



Getting past the Gatekeepers

The EU Digital Markets Act

November 2022

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Introduction

The European Commission (the “**Commission**”) is leading the way on big tech regulation with the Digital Markets Act (“DMA”), which came into force on 1 November 2022 with the aim of putting an end to unfair practices in the online platform economy.

The Commission recognises the increasingly important role that digital services and online platforms have on the economy. Certain big tech companies (referred to as “**Gatekeepers**”) provide core platform services, such as distributing and advertising products, and have the ability to connect third party business users with many customers through their services. This, in turn, enables these ‘Gatekeepers’ to leverage certain advantages, such as access to large amounts of business or consumer user data which could threaten competition within the relevant markets. The DMA seeks to redress the imbalance of power in the digital sector to ensure that these markets remain open and fair.

Who are the ‘Gatekeepers’?

Under the DMA, ‘Gatekeepers’ are those companies that provide certain services such as app stores, online search engines, social networking services, certain messaging services, video sharing platform services, virtual assistants, web browsers, cloud computing services, operating systems, online marketplaces, and advertising services.

If a company satisfies the following three main criteria, it will be classified as a ‘Gatekeeper’ and must comply with the provisions of the DMA:

(1) a significant impact on the internal market: the company provides the same core platform service in at least three Member States and has either an annual turnover within the EU of at least €7.5 billion for each of the past three financial years or the fair market value of the undertaking is at least €75 billion;

(2) provision of a core platform service that controls an important gateway for business users to reach end users: the company provides a core platform service to at least 45 million monthly active end users established or located in the EU in the last financial year and at least 10,000 yearly active business users established in the EU in the last financial year; and

(3) an entrenched and durable position: the company has met the second criterion for the last three financial years.

There will be a six-month implementation period after which any company that satisfies these three criteria must notify the Commission that it is a ‘Gatekeeper’. The ‘Gatekeeper’ will have a

maximum of six months after the Commission’s decision on designation, to ensure compliance with the DMA.

“Do’s” and “Don’ts” For ‘Gatekeepers’ Platforms

The DMA establishes certain obligations that ‘Gatekeepers’ must comply with in their daily operations. For example, a ‘Gatekeeper’ must not:

- ❌ treat its own products or services more favourably in ranking than similar services offered by third parties on the ‘Gatekeeper’s’ platform;
- ❌ prevent end users from linking up to businesses outside the ‘Gatekeeper’s’ platform;
- ❌ prevent users from un-installing any pre-installed software or app if they wish; or
- ❌ track consumers outside of the ‘Gatekeeper’s’ core platform service for the purposes of targeted advertising, without effective consent having been granted.

The DMA also imposes certain onerous positive obligations on a ‘Gatekeeper’. For example, a ‘Gatekeeper’ must:

- ✅ allow users to download the app store of their choice on their mobile phone;
- ✅ offer users the possibility to install a default search engine; web browser or voice assistant of their choice at the time of first use;
- ✅ allow third parties to inter-operate with the ‘Gatekeeper’s’ own services in specified circumstances;
- ✅ provide advertisers who use their platform with tools and information regarding pricing and fees paid by the advertiser or remuneration received by the publisher, to carry out their own independent verification on their advertisements hosted by the ‘Gatekeeper’;
- ✅ allow its business users to access the data they generate in their use of the ‘Gatekeeper’s’ platform;
- ✅ allow business users to promote offers to end users acquired through the ‘Gatekeeper’s’ core platform service or other services;
- ✅ allow business users to conclude contracts with end users, regardless of whether the end user uses the core platform service; and
- ✅ allow end users to access and use content, subscriptions, features, or other items through the ‘Gatekeeper’s’ core platform services.

Powers of the Commission and Sanctions

The Commission will be the sole enforcer of the DMA, in cooperation with the relevant authorities in the EU Member States, and may make formal information requests, carry out interviews, take statements, conduct inspections and carry out market investigations.

Very significant fines can apply if a 'Gatekeeper' fails to comply with its obligations under the DMA. In the case of non-compliance, fines of up to 10% of the 'Gatekeeper's' total worldwide turnover, or in the case of repeated infringements up to 20% of the 'Gatekeepers' world turnover, can be imposed. Furthermore, if there are systemic infringements, the Commission is also able to impose behavioural or structural remedies necessary to ensure the effectiveness of the obligations, which could include a ban on further acquisitions. The Commission also has the power to conduct dawn raids.

It is also worth noting that third parties, who have suffered harm, may take a direct action against a 'Gatekeeper' for civil damages in a national court following a decision by the Commission of a failure by a 'Gatekeeper' to comply with the DMA. The Commission will cooperate with national courts in such proceedings by transmitting information or providing opinions to questions raised on the application of the DMA.

Conclusion

As it aims to have the protection of business users and end users at its forefront, the DMA will no doubt quickly become a core piece of legislation within the EU.

Obligations on 'Gatekeepers' under the DMA are strict and non-compliance may result in substantial fines and/or behavioural remedies being imposed. If you are operating within the digital sector and would like to understand more about the DMA, or how the DMA might impact your business, please contact our EU & Competition Team.

Key contacts

For further information, please get in touch with your usual Eversheds Sutherland contact, or your local Competition lawyer below:



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