EuroCommerce for retail & wholesale

Position paper
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Digital Markets Act – key messages

EuroCommerce takes note of the Commission proposal for a Digital Markets Act and supports the objective of ensuring fair competition in a digital environment. Digitalisation is creating new opportunities and driving transformational change through increased efficiency, transparency and competition. In the retail and wholesale eco-system, digital increases choice, efficiency and sustainability and helps create new jobs. Consumers have become used to digital and are increasingly using multiple combinations of online and offline channels. Platforms are an important source of social and economic benefits, increasing visibility, access to markets, matching efficiency or reducing transaction costs; they are a way for business users to reach new customers in an increasingly digital world, including for small- and medium-sized businesses which might face issues of lack of expertise and resources to go online independently or navigate the online platform and marketplace environment. It is important for the DMA to ensure a level playing field where business users benefit from the choice and innovation fair competition brings to the platform economy.

To remain competitive in a challenging environment, retailers and wholesalers need a legal framework that gives them **legal certainty** and **incentives to grow** in a properly functioning single market and invest in robust omnichannel strategies. The DMA should provide **EU level maximum harmonisation** to address regulatory fragmentation and ensure policy coherence with other legislation, in particular the platform to business regulation and competition rules on vertical and horizontal agreements. Its scope should remain strictly limited to what is necessary to achieve these objectives. We also ask policy makers to ensure a proper balance between the need to adapt to a fast-changing competitive environment and at the same time, to ensure legal certainty and clarity to gatekeeper and emerging platforms, particularly on the scope of the DMA, and the practices regulated by it.

Key messages

- **action at EU level is appropriate**: the DMA should create incentives for platforms to continue to innovate and grow in the Single Market; we support regulation at EU level to seek to avoid regulatory fragmentation and offer maximum harmonisation.
- **focus on a limited number of online gatekeeper platforms:** we support a clear focus on a limited number of gatekeeper platforms and the introduction of a designation process; the combination of quantitative and qualitative criteria is helpful but needs to provide stronger legal certainty to both emerging and gatekeeper platforms;
- **focus on a limited number of practices that are clearly defined, with article 5 being a list of black practices and article 6 a list of "grey" practices; clarify applicability to specific core services:** practices covered by article 5 and 6 have a significant impact on the operation of designated emerging and gatekeeper platforms; to ensure legal certainty, provisions should be clearly spelt out and their applicability in the context of specific core services needs to be clarified; article 5 should be a list of black practices whereas the DMA should allow companies, where relevant, to demonstrate the pro-competitive effects of the practices listed in article 6 in their specific circumstances;
- **market investigations and enforcement:** the DMA grants significant market investigation and enforcement powers to the Commission; we ask that these are used as a last resort on the basis of a clear methodology; fines and structural remedies should be an option of last resort, only used in exceptional circumstances and with the necessary safeguards;
- **adapt transition periods**: we ask that a proper balance is achieved between the need to adapt to a fast-changing competitive environment and to ensure legal certainty and clarity to business operators notably as concerns the scope and regulated practices; the transition period needs to be extended to allow sufficient time for the Commission to implement all necessary and guidance rules and for gatekeepers to adapt their processes.

A designation process based on clearly defined criteria

We support the principle of a clear designation process, based on a combination of quantitative and qualitative criteria applicable to core platform services:

- **Limited scope**: the provisions of the DMA are far-reaching; we thus welcome its application being limited to a small number of players with a position close to dominance and a clear impact on the Single Market and its focus being restricted to markets where competition is limited e.g. as a result of lock-in. The rules should not create disincentives for further development of online platforms: these generate clear societal and economic benefits to consumers and business users.
- **Legal certainty an absolute pre-requisite:** an undertaking needs to know unambiguously whether it is covered under the scope of the regulation or not. We support the principle of a designation process based on clear-cut criteria. Given the diversity of business models covered by the DMA, we would suggest clarifying how the quantitative and qualitative criteria will be applied. Further clarifications might be helpful in relation to situations where individual core services of a platform might fall below the criteria but collectively meet them. We would further suggest strengthening the provision for dialogue between platforms and the Commission when assessing "gatekeeper platforms" to allow undertakings to make an efficiency defence as necessary (art 3.4).
- **Clear definitions**: we would seek clarification on the definitions of 'active business user' and 'active end user' under article 3; the concept of 'user' may be interpreted differently depending on the type of gatekeepers and core platform services under consideration (for instance social networks and online marketplaces). Clarity as to the interpretation of the concept of 'active' is also necessary.
- **Limited scope of the qualitative criteria (art. 3(6))**: we suggest that core service providers designated as gatekeepers by the Commission on the basis of the qualitative criteria of article 3(6)) should be in the vicinity of meeting the quantitative criteria under article 3(2). We also suggest that market shares be one of the elements the Commission considers under article 3(6) to establish whether a provider of core platform services is a gatekeeper. We believe that in its assessment under art. 3(6) the Commission should also maintain its focus on gatekeepers active in markets where competition is limited as a result of lock-in (e.g. markets where no or very limited multihoming is present).
- **Review process (art 4):** Digital markets are by their nature fast-moving, and we welcome the principle of a review every 2 years to keep up with market developments. This should include a review of gatekeeper platforms, as well as the criteria for defining them. It will be important to develop a clear methodology for conducting that evaluation.

1. Clearly defined obligations/prohibitions and maintaining practices with pro-competitive effects (art 5 & 6)

When regulating trading practices, it is essential to limit intervention to what is strictly necessary and not inhibit operators from entering into legitimate, efficiency-enhancing agreements – see annex 1 for more details on the impact of prohibitions/obligations in articles 5 and 6:

- **article 5 should aim to address well-identified practices with clearly demonstrated anti-competitive effects (black list)**: we support the recommendation by the Joint Research Centre ('JRC') economic experts to create *a black list of forbidden behaviours to which only extreme considerations would justify an exception*.[1] It will be important that prohibitions in article 5 are clearly defined in order to provide legal certainty for undertakings. We support in this context the provisions in article 8 and 9 which allow for *exemptions if the obligation would endanger the economic viability of the operation of the gatekeeper in the EU*.
- **Ensure legal certainty and avoid the unintended consequences of the far-reaching impact of prohibitions:** Prohibitions and obligations in articles 5 and 6 can have far-reaching effects on the regulated entities and on how they serve business users and customers[2]. We ask that in the designation decision the Commission provides clarity on the application of the provision in the context of specific core services, as some of the provisions were drafted in the context of a specific

[1] The EU digital Markets Act: a report from a panel of Economic experts, JRC 2021

[2] The EU digital Markets Act: a report from a panel of Economic experts, JRC 2021

core service but are given a wider application. We further ask that the effects of the provisions are clearly understood to avoid unintended consequences. For instance, a prohibition of promotion of offers outside the core platform service (as currently envisaged by art 5c) on marketplaces and other business models with a strong degree of multi-homing might have the unintended consequence of rendering the core platform a pure advertising space.

- **Article 6 must be clarified and should become a list of "grey practices"**: further clarification is needed in relation to article 6, specifically to what the wording 'susceptible of being further specified' will entail. Some provisions in art 6 could have a significant and disruptive impact and a chilling effect on innovation. The DMA should allow gatekeepers to demonstrate the pro-competitive effects of the practices listed in art 6 in specific circumstances (within a short period of time, e.g. 6 months), as recommended by a panel of experts from the JRC.[3]. This would avoid legal uncertainty that could arise from the dialogue procedure between the platform and the Commission provided for in art 7.
- **measurement and attribution services should be covered by the DMA**: we would seek clarification as to whether measurement and attribution services (i.e. the tracking of online consumers for marketing purposes) are included in the core platform service of advertising services (or part of provision of article 6g). We believe that measurement and attribution services should fall within the scope of the Regulation as the main purpose of such services is to appropriately distribute monetary credit for purchases among the channels contributing to each sale.
- **The list of practices under articles 5 and 6 should not be extendable via delegated acts**: article 10 of the Regulation empowers the Commission to update the obligations of articles 5 and 6 through delegated acts. We suggest the Commission use the ordinary legislative procedure as to allow for proper consultation with stakeholders and appropriate transitional periods for any adjustment.

2. Proportionate enforcement provisions

We agree with the need for European-level supervision. Digital markets can have a global dimension. Fragmented enforcement and diverging interpretation of rules will create legal uncertainty and unnecessary burdens for gatekeepers. However, we have concerns about the potentially far-reaching nature of some the Act's enforcement provisions. We would also recommend here clarifying the relationship between EU-level and national enforcement:

- **Market investigations**: The DMA gives the Commission strong market investigation powers to investigate platforms, core services, practices and possible infringements. We believe that these provisions need to clarify the circumstances under which the Commission would launch such investigations, and that market investigation should only be used in very exceptional circumstances. We note that the Commission should have the necessary capacity, knowledge and expertise to conduct such investigations. We would also suggest introducing a dialogue process with stakeholders to provide a sounding board as the Commission considers such action.
- **Rights of defence**: We welcome the inclusion in the proposal of a strong right of defence, inspired by competition law. These provisions are of fundamental importance, given that the DMA may have a far-reaching impact on the operation of the gatekeepers.
- **Investigation powers**: we would welcome clarifications as to the meaning of 'inspections' under article 21. In particular, we would suggest the Commission not be allowed to conduct dawn raids in relation to market investigations under the DMA, as such powers should only be limited to Commission's investigation into anticompetitive conduct under article 101 and 102 TFEU.
- **Relations with national authorities**: We agree that enforcement should be at EU level, as the DMA is aimed at gatekeepers with a presence in several countries. We would further recommend clarifying in the DMA the relationship with national regulators and the possible impact of diverging national approaches. The present draft is ambiguous as to whether national authorities could impose similar measures in relation to businesses with no significant impact on the single market, but that have an impact on their domestic market. In this respect, we call on the EU and national authorities to continue to support the competitiveness of platforms in the single market which compete with larger digital eco-systems established outside the EU and relying on large domestic

[3] The EU digital Markets Act: a report from a panel of Economic experts, JRC 2021

markets.

- **More proportionate fines; use of interim measures**: We agree that fines should act as a deterrent. However, imposing the same level of fines as in competition rules, where there is no efficiency defence seems disproportionate. In line with the need to ensure adaptability in a fast- changing environment, we would ask the Commission to consider using interim measures to ensure that infringements are suspended or reversed while the Commission comes to a final decision. Fines and structural remedies should be an option of last resort, only used in exceptional circumstances and with the necessary safeguards.
- **Simultaneous applicability of the DMA and EU competition rules**: it is understood that Articles 101 and 102 TFEU and the DMA could apply to the same conduct. We would seek clarification on how such process would play out to ensure legal certainty and avoid the possibility of double jeopardy.

3. Implementing provisions

We understand the pressure for swift application of the DMA. However, the DMA will require core service platforms to significantly adapt their internal processes and operations. A 6-month transition period is unrealistic and should be at least extended to 12 months. Furthermore, any period specified in the Regulation should begin after the Commission has adopted all the necessary guidelines and delegated acts.

Annex 1: Detailed comments on the list of practices (articles 5 & 6)

- **Art 5 a) - Prohibition on the combination of data between different core services**: Platforms use data generated to improve their services for business users and consumers. Under art 5a, gatekeepers would no longer be able to rely on any gateway provided for by GDPR (such as legitimate interest, contract or compatible further processing) other than consent to combine data; this would significantly hamper the provision of advertising services across business divisions and services for business users and consumers. This prohibition targets data-monetising business models and its application should be limited to those specific core platform services.

- **Art 5b) - Prohibition on wide retail parity clauses**: Parity clauses are a way for marketplaces to ensure the attractiveness of the platform in facilitating sales and to limit free-riding by business users in a highly transparent environment. Parity clauses can be wide (i.e. they prevent the business user from offering different prices and conditions on other online intermediation services) or narrow (when they prevent the business user from offering different prices and conditions on its own website). The DMA prohibits the use of wide parity clauses and EuroCommerce supports the current scope of art. 5b.

- **Art 5 c): Promotion of offers outside the core platform service:** this provision obliges gatekeepers to allow business users to promote offers to and conclude contracts with end users acquired via the platform. We reiterate the need for the Commission to specify, in the designation decision, what provisions are applicable to what type of core service: this prohibition targets a specific business model (gatekeepers providing services where competition is limited as a result of lock-in, for instance in the case of application stores for smart phones) but might have unintended consequences on platforms characterised by a strong degree of multi-homing (such as in ecommerce), with the risk of free riding issues and undermining services provided to the business users of those platforms.

- **Art 5 g) – Information to advertisers and publishers:** We support the principle that gatekeepers should provide information to advertisers and publishers to whom they provide advertising, so that they understand the price paid for different advertising services (as part of the advertising value chain). The Commission should clarify what 'information concerning the price paid by the advertiser and publisher' covers and whether the platforms have this information given that they will not always cover the full advertising service.

- **Art 6 a) - Dual role**: we support the restriction under art. 6a on the use by a gatekeeper of data not publicly available generated through activities of business users to compete with those business users. The exchange and use of data in relationships that are both vertical and horizontal are regulated under existing competition rules (Horizontal and Vertical guidelines). In a dual relationship, gatekeepers should not use data generated on the platform to compete with their business users, while they should be allowed to continue using the data generated on the platform to invest in the operation and the customer service, improve business users and consumers' experience, prevent fraud and improve security. This obligation should also apply to data that the core service has received from business users in connection with advertising services.

- **Art 6 d) - More favourable treatment in ranking services and products**: We recommend a case-by-case analysis to allow pro-competitive and efficiency enhancing effects of self-preferencing to be taken into account[4]. It is also important that this provision is consistent with the transparency requirements in the Platform to Business Regulation. We would recommend that self-preferencing continues to be possible as long as criteria are applied in a transparent and non-discriminatory manner to prevent the gatekeeper from taking unfair advantage in offering its own products or services. A blanket prohibition risks creating legal uncertainty in dealing with business users; this would be detrimental to business users who would see their choice of sales channels being reduced, and to consumers whose choice of options would be equally reduced.

[4] See the Final Report of Expert Group for the Observatory on the Online Platform Economy - Work stream on Differentiated treatment, 2021: "*the difficulty of designing specific prohibitions is that practices of differentiated treatment may have pro- and anticompetitive effects at the same time*" and the report of three experts to Commissioner Vestager on competition in a digital era: "*many types of conduct – including potentially self-preferencing – may have pro-competitive effects*".

- **Art 6 h) - Effective portability of data**: The availability of large volumes of data is the result of the significant investments made by platforms. Under the GDPR, intermediation services already have an obligation to ensure portability of data. The obligation under this article entails an extension of requirements beyond personal data; we note that an obligation to share data may increase risks of free-riding and deter investment in the platform;

- **Art 6 i) - Access to data generated through the platform free of charge:** Data and data analytics are usually provided as a service (against a fee), either as part of the contract with the marketplace or as a separate service. A general obligation to share non-personal data may give competitors access to autonomously-generated and commercially valuable data, thus distorting competition and reducing incentives to invest in data intensive business models. Such a blanket provision was not recommended by the experts' report to Competition Commissioner Vestager in 2019, which instead favoured a case-by-case approach. A provision of this sort will also favour large brand business users who have greater capability in processing data compared to SMEs, who tend to rely on the platform to provide analytics tailored to their needs;

- **Art 6 j) - access to ranking, query, click and view data on FRAND terms**: Data and data analytics are provided by search engines as a service; an obligation to share data may entail risks of free-riding and deter the investments required to grow a platform. Any sharing of customer data will also need to comply with GDPR provisions. We would also seek an explicit clarification that 'online search engine' does not include search functions on online stores, consistently with the definition of 'online search engine' under Regulation 2019/1150 ('P2B Regulation').

Annex 2 - key facts and figures

- E-commerce sales represent on average about 10-15%[1] of total retail sales, with significant differences across product categories/sectors and countries; this trend will continue to grow.
- Recent research suggests a rise of 44% in demand of key product groups on pure-player websites since the start of COVID-19, and points to consumers being likely to continue using online retail to a similar if not greater extent after the crisis.
- Digitalisation has increased competitive pressure on incumbents from innovative new entrants. Many retailers and wholesalers now have some form of online offering (pure play or in combination with brick and mortar - omnichannel) creating convenience and value for consumers.
- Manufacturers increasingly address consumers directly online, through marketplaces and subscription models, thus becoming direct competitors to retailers and wholesalers. In a number of sectors (e.g., FMCG), suppliers with already strong market positions are frequently consolidating, and control unique brands with significant profit margins[3]. In order to increase control over the distribution of their products, manufacturers are increasingly imposing conditions making it more difficult for sellers to use certain digital channels (e.g. third-party marketplaces) and thus access consumers online.
- Digitalisation has expanded the selling market for some products offered in stores and online and boundaries between online and offline are increasingly blurred. National competition authorities are starting to integrate the online dimension in their market analysis. The importance of digital, however, varies between individual sectors (e.g., FMCG generally has a lower digital penetration compared with consumer electronics or books).
- Consumers are increasingly using omnichannel, and the consumer journey now involves a combination of diverse on- and offline channels, including search engines, company websites, marketplaces, pure players, omnichannel operators, etc.
- Digital markets can be regional, national or global; retailers and wholesalers are increasingly facing competition from players established outside the EU, particularly from China. This trend will increase, and needs to be taken account of in regulation of the EU market.

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