EUROCHAMBRES Position Paper on the Digital Markets Act (DMA)

The internet and online trade have provided consumers with unprecedented availability and choice of products. However, in recent years some gatekeepers have increased their power, to the point that some have distorted this, almost perfect, market by using unfair trade practices. Therefore, EUROCHAMBRES welcomes the Digital Markets Act as it will help to strengthen the internet as a fair, transparent and free market place for companies and consumers alike.

For many companies, large online platforms have become their primary sales channel. Businesses have become increasingly dependent on a variety of digital services that the platform economy offers. Nonetheless, this has exposed many of those traders to, often unfair, practices of gatekeepers. There is a noteworthy bias towards monopolies from the platform economy, whilst traditional competition law is too slow to effectively enforce fair conditions in such dynamic online marketplaces.

The core concept of the proposal for a "Regulation on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)" (COM(2020) 842) to ban specific unfair practices ex ante appears to be the most promising approach to deal with unfair practices of gatekeepers and to ensure fairness in online markets. Undoubtedly, we consider the proposal is focussed, well-reasoned and balanced. Nevertheless, certain aspects of the proposal could be refined, such as the following:

- **Designation and notification of a gatekeeper (Art 3, 4, 26)**

  We acknowledge that the scope of applicability of the DMA was chosen to be narrow. The criteria for the designation of gatekeepers should be as clear and easy to apply as possible. However, it might be difficult to assess the current turnover (Art 3 lit 2) of a particular undertaking that may consist of different platforms, online stores or be intertwined with non-digital enterprises.

  Taking into consideration how the European Commission might have to rely on information provided by the undertaking, it seems inconsistent that even fraudulent non-compliance with the notification requirement (Art 3 lit 3) has a lower penalization than non-compliance with the obligations of Art 5-6.

  Bearing in mind the internet's dynamism, the deadlines seem rather long. We therefore suggest shortening the deadline for Art 3 lit 3, from three to two months, Art 3 lit 4, from 60 to 45 days, and Art 3 lit 8, from six to three months.

  Moreover, we suggest to further specify in Art 3, which procedure is foreseen to appeal against the Commission's decision to qualify and undertaking as a gatekeeper

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or to request deletion from the list of gatekeepers, and if such appeal is followed by suspension.

- **National law and EU law (Art 1 lit 5)**

  Article 1 (5) DMA stipulates that Member States may not impose on gatekeepers further obligations by way of laws, regulations, or administrative action. While this fully harmonises EU legislation on "gatekeepers", as defined in Art 3, Member States will be tempted to develop a similar "national" DMA-like legislation if they want to set limits for dominant actors in just one Member State or an actor that does not surpass the thresholds of Art 3. This undermines legal reliability, and it is currently leading towards a multitude of national provisions, like the DMA, which makes compliance difficult for online platforms.

- **Obligations for gatekeepers (Art 5, 6 and 7)**

  The obligations set out in Art 5 and 6 seem appropriate to put an end to the most unfair trade practices of gatekeepers. As previously mentioned, there seems to be a contrast between wrongful or fraudulent non-compliance with the notification requirement for gatekeepers of Art 3 lit 3 facing less penalisation than non-compliance with the obligations of Art 5-6. The DMA does not stipulate if these obligations of Art 5-6 still apply to an undertaking if that undertaking wrongfully or fraudulently did not pursue its notification obligation.

  Generally, we would prefer the obligations mentioned in Art 6 to be further specified beforehand and then migrated to Art 5. This would enhance legal safety on the side of gatekeepers and their business clients alike.

  The application of Art 5 (g) might seem equally difficult as it is a common practice in the advertising industry to offer bonuses or discounts based on the total annual turnover. In such cases, the nominative price disclosed does not correlate with the actual price.

  We welcome the provisions of Art 6 lit 1(f) and (h) and underline the need for effective law enforcement, as currently providers of cloud services often make portability effectively impossible for company users. This is especially the case for cloud services, where data often cannot be migrated without loss. The wording of (h) should specify if the requirement of real time access applies only to data portability under the GDPR or in general.

  As concerns Article 7, the Commission should assess each case individually, more specifically, terms of available technical means and practical impacts.

  Furthermore, we suggest to include in Chapter V an industry stakeholder feedback mechanism on the application and effects of the obligations for gatekeepers. This could provide valuable insight for the legislator and implementing bodies.

- **Suspension of obligations (Art 8)**

  It is not clear which exceptional circumstances, other than public interest (Art 9), might justify the application of unfair practices by a gatekeeper. In any case, we recommend that a suspension should be granted for a limited time not exceeding three years.

- **Imposing new obligations for gatekeepers, delegated acts and structural remedies (Art 10, 16, 17, 33)**

  Generally, the means to adopt delegated acts should be used cautiously and should be well-reasoned. Ideally, Art 10 and 17 should be used to clarify or update the existing provisions of Art 5,6 and 7.

  Such market investigations should be conducted with the support of Member States. It seems appropriate to make the request for a market investigation according to Art 33 applicable for the procedure of Art 17 alike.

  Imposing structural remedies on gatekeepers as foreseen in Art 16 is to be deemed a very serious sanction in a market economy and should thus be clearly designated as last resort.

- **Concentrations and Mergers (Art 12)**

  The DMA should be fully consistent with merger control regulations. While we agree with the intention of Art 12 to notify competing authorities on time of pre-planned concentrations, the stipulation of such rules in the DMA might lead to confusion and legal uncertainty, given the fact that the Merger Control Regulation already provides a high density of regulations for such concentrations. Simultaneously, it might be appropriate to specify which authority conducts the necessary approval procedure for such planned concentrations and if the procedure, according to Art 12, will remain independent, or pooled with the procedure according to the Merger Control Regulation.

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