BUSINESSEUROPE

POSITION PAPER

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The Digital Markets Act (DMA)

KEY MESSAGES

1. **We agree with the intentions of the DMA to harmonise rules to ensure contestable and fair markets in the digital space where gatekeepers are present.**

2. **No contradiction between the DMA and ex-ante rules enacted by Member States should exist, it should remain without prejudice to existing EU Competition Law. The DMA should apply and be enforced extraterritorially.**

3. **Appropriate and clear criteria are needed to legally define what a gatekeeper is to legally understand who is and who could potentially become a gatekeeper. We support qualitative and quantitative designation in this regard.**

4. **We support the goals of obligations listed in Art 5 & 6. Notably those that ensure: fair access and use of data, an end to practices with lock-in/entry barrier effects or self-preferencing/discriminatory access. We support achieving greater device neutrality, interoperability, effective data portability and more online advertising transparency.**

5. **We believe that Art 5 obligations should apply immediately without a Commission dialogue. Art 6 obligations that are susceptible of being further specified should have the option of an efficient Commission dialogue.**

6. **We support the use of Art 9 be utilised in specific circumstances where an overriding public interest exists. This should be based on a clear description of the overriding public interest.**

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CONTEXT

Tech companies have rapidly grown in the past decade. Some have been even more successful than others, what is now known as "big-tech", has substantially increased its market capitalisation towards the end of 2019. This impressive growth has not only been due to success among consumers but also among business users, bringing both benefits as a result. At the same time, they have raised many issues related to fairness and contestability of markets, particularly as businesses now increasingly depend on the variety of digital services that they offer.

As stated in the DMA explanatory memorandum, *"Large platforms have emerged benefitting from characteristics of the sector such as strong network effects, often embedded in their own platform ecosystems, and these platforms represent key structuring elements of today's digital economy, intermediating the majority of transactions between end users and business users".*[1] Against this backdrop, the issue of platforms acting as gatekeepers, is an important one: it entails defining them precisely to avoid side-effects which would penalise other businesses. A dedicated framework could ensure a fair and contestable online environment to reach a better functioning Digital Single Market.

The Platform Observatory explains that, the 50 top online platforms represent over 60% of website traffic across the EU. Towards the end of 2020, it was estimated that 59% of European companies derived more than 25% of their revenues from e-commerce. Nearly 30% of all of Europe's hotel bookings were performed via online platforms. In fact, 30% of global website traffic is dedicated solely to hospitality, social media and e-commerce platforms. Overall, around 61% of businesses users consider their success highly or completely dependent on online platforms. This trend continues to increase throughout the COVID-19 crisis and impact of local lockdown measures.

The consolidation of these digital services is increasing. Around 40% of all business acquisitions that took place between 2013 and 2020 involved online platforms.

A limited number of platforms are considered to already be in this "gatekeeper" position; however, this does not automatically mean they are systematically abusing it. However, their size and systemic economic importance are so high and develop so rapidly that we need harmonised and future-proof measures to assess whether these markets remain fair, effective and contestable overtime. If constructed and applied properly, the DMA will benefit consumers, business users, providers of digital services and the wider EU economy.

We share the Commission's ambition to ensure fair and contestable markets in the platform economy. As a key societal stakeholder, BusinessEurope outlines its reaction to the Commission proposal for the DMA, below:

SCOPE

We agree with the intentions of the proposal to set up and harmonise rules to ensure contestable and fair markets in the EU digital space where gatekeepers are present. If achieved, this should result in more choice, greater opportunities for competitors, consumers and business users alike, as well as productivity, innovation, competitive gains and competitive and fair prices.

[1] COM(2020) 842 final, p1

While the DMA refers to harmonisation as an objective, it is also important that the DMA includes provisions to make this actionable in relation to preclusion of separate national rules regulating for the same substantial issues. It needs to be ensured that there is no contradiction between the DMA and ex-ante rules enacted by Member States in this area as well as applying without prejudice to existing EU Competition Law. We believe Art 1(6) could be strengthened in this regard.

Due to the globalised nature of the digital economy, we also agree that the DMA should apply and therefore be enforced extraterritorially to digital platforms based outside of Europe but offering their services to business users and end users based within it. However, it is important for the stability of digital markets to define a legally certain Regulation that enables clear and predictable rules.

It is also important to note that the EU is not alone in looking to adapt the legislative framework in relation to digital markets to ensure fairness and contestability. As new digital regulatory models are developed globally, there is a pressing need for greater dialogue and collaboration amongst 3rd countries to support best practice-sharing and identify if any areas of divergence exist.

DESIGNATING GATEKEEPERS

Appropriate and clear criteria are needed to legally define what a gatekeeper is. Participants and stakeholders of digital markets need to understand who is and who could potentially become a gatekeeper. When defining these thresholds, we should avoid the inclusion of smaller digital services that do not pose gatekeeper issues (eg. small and specific industrial platforms that have different market realities to the wider platform economy).

We agree that gatekeeper status can be determined with the qualitative criteria in Art 3(1) and the quantitative thresholds laid out on in Art 3(2). This should be used to instil with legal clarity who are gatekeepers in the market.

We highlight that the definition of “Business user” (Art 2(17)) includes both natural and legal persons just as the definition of “End user(s)” (Art 2(16)). While we agree that both definitions are needed, for legal clarity, we question why a distinction between both definitions has not been made? What constitutes an “active user” could also aid legal certainty.

Determining what a core platform service acting as an “important gateway for business users to reach end users” under Art 3(1)(b) should ensure those providing a merely technical service are not caught up in being designated a gatekeeper. The focus of the DMA should be on those with a weight of importance for market access where businesses will meet end users and therefore act as a true digital gateway. The nature of a digital intermediary in bringing those two sides together should therefore be more clearly defined (eg. to conceptually ensure they are a gatekeeper).

We support the need for Art 3(6) to designate a business with gatekeeper status in even when they are not fulfilling the clear quantitative thresholds of Art 3(2), in accordance with Art 15. To ensure effective use of Art 3(6), we believe a link to the qualitative criteria laid out in Art 3(1) should be made. In support of designating gatekeepers using qualitative criteria, we remind the Commission that legal certainty remains a key principle of the DMA. These decisions should be adopted with caution and not be susceptible to political influence. Therefore, these decisions should be based on evidence.

Art 3(6) could be useful in relation to margin cases and keep the DMA effective in practice. Therefore, it could apply to potential gatekeepers that have considerable economic power, are sufficiently large and dominant, have paramount significance and raise fairness and contestability concerns.

In support of legal certainty, guidelines and a methodology to support the use of the power to designate a gatekeeper without fulfilling quantitative thresholds of Art 3(2) before the full application of the DMA applies would clarify its use (particularly in relation to concepts of "other structural market characteristics" which currently remain too vague). Suggestions recently made by a panel of economic experts on the DMA in relation to "objectively measurable proxies"[2] could be a good starting reference point to support these guidelines and methodology, particularly in relation to dependence on referral traffic and the extent of multi-homing. However, the publication of guidelines or methodology in support of Art 3(6) should not delay the entry into force of the DMA.

If the Regulator needs the ability for more flexible application of the thresholds in Art 3(2) as these business models typically progress rapidly, then the powers granted in Art 3(5), to regularly adjust this Regulation to market realities are sufficient and could also be useful in relation to Art 5 & 6 obligations *(see below)*. However, substantial legislative changes should not be implemented via delegated acts, but rather by ordinary legislative procedure.

We agree that gatekeeper status should be determined based on the nature of the overall undertaking. The Regulator should use Art 3(7) to determine which services offered by that undertaking can be viewed as "core services" pursuant to fulfilling specific criteria in Art 3(2)(b). These "core services" should be listed by the Regulator. Many potential gatekeepers have gatekeeper impacts in certain services markets but not others. We should only place obligations on the relevant core services that are important gateways for business users to reach end users.

OBLIGATIONS

We support the goals of obligations listed in Art 5 & 6. Notably the obligations that ensure: fair access and use of data, an end to practices with lock-in/entry barrier effects or self-preferencing/discriminatory access. We also support achieving greater device neutrality, interoperability, effective data portability and more online advertising transparency. To ensure proportionate outcomes and effective results, the impact of obligations on user privacy, business intellectual property, cybersecurity and integrity of technologies should be considered when determining what is expected from gatekeepers.

However, some of these obligations take specific market situations and business models into account but will potentially be applied to a broad range of services and businesses. This could make obligations too rigid in their application and inevitably have unintended consequences.

We believe the clearly blacklisted Art 5 obligations should apply immediately to ensure gatekeeper compliance without the need for a dialogue with the Commission. Further to this, we support the use of Art 7(2) to determine how Art 6 obligations that are susceptible of being further specified can be efficiently complied with by the gatekeeper.

[2] Pg 9, the EU Digital Markets Act, the Joint Research Centre (2021)

Enabling the use of an efficient dialogue in relation to Art 6 should seek to ensure clear and efficient gatekeeper compliance. It should be entered to in good faith and not be used to try to negotiate lower obligations for the gatekeeper or result in evasion or an unjustified delay of implementing them in practice. In this regard, we support the Commission having the final decision in relation to the dialogue and ability to launch further formal investigations.

We also support this period of dialogue being time limited so that Art 6 obligations always apply, regardless of the outcome of the dialogue, following 6 months of gatekeeper designation, as supported by Art 3(8). At the same time, the gatekeeper should be able to waive the need for dialogue in relation to certain obligations if they believe their intended remedy of compliance is sufficient.

While each Art 6 obligation should apply across the board, this efficient dialogue should increase mutual knowledge, trust and ensure better compliance as the technical implications that each obligation could have on those gatekeeper core services who will implement them could be demonstrable to the regulator. This procedure would also be an opportunity for the Regulator to consider the implications of solutions as to what each obligation can achieve and how it impacts business users (particularly SME's) and consumers. This will support clearer market conditions and therefore investment in the platform economy and enable these obligations to be applied to the well documented diversity of Europe's digital economy. In this regard, it would also be useful to take note of other interested parties in this efficient dialogue, particularly the business users that utilise the gatekeepers core services. This would also offer gatekeepers the ability to explain how other legal frameworks they are subject to may impact the application of these obligations and overall diminish the prospect of further appeals in courts.

While we support all Art 5 & 6 obligations we would like to highlight potential issues to which policy makers could add further legal clarity to. In relation to Art 5(b) it is unclear whether business users can offer different prices and conditions on their own website. This seems to be the spirit of the measure and that restricting business users to platforms only does not seem to be the goal, however, this should be more explicitly drafted in the final text, otherwise, we are simply swapping one lock-in measure for another. In relation to Art 6(1)(i), it is unclear as to whether this would mean that gatekeepers must share data with one another? While we support the spirit of this obligation so that business users gain more access to data generated in the context of their operations, we would like to highlight the need to comply with the GDPR and general support for voluntary data sharing practices where fairness and contestability issues, in light DMA application, are not found to arise.

We believe that the use of powers in Art 10 should be exercised in a limited, rapid, effective and punctual manner to ensure legal certainty. Just as Art 3 requires clear criteria in terms of designating gatekeepers, businesses need clear and stable commitments to fulfil once defined as a gatekeeper. However, we understand the need for future-proof and flexible commitments. Overall, determination of the obligations and designation of gatekeepers should not remain totally fluid, otherwise crucial elements of this proposal will not be legally certain.

SUSPENSION & EXEMPTION

We support the possibility to use Art 9 in specific circumstances where an overriding public interest exists. This should be based on a clear description of the overriding public interest laid out in Art9 and not be open to Member State or Regulator flexibility or abuse. We highlight that Art 9(2)(a) "public morality" could need further improvement by policy makers to ensure legal certainty.

The procedure to request or apply should follow that mentioned in Art 32(4). It is clear, particularly due to recent events such as COVID-19, there may be situations where obligations of this Regulation could be suspended, at least until the public interest issue has subsided, for services to be delivered if they are helping to achieve that public interest goals as provided for in Art 9(2).

Although Art 8 is subject to strict conditions and only permissible upon Commission agreement we are concerned that potentially permitting any gatekeeper or core service of a gatekeeper to suspend itself in whole or part from these obligations as they endanger their "economic viability" would send the wrong message to the digital single market. We would be stating that unfair practices can continue if the business model that bases itself on such practices and would lose its economic viability otherwise. However, if policy makers intend to go forward with this provision we would certainly request legal clarity as to how "economic viability" can be determined.

INVESTIGATION & ENFORCEMENT

We support the use of existing competition possibilities, such as information requests, interviews and interim measures limited in time in order for the Regulator to effectively enforce this Regulation. But it should be clear that the Regulator has a reason to investigate before it uses the powers listed in Chapter V and uses these powers on the principle of proportionality which while included in the Recitals, should be used in the main body of this Chapter.

While we want an efficient framework we also believe that proportionate procedures should be followed. The right to be heard within Art 30 will be vital in ensuring proportionality. Therefore, the deadline of 14 days should be extendable, if requested by the gatekeeper, undertaking or association of undertakings, and the extension granted at the discretion of the regulator, on the basis of the complexity of obligations.

It is also unclear whether these investigative powers apply only to gatekeepers or also 3rd parties. We remain concerned with the impact of these investigations on the rest of the supply chain. Particularly when enforcement measures could then be used for mistaken, untimely, or incomplete information. Business user resources, particularly among SMEs are low and should therefore be treated proportionally if they are involved in an investigative procedure. We therefore believe Chapter V should clarify what responsibilities are expected from 3rd parties during these investigative procedures which currently remain unclear. The Commission should use information requests to non-gatekeepers with caution, particularly due to the limited resources these businesses have. Requests for access to databases and algorithms should be limited to the gatekeepers themselves and not extend to 3rd parties.

We also note the recent European Court of Auditors report[3] in relation to the lack of resources available to the Commission for competition enforcement of competition concerns, let alone adding this ex-ante Regulation on top. We should not underestimate the task at hand, particularly considering the timelines outlined throughout the proposal. Following entry into force, the Commission will be required to identify which undertakings that provide core platform services are within the scope of the Regulation and monitor compliance of 18 listed obligations. In the longer term, the Commission should have the resources available to develop a detailed understanding of the markets they are

[3] Special Report No 24/2020: the Commission's EU merger control and antitrust proceedings: a need to scale up market oversight (2020)

regulating and the business models that are at play in those markets. We therefore consider that more resources should be allocated to enforce the DMA.

Furthermore, although we strongly support centralised supervision and enforcement of the DMA at EU level, national competition authorities can play an useful supporting role. They have an important signalling function and easier access for businesses to raise issues related to the DMA. We therefore believe that the involvement of national competition authorities should be included in the Digital Markets Act (eg. by including them in the Digital Advisory Committee under Art 32 or via a reference to the European Competition Network (ECN)). In this sense, we believe that Member states should play a more important role in the enforcement of the proposal to ensure its effectiveness. Activities such as complaint handling, remedy compliance and consultation undertaking could be carried out at Member State level. This would allow to free Commission resources for the more strategic tasks required by the DMA. We also ask for the Commission for further clarity as to how the Digital Advisory Committee will otherwise cooperate with the ECN.

Finally, we would like to highlight the differences between the fines that can be utilised to enforce the DMA, at 10% of turnover under Art 26(1), when compared to those being proposed under the DSA at no more than 6% of turnover (Art 42) and existing under the GDPR, at 4% of turnover (Art 83).

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