

The EU’s Bold Step

Technology, Privacy, and eCommerce



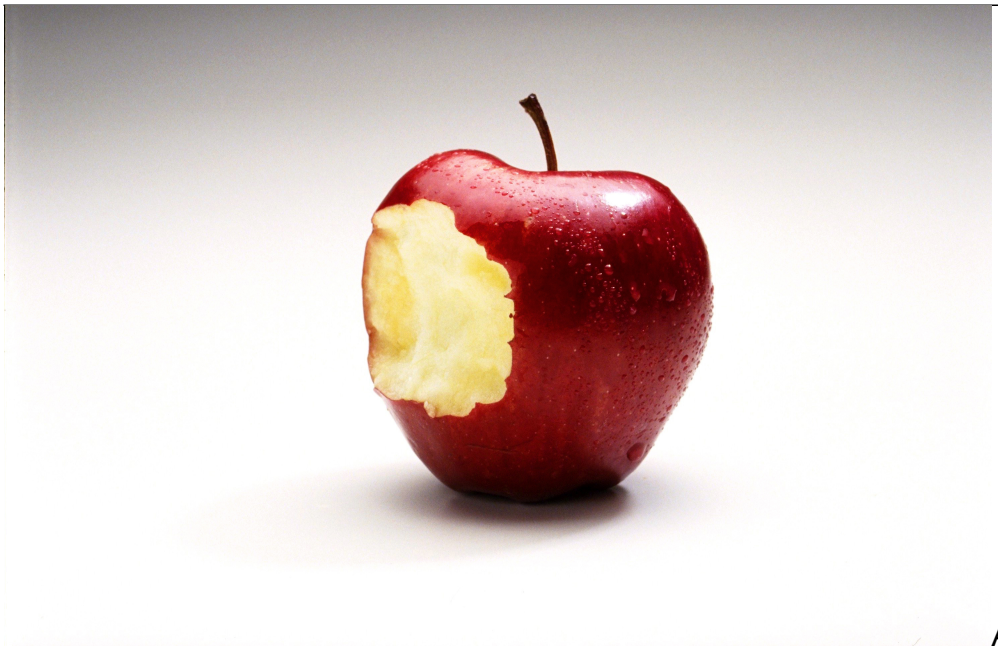
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The European Union showed its commitment to curbing the monopolistic tendencies of Big Tech by levying a nearly US$2 billion fine against Apple for competition violations, marking a first in the tech giant's history. This action comes as part of a broader initiative to regulate the digital marketplace, with Apple, Meta, and Google now under formal investigation for potentially breaching the new Digital Markets Act (DMA). These investigations aim to ensure that the digital market remains competitive and fair, reflecting the EU's determination to challenge the dominance of major tech companies and protect consumer interests.

What is the DMA?

At the heart of these investigations is the Digital Markets Act (DMA), a regulation designed to prevent Big Tech firms from monopolizing digital markets. The DMA targets "gatekeeper" companies, those providing "core platform services" and possessing significant market power, by enforcing a set of rules intended to make digital markets more contestable and equitable. This includes ensuring consumers have more choices and preventing gatekeepers from using their platforms to unfairly advantage their own products or services.

Taking a bite of (the) Apple



Apple faces scrutiny by the DMA for failure to comply with new regulations. Molotok289 / *Shutterstock.com*

Apple's fine penalizes the company for restricting music streaming competitors, such as Spotify, from informing users about cheaper subscription options outside of Apple's ecosystem. This practice favored Apple's own music service by enforcing a 30% fee on competitors for in-app payments, limited consumer choice, and forced higher prices for music streaming subscriptions. Apple is being scrutinized under the DMA for potentially not fully complying with rules allowing app developers to direct users to external offers, along with concerns regarding the company's compliance with new regulations that demand allowing alternative app stores and payment systems on its devices.

Meta under the microscope

Meta is under the EU's microscope for its "pay or consent" model, which offers users an ad-free version of Facebook and Instagram at a price, raising questions about the fairness of the choice provided to users. This investigation reflects the EU's concerns over whether Meta's approach complies with the DMA's regulations, particularly in how it manages user data and offers alternatives to ad-based models. The EU is focused on ensuring that consumer choices are not unduly limited by the business practices of dominant digital platforms.

Google’s search for compliance

Google also faces scrutiny under the DMA, with the European Commission examining whether the tech giant has unfairly prioritized its services in search results and complied with the DMA's rules that allow app developers to offer external purchasing options. Google's response, stating it has made considerable efforts to align with DMA requirements, highlights the complex challenge tech companies face in adapting to these new regulations. The investigations into Google's practices, particularly around app store policies and search result prioritization, reveal the broader implications of the DMA for reshaping competitive practices in the digital market.

In-house implications

The European Union's rigorous enforcement of the DMA holds significant relevance for in-house

counsel across industries. These developments highlight the escalating regulatory scrutiny on competitive practices and data privacy, presenting both challenges and opportunities for legal departments. For in-house counsel, staying abreast of these changes is crucial for advising on compliance strategies, mitigating legal risks, and navigating the complex landscape of global digital market regulations. This ensures the organization not only avoids hefty fines and legal battles but also leverages these regulations as a guide for ethical and competitive business practices in the digital age.



As an in-house counsel, keep yourself up to date with the latest DMA developments to stay in compliance with all regulations. chayanuphol / *Shutterstock.com*

Some in-house counsel believe that understanding the digital environment is crucial for legal teams. As noted by an EU-based in-house counsel, grasping how platforms technically operate— such as data flow and processing — is essential for advising on regulations like the DMA. This requires teams that blend the tech-savviness of junior lawyers with the deep legal expertise of senior anti-trust counsel. Beyond Big Tech, it’s crucial for legal departments in traditional companies to understand DMA implications to safeguard their competitive positions against digital disruptors like Amazon, which may use their dominance in ways that impact other industries, such as transportation. This knowledge is key to ensuring compliance and preparing strategic responses.

Compliance and Risk Management

In-house legal teams must navigate the complexities of ensuring compliance with the DMA. This involves a comprehensive audit of current practices, particularly in areas such as default app settings, app store policies, and data usage agreements, to identify potential conflicts with the DMA's requirements. Legal professionals must work closely with other departments, including IT,

compliance, and business development, to implement necessary changes that align with the DMA's provisions. This cross-functional collaboration is essential for developing a holistic compliance strategy that mitigates risk and avoids the substantial fines associated with non-compliance.



Cross-functional collaboration and auditing is essential for in-house legal teams to prevent potential risks. Lomb / *Shutterstock.com*

Strategic Implications and Market Positioning

The DMA's focus on increasing competition and reducing the monopolistic power of gatekeepers presents both challenges and opportunities for companies operating in the digital space. In-house legal teams should play a strategic role in advising on potential market positioning and business opportunities that arise from these regulatory changes. This includes exploring new market entry strategies, partnership opportunities, and innovative product offerings that comply with the DMA while capitalizing on the more open and competitive market environment it seeks to create.

Litigation and Regulatory Engagement

Given the high stakes involved, in-house lawyers should prepare for the possibility of litigation and increased regulatory engagement. This preparation involves not only defending the company's practices if challenged but also proactively engaging with regulatory bodies to clarify obligations, negotiate compliance measures, and, where necessary, challenge regulatory interpretations or decisions that the company views as unfounded. Effective engagement with regulators requires a clear understanding of the legal arguments, technical details of the company's operations, and the strategic implications of regulatory decisions.

Continuous Monitoring and Adaptation

The dynamic nature of digital markets, combined with the evolving regulatory landscape, necessitates continuous monitoring of legal and technological developments related to the DMA and other similar regulations globally. In-house legal teams must stay informed of changes in the regulatory environment, emerging best practices, and key legal decisions affecting digital market regulations. This ongoing vigilance enables companies to adapt swiftly to new requirements and maintain a competitive edge in an increasingly regulated digital world.

Here are the top actions in-house lawyers should take to navigate this new DMA regulatory landscape effectively:

1. Understand the Scope and Requirements of the DMA

Deeply understand the provisions of the DMA, including the criteria for being designated as a gatekeeper, the obligations imposed on gatekeepers, and the penalties for non-compliance. This foundational knowledge is crucial for advising the business on how to adapt its operations in compliance with the law.

2. Conduct a Comprehensive Compliance Audit

Review the company's current practices, especially those related to core platform services, data usage, and interoperability, to identify any areas that may conflict with DMA requirements. This audit should cover all aspects of the business that interact with users and other businesses in the EU digital market.

3. Develop and Implement a Compliance Strategy

Based on the audit findings, develop a comprehensive compliance strategy that addresses any gaps and ensures ongoing adherence to DMA obligations. This strategy should include policy updates, operational changes, and the implementation of new processes or technologies as needed.

4. Foster Cross-Functional Collaboration

Collaborate with other departments, such as IT, product development, and marketing, to ensure a cohesive approach to DMA compliance. In-house lawyers should work closely with these teams to understand the operational impact of compliance measures and to integrate legal requirements into business practices.

5. Monitor and Adapt to Regulatory Guidance

Stay informed about any guidance, decisions, or enforcement actions from the European Commission and other relevant regulatory bodies concerning the DMA. Be prepared to adapt the company's compliance strategy in response to new interpretations or clarifications of the law.

6. Engage with Regulators

Proactively engage with regulators to seek clarity on compliance expectations and to advocate for the company's interests. This engagement can include participating in consultations, submitting feedback on proposed regulations, and responding to inquiries from regulatory bodies.

7. Educate and Train Relevant Stakeholders

Develop and deliver training programs for relevant stakeholders within the company to ensure they understand the DMA and its implications for their work. This education should focus on promoting compliance and preventing inadvertent violations of the DMA.

8. **Prepare for and Manage Audits and Investigations**

Establish procedures for responding to audits and investigations by regulatory authorities. This includes maintaining necessary documentation, preparing employees for interviews, and managing communications with regulators.

9. Evaluate and Negotiate Third-Party Relationships

Review agreements and collaborations with third parties, including app developers, advertisers, and service providers, to ensure they are in line with DMA requirements. This may involve renegotiating terms to comply with the DMA's provisions on fairness and openness.

10. Assess and Mitigate Risks of Non-Compliance

Continuously assess the risks associated with non-compliance, including potential fines and reputational damage. Implement measures to mitigate these risks, such as establishing internal controls and compliance monitoring systems.

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