Position Paper on the Digital Markets Act

Introduction

Ecommerce Europe fully supports the European Commission's objectives of the Digital Markets Act proposal to ensure fair competition and enable all players to reap full benefits of the digital economy. Over the last years, the platform economy has redefined the way retailers sell goods and services online, with the outbreak of the COVID-19 pandemic only further accelerating this trend. Platforms have become an important channel for brick-and-mortar shops to start selling online, allowing them to survive during closure due to lockdown measures. Furthermore, digital platforms have enabled existing e-shops, in particular SMEs, to lower entry barriers, maximise their sales and reach new audiences. At the same time, this trend can create some challenges as it has led to new forms of competition within and beyond European borders. Ecommerce Europe fully supports developments in the sector and calls on policymakers to seek the right balance between strengthening competitiveness of the diverse online retail landscape and fostering innovation and growth.

In this paper, Ecommerce Europe outlines its position on the various elements of the European Commission's Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act or DMA)[1]. Ecommerce Europe and its members are committed to cooperating in an open and constructive way towards the best suitable solution for digital commerce in Europe.

General comments

- The digital commerce sector is exceptionally characterised by its cross-border nature, making it crucial to have a **harmonised legal framework** in place to give businesses the necessary legal certainty. Currently, national governments are also putting forward initiatives to regulate the platform economy (e.g., Germany). In light of these efforts by Member States to tackle the issue at national level and to avoid regulatory fragmentation, Ecommerce Europe strongly encourages the Commission's ambition to take action at EU level.

- Similar to the Digital Services Act, the DMA also intends to regulate a wide variety of different business models. It has to be taken into account that, among the companies that would fall within the gatekeeper category, there will be a great **diversity of business models, services offered, and types of interaction with business users and consumers**. These differences add complexity to the application of the obligations of the DMA. Ecommerce Europe therefore stresses that the DMA should be proportionate, principle-based, technology and channel neutral (omnichannel), to be designed to adapt to the evolution of the fast-digitalising economy.

- Ecommerce Europe is concerned about the **proposed implementation timeline**. In the proposal, it is established that the Regulation would apply from six months after its entry into force. Considering the extensive nature of the proposed obligations, it is not feasible to expect compliance after a six-month transition period. To facilitate compliance, Ecommerce Europe would propose at least 12 months of transition time and would like to add that any implementing guidance accompanying the adoption of the DMA should be provided at least 6 months before the application date, to give businesses sufficient time for implementation.

- To ensure legal certainty, the **provisions and methodology provided in the DMA should be clearly defined**. Ecommerce Europe is cautious about leaving key definitions up to delegated acts and is concerned that it would prevent stakeholders from being consulted and involved in the development of new definitions.

[1] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act)

Designation of gatekeepers

The process for the designation of gatekeepers is defined by a set of quantitative thresholds focusing on features that would make unfair conduct weakening contestability most prevalent and impactful. The rules only apply to providers of core platform services that have a significant impact on the internal market, individually constitute an important gateway for business users to reach end users, and enjoy an entrenched and durable position in its operations or it is foreseeable that they will do so in the near future.

Since being designated as a gatekeeper has very far-reaching consequences for companies, Ecommerce Europe welcomes that only a small group of very large players would fall within the scope. We would however like to call on policymakers to provide further clarity on the precise scope, as the rules should not create disincentives for business development or growth for start-ups and scale-ups. While the current thresholds would simplify enforcement, Ecommerce Europe would rather argue for further precision of the scope in the designation of gatekeepers.

We believe that the criteria for designating gatekeepers need to be based on clear definitions to offer as much legal certainty as possible to companies. Firstly, further clarity is required on the definitions of and distinction between the concepts of ‘undertaking’ and ‘provider of core platform services’, in particular as there is currently no definition for “provider of core platform services”. Article 3.7 requires the Commission to list the relevant Core Platform Services (CPSs) that are provided by a gatekeeper company. Where applicable, this obligation should include a duty to specifically identify the relevant part(s) of a service or combination of services that falls into scope of the CPSs. Secondly, it is unclear whether an “important gateway” (Art 3.1(b)) means that the service provider should play an “intermediary” role between business users and end users. To avoid that services are unintendedly captured by the Regulation, we suggest clarifying what this intermediary role refers to. Furthermore, given the diversity of business models in scope of the DMA, Ecommerce Europe asks policymakers to clarify how to address situations where core services of a platform might not meet the criteria individually, but would collectively. We would also suggest providing further opportunities for dialogue (Art. 3.4) between platforms and the Commission when assessing gatekeeper platforms to allow companies, when appropriate, to demonstrate they should not fall within the scope. Thirdly, Ecommerce Europe is cautious of the fact that the Commission has the ability (Art. 3.6) to identify as “gatekeepers” providers that do not meet the quantitative thresholds listed in Art 3.2. We would request further transparency on the procedure the Commission would follow to identify new gatekeepers. When assessing whether platforms could be considered gatekeepers on the basis of qualitative criteria (Art. 3.6) we suggest the Commission should introduce an assessment of to what extent business users and end users can practice multi-homing, as markets with strong multi-homing generally offer higher contestability.

Lastly, the definitions of 'monthly active end users' and ‘business user’ are unclear. Article 3.2 attempt to clarify the concept as the average number of monthly active end-users throughout the largest part of the last financial year. However, this does not specify whether it refers to unique users, or could also include users returning several times to the platform. The concepts of business users and end users can also be of a different nature and of very different relevance depending on the core platform service of reference. Therefore, we ask policymakers to develop a clear definition of the concepts of business users and end users for each core platform service.

Ecommerce Europe welcomes the proposed obligation for the Commission to review at least every two years whether the designated gatekeepers still meet the requirements (Art. 4). We consider that the digital sector is rapidly developing, and the proposed review period ensures that the application of the rules remains up to date with market developments. Furthermore, we advocate that the Commission should, next to the review of the gatekeeper status, also have to review of the requirements for being qualified as such. Moreover, for any evaluation, a clear and transparent methodology should be developed.

Practices of gatekeepers that limit contestability or are unfair

While Ecommerce Europe generally supports and understands the objectives pursued by Articles 5 and 6 of the DMA, we would like to raise several concerns with regards to their application and potential impact.

In the discussions leading up to the publication of the DMA, the concept of "grey practices" was of key importance. These practices would be presumed to be anticompetitive but could be allowed on a case-by-case basis if gatekeepers could demonstrate the procompetitive nature of the practice in a specific context. Currently, the text does not include any "grey list", but instead groups all practices (in both Art. 5 & 6) into a sort of "blacklist". In line with the expert report[2] published by the JRC, Ecommerce Europe believes that several practices of Articles 5 and 6 would better fit into a grey list and we therefore suggest changing Article 6 into a grey list.

Overall, for each of the practices included in Articles 5 and 6, it is crucial that it can be clearly demonstrated that such practices are anticompetitive and should therefore be prohibited. The obligations and prohibitions provided in the DMA proposal have far-reaching consequences for the businesses involved. The Impact Assessment provides no detailed information on how their wider application would affect business models/core services with rather different characteristics. It should also be noted that the introduction of some of the measures may not have a positive effect on SME business users, but may favour larger (brand) businesses users only, as they would have more capabilities to deal for instance with large datasets or would be better placed to sell directly to end users.

Finally, the provisions in Articles 5 and 6 are quite broadly formulated and would benefit from several clarifications. Ecommerce Europe would recommend using more detailed and prescriptive prohibitions / obligations to ensure legal certainty and avoid lengthy discussions in the regulatory dialogue between the platform and the Commission (Art. 7). Ecommerce Europe stresses that it is important to consider the potential differences between the core services offered by a gatekeeper. It should therefore be possible that the obligations and prohibitions presented in Articles 5 and 6 could be applicable to one core service, but not to others. Gatekeepers should be able to provide evidence demonstrating that a measure would not be relevant for a certain business model. Given the wide variety of business models in scope, it should be clear that a one-size-fits-all approach is neither feasible nor desirable.

Obligations for gatekeepers (Art. 5)

- **Article 5(a): Combining personal data**

Article 5(a) addresses user consent for combining personal data. While Ecommerce Europe considers this to be an important provision, the processing of this type of data is already regulated by the General Data Protection Regulation (GDPR)[3]. We support the DMA's objective to ensure that consumers can freely choose to opt-in to these business practices by offering a "less personalized alternative" (Recital 36). However, it is important to consider that the GDPR allows combining data across services on legal grounds other than user consent, such as legitimate interest or for the performance of a contract. To avoid legal uncertainty, it is crucial that the DMA is aligned with the GDPR and seeks the right balance between the protection of personal data and the platforms' work to optimise the consumer's experience by using data to improve their service.

- **Article 5(b): Retail parity clauses**

Article 5(b) states that gatekeepers are not allowed to limit business users from choosing to differentiate commercial conditions (e.g., offering the same products via other intermediation services at different prices or conditions). This is a blanket prohibition on retail parity clauses (or most favoured nation (MFN) clauses), which are a way for marketplaces to ensure the attractiveness of the platform and to limit free riding by

[2] The EU digital Markets Act: a report from a panel of Economic experts, JRC 2021
[3] REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

business users. Ecommerce Europe believes a blanket provision is not appropriate to regulate this, it may significantly impact the platforms' attractiveness and could lead to business users merely using platforms to advertise their products and then to sell them via other channels. This would in particular favour larger brand suppliers that have more capabilities to sell via their own sales channels, and not the smaller business users. These parity clauses should instead be analysed and regulated on a case-by-case basis and should be more precisely defined.

- **Article 5(g): Advertising transparency**

Ecommerce Europe welcomes the principle proposed in Article 5(g) that stipulates that gatekeepers have to provide information to advertisers and publishers to which it supplies advertising services, as this will help them understand the price paid for the different services. However, to avoid placing business partners at a competitive disadvantage, the article should clarify that the information only concerns the prices that a given counterparty pays, and not also the prices that other counterparties pay on a granular basis.

Obligations for gatekeepers susceptible of being further specified (Art. 6)

- **Article 6.1(a): Dual roles**

Ecommerce Europe supports the principle in Article 6.1(a) which states that gatekeepers taking on a dual rule may not use the data they gather from their business users to compete with them. Recital 43 clarifies that the concern is with data "gained from transactions" with a business user and the use of this data by the gatekeeper for "similar services". Ecommerce Europe recommends that, for clarity and legal certainty, this language should also be reflected in Article 6(1)(a) itself. Furthermore, it is important to point out that gatekeepers may still use the data generated on their platform to invest and improve the operation and customer service. Ecommerce Europe believes that it should be added to Article 6.1(a) that gatekeepers must not prevent (directly or indirectly) business users from collecting data from their end users when interacting with them through the gatekeeper's platform (in line with relevant privacy rules).

- **Article 6.1(d): Ranking services and products**

Article 6.1(d) prohibits gatekeepers from treating their own products and services more favourably in ranking compared to similar services or products from third parties. Ecommerce Europe is cautious of a blanket provision prohibiting the practice as a whole and would instead argue for a case-by-case analysis of such practices, to allow for the pro-competitive and efficiency enhancing effects of self-preferencing to be taken into account[4]. The article would benefit from further clarification, and it should be considered that ranking is a complex exercise, especially for services that offer results across a wide spectrum of different types of queries and information. Most important therefore is that ranking criteria are applied in a transparent, and non-discriminatory manner, to prevent gatekeepers from having an unfair competitive advantage towards their business users. Finally, the article should be aligned with the transparency requirements of the Platform-to-Business Regulation[5]

- **Article 6.1(h): Data portability**

Article 6.1(h) extends the existing obligation for platforms to ensure data portability for personal data under the GDPR also to non-personal data. Overall, Ecommerce Europe is cautious of the effects of such an extension, as it may increase risks of free riding. Currently, we already note cases in which businesses (data portability companies) attempt to exploit the data portability right of the GDPR by collecting purchase history and personal data, enabling capitalisation on other companies' information. In these cases, these businesses offer data subjects bonuses in exchange for them to exercise their right to data portability and to request personal data linked to purchase history.

Furthermore, the article should be further clarified. First, as stated in Recital 54, both "business users and end users should be granted effective and immediate access to the data they provided or generated in the context of their use of the relevant core platform services of the gatekeeper, in a structured, commonly used

[4] c.f. report by the platform observatory on self-preferencing
[5] REGULATION (EU) 2019/1150 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services

and machine-readable format." Article 6.1(h) mentions only that gatekeepers shall "provide tools for end users to facilitate the exercise of data portability". It should be specified that both business users and end users can port their data, personal and non-personal, as is stated in Recital 54 by indicating that the exercise of data portability should be done building on - rather than in line with Regulation EU 2016/679. Second, Recital 54 also notes that end users should also be granted effective and immediate access to "any other data at different levels of aggregation that may be necessary to effectively enable such portability". It should be clarified what "any other data" means, and particularly whether this goes beyond provided or generated data. In addition, policymakers should clarify what "continuous and real time" access means in the context of this specific article. Finally, authorities must ensure consistency with other EU legislation dealing with portability. This refers most notable to the provisions under the GDPR, but also to the upcoming Data Act.

- **Article 6.1(i): Free access to data**

Ecommerce Europe has some concerns about the obligation for gatekeepers to provide business users, or third parties, free of charge with access to and use of aggregated and non-aggregated data. Data and data analytics are generally provided by platforms as a service (against a fee), either as part of a contract or as a separate service. Ecommerce Europe would encourage policymakers to, instead of a blanket provision, adopt a case-by-case approach, in particular as this general obligation could have a distorting effect on competition. Moreover, instead of helping SMEs, this obligation is more likely to be in favour of larger (brand) business users which have more capacity to process the data.

Furthermore, the article also contains some concepts that should be further specified. The definition of what constitutes business users' data is not very precise. For example, Recital 55 refers to "data inferred from" business users' activity. Inferred data would typically include proprietary commercial or technical insights that require engineering work to produce and may be used to improve services. It should also be clarified what the difference is between the obligation to provide effective data portability under Article 6.1(h) and the obligation under 6.1(i) for gatekeepers to provide third parties authorised by a business user real-time access to the business users' data.

Suspension and exemption for overriding reasons of public interest (Art. 8 and 9)

Ecommerce Europe supports the provisions in Articles 8 and 9 that allow for exemptions if an obligation or prohibition from Articles 5 or 6 would endanger the economic viability of the operation of a gatekeeper in the EU. However, Ecommerce Europe would like to suggest a more flexible approach with regards to the exemptions. First, we would like to point out that Article 30 of the DMA proposal specifically refers to the right for an undertaking to be heard prior to the European Commission adopting a decision under Articles 8 and 9, which we strongly support. However, Articles 8 and 9 do not set out any requirement for the Commission to provide preliminary findings to the gatekeeper. There needs to be a procedural safeguard for companies to address the Commission's arguments for having rejected a company's request under Articles 8 and 9. Beyond the exemption in case the provisions would endanger economic viability, Ecommerce Europe believes that companies should also be able to bring a defense to demonstrate a certain practice is not anticompetitive, in line with the suggestions raised above in favour of more case-by-case assessments. In its current form, further clarity is needed on the key concepts of Articles 8 and 9 of "economic viability" and "overriding reasons of public interest". Furthermore, it is important that, as a company requests an exemption, it should be protected from being considered non-compliant under Article 25 for as long as the Commission is assessing this request.

Overall, given the wide scope of the DMA, its obligations, and the complex technologies involved, Ecommerce Europe believes that providing companies with the possibility to defend an exemption, would make the DMA more future-proof and would create the required flexibility to achieve its objectives while avoiding unintended harmful consequences. This approach would also be consistent with the approach adopted under the amendment of the German Competition Act and the UK proposals for digital codes of conduct.

Market investigation, enforcement, and fines

Digital services are by nature often cross-border, within Europe or even on a global level. In response to the growth of digital markets, European countries have introduced or discussed national rules to regulate the sector. Ecommerce Europe is strongly convinced of the importance of creating a system of rules and enforcement that is as harmonised as possible. Ecommerce Europe therefore welcomes the proposed European-level supervision in the DMA. However, it should be further clarified how the governance framework within the European Commission will be organised and what the relation with national enforcement is.

The DMA introduces far-reaching market investigation powers for the Commission to designate gatekeepers, identify core platform services for a gatekeeper (Art. 15), investigate infringements (Art. 16) or examine new services or practices (Art. 17). It should be clarified under which circumstances the Commission would launch such investigations, and that market investigation should only be used in very exceptional circumstances. Given the resource constraints of the European Commission, in particular with regards to staff, we would like to ensure that sufficient time, human and financial resources are allocated to proper enforcement of the complex rules in the DMA, and especially with regards to market investigation. It could be considered to have greater involvement of national competent authorities. This could for instance be helpful for handling the dialogue with relevant stakeholders, particularly SME business users and end-users. National authorities could also assist the European Commission by conducting deep-dive analyses relevant for market investigations. It should, however, be clarified that the DMA takes precedence over national rules in this field, to avoid diverging approaches across the Single Market. Moreover, it is currently unclear whether national governments can take similar measures towards businesses which have no significant impact on the EU market, but only on a domestic market.

Recitals 33, 58 and 60 describe the importance of a regulatory dialogue to further define, tailor and facilitate compliance with the obligations in Article 6. The regulatory dialogue should also be conducted for the purposes of Articles 5 and 7. As mentioned above, several obligations and prohibitions in both Articles 5 and 6 should be subject to case-by-case assessment, rather than a blanket provision. Allowing regulatory dialogue would ensure that gatekeepers can bring forward evidence demonstrating that a certain practice is not anticompetitive for a specific core service. For Article 7, regulatory dialogue could be achieved by requesting gatekeepers to notify the Commission of the measures that they intend to implement to ensure compliance with the obligations within a limited time frame of their designation as a gatekeeper. This would ensure legal certainty for all interested parties and ensure a timely and effective implementation of the new rules. Moreover, the dialogue would allow the regulator to ensure that the objective of the DMA provisions is met from the beginning while reducing risks of non-compliance for companies. It 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. Ecommerce Europe would recommend extending the regulatory dialogue also to Article 3 on the designation process, particularly when considering qualitative criteria, Article 17 which allows the regulator to review the list of core platform services and obligations, Article 23 on commitments and Article 16 and 25 related to non-compliance investigations, and Article 22 on Interim Measures. Ecommerce Europe believes that the introduction of the regulatory dialogue for additional articles will not slow down the DMA's processes but will instead lead to better compliance and simplified enforcement procedures.

Finally, we support the introduction of the Digital Markets Advisory Committee (Article 32), to be formed by representatives and experts from Member States, to assist the European Commission. Considering that many of the obligations imposed on gatekeepers are related to the access, use and sharing of data, including personal data, appropriate coordination with national data protection authorities must be warranted.