage, distribution and bundling of services, non-discriminatory treatment, fair, reasonable, and non-discriminatory (“FRAND”) access to data and services, interoperability for messaging services, and certain reporting obligations.⁴ Since the DMA’s entry into force in September 2022, a number of developments have taken place which we examine below.

I. Designated Gatekeepers

To date, the European Commission (“EC”) has designated seven gatekeepers and 24 CPSs (see Table 1 below). The EC is currently investigating whether X, the online social networking service, should also be designated as a gatekeeper.

Table 1: Designated gatekeepers

Company	Core platform services	
	Type of core platform services	Service
Alphabet	Online intermediation service	Google Maps, Google Play and Google Shopping
	Online search engine	Google Search
	Online advertising service	Google Ads

¹ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), L 265/1. For more details regarding the Dos and Don’ts under the DMA, see <https://www.quinnemanuel.com/the-firm/publications/client-alert-the-digital-markets-act-a-brave-eu-world-for-big-tech/>.

² DMA, Article 2 (2).

³ A gatekeeper is an undertaking (a) having “a significant impact on the internal market”; (b) providing “a core platform service which is an important gateway for business users to reach end users”; and (c) enjoying “an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future”. The DMA provides for quantitative presumptions based on turnover/average market capitalisation, monthly active end-users and yearly active business users thresholds. See DMA, Article 3 (1) and (2).

⁴ DMA, Articles 5, 6, 7, 8, 11, 13, 14 and 15.

	Video-sharing platform service	YouTube
	Web browser	Chrome
	Operating System	Google Android
Amazon	Online intermediation service	Amazon Marketplace
	Online advertising service	Amazon ads
Apple	Online intermediation service	App Store
	Web browser	Safari
	Operating system	iOS and iPadOS
Booking	Online intermediation service	Booking.com
ByteDance	Online social networking service	TikTok
Meta	Online intermediation service	Meta Marketplace
	Online social networking service	Facebook and Instagram
	Number-independent interpersonal communication service	Whatsapp and Messenger
	Online advertising service	Meta ads
Microsoft	Online social networking service	LinkedIn
	Operating system	Windows PC OS

II. Challenges to the EC’s designation decisions under the DMA

To date, ByteDance, Meta and Apple have challenged the Commission’s designation decisions before the EU General Court.⁵

ByteDance was the first to appeal its designation as a gatekeeper for its service TikTok.⁶ ByteDance argued that TikTok does not hold an entrenched position in the online networking service, as it “*faces intense*

⁵ See Case T-1077/23, *ByteDance v Commission*, EU:T:2024:478.; Case T-1078/23, *Meta Platforms v Commission*.; Case T-1079/23, *Apple v Commission*.; and Case T-1080/23, *Apple v Commission*.

⁶ See Case T-1077/23, *Bytedance Ltd v Commission*, EU:T:2024:478.

*competitive pressure from some of the world's largest and most successful companies?*⁷ which have been imitating its offer,⁷ does not benefit from network or lock-in effects, and is only a recent entrant in the digital advertising space. As a result, such a designation would hinder TikTok's ability to develop and contest the power of other dominant technology companies. Moreover, ByteDance argued that TikTok does not meet the DMA's revenue thresholds in the EEA and that it was designated on the basis of selective information and absent a market investigation contrary to other designated gatekeepers.⁸ The General Court, in its first substantive judgment on the DMA, dismissed the appeal in its entirety. It found that the Commission was correct in designating ByteDance as a gatekeeper because of its high global market value, the large number of TikTok users in the EEA, its financial capacity, its potential to monetise its users and its remarkable upward trajectory.⁹ In particular, the Court observed that, since 2018, TikTok had succeeded in exponentially increasing its number of users, especially with a high engagement rate with young users, to attain half of the size of Facebook or Instagram within a very short period of time.¹⁰ The Court also rejected ByteDance's arguments pertaining to an infringement of its rights of defence and the principle of equal treatment.¹¹

ByteDance also filed an application for interim measures for the suspension of some obligations imposed under the DMA arguing, *inter alia*, that it would be forced to disclose highly strategic information concerning its users profiling practices, which would in turn significantly harm its business. The action was dismissed for failure to show to the requisite standard that there is a real risk of disclosure of confidential information or that such a risk would give rise to serious and irreparable harm.¹²

Meta argued during the administrative procedure that Messenger is just a feature of Facebook (the chat function), and therefore is not independent from it. In addition, Meta submitted that Messenger does not constitute an important "*gateway for business users to reach end users*" as it accounts for less than 5% of traffic for business-to-consumer communications in the EEA.¹³ Meta also argued that Marketplace cannot be considered as a standalone online intermediation service as it is not provided separately from Facebook and that it functions as a consumer-to-consumer experience for end users to reach other end users.¹⁴ The Commission dismissed those arguments.¹⁵ Meta has challenged its designation as gatekeeper as regards Marketplace and Messenger.¹⁶

⁷ See <https://newsroom.tiktok.com/en-eu/appealing-our-gatekeeper-designation-under-the-digital-markets-act>.

⁸ See Case T-1077/23, *Bytedance Ltd v Commission*, EU:T:2024:478, paras 37, 57, 73, 121, 163 216, 248, 287, 321, 329, 338 and 372.

⁹ Case T-1077/23, *Bytedance Ltd v Commission*, EU:T:2024:478, para. 108.

¹⁰ Case T-1077/23, *Bytedance Ltd v Commission*, EU:T:2024:478 paras 150 and 199.

¹¹ See Case T-0077/23, *Bytedance Ltd v Commission*, EU:T:2024:478, paras 340-371 and 374-379.

¹² See Order of the President of the General Court of 9 February 2024 in Case T-1077/23 R, *Bytedance Ltd v Commission*, EU:T:2024:94.

¹³ See Commission Decision of 5 September 2023 in Case DMA.100020 *Meta - online social networking services*, DMA.100024 *Meta – number-independent interpersonal communications services*, DMA.100035 *Meta – online advertising services*, DMA.100044 *Meta – online intermediation services – marketplace* ("Meta Designation Decision"), paras 156-164.

¹⁴ Meta Designation Decision, paras 234-246.

¹⁵ See Meta Designation Decision, paras 165-190 and 247-267.

¹⁶ See Case T-1078/23, *Meta Platforms v Commission*.

Apple argued during the administrative procedure that the three main CPSs it considered as meeting the DMA thresholds (i.e., iOS, App Store and Safari) should be further segmented by end-user device.¹⁷ The EC accepted Apple's arguments that the operating system constituted a distinct core platform service depending on the type of end-user device having regard to the device's specific features, such as battery life or the specificities of programmes and applications required,¹⁸ but dismissed them as regards the two other CPSs. Additionally, Apple had argued that iMessage is offered for free and has not been designed for business-to-consumer communication, hence failing to qualify both as a number-independent interpersonal communication service ("N-IICS") and as a core platform service. The EC dismissed those arguments on the ground that Apple receives an indirect remuneration through the sale of devices where iMessage is pre-installed. It also found that iMessage could be characterised as a "gateway for business users to reach end users" within the meaning of Article 3 of the DMA.¹⁹ Apple has brought an appeal before the General Court, challenging the interoperability obligations concerning the iOS, its designation as a gatekeeper as regards the App Store, and the categorisation of iMessage as a N-IICS, even though the EC subsequently concluded following a market investigation that iMessage was not an important gateway for business users due to its low usage numbers.

III. Infringement proceedings

On 7 March 2024, the six gatekeepers that were initially designated submitted their compliance reports. Shortly after, on 25 March 2024, the Commission opened the first non-compliance investigations against Alphabet, Apple and Meta. The EC's concerns were targeted at potential breaches by Google Play and Apple App Store of the obligation to freely permit app developers to steer consumers to offers outside their platforms. The EC also started enquiring about alleged self-preferencing practices from Alphabet over its own vertical search services such as Google Shopping and Google Hotels and Apple's design of the web browser choice screen which may be inhibiting users from genuinely exercising their choice of services (the so-called "steering" issue). Finally, the EC opened an investigation into Meta's "pay or consent" model, especially with respect to Meta's obligation under the DMA to seek user consent before combining or cross-using personal data.²⁰

On 24 June 2024, the EC informed Apple of its preliminary findings on the "steering" issues raised by Apple App Store's model which imposes restrictions on the ability of app developers to freely provide their customers with pricing information about or promote better offers. Apple's online intermediation service would only permit it through restricted "link-outs", by which customers are redirected to another web page. In particular, the EC found that none of Apple's business terms allow app developers to freely inform their customers of alternative offers. The Commission also considered that the fees charged by Apple for facilitating initial acquisitions of new customers by app developers go beyond what is strictly necessary. Apple was given the opportunity to access the documents relied upon by the EC, and to reply in writing. On the same day, the EC launched a non-compliance investigation into Apple's Core Technology fee, i.e., a €0.50 fee per installed

¹⁷ As regards iOS, Apple considered that it should be separated by the following: iOS for iPhones, iPadOS for iPads, macOS for laptops, watchOS for wearable devices and tvOS for connected TVs. Concerning the App Store, it differentiated between software application marketplaces for iPhones, iPads, macOS, watchOS and tvOS. Finally, it argued that three distinct types of web browsers coexist, namely those catered on iOS, iPadOS and macOS. See Commission Decision of 5 September 2023 in Cases DMA.100013 *Apple – online intermediation services – app stores*, DMA.100025 *Apple – operating systems* and DMA.100027 *Apple – web browsers* ("Apple Designation Decision"), paras 27-28, 72-74 and 101-103.

¹⁸ Apple Designation Decision, paras 83-90.

¹⁹ See Apple Designation Decision, paras 133-146.

²⁰ See Press Release, "Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Markets Act", 25 March 2024, available at https://digital-markets-act.ec.europa.eu/commission-opens-non-compliance-investigations-against-alphabet-apple-and-meta-under-digital-markets-2024-03-25_en.

app that developers of third-party apps and third-party apps must pay under Apple’s new business terms for EU apps, as well as into Apple’s multi-step user journey to download and install alternative app stores or apps on iPhones, and the eligibility requirements Apple imposes on developers offering alternative app stores or directly distributing apps from the web on iPhones comply with the DMA.²¹

Finally, on 1 July 2024, the EC sent its preliminary findings to Meta as regards its “pay or consent” model, which was introduced by Meta in November 2023 to address the prohibition imposed on gatekeepers to combine personal data from different CPSs or external sources without the users having been able to make specific choices and to give their consent in accordance with the General Data Protection Regulation.²² According to the EC, that model does not allow Facebook and Instagram users who do not wish to subscribe to an ad-free version of those services for a monthly fee to have access to an equivalent service that uses less of their personal data, thus breaching Article 5 (2) of the DMA.²³

IV. DMA and private enforcement

It is highly likely that private enforcement will play a role in the enforcement of the DMA. This is because the DMA has direct horizontal effect meaning that affected parties (companies or individuals) have the right to initiate private actions before national courts against gatekeepers for damages incurred as a result of infringements of the DMA. National courts must coordinate with the EC in relation to actions pertaining to the DMA’s implementation.²⁴ We note that the EU Damages Directive is only applicable to the enforcement of Articles 101 and 102 TFEU, and thus cannot be relied upon in cases concerning the DMA.²⁵ However, Article 42 of the DMA refers to the Directive on representative actions as applicable “*against infringements by gatekeepers of provisions of [the DMA] that harm or may harm the collective interests of consumers.*”²⁶

Affected companies and/or individuals could seek remedies, damages or injunctions based on follow-on or even standalone claims, where these are permitted. The procedural aspects of private enforcement concerning the DMA will be subject to the procedural rules of individual Member States. Notably, the German legislator has recently amended the Act against Restraints of Competition to expressly include violations of Articles 5 to 7 of the DMA. As a result, the competition law chambers of the German regional courts have jurisdiction to rule on private disputes concerning the DMA.²⁷

²¹ See Press Release, “Commission sends preliminary findings to Apple and opens additional non-compliance investigation against Apple under the Digital Markets Act”, 24 June 2024, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3433.

²² See Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), L 119/1.

²³ See Press Release, “Commission sends preliminary findings to Meta over its “Pay or Consent” model for breach of the Digital Markets Act”, 1 July 2024, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3582.

²⁴ DMA, Article 39.

²⁵ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, L 349/1.

²⁶ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, L 409/1.

²⁷ Gesetz gegen Wettbewerbsbeschränkungen, Sections 33 (1), 33a (1) and 87.

Pursuant to the obligation of sincere cooperation,²⁸ national courts will, in principle, stay proceedings in any private actions against any of the gatekeepers that have appealed their designation. Once a designation has become final, and given the direct application of the DMA, national courts would normally rule on any admissible private actions brought before them.

As regards jurisdiction, affected parties could bring an action in the EU Member State in which the gatekeeper or its subsidiary have a registered office, or in the courts of the Member State in which the harmful event occurred or may occur.²⁹ It remains to be seen whether competition law cases such as *CDC Hydrogen Peroxide*, establishing that, in case of artificially high prices caused by a cartel, the court of the victim's registered office may have jurisdiction for the entirety of the alleged damage, or *FlyLAL* and *Tibor-Trans*, where the Court of Justice found that “*where the market affected by the anticompetitive conduct is in the Member State on whose territory the alleged damage is purported to have occurred, that Member State must be regarded as the place where the damage occurred*”, will apply to private proceedings relating to the DMA.³⁰ If the gatekeeper does not have a registered office or a subsidiary in the EU, jurisdiction will be determined by private international law principles.

As regards the law applicable to the civil law aspects of the liability, the dispute will be ruled according to the law of the place where the damage occurred, *i.e.* “*the law of the country where the market is, or is likely to be, affected*” or “*when the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seized, provided that the market in that Member State is amongst those directly and substantially affected*”.³¹

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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²⁸ See, e.g. Case C-344/98, *Masterfoods Ltd v HB Ice Cream Ltd*, EU:C:2000:689, para. 57.

²⁹ Pursuant to Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 September 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), L 351/1, Articles 4 and 7(2).

³⁰ See Case C-352/13, *CDC Hydrogen Peroxide SA v Akzo Nobel NV and Others*, EU:C:2015:335, paras 52 and 54.; Case C-451/18, *Tibor-Trans Fuvarozó és Kereskedelmi Kft. v DAF Trucks NV*, EU:C:2019:635, para. 33.; and Case C-27/17, *flyLAL-Lithuanian Airlines v Starptautiskā lidosta “Rīga” and Air Baltic Corporation*, EU:C:2018:33, para. 40.

³¹ See Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), L 199/40, Articles 4, 6 and 16.