

COMPETITION

Ground-breaking European Union legislation limits dominance of major tech corporations

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The Digital Markets Act (“**DMA**”) is a piece of EU legislation aimed at targeting enormous tech companies that operate platforms serving as a gateway between business users and end users and establishes a range of obligations for gatekeepers, as they are referred to, explicitly prohibiting anti-competitive behaviour.

The DMA’s primary objective is to dismantle the gatekeeper status that major tech firms have held for the past decade. It grants the European Commission the authority to conduct market investigations and develop remedies if these companies violate the rules.

These laws aim to foster increased competition, allowing startups to compete on a more levelled playing field against existing industry giants.

The DMA imposes relatively onerous regulations such as prohibiting tech companies from monetising data collected from phone users, preventing them from leveraging this data to create detailed profiles of individual consumer behaviour.

Another example is the prohibition on gatekeepers from cross-using personal data sourced from a core platform service in separate services provided by the gatekeeper. Under this regulation Google, for example, will be barred from interchanging data from Gmail to customise its Google Pay services to compete with companies such as PayPal or MasterCard.

Initially the big 6 tech corporations, being Alphabet (the parent company of Google), Amazon, Apple, ByteDance (owner of TikTok), Meta (comprising of Facebook, Instagram, and WhatsApp), and Microsoft, will be subjected to these regulations.

They will have a six-month period (which concludes on 6 March 2024) to adhere to a comprehensive set of guidelines under the new legislation and failure to comply could result in fines of up to 10% of their annual revenue.

The DMA sets out classification thresholds in order to identify “gatekeepers” and is comprised of a turnover and user test applicable within the European Economic Area [1].

According to these criteria, certain companies and services such as Samsung and Outlook successfully contested their mandate to be bound to these regulations based on the fact that they fell short of the criteria.

In July of this year, the South African Competition Commission (“**the Commission**”) released its Online Inter-mediation Platforms Market Inquiry (“**the Online Market Inquiry**”), which ordered Takealot to make significant changes to its online trading platform to resolve issues of perceived anti-competitive behaviour.

Some of the binding recommendations imposed on Takealot require it to segregate its retail division from its marketplace operations, amend its display of highlighted products, boost previously disadvantaged businesses on its online trading platform and stop forced pricing limits on retailers making use of its online trading platform.

Some of the concern surrounding the Commission’s recommendations against Takealot arises from the fact that other online platforms have not been investigated or subjected to the same behavioural restrictions as Takealot.

Several online competitors not mentioned in the report, such as Shein, Wish, and AliExpress, are gaining substantial traction within the South African market and it is anticipated that Amazon, the world’s largest online retailer, is imminently about to establish a presence in South Africa.

In order to address this concern, the Commission confirmed that it will be issuing regulations in order to deal with future market conduct in digital markets which were not considered during the Online Market Inquiry.

In a statement published on the Commission’s website, the following is noteworthy –

However, the Provisional [Online Market Inquiry] Report also recognised that this Inquiry happens at a point in time, and its decisions on specific platform categories are based on the current market features and landscape. The report recognised that conduct that has not yet emerged in some of the categories may do so in future, other inter-mediation categories will gain traction in the market exhibiting similar market features and, if the remedial action is effective, new leading platforms may emerge. The Provisional Report recommended Commission Guidelines or Section 78 Regulations in terms of the Act, which sought to prohibit certain conduct of leading platforms, and permit the identification and review of such platforms. This was to complement the immediate remedial actions by providing better long-term oversight.

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After considering the submissions on the Provisional Report recommendations along with these factors in respect of future enforcement, the Inquiry is currently of the view that section 78 regulations are desirable as they can strengthen enforcement going forward.

It is therefore evident that large online platforms and marketplaces that operate in South Africa may need to be prepared to comply with more rigorous regulations which could potentially mimic those contained within the DMA.

It will be interesting to note what thresholds the Commission will set for these proposed regulations to become applicable and whether it will limit the application of the regulations to only a handful of large entities like Google, Amazon, Meta etc. or expand its application to have a wider effect within digital markets in South Africa.

There is no clear indication of when the Commission will publish the draft regulations for comment, but in light of the rapid rate at which tech companies are expanding globally and the significant barriers to entry that can be created if left unregulated, the sooner the better.

[1] There are three main cumulative criteria that presumptively lead to a designation as a gatekeeper:

- (i) turnover equal to or above €7.5 billion in each of its last three financial years, or where its average market capitalisation or equivalent fair market value amounted to at least €75 billion in its last financial year, and it provides a core platform service in at least three Member States;
- (ii) if the company operates a core platform service with more than 45 million monthly active end users established or located in the EU and more than 10,000 yearly active business users established in the EU in the last financial year; and
- (iii) the gatekeeper has an entrenched and durable position over the last three financial years.



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