


Gatekeepers under the DMA – TikTok’s battle to have its designation revoked

 01 March 2024

The Digital Markets Act (DMA) is a part of the Digital Services Package; a package of two sibling regulations proposed (and now entering effect) to rein-in large technology platforms.

The DMA's obligations are aimed at large technology platforms which are termed 'Gatekeepers' under the DMA. The European Union (EU) has passed this legislation to address certain market behaviours of the largest technology platforms, which have amounted to such a size, that they are now displaying dominant behaviour.

Bytedance’s designation as Gatekeeper

Bytedance Ltd. (Bytedance) is TikTok’s parent company, and it was designated as a Gatekeeper by the EU Commission on 6 September 2023. In November 2023, Bytedance appealed against this designation as a Gatekeeper to the EU General Court (Main Proceedings).

Interim measures

Bytedance made a separate application for interim measures to the EU General Court, seeking suspension of the EU Commission’s decision to designate Bytedance as a Gatekeeper until the court ruled in the Main Proceedings. Bytedance has publicly vocalized that it "is a challenger, not an incumbent, in the digital advertising market" and that it does not meet the revenue threshold set by the DMA to be considered a Gatekeeper. Bytedance also argued that it did not (unlike others) have an opportunity to present evidence before it was designated a Gatekeeper. Bytedance also argued that complying with the legislation, particularly Articles 5, 6 and 15 would lead to the disclosure of highly strategic information concerning its user profiling practices.

Bytedance’s application for interim measures was dismissed on the basis that Bytedance could not prove an interim measures order was needed to prevent "serious and irreparable harm". As a result, Bytedance is required to comply with its obligations under the DMA in March 2024.

The EU General Court held that Bytedance’s claim for interim measures was for a harm which was 'hypothetical'. Bytedance failed to demonstrate the serious and irreparable financial harm resulting from its obligation to comply with the DMA.

The Main Proceedings

The final judgment on the Main Proceedings is yet to be delivered but we await the ruling which will undoubtedly be of interest for others who have, or may in future, be designated as a Gatekeeper. The main proceedings should see the court seeking to strike the delicate balance between transparency and safeguarding confidential information.

The European Commission has powers to grant Gatekeepers a limited suspension or exemption to "facilitate compliance", especially when the Gatekeeper’s 'economic viability' is at risk. However, the court noted that Bytedance has not yet made any such request.

A reminder of fines

The DMA sets out potential fines of up to 10% of global turnover for intentional or negligent non-compliance of the obligations identified under the DMA. Repeat offenders can face a fine up to 20% of their turnover. The DMA also allows for other types of fines which will allow the EU Commission to be flexible in how it approaches non-compliance.

Next steps

As always, we are available to answer queries relating to the DMA and/ or the Digital Services Package.

Contact



Raymond Sherry

Associate

raymond.sherry@brownejacobson.com

+35315743916

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