



FIVE QUESTIONS

ABOUT NEW EU RULES FOR LARGE ONLINE COMPANIES

FOR HEIKO RICHTER

At the end of March, the bodies of the European Union reached a preliminary agreement on the Digital Markets Act (DMA). This aims to limit the market power of tech giants such as Google, Apple, Facebook/Meta, Amazon, or Microsoft in the future and to safeguard competition on the European market. Mr. Richter, why aren't the existing regulations sufficient?

HEIKO RICHTER So far, especially in antitrust law, we've only had ex post facto laws: these only take effect after an infringement has occurred or is suspected. As a result, it takes a very long time before the behavior is sanctioned. In some cases, the contested acts took place up to ten years ago and the legal proceedings have still not been concluded. The result is that antitrust law is too slow in this context.

What's going to change?

The basic concept of the DMA centers around ex ante – or “before-the-event” – regulation. It will impose conduct obligations on major online service providers. According to initial information, companies are to be considered “gatekeepers” if they generate an annual turnover in excess of EUR 7.5 billion in the EU or have a market value of more than EUR 75 billion. The service itself must have over 45 million end users per month, as well as 10,000 commercial users in the EU per year.

What obligations will gatekeepers have in the future?

In the list of obligations, particular importance is given to prohibitions on tying registration for one service to registration for another, for example, or on forbidding commercial users from offering their products and services at different prices and under different conditions on third-party platforms. In addition, operating systems such as Google's Android or Apple's iOS would have to allow app stores other than their own to be installed on smartphones. Self-preferencing is explicitly prohibited.

Can these new regulations make the digital markets more open and fairer?

The crucial point is how the rules will actually be applied and enforced in practice. It remains to be seen whether the agreed-upon procedure will be effective – including, for example, the envisaged dialog between the Commission and gatekeepers with regard to the regulatory measures. Other unresolved questions include how effectively national authorities and the EU Commission will work together and what role national courts will play in enforcing the rules. Furthermore, the plan is for the EU Commission to play a central role, with the power to order a wide variety of measures against gatekeepers while also monitoring compliance with the measures. To this end, the Commission will need to create numerous additional positions with specific expertise. Indeed, it will be taking on a completely new role as a

regulatory authority, and it'll be interesting to see if it can ultimately stand up to the big tech companies on an equal footing.

Assuming everything goes according to plan, the new regulation will come into force in 2023. Can all of these innovative provisions be implemented immediately?

That remains to be seen. The problem is that many technical issues are not resolved and are instead simply being deferred. The fine-tuning of the DMA will take the form of so-called delegated acts that have yet to be issued by the Commission. In practice, this often takes years. For example, the German railway company Deutsche Bahn (DB) has so far not been obliged to provide other services, such as Google Maps, with real-time information about its trains. Although the EU Directive that regulates this issue has been in force since 2010, it was not until 2017 that the Commission clarified the details in a delegated act – and only in 2021 were the rules finally incorporated into the German Passenger Transportation Act. Nevertheless, it is still unclear whether Deutsche Bahn is required to provide this real-time information.

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