



## The EU Digital Markets Act

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The European Union's Digital Markets Act introduces rules for platforms that act as "gatekeepers" in the digital sector. These are platforms that have a significant impact on the European single market due to their size and reach. This market power sometimes manifests itself in the fact that corresponding platforms can unilaterally determine the "rules of the game" for their users. Google, Facebook, YouTube and Amazon come to mind. However, the regulation also covers those platforms whose gatekeeper function is only to be feared in the future. Such platforms are often a central interface for communication between companies and their customers.

The Digital Markets Act aims to prevent gatekeepers from imposing unfair conditions on businesses and consumers and to ensure the openness and transparency of important digital services. Examples of these unfair conditions include prohibiting companies from accessing their own data or situations where users are locked into a particular service and have limited options to switch to alternative services ("lock-in effect").

### **Applicability**

The Digital Markets Act will only apply to large companies. The draft regulation that has now been adopted

sets objective criteria for identifying "gatekeepers". They must control at least one so-called "core platform service" (such as search engines, social network services, certain messaging services, operating systems, and online intermediary services) and have a persistent, large user base in several EU countries. The Digital Markets Act can thus be seen as a response to the rampant market power of the Internet giants.

Specifically, there are three main cumulative criteria that bring a company within the scope of the Digital Markets Act:

1. A size that affects the internal market: This is presumed if the company has an annual turnover in the European Economic Area (EEA) of at least €6.5 billion in the last three financial years, or if its average market capitalization or equivalent market value in the last financial year was at least €65 billion, and it provides a central platform service in at least three member states;
2. The control of a major gateway for commercial users towards end users: this is presumed if the company operates a central platform service with more than 45 million monthly active end users based or located in the EU and more than 10,000 annually active commercial users based in the EU in the last fiscal year;



3. A (presumably) consolidated and lasting position: this is presumed if the company has met the other two criteria in each of the last three financial years.

If all these quantitative thresholds are met, the company in question is presumed to be a gatekeeper, unless it can prove otherwise. However, a company may also be identified as a gatekeeper by the Commission if it does not (yet) meet all the requirements. Market investigations by the Commission are to take place for this purpose.

**Legal consequences for platforms**

In the future, gatekeepers will have to behave in a way that ensures an open and fair online environment for companies and consumers. To this end, they must comply with certain obligations set out in the draft legislation, i.e., proactively implement certain behaviors and refrain from unfair conducts.

If a company does not yet have an established and lasting market position, but it is foreseeable that this will be the case in the near future, it must already comply with a certain part of the obligations under the Digital Markets Act. This is to ensure that the gatekeeper in question does not use unfair means to achieve a consolidated and permanent market position in its field of activity.

**Duties and prohibitions of gatekeepers**

The Digital Markets Act sets forth a list of obligations that gatekeepers must implement in their daily operations to ensure fair and open digital markets. This list is to be continually developed and updated.

Some examples of the obligations include:

- Gatekeepers must provide businesses advertising on their platform with access to the gatekeeper’s performance measurement tools and the information necessary to allow advertisers and publishers to conduct their own independent review of their advertising hosted by the gatekeeper;

- Gatekeepers must allow their business users to advertise their offers and enter into contracts with their customers outside of the gatekeeper’s platform;
- Gatekeepers must allow their business users access to data generated by their activities on the Gatekeeper platform.

Some examples of prohibitions include:

- Gatekeepers may no longer prevent users from uninstalling pre-installed software or apps;
- Gatekeepers may not use data obtained from their business users to compete with those business users;
- Gatekeepers may not prevent their users from accessing services that they may have purchased outside of the gatekeeper platform.

**Implementation by the Commission**

Once the Digital Markets Act is enacted, the Commission will consider whether companies engaged in core platform services qualify as gatekeepers under the regulation:

1. Companies will have to verify for themselves whether they meet the quantitative thresholds set out in the regulation for identifying gatekeepers. They will then have to provide information on this to the Commission.
2. The Commission will then designate as gatekeepers those companies that meet the thresholds of the Regulation, based on the information provided by the companies (subject to possible substantiated rebuttal) and/or following a market investigation.
3. Within six months after a company is identified as a gatekeeper, it must comply with the obligations and prohibitions set forth in the Regulation. For those gatekeepers who do not yet hold an established and permanent position, but who are expected to do so in the near future, only such obligations shall apply that



are necessary and reasonable to ensure that the company does not use unfair means to achieve such an established and permanent position in its operations.

## Legal consequences in the event of infringement

To ensure the effectiveness of the new rules, the possibility of sanctions for non-compliance with the prohibitions and obligations is provided for.

If a gatekeeper does not comply with the rules, the Commission can impose fines of up to 10% of the company's total annual worldwide turnover and periodic penalty payments of up to 5% of the company's total annual worldwide turnover. Fines in the billions are thus theoretically possible.

In the case of systematic violations, the Commission may impose additional measures. If necessary to achieve compliance and if no alternative, equally effective measures are available, these may include structural remedies, such as requiring a gatekeeper to sell a company or parts thereof (break-up).

## Market investigations

To ensure that the new gatekeeper rules keep up with the rapid pace of digital markets, the Commission will have the power to conduct market investigations. The purpose of market investigations is threefold:

- Identify gatekeepers that are not covered by the quantitative thresholds provided in the Digital Markets Act, or that meet those thresholds but have made a reasonable request that rebuts the presumption based on those thresholds;
- Determine whether additional services within the digital sector should be added to the list of core platform services covered by the regulation or whether new practices are emerging that could have the same adverse effects as those already covered;

- Develop additional remedies if a gatekeeper has systematically violated the Digital Markets Act rules.

## Enforcement of the Digital Markets Act

Given the cross-border nature of gatekeepers and the complementarity of the Digital Markets Regulation with the Digital Services Regulation and other internal market legislation, and in particular competition law, enforcement of the instrument will remain in the hands of the Commission. Member States may at any time request the Commission to launch a market investigation for the purpose of designating a new gatekeeper.

## Damages

The Digital Markets Act is a regulation that imposes precise obligations and prohibitions on gatekeepers affected by its scope. Once adopted, the regulation is directly applicable in every member state of the EU. This facilitates damages claims by those harmed by the conduct of non-compliant gatekeepers.

## Relationship to competition law

The Digital Markets Regulation complements competition law enforcement at the EU and national levels. The new rules are without prejudice to the enforcement of EU competition rules (Articles 101 and 102 TFEU) and national competition rules relating to unilateral conducts. With the Digital Markets Regulation, the Commission aims to be able to take faster and easier action against anti-competitive behavior. By constantly developing the obligations and prohibitions, it should be possible to flexibly stop new practices. Existing competition law is not always sufficiently suited to the fast-paced online world.



## Further procedure

The regulation still has to be adopted by the EU Parliament and the member states before it comes into force.

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