



Dottie Kinn, „Golden Gate Bridge“, 2012.

THE EU ACTIVATES DIGITAL MARKETS ACT

What business users, customers and innovators need to know

SUMMARY

The Digital Markets Act (DMA), a new regulation of the European Union (EU), started to apply in May 2023. The DMA is aimed to ensure fair and open digital markets in the EU.

The DMA is targeted at large online platforms which have a strong economic position and a significant impact on the internal market as well as a strong intermediation position. Such companies may be designated as “gatekeepers”.

By 3 July 2023, large online platforms that may meet the criteria set out in the DMA to qualify as gatekeepers were required to notify the European Commission (EC) for a thresholds check. Online platforms that are designated as gatekeepers will have to comply with certain “do’s” and “don’ts” in their daily operations. Non-compliance will result in fines of up to 10% of a company’s total worldwide annual turnover.

“Don’ts” include favouring services and products offered by the gatekeeper itself in ranking and preventing users from un-installing any pre-installed software or app if they so wish.

Analysis shows that enforcement of the new obligations is likely to increase costs for end-users and business clients, reduce the supply and quality of services, and slow down the development of innovation- and technology-driven start-ups with strong growth potential. These outcomes will largely result from the new regulatory interventions rather than from business decisions driven by consumers and market processes.

1. WHO FALLS UNDER THE NEW DIGITAL MARKET RULES

Stages in the implementation of the Digital Markets Act¹



The Digital Markets Act (DMA) aims to regulate large online platforms that qualify as "gatekeepers". This designation is assigned when companies, among other criteria, have a strong economic position and a strong intermediation position, meaning that they link a large user base to a large number of businesses. The European Commission holds that online platforms that act as "gatekeepers" negatively affect the internal market, so the regulations are intended to ensure such platforms behave in a fair way online. The DMA entered into force in May 2023.

By 3 July 2023, large online platforms were obligated to provide data and notify the European Commission for thresholds checks to determine whether they qualify as gatekeepers. The Commission will qualify companies as gatekeepers and announce the list of gatekeepers on 6 September 2023.

¹ "Digital Markets Act: rules for digital gatekeepers to ensure open markets enter into force", European Commission. Retrieved on 30 May 2023 from https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6423.

According to the DMA, a company shall be deemed a gatekeeper if the following criteria hold:²

- *the quantitative criteria listed in Table 1 for turnover, market value, and number of users*, which are meant to ensure that gatekeeper status is not applied to relatively small market players;
- *the market power criteria listed in Table 2*, which establish whether a company has a significant impact on the internal market, enjoys an entrenched and durable position, and has control of a crucial gateway between business and end users;
- *the core platform service criterion, detailed in Table 3*, according to which the DMA does not apply to the digital market as a whole, but only to companies that provide one of the services referred to as a "core platform service".

TABLE 1

*Quantitative criteria
for gatekeepers³*

Annual Union turnover equal to or above EUR 7.5 billion in each of the last three financial years;

Average market capitalisation or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year;

Provides a core platform service that in the last financial year has at least 45 million monthly active end users established or located in the Union and at least 10 000 yearly active business users established in the Union.

TABLE 2

*Market power criteria
for gatekeepers⁴*

Has a significant impact on the internal market;

Provides a core platform service which is an important gateway for businesses to reach end-users;

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

Once formally qualified as gatekeepers (the designation date is 6 September 2023), companies will have six months to comply with the "do's" and "don'ts" defined in the DMA (see Tables 4 and 5).

² "Digital Markets Act: rules for digital gatekeepers to ensure open markets enter into force", European Commission. Retrieved May 30, 2023 from, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6423

³ "Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (Text with EEA relevance)", EUR-lex. Retrieved June 5, 2023 from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925>

⁴ "The Digital Markets Act: ensuring fair and open digital markets", European Commission. Retrieved June 5, 2023 from https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en

TABLE 3

Core Platform Services Covered by the DMA

Core Platform Services⁵	Examples⁶
Online intermediation services	<i>Google Play Store, Apple App Store, Apple eCommerce, Apple Books, Facebook marketplace, Airbnb; Uber, Uber Eats; Booking.com, Expedia.com, PayPal, eBay eCommerce, Zalando eCommerce</i>
Online search engines	<i>Google Search, Bing Search, Yahoo Search</i>
Online social networking services	<i>LinkedIn, Facebook, Instagram, Twitter</i>
Video-sharing platform services	<i>YouTube, Facebook, Dailymotion</i>
Number-independent interpersonal communications services	<i>Skype, MS Teams, Messenger, WhatsApp, Zoom, Slack</i>
Operating systems	<i>Android, Windows, MacOS, iOS</i>
Web browsers	<i>Chrome, Safari</i>
Virtual assistants	<i>Alexa, Siri, Google Assistant, Cortana</i>
Cloud computing services	<i>Google Cloud, Amazon Web Services, Microsoft Azure, SAP IaaS/PaaS, Oracle Cloud, Salesforce</i>
Online advertising services, including advertising networks, advertising exchanges, and any other advertising intermediation services	<i>Google Display and Search Ad, YouTube Video Ad, Amazon Display and Search Ad, Twitch Video Ad, Bing Search Ad, LinkedIn Display Ad, Facebook Display Ad, Instagram Display Ad, Twitter Display Ad, Booking Search Ad, Expedia Search and Display Ad, eBay Search Ad, Zalando Search and Display Ad, Yahoo Search Ad, Dailymotion Video Ad</i>

⁵ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (Text with EEA relevance)", EUR-lex. Retrieved June 5, 2023 from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925>

⁶ "Which platforms will be caught by the Digital Markets Act? The 'gatekeeper' dilemma", Bruegel. Published December 14, 2021 <https://www.bruegel.org/blog-post/which-platforms-will-be-caught-digital-markets-act-gatekeeper-dilemma>

2. THE “DON'TS” FOR GATEKEEPERS

The DMA specifies practices that allegedly manifest market "imperfections". The new rules establish obligations for gatekeepers – “do’s” (see Table 5) and “don’ts” (see Table 4) that they will have to comply with in their daily operations.

TABLE 4	TABLE 5
<p><i>Don'ts</i></p> <p>Treat services and products offered by the gatekeeper itself more favourably in ranking than similar services or products offered by third parties on the gatekeeper's platform;</p>	<p><i>Do's</i></p> <p>Provide companies advertising on their platform with the tools and information necessary for advertisers and publishers to carry out their own independent verification of their advertisements hosted by the gatekeeper;</p>
<p>Prevent consumers from linking up to businesses outside their platforms;</p>	<p>Allow their business users to access the data that they generate in their use of the gatekeeper's platform;</p>
<p>Prevent users from un-installing any pre-installed software or app if they wish so;</p>	<p>Allow third parties to inter-operate with the gatekeeper's own services in certain specific situations;</p>
<p>Track end users outside of the gatekeepers' core platform service for the purpose of targeted advertising, without effective consent having been granted.</p>	<p>Allow their business users to promote their offer and conclude contracts with their customers outside the gatekeeper's platform.</p>

The key presumption of the DMA is that large online platforms use unfair practices with regard to business clients and users to gain an undue advantage and significant market power. A pre-defined set of obligations for gatekeepers, the “do’s” and “don’ts”, is expected to make European digital markets fairer.

The following analysis examines two forbidden practices. Specifically, gatekeepers may no longer:

- treat services and products offered by the gatekeeper itself more favourably in ranking than similar services or products offered by third parties on the gatekeeper's platform,
- prevent users from un-installing any pre-installed software or application if they wish to do so.

2.1. Prohibiting online platforms from favouring their own products

Large online platforms that are formally recognized as gatekeepers will be barred from treating their own services or products more favourably on their core platform than similar services or products offered by third parties on the platform.

At present the users of a core product or service of an online platform may be offered another product or service of that same platform without their prior effective consent. For example, amazon.com offers Amazon Basics products in a higher ranking on its e-commerce site and Google Search provides a link to Google Maps for a user who searches for a given restaurant.

In addition to their core business (e.g. the production of smartphones or operating systems or internet search engines), large digital companies develop new services, like the mentioned mapping services (Google Maps⁷) or financial services (like Apple Pay⁸), to grow and expand. In other words, such companies offer users their own additional products, and in doing so they position their own products more favourably than others on their platforms.

The EC considers such a strategy to be unfair and to disregard users' interests. However, prohibiting large online platforms from treating their own other products and services more favourably on their own platforms may have unintended negative consequences for consumers and digital market participants.

Consumers' decisions may become irrelevant, reducing their freedom to make informed choices. The DMA appears to assume it is evident that giving preference to one's own product or service is a negative act. It fails to assess whether giving preference to a service offered by the platform itself really is, in fact, negative for the consumer. The consumer's interest should always be given priority. The consumer should be the ultimate decision maker and not an intermediary regulatory body that decides for the consumer.

It is wrongly assumed that businesses will intentionally provide lower-quality products or services just to maximize profit or will seek to undermine their own users in some other way. The alleged strategy for an online platform of acting against its customers, disregarding the customers' needs and thus the laws of demand, is not economically viable. It would be detrimental to the business. Widespread use of such practices would, over time, simply result in the loss of a large proportion of customers.

By putting the consumer in an allegedly worse position, the DMA is creating a need for intervention by a third-party arbitrator in the business of two parties (consumer and supplier). In reality, it is up to the consumer to decide whether prioritizing an online platform's product is

⁷ Viktor Hendelmann, "How Does Google Maps Make Money? Analyzing Its Business Model", Productmint. Retrieved June 13, 2023 from <https://productmint.com/how-does-google-maps-make-money/>

⁸ Roel Wieringa, "The Business Models of Apple Pay and Apple Card", The value engineers. Published July 20, 2020 <https://www.thevalueengineers.nl/the-business-models-of-apple-pay-and-apple-card/>

beneficial or harmful to the consumer and based on that to 'vote' with their money. If platforms do in fact give preference to their own service/product and their user base does not decrease, that would be a clear sign that the services thus preferred are suitable for consumers. It would show they trust the platform and its judgment to provide for the best end result. In this two-way "contract" between provider and consumer, there is no need for a third party (regulator).

Prohibiting platforms from favouring their own products ignores the will of consumers as expressed in their own choices. Enforcing this provision will limit the scope of consumers ability to make a free and informed choice of goods and services.

Ultimately, consumers will pay for the additional restrictions. The notion that a consumer needs as much choice as possible in all possible cases is not accurate. In the current era of information overload, it is often not more product choices that consumers pay for, but rather products selected and adapted to meet their preferences. Users pay a platform by providing their data to save time and enable selection of the best products/services for their needs. The consumer trusts the means a platform uses to achieve the goal of fewer options, but ones that fit the user's preferences. If a platform gives preferential treatment to its own services to achieve the goal set by the user, then so be it. If a platform proves to be successful (in terms of its market share and increasing number of users, for example), then the users are showing they consider it a good strategy, worth paying for (whether in money or user data). Allowing a platform to do whatever it takes (without violating the law) to achieve the objective of fewer but well-selected options saves users time. And on the contrary, applying the regulations in the DMA would require additional time resources from the user.

The DMA distorts competitive conditions for digital technology services. The act singles out certain digital technology services and imposes higher requirements on companies that provide those services. This may reduce the competitiveness of businesses in digital technology, especially those providing the specific core platform services listed in the DMA.

The problem it is alleged is uniquely created by gatekeepers in the digital sector in fact can be frequently seen in other sectors. Many large companies, not only in the digital tech sector, have a strong economic position and a significant impact on the internal market, and are active in multiple EU countries.⁹ However, it is questionable whether this position of theirs can be properly called "gatekeeping", i.e. the power to allocate resources and opportunities.¹⁰

One example of self-preferencing in other fields of business is a grocery store's placement of private-label products on its shelves. Stores give priority to their own products over those of other suppliers.

⁹ "The Digital Markets Act: ensuring fair and open digital markets", European Commission. Retrieved June 5, 2023 from https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_it

¹⁰ Cambridge Dictionary. Retrieved June 7, 2023 from <https://dictionary.cambridge.org/dictionary/english/gatekeeper>

Another example is stores in major shopping centres which are owned by the owner of the shopping centre. Self-preferencing in this case is the very fact that a shopping centre owner has a store of its own in its building. Prohibiting self-preferencing would allow a consumer to protest the fact that a grocery store in the shopping centre is owned by the shopping centre's owner.

Prioritisation of a company's own products is common in many sectors, but it is only the digital markets that are being subjected to stringent restrictions.

It encourages the inefficient use of scarce resources. Under free and open market conditions, it is the consumer's verdict that determines what products and services are competitive. The new regulations, however, create a risk that products and services which for one reason or another would not survive under open market conditions may now become successful. This will result in an ineffective distribution of scarce resources, thus harming the consumer, who for that reason will either receive lower quality or have to pay more.

As an example, there are alternatives to the Google search engine, even some, like DuckDuck Go¹¹, that offer untracked browsing (and no self-preferencing), yet 4 out of 5 users choose the Google search engine instead¹². Even if alternatives with no self-preferencing exist, users still use a product that has self-preferencing. This indicates that self-preferencing is not as important as EU institutions and regulators might think. The high level of consumer trust in such a service with self-preferencing is highly significant. It shows that competing products simply do not provide a good enough offer to motivate users to switch.

Regulations that favour a group of suppliers who would not be competitive without such public intervention mean that scarce resources will end up being allocated and used inefficiently.

Implementing the regulations could be costly. The costs of implementing the DMA should be assessed. Even clear quantitative criteria for identifying gatekeepers, like market capitalisation and number of active users, pose serious implementation risks. Market capitalisation, for instance, can be volatile, especially in a context of high market uncertainty, and what defines an "active end-user" may vary notably for different platforms.

The DMA states that "core platform service(s) shall consider as distinct core platform services those core platform services which are used for different purposes by either their end users or their business users"¹³ (e.g. Facebook and Facebook Messenger). Although they seem similar, Facebook and Instagram can also be treated as separate core platform services because their

¹¹ Ivy Wigmore, "DuckDuckGo", Techtarger. Retrieved June 13, 2023 from <https://www.techtarger.com/whatis/definition/DuckDuckGo>

¹² "Market share of leading desktop search engines worldwide from January 2015 to March 2023", Statista. Retrieved June 13, 2023 from <https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/>

¹³ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (Text with EEA relevance), EUR-lex. Retrieved June 5, 2023 from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925>

users use these social networks for different purposes.¹⁴ Distinguishing based on the purpose for which an end-user uses a platform could be extremely challenging.

These examples show that implementation of the DMA could lead to lengthy and costly disputes over matters of interpretation, possibly involving legal proceedings. There is thus a risk that enforcement of the DMA's "Don'ts" will be difficult and may require more resources than the potential benefits it could bring.

2.2. *Prohibiting the installation of non-removable applications*

Another practice the DMA declares unacceptable for gatekeepers is preventing users from un-installing any pre-installed software or application if they wish.¹⁵ Examples are applications that are integral to the operating system (e.g. settings applications), core applications (e.g. camera, messaging, web browser), and applications that are built-in for commercial advantage (e.g. an app store, mobile wallets, etc.).¹⁶

Consumer choice is being limited. Products and services seek to offer different unique benefits to consumers to increase the user base. Thus, certain smartphone producers (with their respective operating systems) offer price or quality as a benefit to the user, while others allow users to delete built-in apps if they wish to do so. Still others offer the unique benefit of a standard package of smartphone services (including non-removable applications) that is uniformly available anywhere in the world. The DMA poses a serious threat to that last benefit. Forbidding non-removable applications reduces the scope for such unique value creation, homogenizing the value proposition that smartphones can offer consumers and thus reducing consumer choice.

Predictability when buying a product is being reduced. A product and its pre-installed software or applications are a complete package the consumer receives. Users who do not like a particular application (say, the Safari browser) are free to choose another product makes applications "deletable" as a benefit. But if a consumer chooses to buy a full package (e.g. the whole iPhone experience including its "non-removable" applications), that means the overall benefits offered by the package outweigh the potential benefits of having the possibility of deleting the apps. Again, it comes down to letting the consumer be the ultimate decision-maker.

Analysing it further, the prohibition of pre-installed non-removable applications deprives the consumer of the predictability of knowing what standard features to expect anywhere

¹⁴ Christophe Carugati, "The difficulty of designating gatekeepers under the EU Digital Markets Act", Bruegel. Published February 20, 2023 <https://www.bruegel.org/blog-post/difficulty-designating-gatekeepers-under-eu-digital-markets-act>

¹⁵ "The Digital Markets Act: ensuring fair and open digital markets", European Commission. Retrieved June 5, 2023 from https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en

¹⁶ JOE CASON, "Here Are All the Pre-Installed iPhone Apps You Can and Can't Delete", makeuseof.com. Published June 8, 2022 <https://www.makeuseof.com/which-pre-installed-iphone-apps-can-you-delete/>

worldwide. The business model of the McDonald's fast-food chain is a great example of the concept of predictability as something with clear value that consumers will pay for.

In current times of overabundant information and product offers, consumers, especially in digital markets, are simply unable to compare all the factors and all the products available to choose the one that is right for them. To save time, consumers choose a full package offered by a particular brand. Just as when choosing McDonald's as a place to eat, it is clear what benefits a particular package brings. The new regulation aims to untangle full packages. By doing so, it intervenes in specifics of phone functionality and seriously risks undermining the unique value propositions of some smartphone models. As a result, the unique benefits a particular brand's product package brings will gradually decrease. This will deprive the consumer of predictability, i.e., the ability to choose a product from a certain brand and know what to expect from that brand's package without investing a lot of time.

Consumers will have to spend more time ensuring the security of services they use.

Consider the pre-installed camera application on a phone. The reputation of the phone's operating system (OS) is at stake when it comes to security: for a good consumer experience, the camera application should be as secure as possible. The maker of an operating system can be sure about the security of its own camera application or that of a trusted supplier. But it cannot guarantee anything for an application from a third party. As a result of the new regulation, makers of operating systems and smartphones will have to find technological solutions to ensure that applications downloaded from other suppliers are secure. Searching for a secure application will also require additional time from the user.

The DMA involves intervention in the strategic decisions of private business subjects.

Companies categorised as gatekeepers offer products to the market that provide value, such as quality, durability, or low cost. An illustrative example is a smartphone, whose uniqueness lies in the exceptional quality of the device for the user. To deliver value, device manufacturers insist on only the best software and applications or develop them themselves.

Naturally, when a smartphone manufacturer wants to provide the consumer with exceptional quality, it wants its exceptional software/applications to remain an integral part of the device. The manufacturer can only be responsible for its own or its partners' software. In allowing such software to be deleted, it risks its own reputation, since a third-party application may not provide the quality needed. This may undermine the ultimate goal of a product/service package of exceptional quality. Requiring the possibility of deleting software constitutes an intervention in private operators' product development, marketing and technology decisions, as well as in their corporate strategy. It is an intervention in private strategy decisions.

Incentives to innovate are weakened. Innovation incentives are directly related to the earnings potential that investment in innovations can bring.

Smartphone manufacturers make considerable investments in technical aspects of the device, while the OS and applications also need to be developed accordingly. A camera with top-notch

functionality (hardware) should go together with a camera application (software) that can utilize all the available camera features. Under the DMA, applications can be created by a third-party supplier. That does not ensure due quality, and a third-party application may not take full advantage of the hardware's capabilities. This will reduce the incentive to innovate. There will be no reason to invest in smartphone camera functionality, for example, if third-party camera applications may not enable full use of that functionality.

There is a risk of more market concentration and less competition. A business's legitimate aim of making a profit drives its efforts to innovate and offer unique value in a competitive environment. A unique approach attracts the attention of a wider range of customers. The urge to stand out and offer something different makes the consumer more selective and makes others work to compete. As a result, the consumer benefits. But the DMA's restriction on non-removable applications will lead to a convergence of smartphone functionality. This will reduce the uniqueness of the overall packages offered by smartphone manufacturers.

Ultimately, that means producers will partly lose their ability to compete on the basis of uniqueness. They will need to compete solely on quality or price, and that will reduce the scope for competition.

Suppliers of products and services who have invested heavily in creating uniqueness (as their main value proposition to consumers) will have to undergo a major and costly transformation, which may not be possible for everyone. The DMA essentially supports the strategies of firms which until now have competed on price and quality, perhaps even making it easier to absorb market players that have competed on the basis of uniqueness. This is likely to lead to increased market concentration. So these regulations aiming to increase competition may very well reduce it.

CONCLUSION

The DMA's prohibition of gatekeepers favouring their own services and products or offering users pre-installed undeletable software may have unintended negative consequences for consumers, businesses, and innovators including:

- Higher prices and/or lower service quality;
- Less freedom for consumers to make informed choices;
- Less predictability when purchasing a product or service package;
- Increased time costs for consumers;
- Reduced incentives to innovate;
- Distorted competitive conditions for digital technology services;
- Risks of greater market concentration;
- High costs of implementing and adapting the regulation;
- Increasing inefficiency in the use of scarce resources.

Conditions for consumers, businesses, and innovators now likely will worsen, not because of platform business decisions dictated by consumers and market processes, but due to the application of the regulations in the DMA.

For a more detailed analysis of the Digital Markets Act, see the paper "Digital Market Act: Competition, Property, Innovation and User Interests."¹⁷

¹⁷ Lithuanian Free Market Institute, "Digital Market Act: Competition, Property, Innovation and User Interests". Published January 2022 https://www.llri.lt/wp-content/uploads/2022/02/Paper-On-Digital-Market-Act_LFMI-2021-12-14.pdf