

# DMA Stakeholder Workshop

Applying the DMA's ban on self-preferencing,  
How to do it in practice?

Guiding principles and concrete examples for  
the flights on-line distribution sector

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## Guiding principles: The Chapter III of the DMA deals with unfair practice or practice limiting market contestability


### Intertwined but distinct concepts

#### Contestability (Recital 32)

Ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services. Concept focused on the contestability of the core platform services (see recital 79).

#### Unfairness (Recital 33)

Imbalance between rights and obligations of business users where the gatekeeper obtains **a disproportionate advantage**.



For Flight searches, the self-preferencing ban is mostly about unfairness. But self-preferencing can also undermine contestability (Rec. 51)  
Art. 6.5 should allow to address both situations (Rec. 34)



## Guiding principles : 4 cumulative steps and a safety net

### Four cumulative steps need to be checked:

#### \*Safety net:

Any measure that has an equivalent effect to the differentiated or preferential treatment in ranking falls into the scope of the prohibition (Rec. 52)

- 01 Does the ranking happen on one of the **Core services** of the gatekeeper listed in the designation decision?  
If yes
- 02 Does this ranking include a **specific service** of the gatekeeper?  
If yes  
Is this Gatekeeper specific service benefiting:  
03 of “any form of differentiated or preferential treatment ”... (Equal treatment test\*)
- 04 ...compared to **similar services** of a **third party** ?  
(Similarity test)

## Guiding principles: equal treatment for similar services

**More favorable treatment** : any form of differentiated or preferential treatment (disproportionate advantage per se)

Every service needs to be treated the same exact way. No argument based on equivalence of situation or the specific needs of a user.

**Similar** : This service does not need to be identical, it just needs to have a resemblance with the service offered by the gatekeeper

OTAs and Metasearch engines do not fulfill the same function in the online travel space, but they have similar features (comparison).

The prohibition is focused on the **service**

The service is protected from differentiation (not the provider of the service). The provider can be any third party (legal entity, individual).

## Guiding principles: The clear wording of the Art. 6.5 of the DMA

**Literal interpretation:** Very clear wording and no divergence in the different linguistic versions of the article 6.5 and its recitals 51 and 52.

**Certainty & predictability**

In accordance with the maxim '**interpretatio cessat in claris**' (interpretation ceases with clarity), the Court of Justice does not call into question the clear and precise wording of an EU law provision (Case C-582/ 08 Commission Vs UK).

Literal interpretation is even more necessary for EU laws imposing fines, penalties and structural or behavioral remedies. Textualism goes hand in hand with EU laws that have a sanctioning nature.



## Guiding principles: The objectives protected by the DMA

### Contextual interpretation: Protecting contestability and fairness

The **objective** of the DMA is to protect **market contestability** and **fair digital markets** to the benefit of the **Union's economy as a whole** and ultimately of the **Union's consumers** (Rec.8).

What is affected by weak contestability is *"the innovation potential of the wider online platform economy"* (Rec. 32). **What matters is the 360 ° innovation, not the sole innovation of the gatekeepers.**

The importance of the objective to protect may justify even substantial negative consequences for certain economic operators (*Case G58/08 Vodafone and Others paras 53 and 69, Case G581/10 Nelson and Others, para 81*).

**The literal and the contextual interpretations confirm the need for a firm application of the Art. 6.5 of the DMA**

## CONCRETE EXAMPLE n°1

### Mobile ranking display - Flight tab + Carousel + GF

The “Flights” tab appearing dynamically for flight related searches is for Google travel related services only.

**Differentiated treatment in ranking**

The “Vols pour New York” box is defaulted on the Google flights search tool.

**Differentiated treatment in ranking**

A carousel “Find flights on” section is shown between the “Flights to New York” box and the Google travel search engine filters. Google Flights not present, OTAs and other Metas only.

**Differentiated treatment in ranking**

The flight search fields and rich-content associated is a Google Flights feature only

**Differentiated treatment in ranking**



## CONCRETE EXAMPLE n°2

### Mobile ranking display

#### SEM + SEO (GF in SEO)

No “Flights” tab appearing for flight related searches

**Equal treatment in ranking**

\*No “Google Flights” box, No carrousel

**Equal treatment in ranking**

Google Flights appearing in the SEO results

**How to assess Equal treatment in SEO ranking?**



# How to ensure non differentiated treatment in SEM and SEO?

Managing  
abnormality  
and conflict  
of interests

## §176 Google Shopping case:

*“The **promotion** on Google’s general results pages of one type of specialised result – its own – over the specialised results of competitors involves a certain form of **abnormality**”.*

## Recital 51 of the DMA:

The vertical integration of Gatekeepers “*frequently leads to **conflict of interests***”.

SEO & SEM Ranking applied to services offered by the Gatekeepers must be transparent, fair and non-discriminatory (Art. 6.5)

Obligation for the Gatekeepers to apply FRAND general conditions of access to its online search engine (Art. 6.12) **including pricing** (Rec. 62).

How to apply the FRAND principles to auction-based ranking models if the Gatekeeper wants to compete in the SEM space? (Dialogue process)

# How to ensure non differentiated treatment in SEM and SEO?

## THE DMA TOOLKIT

Complete set of rules defined by the DMA to monitor these areas:

- No access to SEO/ SEM Business users' data (Art. 6.2)
- Information by third parties impacted by SEO/ SEM ranking (Art. 27)
- Obligation for the Gatekeepers to comply “by design” (Rec. 65)
- Obligation to apply FRAND General conditions of access (Art. 6.12)
- Anti-circumventing measures (Art.13)
- Any measure having an equivalent effect to differentiated treatment:  
The access to SEO rules and SEO data (Ethical walls/ No access to SEO confidential information to manage the Gatekeeper's verticals)
- The Commission can request access to any data including algorithms (Art.21.1) or impose an obligation to retain all documents (Art. 26)