DMA's Self-Preferencing Ban: setting the stance for equal treatment

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Since March 7th, all core platform services that the European Commission has designated as gatekeepers under the Digital Markets Act (DMA) so far, must comply with the DMA's obligations and had to submit comprehensive compliance reports. In these reports, they must show in a detailed and transparent manner all relevant information needed by the European Commission to assess the gatekeeper's effective compliance with the DMA.

In our series of briefings, we recap the key milestones of the DMA implementation, deep dive into the various obligations that gatekeepers are facing, lay out the DMA's implications for stakeholders who are not (currently) within the direct scope of the legislation and update you on the current status of affairs in the DMA's implementation.

This time we focus on: self-preferencing under the DMA.

Self-preferencing and Market Power

The DMA addresses the issue of self-preferencing in digital markets, aiming to prevent gatekeepers from leveraging their dominant position in one market (i.e., core platform service such as a marketplace, a search engine or software application store) to prioritize their products or services over those of competitors in markets upstream, downstream or neighbouring the core platform service.

Concerns arise where gatekeepers assume a dual role: as intermediary for third-party businesses and a direct competitor of those very businesses. This dual position grants gatekeepers the power to directly influence the competitiveness of products or services offered by third parties on their platforms.

Picture yourself as an online retailer selling via a gatekeeper's marketplace. Despite offering lower prices, your products are consistently demoted by those offered by the gatekeeper's own retail business, which directly rivals yours. Moreover, you provide a specialized comparison search service (e.g., flights or hotels) and a significant portion of your customer-base discovers your website after an initial search on a gatekeeper's general search engine. However, the prominence given to the gatekeeper's own specialized comparison service in these search results overshadows your offer.

What Does the Provision Say?

Under Article 6(5) of the DMA, gatekeepers are prohibited from favouring their products or services in rankings, indexing, and crawling processes over third-party offerings of similar services or products. Instead, the DMA calls for transparent, fair, and non-discriminatory conditions to rankings, aiming to establish a level playing field.

Despite the explicit prohibition, the DMA lacks precise definitions for critical elements of the ban on self-preferencing, notably in clarifying what falls within the concept of discriminatory conditions. While it's relatively straightforward to discern discrimination in application (e.g., establishing different set of criteria for first-party versus third-party products), identifying and addressing discrimination by design—such as determining which parameters influence ranking and if they include a discriminatory bias — is considerably more challenging (e.g. if a ranking favours digital products over physical products proposedly to accustom for customer preferences but at the same time the gatekeepers happens to primarily offer the former). The absence of clear guidance introduces legal ambiguity for both gatekeepers and business users, fostering uncertainty in the interpretation and enforcement of the regulations. Yet, the provision is subject to further specification by the Commission, as set by Article 8 DMA.

Provision's Context: Antitrust Principles and Key Precedents

The DMA's stance on self-preferencing is rooted in previous case-law, as evidenced by the *Google Shopping* case, which came to a close, and the Amazon investigations, which led to Commitments.

- Google Shopping Case: The European Commission's decision against Google marks a milestone in antitrust enforcement regarding this issue. Google was found to have abused its market dominance by giving preferential treatment to its own shopping comparison search service (Google Shopping) by giving it prominent placement in the generic search results, to the detriment of competitors. The Commission rejected arguments related to objective justification, emphasizing that no evidence suggested that the conduct was objectively necessary or that the exclusionary effects were outweighed by consumer benefits or efficiency gains. Ultimately, the Commission imposed a fine of nearly 2.5 billion and mandated Google to cease its discriminatory practices (see decision here).

  The General Court upheld the Commission's understanding and outlined that, in view of Google's 'ultra-dominant' position on the market for general search services and its role as a gateway to the internet, Google was under special responsibility to ensure internet neutrality and a fair competitive landscape. Nevertheless, the "active behaviour in the form of positive acts of discrimination" in the treatment of the results of comparison shopping service providers fell short of this standard (see decision here).

- **Amazon Investigations**: The European Commission and the UK Competition and Markets Authority (CMA) scrutinized Amazon for its selection process of the "Featured Offer" in the marketplace (Buy Box). Following complaints that Amazon Retail's offers were systematically selected as the Featured Offer despite third-party sellers offering products with comparable or superior attributes such as price and delivery time, enforcers expressed suspicion that Amazon's selection algorithm may have been designed to unfairly prioritize product offers from Amazon Retail and/or FBA Sellers (those utilizing Amazon's fulfilment services). Specifically, there were concerns that Amazon's seemingly objective criteria might incorporate a discriminatory element within its design. These investigations resulted in commitments from Amazon to apply objectively verifiable, non-discriminatory conditions and criteria in determining the Buy Box winner.

While these precedents have undoubtedly shaped the regulatory landscape, the DMA's self-preferencing prohibition in Article 6(5) DMA takes a more stringent stance by disallowing gatekeepers to argue on the basis of objective justification. Any economic discussion regarding the potential positive impacts of self-preferencing on competition and consumer welfare is precluded.

Implications for the Digital Ecosystem

The implications of these provisions are far-reaching across the digital ecosystem:

- **For gatekeepers:** Complying with the DMA entails a comprehensive review and potential restructuring of algorithms and operational strategies. This includes reassessing the criteria used for ranking and displaying offers in the core platform service, testing if they unfairly favour the gatekeeper's own offerings. However, the lack of precise guidance on key concepts of the prohibition leaves room for ambiguity.

- **For third-party business users:** The DMA presents the prospect of a fairer ranking and display criteria, which could enhance the visibility of third-party sellers compared to products and services associated with gatekeepers within the core platform service ecosystem. Nonetheless, businesses must stay informed and continuously monitor these parameters to fully leverage the rights afforded by the provision.

- **For end users**: The DMA aims to enhance user experience by ensuring that search results and product offers are selected and displayed reflecting their preferences rather than to favour the gatekeeper's products and services. This could lead to a wider variety of choices, better prices, and higher-quality services, overall improving customer experience.

Looking Ahead: Enforcement

The DMA's endeavours to address self-preferencing and promote equal treatment within core platforms service markets faces notable challenges, with a primary focus on the need to establish clearer criteria for detecting self-preferencing. Better guidance facilitates compliance and active monitoring, ultimately preventing circumvention.

This challenge is demonstrated by the swift action taken by the Commission on 25 March 2024, within a mere two weeks of the DMA's implementation, as proceedings were initiated against Alphabet to investigate potential self-preferencing in Google's display of search results, particularly concerning its vertical search services such as Google Shopping, Flights, and Hotels. The Commission's scrutiny centers on evaluating whether Alphabet's compliance measures effectively ensure equitable and non-discriminatory treatment of third-party services in comparison to its own offerings. Furthermore, investigations have been launched to ascertain whether Amazon is giving preferential treatment to its own brand products on the Amazon Store.

It is expected that additional guidance will emerge from these proceedings, offering business users greater clarity on the extent to which they can enforce their rights under the provision. In fact, the DMA introduces relevant tools and opportunities for third-parties to flag ongoing misconducts and assert their rights, e.g., presenting complaints to the European Commission or National Competition Authority (NCA), applying for interim measures before the European Commission, and seeking injunctive relief and damages in national courts (see our briefing on private enforcement of the DMA here).

BLOMSTEIN will continue to monitor and assess the developments and practical application of the DMA provisions. If you have any questions on the topic, Anna Huttenlauch, Elisa Theresa Hauch and Ana Carolina Vidal will be happy to assist you.