Position Paper

Digital Markets Act: Five Principles for a functioning Digital Economy and fair competition

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Intro

The EU Commission published its proposal for a Digital Markets Act (DMA) together with the Digital Services Act on 15 December 2020. The DMA focuses on digital platforms with considerable size and relevance for users' market power. The DMA aims at implementing a harmonized regulatory framework to ensure fairness and contestability in the EU's digital sector that is intended to sit alongside the existing competition law regime and other related provisions such as the Digital Services Act and P2B regulation. Its approach encompasses 18 behavioural obligations for digital platforms designated as "gatekeepers". The DMA is overall welcomed as it fills the gaps of existing competition law regimes that have proven too slow and ineffective to tackle the issues triggered by large and dominant platforms. It focuses on structural market features that are vastly common to digital platform models (e.g. significant network effects and economies of scale and scope, data-driven feedback effects) that are likely to jeopardize contestability and fairness in the digital sector. While we believe that a harmonized framework and fairness on digital markets are necessary we see that some elements of the current proposal would benefit from greater clarity. For example, the presumptive jurisdictional thresholds might create difficulties in border cases. More specifically, in cases under which the EU Commission assesses digital platforms that do not meet the thresholds, but are still considered for the designation of a gatekeeper status more clarity is needed to increase legal certainty. Moreover, consideration should be paid to the impact the DMA could have on certain business models and how the rules could impact innovation.

The DMA introduces 18 behavioural obligations that primarily seem to draw from experiences of very specific past competition cases and complaints. Those 18 obligations would apply to different platform/gatekeeper models, affect a wide range of industries. Innovation and design of digital services and the possibilities to monetise such services could also change for European players that could be impacted by such a legislation

and so it is vital that the proposed legislation is carefully designed to ensure it is sufficiently targeted, problem-oriented, and fit for purpose to benefit European consumers. The ripple effects are, as of now, not certain and should be assessed in depth. Therefore, the DMA should be sufficiently flexible to account for new and different business models and developments in the digital sector. Many innovations for digital services stem from the interconnected platform ecosystem and stakeholders should be encouraged to still deploy those in Europe. Pro-competitive conduct that benefits consumers needs to be preserved to ensure the balance that is envisaged by the DMA will need to factor in the interests of competitors and business partners on platforms as well as, ultimately, consumers.

While the DMA needs some more work to grow into a framework truly enabling fair competition and competitive markets, we welcome the initiative and aim to comment based on the following five principles below:

I. Retain core competition mechanics: Scope should be based on objective evidence

Our understanding of the DMA is that it is intended to regulate "intermediary" gatekeepers who provide certain identified services because such services, while capable of providing a wide range of consumer benefits, also can be considered highly influential. The DMA seeks to address concerns at a high-level that certain services could restrict competition and innovation and that the concern could arise not just from specific anti-competitive behaviour but due to structural issues for which existing competition laws such as Articles 101 and 102 TFEU might not be well suited.

It is important that, if the DMA is to be introduced into law, it is clear as to scope and operation so that all potentially affected parties have clarity.

For example, clarity is needed as to the rationale why certain services may be designated as core platform services and, for future market investigation, what type of features could lead to additional services being designated as core platform services.

That said we support that the Commission may also consider providers of core platform services as gatekeepers that do not meet the presumptive quantitative thresholds. This acknowledges that providers may just as well have a significant impact on the internal market and thus qualify as gatekeepers if they do not meet the thresholds proposed by the Commission. We also believe that the procedure suggested by the Commission for such cases may ensure that any such designation is based on a thorough investigation of the relevant market situation. We consider it necessary, however, that such an assessment also includes consideration on possible effects on innovations and market developments. We therefore suggest further analysis be conducted on market effects and upcoming new platform models in the EU to not counteract the goals of the DMA.

II. Taking diversity into account: Obligations should not follow a one size fits all approach
Once a core service/platform is considered to fall into scope it will have to implement all obligations in a general manner without specification. This approach might guarantee speed but in some cases it could prove to be disproportionate.

It is not clear what the process would be for taking into account any welfare enhancing effects of platforms or services beyond a very narrow set of exemptions such as public morality, safety/public security or if obligations are threatening the platform's existence, for which gatekeepers must apply with the Commission. Bitkom recommends that further consideration be given to how a company may explain and the European Commission consider the pro-competitive impact a service may have and in which circumstances a service may not be subject to the DMA. Any list of prohibitions should therefore be accompanied with a subset of obligations that offer an efficiency defence resulting in a more tailored list of obligations.

III. Reliable rules: Application and rules must be clear and tailored
To identify gatekeepers - similar to the European Merger Control Regulation - the DMA proposes certain presumptive thresholds for the determination of gatekeepers. However, it is possible that certain companies or services not meeting such thresholds could still be caught by the DMA and that certain companies and services meeting such thresholds should not necessarily have the DMA apply to them.

The DMA would benefit from greater clarity, including detailed guidance, as to (1) when a company not meeting the thresholds may still be designated as a gatekeeper and (2) what factors are relevant to determining that a company or services should be caught by the DMA. For example, it is possible that there is a high-number of users of a service spread very widely across the entire EU so that there is no current substantive concern with such a service.

If a goal of the DMA is to ensure clarity it must be designed not to create uncertainty or even arbitrary outcomes. Bitkom recommends further consideration to be given to how and in which cases a company may explain and the European Commission consider the pro-competitive impact a service may have and in which circumstances a service may not be subject to the DMA without having to go through either a market investigation process or even a court process where a European Commission decision may be challenged (as that itself could undermine the effectiveness of the DMA).

The definition of "core platform services" as the first step to fall under the DMA comprises a lack of clarity and legal certainty. While some definitions refer to other regulation (for

instance the P2B Regulation), other definitions are very vague, open and without further explanation.

Lack of clarity regarding the definition of "core platform services" combined with uncertainty as to the jurisdictional thresholds when designating a gatekeeper, applying self-executing obligations and prohibitions without taking into account justifying aspects or different business models as well as lack of procedural safeguards and regulatory dialogue could lead to a disproportionate regulation of providers that may also prevent innovation. While we think a harmonized regulation is useful and necessary, the proposal should answer and reflect on these questions.

The further legislative process should aim at introducing greater clarity. In particular, the status of Article 6 remains unclear. Currently, Article 6 is neither a true "grey list" enforced on a case-by-case basis nor a truly self-executing set of rules. Rather all of its provisions apply to any gatekeeper even though it shall be susceptible to specification. There does not seem to be any significant distinction from Article 5.

Bitkom understands that the European Commission wishes to have a form of standalone regulation rather than another tool that requires case by case assessment. One option to consider is to design the DMA in a way that it includes a general set of overarching obligations on the one hand and a more tailored list of remedies on the other hand that may apply only to certain designated core platform services. If such a model were to be adopted then consideration should be given what criteria could be relevant to the more tailored remedies applying to a service, as well as what reasoned arguments could be raised by a company prior to the European Commission reaching a decision. Further clarity around such initial dialogue would likely make the DMA more effective and less susceptible to ongoing legal challenge. If the DMA does not provide sufficient opportunity to be heard not only would that be a design oversight but also the desire for effective upfront regulation would be lost as any decisions would be even more likely to face challenge before the European courts.

IV. Ensure innovations in Europe: Justifications and procompetitive behaviour needs to be preserved

The DMA should allow gatekeepers to bring forward an "efficiency defence" in certain cases to rebut the application of specific obligations to their business. This should include the option to argue that in the specific case the obligation would lead to a loss of efficiencies that outweighs the potential gains for the contestability of markets. As an example, the revised German competition rules provide such option: Here, there remain procedural safeguards on the decision whether there is abusive behaviour and therefore whether there is an objective justification for the behaviour in question. While it's not up to the

Bundeskartellamt to prove harm, but up to the platform to prove that they do not harm (reversed burden of proof), there is still the possibility to explain why certain behaviour is needed for procompetitive reasons (similar to Art. 101 (3) TFEU). A similar step should be devised for the DMA to ensure that innovations deployed on platforms will still have a place in Europe.

V. Market investigations: Clarifying scope and purpose

Any information gap between gatekeepers and authorities requires efficient monitoring and oversight. Parts of such oversight are investigations and remedies. The DMA rightly establishes the conduct of market investigations to serve as the evidentiary basis for several decisions (e.g. remedies in case of systematic non-compliance). However, it is important that businesses understand the purpose and scope of any market investigations conducted by the European Commission. If the European Commission conducts a market investigation into new services and practices, it is in our view not clear what the outcome of such an investigation would be. Would it lead to new legislation or simply to Article 5 or Article 6 being updated? If certain new obligations are proposed after the market investigation, how will they be applied and will they be applied to all gatekeepers or only some? The DMA should clarify those aspects.