



Gatekeeper and Their Special Responsibility under the Digital Market Act

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COMP.EU.TER Conference

Milan 30.11-1



Co-funded by
the Training of National Judges
Programme of the European Union



How?

- What prompted the DMA
 - Crémer Report
 - Two Impact Assessments
 - DMA
 - NCT
- Aims
 - Contestability
 - Fairness





Why?



Need for speed/procedural efficiency



Address structural problems



Prevent further distortion/harm

Introduction of new remedies

Two new concepts



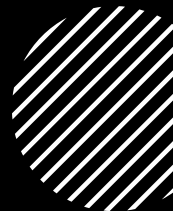
Gatekeeper



Core Platform Service



Core Platform Services (CPSs)



Article 2(2) defines "core platform service" using a list of specific activities:

- (a) online intermediation services;
- (b) online search engines;
- (c) online social networking services;
- (d) video-sharing platform services;
- (e) number-independent interpersonal communications services;
- (f) operating systems;
- (g) web browsers;
- (h) virtual assistants;
- (i) cloud computing services;
- (j) online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by an undertaking that provides any of the core platform services listed in points (a) to (i)



Designation



The designation of gatekeepers under the DMA rests upon three qualitative criteria which are further specified according to quantitative thresholds (Article 3 DMA).

- (a) it has a significant impact on the internal market;
- (b) it provides a core platform service which is an important gateway for business users to reach end users; and
- (c) 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.

Each criterion is defined by a specific set of quantitative criteria.



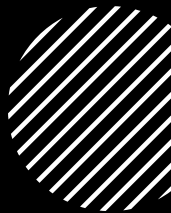
First designation



Gatekeeper name	Core platform service category	Service covered
Alphabet Inc.	Online intermediation services	App Stores: Google Play
Alphabet Inc.	Online intermediation services	Google Maps
Alphabet Inc.	Online intermediation services	Google Shopping
Alphabet Inc.	Online search engines	Google Search
Alphabet Inc.	Video-sharing platform services	YouTube
Alphabet Inc.	Operating systems	Android Mobile
Alphabet Inc.	Online advertising services	Alphabet's online advertising service
Alphabet Inc.	Web browsers	Google Chrome
Amazon.com Inc.	Online intermediation services	Marketplace
Amazon.com Inc.	Online advertising services	Amazon Advertising
Apple Inc.	Online intermediation services	AppStore
Apple Inc.	Operating systems	iOS
Apple Inc.	Web browsers	Safari
ByteDance Ltd.	Online social networking services	TikTok
Meta Platforms, Inc.	Online intermediation services	Facebook Marketplace
Meta Platforms, Inc.	Online social networking services	Facebook Instagram
Meta Platforms, Inc.	Number-independent interpersonal communication services	WhatsApp Messenger
Meta Platforms, Inc.	Online advertising services	Meta Ads
MICROSOFT CORPORATION	Online social networking services	LinkedIn
MICROSOFT CORPORATION	Operating systems	Windows PC OS



Comparative overview



Introduction of a new definition/concept (e.g. gatekeeper)

- EU: Gatekeeper
- Germany: undertakings "of paramount significance for competition across markets" (Art. 19a GWB)
- Japan: "specified digital platform providers"
- UK: firms with "Strategic Market Status"
- US: "Covered company" as defined by the Open App Markets Act Sec. 2(3).
- Korea: superior bargaining power + provision of 'intermediary service'.
- Brazil: "Digital platforms with the power to control essential access"

All use a combination of qualitative and quantitative criteria (with the exception of Germany-only qualitative)



The
obligations/prohibitions



Article 5 are “self-executing”

- Based on previous case law

Articles 6-7 are “susceptible of being further specified”

- Based on other (economic) evidence

Article 5

- Six prohibitions
 - Process personal data; combine personal data; cross-use personal data; MFNs; anti-steering; tying.
- Three obligations
 - Allow user-end user communication; allow end user access to users' services; provide info to advertisers and publishers.

Article 6

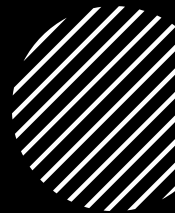
- Prohibitions: 5
 - Data free-riding; defaults; self-preferencing; lock-in.
- Obligations: 11
 - Providing FRAND access to data; un-installation/installation; interoperability.
- 2 rights (necessary and proportionate)
 - measures to ensure that third-party software applications or software application stores do not endanger the integrity of the hardware or operating system provided by the gatekeeper
 - measures and settings other than default settings, enabling end users to effectively protect security in relation to third-party software applications or software application stores

Comparative overview

- No catch-all clause
- No data sandboxes (UK)
- No bargaining codes (UK)
- No data trustees (UK)
- No data retention periods (UK)



Justifications (or lack of it)



No 'efficiency defense'

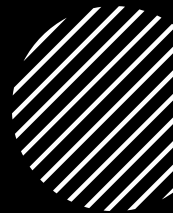
Danger to the viability of
gatekeeper's operation (Art. 9.1)

Public health and public security
(Art. 8.7)

Specific security and privacy
concerns



Flexibility vs Predictability



DMA opted for a detailed list of obligations and prohibitions

Other jurisdictions

- Ger: Art. 19a(2), 1st sentence, Nr. 4b GWB addresses exuberant processing of data in B2B relations. Art. 19a(2), 1st sentence, Nr. 7 GWB prohibits requesting a disproportionate advantage for the treatment of another company's offers
- DMU to develop specific obligations within these categories for each firm with Strategic Market Status where appropriate.

Behavioural hints

- “anti-steering provisions,” which limit the ability of app developers to inform end users of alternative purchasing possibilities create informational and behavioral barriers – they both limit end users’ awareness of alternative purchasing possibilities and make it harder for them to access them.
- Article 6(3): terms “easily,” “without undue difficulty” and “or otherwise” – un-install apps / exercise right.
- Article 6(4): defaults
 - Status quo bias



Conclusion



Further revisions/specifications

Competition in adjacent markets

Central role of the EC

Coordination btw
DSA/GDPR/DMA



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