

# Fair Play in Digital Domains

## DMA Curtailing Parity?

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*Since March 7th, all core platform services that the European Commission has designated as gatekeepers under the Digital Markets Act (DMA) so far, must comply with the DMA's obligations and had to submit comprehensive compliance reports. In these reports, they must show in a detailed and transparent manner all relevant information needed by the European Commission to assess the gatekeeper's effective compliance with the DMA.*

*In our series of briefings, we recap the key milestones of the DMA implementation, deep dive into the various obligations that gatekeepers are facing, lay out the DMA's implications for stakeholders who are not (currently) within the direct scope of the legislation and update you on the current status of affairs in the DMA's implementation.*

*This time we focus on: The prohibition of parity clauses.*

### **What does the provision say?**

Article 5 (3) of the DMA prohibits a company that controls access to an online market (known as a 'gatekeeper') from preventing business users to set higher retail prices for their products or services on the gatekeeper's platform than on their own- or third-party websites. In other words, if you're a business, the provision ensures that you have the freedom to sell your products or services wherever you want online, and under whatever terms you choose, without interference from the gatekeeper. For consumers, the regulation means that they may benefit from searching off-platform for better prices on desired products.

Under this provision, platforms that serve as crucial gateways for business users to reach end users must not engage in the following behaviours:

- **Including parity clauses in their terms of use:** Parity clauses oblige business users to apply the same pricing and the same conditions to their products and services across all platforms and websites.
- **Applying measures with equivalent effects:** Gatekeepers must not employ measures that have similar effects to parity clauses. This prohibition extends to the application of tiered commission rates. For instance, a gatekeeper may not levy

higher commissions on sales made outside their platform, as this could indirectly enforce price parity by deterring business users from setting different prices on other platforms. Similarly, the use of algorithms designed to identify and penalize business users for offering lower prices outside the platform is also forbidden.

- **Incentivizing Measures:** The broad wording of Article 5 (3) may potentially also bar gatekeepers from using incentives to ensure compliance with platform parity. Such incentives could include preferential placement in search results, advanced analytics, customer insights or other forms of value-added services for business users who agree to maintain the same prices on the gatekeeper's platform as they do on other platforms. However, it remains to be seen how the European Commission will ultimately interpret the scope of the provision.

## **What's the provision's context?**

Art. 5 para. 3 DMA was strongly influenced by the case law of national cartel authorities and the European Commission on the use of parity clauses by digital platforms.

In 2013, the German Federal Cartel Office (FCO) scrutinized Amazon Marketplace's use of price parity clauses. These clauses, which required traders to maintain consistent pricing across various platforms and their own online channels, were suspected of violating antitrust law. However, the proceedings were halted when Amazon decided to eliminate these clauses.

Fast forward to 2017, the European Commission turned its attention to Amazon's use of parity clauses in its agreements with e-book publishers. These clauses mandated publishers to notify Amazon about any more favorable terms they had granted to rival e-book platforms and to offer Amazon the same or better conditions. The European Commission wrapped up the proceedings after Amazon made certain commitments.

In other instances, national cartel authorities have examined the best price clauses employed by Booking.com and other hotel booking platforms. These clauses barred hotels from offering their rooms at more favorable prices or terms on other platforms or their own websites.

Art. 5 para. 3 of the DMA aligns with this case law by striving to achieve two interconnected goals: Initially, it seeks to safeguard business users and their commercial ties with their end users ("vertical effect"). Concurrently, the provision also endeavors to foster competition between the gatekeeper and other platforms, thereby averting any exclusionary impacts that could harm the gatekeeper's competitors ("horizontal effect").

## **What's the provision's implication for businesses?**

The immediate consequence of Article 5 (3) is that all designated gatekeepers need to expunge any clauses from their general terms of use that enforce any form of best-price

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requirement or avoid practices that serve as substitutes to price parity clauses towards their business users. It is suggested to be more efficient to prevent such behaviour from being established in the first place, thereby reducing the need for public resources to address those gatekeepers who employ them. However, ensuring that gatekeepers cease all actions with similar effects remains a challenge due to the diverse forms these measures can take.

Article 5 (3) brings about increased flexibility for business users who utilize the online intermediation services of a gatekeeper. They have the liberty to set the pricing and terms of their offerings across various sales channels. For instance, a supplier might adjust the pricing of its products in line with the commission rates imposed by the online intermediation service used for product marketing. Consequently, products marketed on a platform with a higher commission rate could be priced higher than those on a platform with a lower or no commission rate.

This newfound flexibility also benefits competitors of gatekeepers. They are now free to forge competitive agreements with business users, thereby attracting more business. This could potentially enable them to grow and become a veritable competition for gatekeepers.

BLOMSTEIN will continue to monitor and assess the developments and practical application of the DMA provisions. If you have any questions on the topic, [Anna Huttenlauch](#), [Elisa Theresa Hauch](#) and [Pia Hesse](#) will be happy to assist you.