

The DMA, an Oscar-worthy performance?

What happened since March

11 July 2024

Take a seat and grab some popcorn. The DMA series, starring the six gatekeepers Apple, Alphabet, Meta, Amazon, Microsoft and Byte Dance continues. The European Commission has been an active director who has not been exclusively happy with the performance of its main actors. Have business users or end users acted as supporting actors so far or have they only been extras? Here is what happened since the DMA entered into force through the lens of a camera team.

March 7, 2024 – It's getting real

The pre-production phase is over. The six-month period given to the six designated gatekeepers to adhere to the comprehensive obligations under the DMA has expired. The Commission had identified 22 core platform services and decided that Apple's iMessage, Microsoft's Bing search engine, the Edge web browser, and the Microsoft Advertising online service would not take part in the series, for now. From 7 March onwards, the gatekeepers had to prove their compliance with the DMA and present comprehensive reports describing the measures taken. These reports have to be updated on an annual basis. Interestingly, the role that the different gatekeepers want to play in the series apparently differs quite a bit: While Alphabet's compliance report has 211 pages, Apple presented a non-confidential compliance report of 12 pages.

25 March 2024 – The first plot twist?

Only 18 days after the gatekeepers had to comply with the new regulations, the Commission opened non-compliance investigations under the DMA. More specifically, the Commission has opened proceedings against Alphabet, Apple and Meta:

- **Alphabet:** The Commission investigates Alphabet's rules on **steering** in **Google Play Store**. It is concerned that these rules impose various restrictions and limitations on app developers' ability to steer consumers to offers outside the Google Play Store. With regard to **Google Search**, Alphabet's display of Google search results may lead to **self-preferencing** in relation to Google's vertical search services over similar rival services.
- **Apple:** The Commission is worried that Apple's rules on **steering** in the **App Store** may not be fully compliant with the DMA as they impose various restrictions and limitations on app developers' ability to steer consumers to offers outside the App Store. The Commission is also investigating Apple's compliance with **user choice obligations**, including the ability for users to easily uninstall any software

applications on iOS, change default settings on iOS, and select an alternative default service, such as a browser or search engine on their iPhones.

- **Meta:** The Commission is investigating Meta's "**pay or consent**" model for users in the EU. It is concerned that the binary choice imposed by Meta's "pay or consent" model may not provide a real alternative in case users do not consent, thereby not achieving the objective of preventing the accumulation of personal data by gatekeepers.
- **Additional investigations:** The Commission announced additional investigatory steps to gather facts and information in relation to **Amazon's self-preferencing** and **Apple's alternative app distribution** and new business model.

April 29, 2024 – The same actor in a different guise

A month later, a new character was appointed by the director. Next to Apple's iOS operating system, Safari browser, and App Store, the Commission designated Apple with respect to iPadOS, its operating system for tablets, as a gatekeeper. While the quantitative threshold laid down in the DMA had not been met, the Commission still opted for including this additional CSP for the following reasons:

- The number of Apple's *business users* surpassed the quantitative threshold by eleven times, while its *end user numbers* were nearing the threshold and are expected to increase shortly;
- *End users* are tied to iPadOS. Apple uses its extensive ecosystem to discourage end users from switching to other tablet operating system;
- *Business users* are tied to iPadOS due to its large and commercially appealing user base, and its significance for certain applications, such as gaming apps.

Apple is now asked to ensure that iPadOS fully complies with the DMA obligations within a six-month timeframe, i.e. until end of October 2024.

May 13, 2024 – A new actor enters the scene, two others will not be part of the series

Even directors (like end users) want to go on holiday at some point and they would like to do so under fair conditions. Based on Booking's self-assessment submitted on March 1, 2024, which confirmed it meets the relevant thresholds, the Commission has determined that booking.com acts as a significant gateway between businesses and consumers. As far as other players, such as ByteDance and X are concerned, the Commission has decided not to designate them over their online advertising services.

June 24, 2024 –The first villain has been identified

While there is always at least one villain in the movie, the director has identified the first one. It preliminary found that Apple's rules for the App Store are in breach of the anti-steering rules of the DMA, as they prevent app developers from freely steering consumers to alternative channels for offers and content. According to the Commission,

- Apple's terms do not allow developers to **freely steer their customers**. Developers are restricted from providing pricing information within the app or promoting offers on alternative channels.
- Most of Apple's terms permit steering only through "**link-outs**", where developers can include a link in their app that redirects customers to a webpage to finalize a contract. However, Apple imposes several restrictions on this process, preventing developers from communicating, promoting offers, and concluding contracts through their preferred distribution channel.
- While Apple can charge a fee for facilitating the initial acquisition of a new customer via the App Store, the fees it charges **exceed what is strictly necessary** for such remuneration. For instance, Apple charges developers a fee for every purchase of digital goods or services a user makes within seven days after a link-out from the app.

Apple can now exercise its rights of defense by reviewing the documents in the Commission's investigation file and responding in writing to the Commission's preliminary findings.

Apart from its preliminary findings, the director seems like it wants to add some additional spice to the series. The Commission has opened another, third non-compliance investigation into Apple's **new contractual terms for developers for iOS**. Apple has retained the option for developers to subscribe to previous conditions that do not allow alternative distribution channels.

The investigation will assess whether these new contractual requirements breach Article 6(4) of the DMA, particularly the necessity and proportionality requirements. This includes:

- **Apple's Core Technology Fee**, where developers must pay a €0.50 fee per installed app. The Commission will examine whether Apple's fee structure, especially the Core Technology Fee, complies with the DMA.
- The **multi-step user journey** to download and install alternative app stores or apps on iPhones. The Commission will investigate whether the steps and information screens displayed by Apple comply with the DMA.

- The **eligibility requirements for developers** to offer alternative app stores or directly distribute apps from the web on iPhones. The Commission will investigate compliance with the DMA with regards to these requirements, such as the ‘membership of good standing’ in the Apple Developer Program, comply with the DMA.

The Commission will also continue preliminary investigative steps outside of this investigation, particularly regarding Apple’s checks and reviews to validate sideloaded apps and alternative app stores.

July 1, 2024 – Another designated villain enters the scene

While, in the eyes of the director, Apple makes a first good villain, it seems like it likes even more tension. As a second villain, the Commission has preliminary identified Meta. According to the Commission, Meta’s “pay or consent” advertising model does not comply with the data regulations in the DMA under which gatekeepers must seek users' consent for combining their personal data between designated core platform services and other services. If a user refuses such consent, they should have access to a less personalized but equivalent alternative (Article 5(2) DMA).

Meta’s “pay or consent” model, which requires users to either pay for an ad-free version of Meta’s social networks or consent to the use of their personal data for personalized ads, is seen as problematic. The Commission believes that it does not provide an equivalent, less personalized alternative for users who do not consent to the data combination. It does neither allow users to opt for a less data-intensive service that is equivalent to the personalized ads-based service, nor does it allow users to freely consent to their data being combined.

Interestingly, the director has asked for some help here and has been coordinating with relevant data protection authorities throughout its investigation. To ensure DMA compliance, the Commission suggests that users who do not consent should still have access to an equivalent service that uses less of their personal data for ad personalization.

What’s next – Is the season finale approaching?

While some storylines have picked up speed, it is likely that there will be a few more episodes before the season finale. In case the Commission concludes that Apple has not complied with the DMA, it would adopt a **non-compliance decision** within 12 months from the opening of the proceeding, i.e. until 25 March 2025. The preliminary findings of the non-compliance investigation against Alphabet are still outstanding and it is not unlikely that the Commission will open further non-compliance investigations. Non-compliance is expensive for the gatekeepers. In case of an infringement, the Commission can impose fines up to 10% of the gatekeeper's total worldwide turnover and up to 20% in case of repeated infringements.

BLOMSTEIN

Additionally, it should be kept in mind that the DMA is not the only tool against gatekeepers. On 25 June 2024, the Commission sent a statement of objection to Microsoft, sharing its preliminary view that Microsoft is abusing its dominant position in the market for SaaS productivity applications for professional use by tying its communication and collaboration product Teams to its productivity applications included in its suites for businesses Office 365 and Microsoft 365.

BLOMSTEIN will continue its role as a camera team and monitor the latest developments closely. If you have any questions on the DMA or others topics related to the digital economy, Anna Huttenlauch and Marie-Luise Heuer will be happy to assist you.
