Bytedance’s action dismissed by the CJEU

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On 5 September 2023, the European Commission designated Bytedance and the companies which it controls directly or indirectly (including TikTok), as a gatekeeper under Article 3(1) of the Digital Markets Act (DMA). The DMA contributes, *inter alia*, to the proper functioning of the internal market by laying down rules to ensure the contestability and fairness of markets in the digital sector in general, and for business users and end users of core platform services provided by gatekeepers in particular. It aims to limit anti-competitive practices, imposing requirements and constraints on platforms with a major influence on the market.

In November of the same year, Bytedance brought an action for annulment of the Commission’s decision. An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to EU law. At Bytedance's request, the General Court decided to rule on the case under the expedited procedure. On 17 July, the court dismissed Bytedance’s action, confirming that TikTok is a gatekeeper under the DMA. This is the first time that the General Court has interpreted the DMA.

In particular, the court found that Bytedance met the quantitative thresholds set out in the DMA. According to the court, the company’s global market value and the number of TikTok end users and business users in the EU had continued to increase in the last three financial years, far exceeding the thresholds. The arguments submitted by Bytedance, including the fact that Bytedance’s global market value was mainly attributable to its activities in China and that its EU turnover was low, were not sufficiently substantiated to manifestly call this into question.

On the presumption that TikTok is an important gateway, the court found that the Commission was entitled to consider that Bytedance’s high global market value, together with the large number of TikTok users in the EU, reflected its financial capacity and its potential to monetise those users. It further considered that TikTok had succeeded in increasing its number of users very rapidly and exponentially since its launch in the EU in 2018, reaching, in a short time, half the size of Facebook and of Instagram, and a particularly high engagement rate, with young users in particular, who spent more time on TikTok than on other social networks.

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As regards TikTok's entrenched and durable position, called into question by Bytedance arguing that the platform had been considered a challenger in the market, the court emphasised that, although in 2018 TikTok was indeed a challenger seeking to contest the position of established operators such as Meta and Alphabet, it had rapidly consolidated its position, and even strengthened that position over the following years, despite the launch of competing services such as Reels (Meta) and Shorts (Alphabet).

Finally, the court rejected the arguments raised by Bytedance regarding the alleged infringement of its rights of defence and breach of the principle of equal treatment.

As a result of the court's decision, TikTok remains a gatekeeper and must comply with the DMA.

Bytedance Ltd v. European Commission, Case T-1077/23, CJEU, 17 July 2024

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