



The Digital Markets Act

The Digital Markets Act (“DMA”) aims to ensure contestable and fair digital markets by imposing specific obligations on digital platforms that qualify as gatekeepers. This objective is complementary to (but differs from) the goal of EU and national competition rules: protecting undistorted competition on markets.

Stibbe
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Enforcement powers

The DMA lists the enforcement powers of the Commission. The Commission may:

- specify measures that a gatekeeper needs to implement to ensure effective compliance with certain obligations;
- order interim measures in urgent situations. There should be a risk of serious and irreparable damage for business or end users;
- make binding any commitments offered by the gatekeepers;
- adopt a decision finding non-compliance with obligations, behavioural or structural remedies (including a temporary merger ban), (interim) measures imposed by the Commission, or binding commitments;
- impose fines up to 10% of a gatekeeper’s total worldwide turnover in the preceding financial year in cases of non-compliance (up to 20% for a repeat offence);
- impose periodic penalty payments per day of up to 5% of the average daily worldwide turnover in the preceding financial year.

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II. Qualitative criteria and quantitative thresholds

Once an undertaking is designated a core platform service provider, the following criteria must also be met before designation as a gatekeeper.

Qualitative criteria	Quantitative thresholds
<p>Significant impact on the internal market The undertaking has a significant impact on the internal market</p>	<p>This is presumed to be the case if:</p> <ul style="list-style-type: none"> the annual EU turnover is at least EUR 7.5 billion in each of the last three financial years; OR the average market capitalisation (for publicly listed companies) or the equivalent fair market value is at least EUR 75 billion in the last financial year; AND the same core platform service is provided in at least three Member States.
<p>Important gateway The relevant core platform service is an important gateway for business users to reach end users</p>	<p>This is presumed to be the case if, in the last financial year, the core platform service has on average:</p> <ul style="list-style-type: none"> at least 45 million monthly active end users established or located in the EU; AND at least 10,000 yearly active business users established in the EU.
<p>Entrenched and durable position The undertaking enjoys an entrenched and durable position in its operations or it is foreseeable do so in the near future</p>	<p>This is presumed to be the case if, in each of the previous 3 financial years, the core platform service has on average:</p> <ul style="list-style-type: none"> at least 45 million monthly active end users established or located in the EU; AND at least 10,000 yearly active business users established in the EU.

Scope of application

Obligations for gatekeepers

The DMA distinguishes between gatekeepers’ obligations towards the Commission and towards their business users and end users.

II. Obligations towards business users and end users	I. Obligations towards the Commission
<p>Both positive and negative obligations are imposed on gatekeepers. Examples of these obligations on gatekeepers are listed in the table.</p>	<p>Notification obligation Within two months of meeting all the quantitative thresholds, the undertaking must notify the Commission of this fact and provide relevant information.</p> <p>Information obligation A gatekeeper must inform the Commission about every intended concentration that involves an entity providing services in the digital sector or enabling the collection of data - even concentrations that are not notifiable under national or EU competition thresholds.</p> <p>Audit obligation Within six months after its designation, a gatekeeper must submit an (independently audited) description of its user profiling methods applied to/across its core platform service(s) listed in the designation decision to the Commission.</p> <p>Reporting obligation Within six months after its designation, a gatekeeper must submit a description of the measures it has implemented to ensure compliance with the obligations under II. to the Commission.</p>

N.B. The Commission can add new obligations after conducting a market investigation.

Key positive obligations

- Gatekeepers must ensure that:**
- business users are able, free of charge, to communicate and promote offers to end users obtained via the platform or through other channels, and conclude contracts with end users both using the platform and outside of it. End users must be able to use on the platform items purchased from business users outside the platform;
 - advertisers and publishers can request (i) information - on a daily basis and free of charge - on prices and remuneration for a given ad and advertising services and (ii) access to tools and information in order to verify the gatekeeper’s ad inventory;
 - end users are able to easily uninstall software applications on its operating system unless these are essential for the function of the operating system/device;
 - under certain circumstances, (ancillary / messaging / social network services) services of third parties are interoperable with the core platform service of the gatekeeper (or operating system/features used by the gatekeeper when providing ancillary services;
 - access to certain data is provided to business users and end users. This data must be effectively portable. Business users must also be given access to designated app stores, online search engines and online social networking services on FRAND terms;
 - access to certain data is provided to third party providers of online search engines on FRAND terms.

Key negative obligations

- Gatekeepers are prohibited from:**
- processing, for the purpose of providing online advertising services, personal data of end users using services of third-parties that make use of core platform services of the gatekeeper, without end user consent;
 - combining personal data from the relevant core platform service with personal data from other core platform services or from any other services provided by the gatekeeper or with personal data from third-party services;
 - imposing most-favoured-nation clauses relating to offer prices and conditions;
 - hampering the ability of business users or end users to raise with the relevant public authorities concerns relating to gatekeepers’ practices;
 - imposing their identification, payment or technical service on end users and on business users offering services on the platform;
 - tying core platform services;
 - using non-public information from business users when competing with them;
 - self-preferencing in relation to ranking;
 - preventing end users from: unsubscribing from core platform services, switching between or subscribing to different software applications and services while using the gatekeeper’s operating system.

The DMA applies to undertakings that act as gatekeepers. An undertaking qualifies as ‘gatekeeper’ if it fulfils the following cumulative criteria:

I. Core platform service

- The undertaking is a provider of a core platform service, which currently refers to:
- online intermediation services;
 - online search engines;
 - online social networking services;
 - video-sharing platform services;
 - number-independent inter-personal electronic communication services;
 - operating systems;
 - virtual assistants;
 - web browsers;
 - cloud computing services;
 - if the undertaking also offers one of the previous services: advertising services (including advertising networks, advertising exchanges and any other advertising intermediation services).

N.B. a ‘gatekeeper’ can rebut this presumption by presenting sufficiently substantiated arguments that the qualitative criteria are not met.