European Tech Alliance

The European Tech Alliance's Position on the Digital Markets Act

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Foreword

The European Tech Alliance (EUTA) welcomes the Digital Markets Act (DMA) as an important initiative to ensure fair and contestable digital markets.

To this end, we believe it is essential for this new regulation to focus on a small number of systemic gatekeepers which enable businesses and consumers to interact, wield exceptional control and engage in anti-competitive behaviour. In parallel, it is important to avoid that actors who may be large but do not pose a threat to the fairness and contestability of European digital markets are not targeted. This is especially important in the current context, in which the use of digital services is increasing exponentially.

An overly broad approach would also undermine the EU's ambitions to enhance its digital capabilities and home-grown innovation, hurting the many European tech success stories for whom the EU is the most important commercial market, yet that compete with formidable global rivals.

Beyond ensuring a targeted scope, it is also essential to properly address the ecosystem strategy that drives the expansion of gatekeepers and ensure that the regulation is effective in addressing the major problems we see in digital markets today.

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A more targeted scope is a prerequisite for an effective regulation

The proposal acknowledges that companies that have a "gatekeeper" position can have a detrimental impact on contestability and fairness in the markets they operate in. In order to support a thriving (digital) economy in Europe, it is crucial to enable access to markets on fair conditions and competition on the merits for the provision of both core platform services and ancillary services.

The current broad scope of the DMA carries the risk of bringing within its range more companies beyond the handful of major digital players effectively acting as gatekeepers. Narrowing the scope is crucial for the following reasons:

- A broad scope will inevitably dilute the obligations and slow down enforcement against the handful of players that effectively act as "gatekeepers". Targeted obligations applying only to the few relevant gatekeepers would open up digital markets and allow European start-ups and scale-ups to grow, attract more users; expand into other Member States and/or compete on a global level. This is why thresholds should be set in such a way that only systemic players acting as gatekeepers across the whole EU market are captured, rather than smaller companies that may be strong in home markets but do not constitute systemic gatekeepers.
- There are only a handful of companies that today hold a unique position on the market, defined by a lack of viable alternatives, which lock in users and create user dependency, and that are able to leverage their dominant position from one market to another, thereby creating an ecosystem effect.

The gatekeeper definition in Article 3(1) should therefore be refined to better reflect the nature of "gatekeepers" and be fully aligned with the description made in the preamble:

- The criterion "important" gateway for business users to reach end users doesn't seem to reflect the notion of dependency described in the preamble of the DMA. As the Commission has considered when drafting the new rules, the notion of "unavoidable trading partner" may better reflect the gatekeeping position of such platforms – which regulate access to certain markets. This criterion of "unavoidable trading partner" should also be considered as a rebuttal condition.

It is important to establish the right criteria for the automatic gatekeeper designation process. The EUTA welcomes the quantitative criteria put forward by the proposal, but we nevertheless urge several improvements to ensure that only true gatekeepers are caught in scope. These include the following:

- Providing a core platform service in at least three Member States of the European Economic Area (EEA) may not be enough to conclude that a given company has a significant impact on the internal market, which counts no less than 30 jurisdictions. This threshold should be increased to at least 5 Member States. It should also be specified that the same core platform service should be provided widely across the whole Single Market. This substantial presence could be assessed by taking into account total consumer time in the case of specific categories of core platform services.
- All thresholds set out in the second paragraph of Article 3 of the DMA should be cumulative, namely the turnover, the average market capitalisation (when existing), the provision of a CPS in a certain number of Member States, the number of users and the requirement to meet these thresholds in each of the last three financial years.
- The definition of monthly active end users should be clarified within the regulation and linked to different core platform services and how they generate direct income from their users. In this respect, we welcome the proposals by MEP Schwab in the IMCO draft report.
- We support the additional criteria, also proposed by the draft Report, which requires that companies operate two or more core platform services in order to be presumed a gatekeeper.
- The digital sector has experienced exponential growth over the last two decades and will undoubtedly continue its expansion in the future. Thresholds, in particular the user-based one, should therefore be regularly updated to reflect the growing uptake of digital technologies across Europe.

Furthermore, we see that the market investigation route for designating “2nd tier” gatekeepers, Article 3 (6) runs the risk of casting too wide a net. We therefore propose the following solutions:

- All the criteria, points a-f listed in Article 3(6) should be met cumulatively.
- At least one of the quantitative thresholds should remain a necessary condition for the gatekeeper designation.
- An ecosystem orchestrator criteria that reflects the conglomerate nature of gatekeepers and their ability to operate across more than one core platform service, and to leverage activities or data from one to another, should be included.
- An absence of significant multi-homing on both sides of the market should be included as part of the assessment.

This provision would ensure that only potential gatekeepers are targeted by market investigations (art 15) and would give companies legal certainty on the DMA’s scope.

Better capture the logic of ecosystem orchestrator of gatekeepers

Gatekeepers usually control large ecosystems of services known as "walled gardens". Although we support the Commission's wish to focus on a closed number of "core platform services" which have the capacity to affect many end users and businesses alike, limiting the scope of the obligations and prohibitions to the services that would meet gatekeepers' thresholds may not capture their logic of ecosystem.

Such a limit could make some obligations ineffective. The DMA seems to overlook the gatekeepers' ability to leverage power from one market to another, through core platform services that are not necessarily meeting the criteria of Article 3 DMA.

After running the designation process of a gatekeeper, the Commission should determine which of the core platform services of the same gatekeeper must respect the ex-ante conducts.

Regarding core platform services, it should be noted that the proposal doesn't seem to target browsers, which are nevertheless an important gateway to the Internet for European consumers and companies.

One set of European rules for regulating gatekeepers

Building a flexible and future-proof framework is key to regulating fast-moving digital markets. EUTA fully supports the high level of harmonization provided by the DMA and calls on co-legislators to clarify the interplay between the DMA and the competition rules established at Member States' and EU levels. Any duplication of a "gatekeeper framework" by way of national laws, regulations or administrative actions could jeopardize the purposes of the DMA itself, which consists in ensuring contestable and fair markets within the EU.

The DMA should also clarify that the Article 5 and 6 conducts will not be applied more broadly to the platform economy, unless a company has been designated a gatekeeper in a competition law case or via the DMA's market investigation tool. As such we suggest establishing a clear rule that national competition authorities should not subject national champions to the gatekeeper prohibitions and obligations in the DMA. Otherwise, a set of rules from DMA will apply ex post to smaller companies, including European and national champions, weakening their chances to efficiently compete with gatekeepers. This is contrary to the aim of the DMA.

One regulation to address all gatekeeper problems, but a tailoring of the conducts to the different core platform services

EUTA recognizes the need for a horizontal approach, establishing clear and prescriptive conducts for all gatekeepers. This approach should be complemented, when necessary, by prescriptive conducts pre-defined for each core platform service under the DMA. A one-size-fits-all approach to how conducts are applied to gatekeepers risks applying overly restrictive or irrelevant prohibitions to the different platform business models caught by the DMA. The conducts should therefore be adapted to the different core platform services. The proposed approach, where some obligations are susceptible to being further specified (article 6), risks causing legal uncertainty and delaying enforcement.

EUTA has identified the following gatekeeper behaviors as having to be the subjects of specific predefined conducts.

Combination of data collected across the gatekeeper's core platform services and ancillary services *(e.g., art. 5(a), art 6.1(a), recital 43)*

Because of the entrenched nature of gatekeepers, the obligations preventing gatekeepers from combining data collected from the provision of different core platform services, ancillary services and any other services need to be strengthened. The DMA currently links data combination with the collection of individual users' consent (art 5(a)) and with the use of data in competition with business users (art. 6.1(a)). Existing consent collection practices prove the limits of such a provision as users typically give their consent regardless of privacy concerns because of their dependency towards gatekeepers' services. Additionally, a gatekeeper should not use data supplied by the business user, for example for targeted advertising purposes or to gain insights for a competing service of the gatekeeper (recital 43).

Limited access to data generated by business users *(e.g., art. 6.1(g), art. 6.1(i))*

The DMA allows the Commission to further impose data disclosure requirements with respect to the performance measuring tools, the data necessary to carry out independent ad inventory verifications, as well as with respect to data generated by the user on the gatekeeper's core platform service. When imposed, such an obligation should enable access to meaningful information for the relevant business users, including ranking, query, click and view data so that the business user can use this data to develop relevant products and services for its users.

Unfair preferential practices *(e.g., art. 6.1(d))*

The DMA sets out an obligation on gatekeepers to not treat their own products and services preferentially in the ranking of products and services they provide on a specific core platform service. This obligation should be better tailored to the well-known concerns around self-preferencing by an online search engine. Today search engines are the door of anyone doing business online. Gatekeepers use search engines as a lever to promote their own products and services. The current prohibition would not effectively address the competitive abuses linked to search engine self-preferencing. It is the display in the search results page, not the ranking that is relevant. The DMA needs to define unfair preferential practices with greater granularity including by defining technical means that restrict self-preferencing to online search engines (e.g., unfair display techniques).

Tie-in techniques *(e.g., art. 5(e), art 5(f) and art. 6.1(f))*

Tie-in techniques instill strong dependencies on users. The DMA recognizes this issue by aiming to limit practices which practically require business users to "log in" to the gatekeepers' service and thereon, most often, use both the core platform service and other ancillary services. Some of the tie-in prohibitions set out in the DMA may need further specification to ensure that gatekeepers provide several choices to users, such as access to several payment services.

In particular, the prohibition of art. 5(e) should be extended to tie-ins between the gatekeepers' core platform services and their ancillary services such as payment systems, a practice regularly used to apply unfair conditions to business users, including extortionate fees, and that deprive consumers of free choice and competition in how they pay for goods and services. While it has been suggested that the interoperability requirement in Article 6 would address this, in fact it would not prevent a contractual obligation requiring business users or a particular subset of business users to exclusively use the gatekeeper's payment system, as it happens today.

As an accompanying provision to art. 5(e), the obligation on gatekeepers to provide interoperability of ancillary services with their operating system or software in a similar way to what the gatekeepers provide for their own ancillary services (Article 6.1(f)) is also very important.

Contracting techniques *(e.g., art. 5(b))*

The DMA aims at restricting gatekeepers from imposing most-favored-nation clauses, which impede business users from offering better prices or conditions through channels of third-party online intermediation services. This requirement needs to be strengthened to avoid locking in business users.

Mandatory bundling practices *(e.g. art. 6.1 (b), recital 50)*

The offer of bundles of services for business users by gatekeepers has emerged as one of the most harmful practices for market contestability. Such practice allows gatekeepers to charge business users with non-requested services and foreclose competitors even if some of their software applications are less competitive than other providers. Therefore, the DMA should go one step further than allowing end-users to uninstall pre-installed software applications and lay down a general prohibition of pre-installation of any software that is not essential for the functioning of the operating system.

Allowing side-loading of software application stores *(art. 6.1 (c))*

This obligation would enable the installation and use of competing app stores on iOS. The objective is to increase the contestability of app stores, counter unfair practices in app stores and enable developers to use alternative distribution channels and end users to choose between different apps from different distribution channels. This obligation is particularly important in order to ensure the possibility of competition between app stores and not creating closed technical ecosystems.

Allowing fair and non-discriminatory general access conditions *(art. 6.1(k))*

We also support the obligation to apply fair and non-discriminatory general conditions of access to app stores, to avoid abuses and self-preferencing by app stores of their own services for instance (Article 6.1(k)). The aim is to address imbalances in commercial relationships that could lead to unfair and unjustifiably differentiated conditions to the detriment of business users (e.g. prohibitive fees) and end users (e.g. pass on of prohibitive fees resulting in higher prices). However, this obligation should apply to all core platform services, not only app stores.

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