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Don’t let bundling tie you down!

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Since March 7th, all core platform services designated by the European Commission (EC) as gatekeepers under the DMA must comply with the DMA’s obligations and submit comprehensive compliance reports. In these reports, they must show in a detailed and transparent manner all relevant information needed by the EC to assess 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 on: **Tying and bundling** provisions under the DMA.*

What do the provisions say?

Ever felt cornered into accepting a bundle of digital services when all you wanted was one specific app? Or forced to navigate through a web of pre-installed software on a new device, cluttering your digital space with unwanted applications? Why should your choices be limited by the bundling of services and products that don’t necessarily meet your needs or preferences?

Article 5 (7) and (8) DMA target the **restrictive practices of 'tying' and 'bundling'** by digital '**gatekeepers**,' aiming to ensure that choices as a consumer or business are no longer constrained by the dominant market power of a few large companies.

Tying

Article 5 (7) DMA prohibits gatekeepers from requiring end users or business users to use or offer certain ancillary services in conjunction with the gatekeeper's core platform services. This provision targets practices where the use of a core service (the **tying products/service**) mandates the simultaneous use or purchase of another service (the **tied product/service**):

- **Tying products/services** are, for example, online intermediary services, app stores, or online services of social networks.
- **Tied product/services** are limited to those listed in the Art. 5 (7) DMA’s catalogue of selected ancillary services (which may be extended in accordance with Art. 12 (2)(d) DMA): (i) **identification services** (e.g. log-in or sign-in functions provided by Google or Facebook via existing user accounts for e-mail services (such as Gmail) or social media such as a Facebook account), (ii) **web browser engines**, (iii) **payment services**, or (iv) **technical services supporting payment services** (e.g. for in-app purchases).

Distinct forms of tying, such as technical and contractual tying, are particularly relevant for understanding the DMA's scope:

- **Technical tying** involves designing products to only function with each other, effectively excluding competitors' alternatives.

- **Contractual tying** binds customers to use specific services through terms of dealing.

Bundling

Under Article 5 (8) DMA, gatekeepers are restricted from **conditioning the use of their core platform services on the subscription to or registration with additional services**. This targets practices where access to one service is contingent upon acceptance of others, potentially restricting user choice and market competition. Bundling may be "mixed" or "pure":

- A gatekeeper engaging in "**pure bundling**" makes its products or services available only jointly, and the separate components of the bundle are not available on the market.

- When a gatekeeper engages in "**mixed bundling**", products that are complementary to one another are available for separate sale or supply but are also sold jointly at a price less than the sum of both stand-alone prices.

This concept is not completely new: the distinction between pure and mixed bundling was already explored in cases like GE/Honeywell (bundling of GE's aircraft engines with Honeywell's avionics and aerospace components) and Tetra Laval/Sidel. (bundling Tetra Laval's carton packaging machines with Sidel's plastic bottle machines).

What's the provisions' context?

Drawing on antitrust experiences, in particular the **Google Android** case (to which the Commission's DMA impact assessment report explicitly refers), the **tying and bundling provisions** reflect concerns over digital ecosystems where conglomerates leverage multiple services to lock in users, prevent the development of effective competitors, and stifle innovation and user choice.

In the **Google Android case**, the Commission prohibited both tying and bundling practices, which can act as a benchmark for gatekeepers' self-assessment:

- **Bundling**: Google required manufacturers of mobile devices to pre-install the Google Search and the Chrome browser apps in order to be able to obtain a licence from Google to use its app store (Play Store).

- **Tying**: Google granted the operating licence for the pre-installation of Google Search and Play Store apps only to manufacturers that refrained from selling devices running on Android versions not approved by Google (so-called non-compatible forks).

With the surge of AI, tying and bundling provisions may become even more relevant. The **integration of AI technology** like "AI-Chatbots" into gatekeepers' product ecosystems will be viewed critically by the Commission. For example, if a gatekeeper mandates the use of its AI technology with its core services or operating systems, it may be scrutinized for **technical tying**. While the gatekeeper could argue the consumer benefits and efficiencies of its AI technology,

including increased productivity and innovation, the tying may restrict competition by limiting the entry of competing AI technologies. For more details regarding competition-related challenges in the context of AI see our latest briefing.

What's the provisions' implication for gatekeepers and third party businesses?

Gatekeepers need to proactively align their business operations with the DMA's requirements. This will require a **balanced approach of legal diligence and strategic innovation**. Practical steps towards achieving this balance include:

- **Comprehensive Self-Assessment**: Gatekeepers should initiate an in-depth review of their existing product and service offerings. This is crucial to identify potential limitations on user options within their portfolio and develop strategies to offer more openness and flexibility (e.g. access to alternatives services).

- **Strategic Innovation**: Gatekeepers should explore and invest in the development of new DMA compliant technologies and solutions. This includes fostering an environment of continuous learning and improvement, keeping on top of technological advances and proactively integrating them into their service offerings.

- **Legal Vigilance:** Ongoing legal analysis and adaptability will be key: Gatekeepers must ensure that their practices consistently reflect the current interpretation of the DMA's provisions. Regular engagement with legal experts is essential to ensure continuous compliance while driving innovation and growth.

For **third party businesses**, the DMA provisions promise to level the playing field, offering smaller companies and new market entrants a fairer chance to compete by curtailing the competitive edge that gatekeepers gain through tying and bundling practices. Additionally, the DMA empowers third parties with **robust private enforcement tools** to challenge non-compliance effectively. This regulatory shift not only opens strategic opportunities for businesses to contest restrictive practices but also encourages innovation and market expansion within a more equitable digital ecosystem. Companies are advised to delve into both the **formal and informal enforcement mechanisms** outlined in our latest briefing on DMA private enforcement, as understanding these elements is vital for leveraging the DMA to foster business innovation, market entry, and overall growth.

BLOMSTEIN will continue to monitor and assess the developments and practical application of the DMA provisions. If you have any questions on the topic, Elisa Theresa Hauch, Jasmin Sujung Mayerl and the entire BLOMSTEIN competition law team will be happy to assist you.

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