

# **EU DIGITAL MARKETS ACT LAYS THE GROUNDWORK FOR GATEKEEPERS**

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## EU DIGITAL MARKETS ACT LAYS THE GROUNDWORK FOR GATEKEEPERS

One of the European Union's major pieces of legislation in the digital era, the [Digital Markets Act](#) (DMA), entered into force on 1 November 2022. It introduces ex-ante regulation—setting the ground rules for what is and is not acceptable in the digital markets—for large digital platforms and designates so-called “gatekeepers,” which will be subject to increased scrutiny.

The DMA will apply on 2 May 2023 following a six-month transition period. During this six-month period, the European Commission (Commission) will designate the gatekeepers. Gatekeeper obligations will then apply starting in March 2024.<sup>1</sup>

### SUMMARY OF THE DMA'S MAIN PROVISIONS

#### Scope

There are 10 so-called “core platform services” that will be subject to the DMA's provisions:

1. Online intermediation services<sup>2</sup>
2. Online search engines<sup>3</sup>
3. Online social networking services
4. Video-sharing platform services<sup>4</sup>
5. Messenger services (so-called “number-independent interpersonal communication services”)<sup>5</sup>
6. Operating systems
7. Cloud computing services<sup>6</sup>
8. Online advertising services (including any advertising networks, advertising exchanges, and any other advertising intermediation services provided by an undertaking that provides any of the 10 core platform services)
9. Web browsers
10. Virtual assistants<sup>7</sup>

Of these 10 core platform services, 8 were part of the Commission's initial proposal; 2 services (virtual assistants and web browsers) were added to the list during negotiations.

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<sup>1</sup> Nevertheless, certain provisions apply immediately, such as the power of the Commission to adopt delegated or implementing acts and publish guidelines, and the establishment of the DMA High-Level Group and Digital Markets Advisory Committee.

<sup>2</sup> As defined in Article 2, point (2), of Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (Regulation (EU) 2019/1150).

<sup>3</sup> This is defined as “a digital service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found.”

<sup>4</sup> As defined in Article 1(1), point (aa), of Directive 2010/13/EU.

<sup>5</sup> Article 2 No. 7 of Directive EU/2018/1972 of the European Electronic Communications Code defines this as an “interpersonal communications service which does not connect with publicly assigned numbering resources, namely, a number or numbers in national or international numbering plans, or which does not enable communication with a number or numbers in national or international numbering plans.”

<sup>6</sup> As defined in Article 4, point (19), of Directive (EU) 2016/1148 of the European Parliament and of the Council.

<sup>7</sup> Defined as a software that can process demands, tasks, or questions, including those based on audio, visual, or written input, gestures, or motions, and that, based on those demands, tasks, or questions, provides access to other services or controls connected physical devices.

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## Definition of Gatekeeper

Article 3 of the DMA designates so-called “gatekeepers” among the platform providers. An undertaking shall be designated as a gatekeeper if the following three cumulative requirements are met:

1. It has a **significant impact** on the internal market.

This is presumed if the company has an annual turnover of at least €7.5 billion within the European Union in each of the last three financial years, or has a market capitalization or fair market value of at least €75 billion in the last financial year and provides the same core platform service in at least three EU member states.

2. It provides a **core platform service** that is an important gateway for business users to reach end users.

This is presumed if the platform has at least 45 million monthly end users and at least 10,000 annual business users established in the European Union in the last financial year.

3. It enjoys an **entrenched and durable position** in its operations, or it is foreseeable that it will enjoy such a position in the near future.

If the platform provider meets the requirements in point 2 in each of the last three financial years, it is presumed that the platform provider enjoys an entrenched and durable position.

## Process of Gatekeeper Designation

As a matter of principle, *companies are asked to verify themselves* if they meet the quantitative thresholds included in the DMA to identify gatekeepers. They will then have to provide the Commission with necessary information (i.e., turnover data, user basis). Once the DMA becomes applicable on 2 May 2023, any company that meets the quantitative thresholds to be presumed a gatekeeper will have *two months* to notify those quantitative thresholds to the Commission.

The Commission will then designate as “gatekeepers” those companies that meet the thresholds of the DMA. The Commission will base its decision on the information provided by the companies (subject to a possible substantiated rebuttal) and/or following a market investigation.

The Commission has *45 working days* within which it needs to adopt a decision designating such company as a gatekeeper for *each* of its relevant core platform services that meet the quantitative thresholds individually. The designation should occur at the latest by 6 September 2023.

A company that meets the quantitative thresholds of the presumption rule of Article 3(2) of the DMA can plead that it is not a gatekeeper *de facto*. However, it bears the burden of proof and has to present “sufficiently substantiated arguments” to demonstrate why it should exceptionally not be designated as a gatekeeper (Art. 3(5)). The Commission can then either conduct a market investigation or reject the company’s arguments and proceed with a designation decision.

Should a company providing core platform services *not* reach the quantitative thresholds set out in Article 3(2) of the DMA, under Article 3(8), the Commission can also designate the company as a gatekeeper in a separate market investigation pursuant to Article 17. Such a market investigation may be launched if the qualitative thresholds set out in Article 3(1) of the DMA are met by the core platform service provider.

In order to do so, the Commission has to take into account certain criteria; for example, the size of the core platform service provider, the number of business users dependent on the core platform service to reach end users, the number of end users, potential barriers to entry due to network effects and data-

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driven advantages, economies of scale and scope from which a core platform service provider benefits, the binding of business users or end users, and conglomerate or vertical corporate structures as well as other structural market characteristics.

According to Article 4 of the DMA, the Commission can also, upon request or on its own initiative, reconsider, amend, or repeal a designation decision if there has been a substantial change in any of the facts that were the base for the designation, or if the first decision was based on incomplete, incorrect, or misleading information.

Within six months after a company is identified as a gatekeeper (at the latest by 6 March 2024), it will have to comply with the “dos and don'ts” listed in the DMA. For those gatekeepers that do not yet enjoy an entrenched and durable position but are expected to do so soon, only those obligations apply that are necessary and appropriate to ensure that the company does not achieve by unfair means such entrenched and durable position in its operations.

An “Implementing Regulation” will be provided soon and is designed to provide guidance on how the Commission will apply the DMA. The Commission plans to publish the Implementing Regulation and call for feedback by the end of 2022. The notification form for potential gatekeepers in the designation process will be annexed to that Implementing Regulation.

However, companies likely to be designated as gatekeepers have already been asked to engage with the Commission and to submit draft notification forms before the formal designation process starts.<sup>8</sup> This preparatory process can be compared to prenotification talks in merger proceedings before the Commission.

## OBLIGATIONS FOR GATEKEEPERS

The DMA features two sets of obligations: Article 5 contains obligations for gatekeepers, while Article 6 sets out obligations of conduct that “may be further specified under Article 8.” Most of the newly introduced prohibitions can be linked to previous and/or ongoing European antitrust proceedings.

Article 5: Basic Rules of the Game	
Do's	Don'ts
The gatekeeper must <i>enable business users, free of charge, to communicate and promote offers to and conclude contracts with end users also beyond the platform</i> ; in other words, even if those users do not use the gatekeeper's core platform services for that purpose (Art. 5(4)).	The gatekeeper can <i>no longer process end users' personal data for targeted advertising or combine and/or cross-use data</i> across several (core platform) services of the gatekeeper or sign the end user into such other services unless <i>consent is explicitly granted</i> (Art. 5(2)). Such consent may not be requested again within one year after it is refused/withdrawn by the user.  This means that gatekeepers cannot use dark patterns to obtain end users' consent. In that regard, the text specifies that “[g]atekeepers should not design, organise or operate their

<sup>8</sup> Webinar, [DMA: What are the next steps?](#), *Concurrences* (Nov. 2, 2022).

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Article 5: Basic Rules of the Game	
Do's	Don'ts
	online interfaces in a way that deceives, manipulates or otherwise materially distorts or impairs the ability of end users to freely give consent" (Recital 37).
<p>The gatekeeper must <i>allow end users to access and use content, functions, apps etc. of business users via the core platform services</i>, including where end users acquired such items from the relevant business user without using the core platform services of the gatekeeper (Art. 5(5)).</p> <p>This means that gatekeepers cannot prevent users from easily uninstalling any preloaded software or apps or using third-party applications and application stores.</p>	<p>The gatekeeper <i>may not use price parity mechanisms</i>. In other words, the gatekeeper must allow business users to offer the same products or services to end users through third-party online intermediation services or its own direct online sales channel at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper (Art. 5(3)).</p> <p>This provision is clearly designed to prohibit both wide and narrow parity clauses as well as prevent inter-platform competition. In prohibiting any restrictions regarding business users' own sales channels, the DMA also prohibits so-called narrow price parity clauses, which are allowed in some member states' competition regimes.</p>
<p>Gatekeepers must <i>provide information to advertisers and publishers</i> regarding the placed online advertisement, and more precisely the price and fees paid by the advertiser/publisher, the remuneration received by the publisher/advertiser and the metrics on which prices and fees are calculated (Art. 5(9)–(10)).</p>	<p>The gatekeeper should <i>not prevent or restrict</i> business and end users from making <i>complaints</i> to public authorities (Art. 5(6)).</p>
	<p>The gatekeeper <i>may not oblige users to use the gatekeeper's own identification service, web browser, payment service</i>, or a technical service of that gatekeeper that supports payment services (e.g., in case of in-app purchases) (Art. 5(7)).</p> <p>This is directed at preventing the pre-installation and self-preferencing of the gatekeeper's own applications and services.</p>
	<p>Gatekeepers <i>may not require the subscription or registration for a core platform service</i> in order to be able to use another core platform service (Art. 5(8)).</p>

A number of obligations are susceptible to being further specified in the future but already apply from the entry into force of the DMA.

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Article 6 Obligations (Subject to Further Specification Under Article 8)		
Do's		Don'ts
Gatekeepers must <i>allow and technically enable end users to uninstall pre-installed software and to freely choose default settings</i> (Art. 6(3)) <sup>9</sup> as well as <i>allow the installation of third-party software</i> (Art. 6(4)).	Gatekeepers must <i>ensure effective, high-quality, continuous, and real-time access to this data in aggregated or nonaggregated form for business users and third parties authorized by a business user at their request, free of charge</i> (Art. 6(10)).	Gatekeepers may <i>not use nonpublic data</i> <sup>10</sup> generated or provided by business users in the context of their use of the relevant core platform services or other services related thereto (Art. 6(2)).
Gatekeepers must <i>ensure interoperability and access to the operating system and to the hardware and software features of the platform's core service</i> to enable the offering of ancillary services that interact with the operating system (Art. 6(7)).	Gatekeepers must allow third-party online search engine providers <i>fair, reasonable, and nondiscriminatory access to the ranking, query, click, and view data</i> generated by a gatekeeper's search engine. Any personal data in that regard should be anonymized (Art. 6(11)).	Gatekeepers <i>cannot rank their own services or products more favorably (self-preferencing)</i> than other third parties' similar products or services on their platforms (Art. 6(5)). Moreover, gatekeepers must apply transparent, fair, and nondiscriminatory conditions to their rankings.
The gatekeeper shall <i>grant advertisers and publishers—upon their request and free of charge—access to the performance measuring tools of the gatekeeper and the data necessary to carry out their own independent verification and measurement tools</i> to assess the performance of the core platform services provided by the gatekeepers (Art. 6(8)).	Gatekeepers must <i>grant business users with fair and nondiscriminatory access in a targeted manner to app stores, online search engines, and online social networking services</i> (no longer just the app store) (Art. 6(12)).	Gatekeepers may not restrict the end users' <i>ability to switch between, and subscribe to, different software applications and services</i> that are accessed using the core platform services of the gatekeeper, <i>including as regards the choice of internet access services</i> for end users (Art. 6(6)).

<sup>9</sup> This requirement does not apply to the restriction by the gatekeeper of the de-installation in relation to software applications that are essential for the functioning of the operating system or of the device and cannot technically be offered on a standalone basis by third parties.

<sup>10</sup> I.e., any aggregated and nonaggregated data generated by business users that can be inferred from, or collected through, the commercial activities of business users or their customers, including click, search, view, and voice data, on the relevant core platform services or on services provided together with, or in support of, the relevant core platform services of the gatekeeper.

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Article 6 Obligations (Subject to Further Specification Under Article 8)		
Do's		Don'ts
Gatekeepers must provide <i>end users with effective portability of data</i> generated on the platform and <i>continuous real-time access for end users and third parties authorized by an end user</i> . This obligation includes the <i>provision, free of charge, of tools to facilitate the effective exercise of such data portability, including by the provision of continuous and real-time access to such data</i> (Art. 6(9)).	Gatekeepers will have to offer an <i>alternative dispute settlement mechanism</i> in case of a disagreement between the gatekeeper and a business user as regards the application of such general conditions of access.	Gatekeepers may <i>not impose disproportionate general conditions for the cancellation of a core platform service</i> (Art. 6(13)).

## Phasing-In for Messenger Services

A further set of obligations relates to the operation of messenger services by gatekeepers (Art. 7). The notion of “number-independent interpersonal communication services” to which the DMA refers basically captures, e.g., Meta’s messenger as well as WhatsApp, which uses a phone number only for verification and identification of the end user.

As a basic rule, gatekeepers providing messaging services must *grant interoperability concerning basic functionalities of their instant messaging services allowing third parties to interoperate with their own services* (Art. 7(1)).

This obligation means that smaller platforms will be able to request that gatekeeper messaging platforms enable their users to exchange messages and send voice messages or files across messaging apps. The gatekeeper will have to comply with any reasonable request for interoperability within three months after receiving that request by rendering the requested basic functionalities operational.

This provision is designed to facilitate multi-homing for social messengers, as already available for email providers. In addition, end users will equally have the choice to use or refuse such an option where their provider has decided to interoperate with a gatekeeper.

However, messenger services benefit from *transitional arrangements*, which delay the application of the DMA to them:

- Individual voice calls and messages via chat groups are not subject to the DMA for another two years (Art. 7(2b)).
- Voice calls and video calls between an individual user and within a group chat will not have to be interoperable for another four years (Art. 7(2c)).

Non-gatekeeper service providers of messenger services are not obligated to implement interoperability, meaning they are free to choose either to benefit from such interoperability obligation that falls upon the gatekeeper or to keep their services separate from the gatekeeper.

Also, a previous proposal to include social media into the interoperability obligation was not included in the final compromise.

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## Information on M&A Transactions

According to Article 14 of the DMA, gatekeepers must *inform the Commission about the acquisitions and mergers they intend to carry out* in case the merging entities or the target of the concentration provide *core platform services or any other services in the digital sector or enable the collection of consumer data*. Gatekeepers must inform the Commission about such transactions irrespective of whether they are notifiable to the Commission under Regulation (EC) No 139/2004 (EU Merger Regulation).

This information is not a full-blown notification, but *key features of the transaction must be provided* and the Commission will share this information with EU member state authorities. The obligation to report intended acquisitions to the Commission applies from July 2023. The information can be used by the Commission to open market investigations or ask member state competition authorities to examine a given transaction. Conversely, member states can ask the Commission to take on the case. A push to change the standard of review for such transactions, balancing the scale of any harm against likelihood, was ultimately rejected.

## Sanctions

If a gatekeeper violates the rules laid out in the DMA, the Commission can impose a fine on the gatekeeper of up to *10% (in the case of less serious infringements such as information obligations: up to 1%) of its total worldwide turnover* in the previous financial year in accordance with Article 30(1) and (3). This substantially reflects Article 23 of Regulation 1/2003, which sanctions antitrust infringements.

For a systematic offence, a fine of up to 20% of its worldwide turnover may be imposed on the gatekeeper. "Systematic" noncompliance with the DMA means *at least three infringements within eight years* in relation to the same core platform service (Art. 30(2)). If a gatekeeper *systematically* fails to comply with the DMA, the Commission may impose behavioral or structural remedies on the gatekeeper to ensure compliance (Art. 18).

The Commission is also entitled to order periodic penalty payments of up to 5% of the average daily turnover in certain cases defined in the DMA.

The final compromise also corrected an unintended "technical loophole" from the previous version: The DMA establishes that companies labeled as gatekeepers must fulfill the additional *monitoring obligations*, i.e., appointment of a compliance monitor role within the organization, annual reporting and publication of the steps taken by the gatekeeper to comply with the conduct obligations, and an obligation on management to review compliance at least annually (Art. 28).<sup>11</sup>

Finally, a noteworthy change had been introduced in the final version of the DMA regarding possible sanctions for gatekeepers, namely the *possibility for collective damages actions before national member state courts* in case of violations of the DMA (Art. 42).

## Enforcement

The *Commission will be in sole control of the implementation and enforcement* of the DMA. *Member states can open*, at their own initiative, an investigation into a case of possible noncompliance with Articles 5, 6, and 7 of the DMA on their territory and report about their findings to the Commission. But as soon as the Commission takes up the case, the member state authority must stop the procedure.

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<sup>11</sup> In the previous version of the DMA, there were no projected fines for gatekeepers that failed to set up a compliance function. A subsequent amendment designated such a failure as a breach of the DMA, which could trigger a fine of up to 1% of a gatekeeper's global revenue (Art. 30(3j)).



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Moreover, the Commission will have the exclusive power to adopt a decision of infringement, as well as impose relevant remedial measures.

A big achievement was a last-minute change in the compromise, pursuant to which member states can keep the possibility to *independently conduct proceedings against gatekeepers under their own national digital market rules*, which may be similar but not identical to the DMA, i.e., Germany's rules.

Generally, the Commission's powers of investigation to prove an infringement of the DMA (Articles 20–29 of the DMA) are similar to those under European antitrust law (Articles 17–22 of Regulation 1/2003). An additional and *novel power of the Commission under the DMA is the ability to gain insight into the algorithms used by an undertaking* (Art. 21 and 23(2) lit. d). The latter is particularly relevant in order to review algorithm-based remedies, should there be a suspicion that the infringement has not been (sufficiently) stopped.

Finally, as mentioned above, the Commission is also given a *market investigation* tool to designate an undertaking as gatekeeper (Article 17, for example, in less clear-cut cases), expand the list of core platform services (Article 19), or expand the list of obligations of conduct (Articles 12 and 19).

## **Additional Dedicated Commission Resources**

Enforcement of the DMA will be shared between the Commission's competition and tech policy departments, DG Competition and DG Connect. The DMA will lead to the establishment of a brand-new enforcement structure within DG Competition. A new DMA directorate will be created, reporting to DG Competition Deputy Director-General for Antitrust Linsey McCallum. This already shows that enforcement centers around antitrust concerns, building on existing antitrust procedures on self-preferencing or data handling.

Two distinct teams will be placed into this new directorate. First, current unit C6, led by Thomas Kramler, which is already leading some of the Big Tech investigations. Second, a taskforce, currently led by Lea Zuber, and up to 19 new posts, which will be the basis of two new enforcement units. All of this is scheduled to be up and running by January 2023. Further, the post of a Chief Technologist Officer (CTO) will be created, operating similarly to the Commission's Chief Economist, also beyond the enforcement of the DMA.

On 11 November 2022, the Commission [published two separate tenders](#) to get the expertise required to enforce the DMA. The tender documents state that enforcers face tight deadlines, highly technical information, and competing views of the market. The Commission is looking for two contractors to "obtain the right mix of skills and technical expertise."

According to previous tender documents, the Commission gave two theoretical examples of where help might be required. The first refers to two owners of mobile operating systems and app stores, and how touch-and-go technology on a mobile phone might be used to open a car door. In this scenario, the consultant would have to analyze the security risks of allowing other companies access to the phone's chip technology.

In the second example, the Commission puts forward the case of an online marketplace for selling gardening equipment that has access to the data of some of its independent sellers. The marketplace wants to split the running of the platform from its own retail operations. The Commission says its consultants should provide an analysis of how to run separate databases, algorithms, and technical infrastructure so an external auditor could ensure the separation was effective.

DMA officials in DG Connect, headed by Director Rita Wezenbeek, in turn, will focus on rules mandating interoperability, or settle disputes between publishers and search engines.

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## ANALYSIS

The DMA reflects a policy shift toward the ex-ante regulation of digital (platform) operators and will bring about a novel set of obligations to platform operators.

Some prohibitions are worded precisely, as they are building on past or existing cases. They are therefore not forward looking and lack flexibility. The list of obligations under the DMA can only be extended or changed after a market investigation pursuant to Article 19 (duration: at least 18 months) and by way of adoption of a new legislative amendment (delegated act).

Such a one-size-fits-all approach increases the risk of over-enforcement, not least because the starting point is primarily based on quantitative thresholds. Most importantly, and different from, for example, the German rules, the DMA does not provide for an objective justification for a gatekeeper's behavior, apart from exceptions related to economic viability (Art. 9) or for reasons of public health and security (Art. 10). In that regard, it is yet unclear what dynamic will emerge between the Commission and the national courts as regards the DMA's enforcement.

Additionally, further necessary guidance from the Commission on compliance with the DMA may only be available after companies have started engaging in the designation process. For example, the methodology according to which the thresholds are calculated leave various options. Further, guidance will be required on how companies not meeting the quantitative thresholds will be designated as gatekeepers on other than quantitative criteria. The Commission will hold workshops in early December,<sup>12</sup> bringing together platforms and business users to discuss questions on compliance.

It also remains to be seen whether the case practice will allow for sufficient due process guarantees. Contrary to the rules under the DMA, the potential gatekeeper is not provided with a last opportunity to comment on the findings before the Commission with the adoption of the final designation decision.

When it comes to M&A, the Commission will now dispose of the instruments to watch over Big Tech companies taking control of small businesses. The obligation to report intended acquisitions arguably extends the scope of the DMA by bringing in products in scope that would otherwise not be subject to its ex-ante regulation. In any event, it will allow the Commission and member states to look into a lot of business data, so companies should apply stricter standards in their internal documents and communications.

Another tricky area of application will be the regulation of fair and nondiscriminatory access (commonly referred to as FRAND). What constitutes FRAND has long been subject to intense debate and litigation, with the Commission being notoriously reticent to take a position on fair remuneration. According to reports, Andreas Schwab, the lead MEP for the DMA, expects the Commission to come to a solution within the so-called "regulator dialogue" allowed for by the DMA.

From a constitutional point, finally, the DMA is likely to trigger litigation early next year by gatekeepers that could seek to challenge the legal basis on which the regulation was adopted. The DMA was adopted on the basis of Article 114 of the Treaty on the Functioning of the European Union (TFEU), a provision that allows EU legislators to adopt measures primarily aimed at harmonizing national rules and prevent regulatory fragmentation.

Some specialists believe that the appropriate legal basis for the DMA would have been Article 352 of the TFEU, which allows for EU action if required for the attainment of policy objectives set out in the EU Treaties. This provision would, however, have required unanimity within the Council and, reportedly, member states did not unanimously support the DMA, or at least not in its current form. This also sheds light on the open question on the interplay between the DMA and similar laws in certain member states.

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<sup>12</sup> A first workshop on self-preferencing will be held on 5 December 2022. A second workshop on interoperability is reportedly scheduled for early 2023.

# Morgan Lewis

## CONTACT

If you have any questions or would like more information on the issues discussed in this report, please contact:

### Brussels

Christina Renner

+32.2.507.7524

[christina.renner@morganlewis.com](mailto:christina.renner@morganlewis.com)

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