Self-preferencing under the DMA

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After the Digital Markets Act (DMA) entered into force in November 2022, the European Commission is now hosting a series of workshops to consult stakeholders on specific questions regarding the DMA's implementation. The first workshop dealt with the prohibition on self-preferencing in Article 6(5) DMA and focused on the interpretation of the provision as well as possible solutions to ensure compliance with it in practice.

What is self-preferencing?

The prohibition of self-preferencing in the DMA addresses practices whereby gatekeepers favour their own products and services in rankings, crawling and indexing. Gatekeepers are (often vertically integrated) companies that offer goods or services through their own core platform services (CPS) in competition with other service providers on the platform. Due to the captive use of their own platform, there is an inherent risk that gatekeepers rank their own services better than those offered by competitors. According to Article 6(5) DMA, "*the gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall apply transparent, fair and non-discriminatory conditions to such ranking.*"

Ranking describes the relevance given to search results (see Article 2(22) DMA). *Crawling* is a process through which new and updated content is found, and *indexing* means the storing and organising of the content found through the crawling process (Recital 51 DMA).

What's in the scope of the self-preferencing prohibition?

Rankings are inherently discriminatory as they, by their very nature, favour the goods and services ranked highest. Hence, the prohibition on self-preferencing cannot be understood to govern the ranking outcome, but rather the process, which must be transparent, fair and non-discriminatory.

To assess whether certain conduct qualifies as self-preferencing within the sense of Article 6(5) DMA, a three-step-test has been suggested:

- What is the relevant ranking on the core platform?
- Is there a separate service provided by the gatekeeper on the platform?
- Is there unfair preferencing of the separate service in comparison to similar products or services of third parties?

Self-preferencing can be blunt and easy to assess. However, it may also come in disguise and may not be so easy to detect. According to Recital 52 of the DMA, to ensure effectiveness and avoid circumvention of the prohibition, measures of equivalent effect also fall within its scope. While effects-based analyses are common in competition law, it will require case practice and guidance to establish what actions potentially constitute "measures with equivalent effect" and how broad this notion is to be interpreted.

In the Commission's workshop, the question was raised whether Article 6(5) DMA applies if not the gatekeeper's own services, but services of third parties are treated preferentially. Recital 52 of the DMA provides a reference point in this respect, stating that the gatekeeper should not engage in differentiated or preferential treatment in favour of products or services it offers itself or through a business user *which it controls*. Therefore, it appears not to be critical if the gatekeeper gives preferential treatment to any third party; instead, only if it controls that third party, such conduct is in scope of the prohibition.

What can a compliant ranking, crawling or indexing process look like?

The workshop also focused on proposals on how companies can comply with the self-preferencing prohibition. A number of different ideas were discussed, which all focused mainly on Google's search engine and Google's treatment of its own verticals as opposed to third party services. A number of designs and criteria for compliant ranking processes were brought forward, most of them proposing industry-specific solutions. It became very clear that there is no one-size-fits-all solution. Instead, it will need a case-by-case analysis of how a compliant solution can look like taking into account the specific circumstances at hand.

Outlook

The DMA will apply as of May 2023. Companies providing CPS are obliged to notify the Commission that they meet the criteria for gatekeepers provided for in the DMA and provide all relevant information. Within two months from notification, the Commission will adopt a decision designating a specific company a gatekeeper. After such designation decision, gatekeepers will have a maximum of six months to ensure compliance with the obligations set out in the DMA.

The Commission has published a draft implementing regulation regarding procedural aspects of the notification and gatekeeper designation process. However, guidance on how to comply with the substantive rules of the DMA can only draw on the general principles set out in the DMA as well as Commission practice and case law underlying and inspiring the substantive DMA provisions. Significant experience in dealing with behavioural and dominance cases, both from the perspective of a dominant firm and that of a complainant as well as being familiar with the rules on digital competition law is key.

BLOMSTEIN will continue to monitor and assess the developments and practical application of the DMA provisions. If you have any questions on the topic, Max Klasse, Anna Huttenlauch, Philipp Trube, Marie-Luise Heuer and BLOMSTEIN's entire competition law team will be happy to assist you.