European Tech Alliance

Digital Markets Act

Preliminary remarks on certain designated gatekeepers' compliance measures

MAY 2024

The European Tech Alliance (EUTA) supports the Digital Markets Act (DMA) as an important legislation to ensure fair and contestable digital markets. We greatly appreciate the work undertaken by the EU institutions over the last years.

We would like to thank the European Commission for hosting its DMA workshops in the week of March 18. It was a very useful exercise. Unfortunately, we came to the regrettable conclusion that several gatekeepers took liberties in their interpretation of the DMA and do not plan to comply immediately or fully with the EU rules.

EUTA welcomes the opening of proceedings by the European Commission against Apple, Google and Meta as announced on March 25. EUTA believes that robust and swift enforcement is necessary to ensure effective compliance by gatekeepers with their obligations under the DMA. EUTA hopes to see tangible results before the European Commission's 12-month investigation period, as every day that passes with anticompetitive and illegal practices by gatekeepers is a loss for European businesses and consumers. We believe that the Commission should endeavour to swiftly conclude the opened investigation and open further formal non-compliance proceedings.

Respectfully, EUTA would like to share some comments on the implementation of certain provisions of the DMA. In the interest of length, we will focus on primary concerns as of today to the EUTA members. This submission focuses on compliance issues, in particular:

- Apple and Google in relation to app stores and app distribution;
- Google in relation to self-preferencing;
- Meta in relation to the use of business user data;
- Google and Meta in relation to ad transparency obligations;
- Google in relation to access to end user data.

Please note that in the future, EUTA may supplement this submission with further contributions, either covering more detailed points concerning the same issues, or additional issues. The fact that a specific DMA provision is not covered in this submission does not mean that it does not raise compliance issues for EUTA members. We are also available to contribute to the on-going non-compliance proceedings if that were helpful to the Commission.

App store and app distribution related issues

Apple and Google have essentially enjoyed monopoly in app distribution (or quasi monopoly for Google) on their respective ecosystems iOS and Android. In particular, Apple's closed ecosystem has not so far allowed any alternative ways for app distribution. This has led both companies to implement unfair practices limiting competition from third party app marketplaces and in-app innovation, as well as unfair terms on business users (essentially including monopoly rents).

EUTA has been counting on the DMA to restore fairness and contestability in app distribution. In particular, EUTA considers that the DMA provides opportunities to lower the cost of app distribution (by ensuring that any fee applied by Apple or Google is FRAND), remove restrictions imposed on app developers in their communication with end users, boost competition in the markets for payment systems, and open app distribution with sideloading and alternative marketplaces.

Unfortunately, the plans disclosed by both Apple and Google fall short of complying with several provisions of the DMA.

Apple

As of March 7, Apple proposed to app developers to either stay on the existing Apple terms and conditions or to sign up to the new EU terms for now. It remains unclear how long these two options will remain available to app developers placing them in a business-critical uncertainty. This allows Apple to further abuse its dominant position in app distribution by holding the threat of phasing out the old terms and conditions at any point in time - with significant financial implications for any companies which continue to operate on them. The new terms, introducing a so-called Core Technology Fee (CTF), would have significant financial implications for many EU tech companies, particularly for those currently only subject to a developer fee and not subject to arbitrary fees on transactions.

While Apple has the freedom to uphold two sets of terms and conditions within the EU if it desires, it must do so in accordance with principles of equal treatment and non-discrimination. Furthermore, it is imperative to clarify to Apple that all applicable terms and conditions within the EU must align with the DMA. Therefore, Apple shouldn't be allowed to reject app updates for reasons that blatantly contradict the DMA, regardless of whether app developers opt to stick with existing terms and conditions or adopt the new ones. Any provisions in the terms and conditions (whether existing or new) that conflict with the DMA should be deemed null and void.

As regards the new EU terms proposed by Apple, they are falling short of compliance with the DMA in particular for the following reasons:

Article 5(4): Instead of permitting business users to promote offers and establish contracts with already acquired users "*free of charge*", Apple is extending its unjust fees to transactions that were previously exempt from such charge (e.g. reader apps linking account entitlement). Under the new terms, nothing is exempt from charges. It is imperative for Apple to reassess its terms and ensure that transactions falling within the scope of Article 5(4) – transactions with already acquired users – must be free of charge.

In line with Recital 40 of the DMA, an acquired end user is defined as an end user who has already engaged in a commercial relationship with the app developers. Such relationships can be either paid or free, including scenarios like free trials or service tiers.

The following transactions, for instance, should be exempt from transaction fees:

- Conversion of an existing user of free digital goods and services into a premium subscriber;
- Renewal of a subscription;
- Reacquisition of a dissatisfied app service subscriber, thanks to promotional activities;
- Conversion of a customer that has purchased products through a marketplace to a premium delivery service or subscription service.

These are just examples. The point is that Apple should come up with a fee structure that, at most, includes a one-off customer acquisition fee (where merited, i.e. where Apple can prove it has actually facilitated such "initial acquisition") but does not tax all and any transaction for the lifetime of the relationship with the customer. Recital 33 of the DMA makes it clear that business users should be able to adequately capture the benefits resulting from their innovative or commercial efforts, and being obliged to pay perpetual rents to Apple clearly does not meet this requirement.

Article 5(7): While Apple's recent decision to allow app developers to integrate alternative payment systems may seem like a step towards fostering competition, the new EU terms pose significant barriers for such systems to effectively challenge Apple's proprietary setup:

- To utilise their own or third-party payment systems, developers are now compelled to adhere to the new EU terms, which include the imposition of the Core Technology Fee (CTF) - further elaborated in the dedicated section on Article 6(12).
- For many developers, the financial burden imposed by the CTF outweighs any potential cost savings associated with adopting alternative payment systems. It is evident that this "all or nothing approach" is inconsistent with the spirit of the DMA and makes the optionality of using one's own, or a third party, payment system unattractive.
- This is even more relevant for developers of digital goods and services, who on top of the CTF - if applicable - would also have to pay a hefty transaction fee of up to 17% of each transaction.
- When developers do opt for alternative payment systems, they must include intimidating messages for users throughout the payment process, inevitably causing friction and leading to decreased user conversions, thus diminishing significantly the appeal of these systems.
- Apple's offering of a mere 3% discount on transaction fees for transitioning to alternative payment processors. However the cost of developing such systems will comfortably exceed 3% and hence financially disincentivizing the use of an alternative systems[1] .

In summary, the new EU terms create little incentives for developers to implement alternative payment systems.

[1] Typically payment processing fees are in the range 2%-6% depending on the type of payment method used and whether currency conversion and cross-border fees apply. App developers using an alternative billing option would also need to set up tax and customer support functions for the UK market. Merchant of Record services that offer these services charge 3-5% more than payment processing fees, so the combined fees for using an alternative billing system would be in the range of 5-11%.

Article 6(4): This article imposes on Apple an obligation to permit app sideloading and the installation of alternative app stores.

While the new EU terms initially only allowed sideloading of apps through alternative app marketplaces, Apple recently reversed its stance, announcing on March 12th, 2024, that it would allow sideloading of apps from developers' websites and from app marketplaces "from the Spring 2024", for those who agree to Apple's alternative terms, including the CTF (discussed separately). This is a partially welcome step, but (i) very few details have so far emerged on when and how Apple will effectively allow sideloading, and (ii) the already apparent restrictions mean that sideloading as allowed will likely fall short of fostering genuine competition in app distribution. For alternative app stores and sideloading to be truly effective, Apple must ensure that they can compete on fair terms with Apple's own App Store. Presently, this remains unaddressed.

Of particular concern is Apple's apparent intent to impose limitations on app developers choosing to distribute their apps through sideloading. Although Apple has yet to disclose all technical requirements, there are fears that unnecessary obstacles — such as scare screens and other frictions — may be introduced to discourage users from sideloading apps and to make it very risky for developers to choose side loading, potentially favouring App Store distribution. Additionally, the unexplained limitation of sideloading to apps with more than 1 million downloads will exclude thousands of apps, a restriction that seems at odds with the FRAND condition of Article 6(12).

Regarding alternative app stores, Apple has introduced several restrictions that are unlikely to make it a viable option for most business users. At this stage, EUTA and its members deems it improbable that general app stores will thrive on iOS due to these restrictions.

As regards both sideloading from websites and through alternative app stores, the imposition of the CTF will discourage large enough developers (including many providers of free apps) to avail of these opportunities. Moreover, the attractiveness of alternative app stores vis-a-vis Apple's store will be impacted, as consumers may be deterred from using alternative app stores where many popular apps are not available. Therefore, the CTF may act as an obstacle to achieving key DMA goals of contestability among alternative payment systems and alternative app stores.

Article 6(12): Access to the Apple App Store must adhere to principles of fairness, reasonableness, and non-discrimination (FRAND). However, EUTA contends that Apple's conditions fall far short of meeting these standards.

- Transaction fee: Apple's announcements regarding the transaction fee have been notably lacking in clarity regarding its justifications. EUTA understands that Apple considers the fee to cover: (i) app distribution and discovery services; (ii) access to Apple's trusted and secure mobile platform; (iii) access to tools and technology for app development and sharing. However, these justifications are overly generic, insufficient, and partly overlap with the justifications provided for the CTF, making it challenging to ascertain how the fee can be deemed fair and reasonable, particularly in terms of providing fair compensation for actual services rendered.

  It's also notable that the transaction fee is significantly higher compared to the fee charged by Apple for the use of IAP (3%), despite the latter providing much more tangible services to app developers, especially smaller ones.

- Core Technology Fee (CTF): The introduction of this new fee by Apple brings forth several concerns.
    - The CTF will be a barrier to app scaling up and therefore will potentially hinder the emergence of new European tech challengers, which is one of the key objectives of the DMA.
    - It will significantly affect developers utilising a freemium business model, as they will be required to pay a substantial fee per user, even if the user accesses the service for free. This will also make freemium apps more expensive and force app developers to potentially start charging end users. It is quite striking that Apple hugely benefits from the plethora of freemium apps on the iPhone and on top would now ask them to pay Apple even where they do not charge for their own service.
    - It will have a disproportionate impact on developers offering an ecosystem of services. For instance, a developer offering five different services may find that acquiring one user results in the download of five apps. In comparison to companies offering only one service, such developers would have to pay five times more in CTF fees under the new terms and conditions.
    - The lack of justification for the fee's recurrence and its application to the same user (download) every year raises questions. This contradicts any notion of remuneration for the gatekeeper's facilitation of user acquisition, as outlined in the DMA, which implies that at most the "initial" user acquisition could be remunerated.
    - The CTF applies if an app is updated at least once a year, regardless of whether the user *actually* uses the app. This means that app developers may be charged for users that do not use their app and therefore are not monetised. It is obvious that such taxation is neither fair nor reasonable.
    - The CTF would have significant financial implications for many EU tech companies, particularly for those currently only subject to a developer fee and not subject to arbitrary fees on transactions. This could even lead to an existential risk.

Google (Android and Google Play)

EUTA also highlights several concerns regarding Google's purported compliance with app store-related obligations under the DMA. While there have been some changes to platforms like Android or Google Play Store, these adjustments often only scratch the surface of longstanding issues such as the tying and bundling of Google's services. In its compliance reports, Google suggests that the historically more open nature of Android OS compared to iOS inherently aligns with DMA standards. However, significant work remains to ensure that Google fully meets the requirements outlined in the DMA.

Article 5(4): Similar to Apple, Google's approach also fails to fully comply with Article 5(4), particularly since there are no free-of-charge options within its terms. This echoes the concerns raised in relation to Apple's compliance.

Google has introduced a rather intricate business terms structure, distinguishing between in-app purchases and external offers.[2] However, this new fee arrangement poses several challenges concerning Article 5(4) and Article 6(12) (i.e., FRAND fees):

- The fee structure varies between in-app and external offers without clear justification from Google. Article 5(4) does not make such a distinction, emphasising that business users should have the freedom to engage in contracts with end users free of charge both within and outside the app.

- Google's "external offers program" also includes certain technical requirements, ostensibly framed as security measures by Google, which could prove challenging for developers to implement and significantly impair user experience. Among these requirements, two technical specifications stand out as particularly problematic (and similar issues apply to the Apple terms):
    - "*Have a clearly visible URL on your destination page, allowing the user to understand where they've been directed*." URLs used in the context of the external offers program are likely to change depending for example on specific offers (Black Friday deals, etc.). In terms of format, such URLs will be much longer and complex than the example provided by Google. This requirement will not prevent badly intentioned developers to set-up an innocuous looking URL, but will seriously hamper marketing efforts from legitimate developers and artificially reduce their trust in the "linking-out" offer.
    - *"Not pass additional parameters in the URL or pre-populate data from the app, in order to protect the user."* This requirement is, again, framed as protecting the user. However, Google is very well aware that similarly to what was explained above, URL parameters and pre-populated data are essential in today's online marketing. Complying with this requirement would mean that it would be impossible to offer tailored deals to users. In the case of a Black Friday deal and after clicking the link, the user wouldn't be able to see the deal promoted straight away, but would have to look for it himself, and input a lot of data that could've been pre-populated such as the currency they want to pay with, the country where they live...

The technical requirements set forth by Google (and Apple) would inevitably lead to a subpar user experience, ultimately hindering developers' ability to convert free users into paying customers. This limits the incentives of business users to steer users towards their own website and instead push them towards remaining within the Play Store ecosystem. It's evident that Google's technical demands are intentionally burdensome, aiming to impede developers' efforts and artificially degrade user satisfaction.

Moreover, Google's external offer program introduces a puzzling discrepancy between acquisition and service fees. The rationale behind the fee structures remains ambiguous, especially given the apparent disparity between the service fees charged for Google Billing versus (3%) other services (7%). The long duration (2 years) of acquisition fees seems unjustified, particularly for subscription-based models where renewals occur automatically. In fact, there is no reason to pay for an acquisition fee as soon as a subscription automatically renews. A more appropriate model would be to apply a one-off acquisition fee on the first transaction, as is customary in many other

[2] See here.

markets. The conditions for opting out of service fees are equally unclear, raising concerns about the practicality, effectiveness and fairness of such an option for developers.[3]

Article 6(12)/Article 5(7): When it comes to the Play Store fees, Google mostly changed the structure of its fees, but manifestly failed to make them FRAND, and thus compliant with Article 6(12). Play Store fees were not lowered for app developers, and Google does not make the use of alternative payments providers attractive at all for developers. Similarly to Apple, developers choosing an alternative payment provider will only get a 3 to 4% discount from Google. Therefore, Google only provides an illusion of choice here, favouring their own payment service while pretending to comply with DMA requirements. Google's proposed fee structures of 27+3% or 26+4% effectively are no different to Google's standard fees of 30%, therefore, they are not compliant with the DMA requirements. Again, the new approach creates little incentives for developers to implement alternative payment systems (in contravention with Article 5(7), similarly to what was noted for Apple above).

Prohibition of self-preferencing by Google

EUTA members comprise several companies which are affected differently by Google's self-preferencing practices, namely hybrid e-commerce marketplaces platforms (e.g. Zalando, Cdiscount, Allegro, Bol), services platforms (e.g. Booking.com), classified ads marketplaces (e.g., Vinted, Adevinta with classifieds platforms such as Infojobs, Locasun, Leboncoin ou 2ememain, or Schibsted with marketplaces such as FINN and Blocket), and price comparison services (e.g., Prisjakt, which is owned by Schibsted, or Ceneo, which is owned by Allegro).

Google has a history of giving preference to a wide range of its own vertical services (travel, flight, hotel, shopping, jobs etc.) and is rolling out new verticals already outside Europe (vehicles). Some of these have not been addressed yet neither by the Commission in its workshops, nor by Google in its compliance report (for example, jobs and cars). EUTA considers that it is of utmost importance that the Commission scrutinise new features and all verticals in which Google has introduced its own intermediary services and strictly enforce Article 6(5) in all cases in which Google gives preference to its own services competing with a third party service, while carefully assessing potential side effects on other business users and consumers.

As regards the new EU terms proposed by Google, they are falling short of compliance with the DMA:

1. The Product Listing Ads (PLAs) proposed by Google during the 16 January workshop have garnered concern among EUTA members, particularly some companies operating as e-commerce or service platforms. While intended as an online intermediation service, the PLAs fail to address Google's self-preferencing practices, instead intensifying competition within Google's ecosystem and between comparison shopping services (CSSs) and merchants. This heightened competition is likely to drive up prices for both business users and end-consumers. The DMA must not inadvertently burden business users with increased costs or limit their fair access to the core platform services (CPS). If it were to occur, it would contradict the overarching goal of the DMA, which is to improve competition in order to provide consumers

[3] "*After the initial two-year acquisition period, a developer may choose to discontinue Play's ongoing services for a particular app. Since users acquired the app through Play with the expectation of services such as parental controls, security scanning, fraud prevention, and continuous app updates, discontinuation of services requires user consent as well. Subsequently, ongoing services and associated fees will no longer apply to these users. Developers are still responsible for reporting transactions involving users who choose to continue receiving ongoing services from Play.*"

with more options and better prices. Additionally, the Commission must consider the potential emergence of new gatekeepers in the process, as mandating new intermediaries could inadvertently restrict merchants or drive customers towards alternative platforms due to degraded user experiences (e.g., opting for Amazon over Google for product searches).

2. We oppose the introduction of the Product Viewer Detailed Page (the "PVDP") feature as it breaches the DMA articles 6(5) and 6(12). This feature prolongs consumers' search path on Google, reinforcing Google's already dominant market position. The new format will also further establish Google as the primary CSS, relegating advertisers to mere service providers. Google's responsibility is to ensure that every search conducted within its Online Search Engine (OSE) results in directing the end user to the website of the intended business user. This should be determined by the end user's click indicating their desired access. Accordingly, Google should be forbidden from interjecting any intermediate or transitional page features, like the PVDP.
3. With its solutions, Google is still presenting its own services on the search results page in a much richer, attractive and interactive format than any other result from similar third parties. It is crucial for Google to ensure that this new format does not override organic search parameters. Transparency in ranking is key. Google must apply FRAND conditions of access to business users in accordance with article 6(12). Moreover, we urge Google to promptly publish comprehensive guidelines outlining the new format, parameters, and quality criteria necessary for inclusion in these enhanced formats.
4. Google has not provided stakeholders with access to reliable information and empirical data on how its solution complies with article 6(5) (and article 6(12)). In order to fully understand the impact of the proposal and prepare for its implementation, it is imperative that Google immediately provides the Commission and stakeholders with access to relevant information and empirical data that it has gathered in the context of its testing exercises and first weeks of full application. While EUTA appreciates that the DMA has already entered into force, both stakeholders and the European Commission are not able to analyse the measures put in place and to verify their compliance with the DMA.

Finally, and although this is not an issue relating to article 6(5), EUTA notes that Google persists in requiring a Google account to access Android OS and the Play Store. This perpetuates the inseparable link between Google's Play Store and Android devices, effectively limiting consumer choice. In addition, Google uses a profusion of different deceptive design practices to make sure that new Android users are essentially forced to create a Gmail account when setting up their Android phones. The Commission should investigate whether this contradicts Article 5(7).

Use of business user data

Meta

It's yet to be determined whether Meta refrains from leveraging information obtained from their CPSs by business users to gain an unfair competitive advantage against them.

Article 6(2): Meta competes with classified marketplaces such as Vinted, Schibsted, and Adevinta through Facebook Marketplace (FBMP). Simultaneously, these classified marketplaces utilise Meta to promote their services on platforms like Facebook and Instagram, thereby enabling Meta to gather data on their activities and users. However, Meta must refrain from leveraging this data to

gain an advantage in FBMP, as this matter is currently under investigation in an ongoing antitrust case.

While EUTA acknowledges that Meta has announced having introduced technical safeguards and controls to prevent the use of advertising data generated or provided by a business user in competition with that business user, there are concerns regarding the verification of the effective implementation of such safeguards. EUTA calls on the Commission to ensure that Meta's use of advertising data is audited, either by the Commission or independent external experts as outlined in Article 26 of the DMA. This audit is necessary to ensure that Meta's commitments are effectively implemented and that Meta does not exploit advertising data, such as that from classified ads' marketplaces, to gain an advantage in FBMP.

Ad transparency obligations

Google

While EUTA welcomes that Google now makes available, free of charge, new data sets concerning ad pricing and performance, it remains to be seen whether Google fully complies with its obligations.

First, it is clear that the global consent toggle that Google implemented in relation to the sharing of pricing information under Articles 5(9) and 5(10) will lead most advertisers and publishers to opt out and therefore not share granular advertisement price data. This will partly defeat the purpose of these two articles (namely create price transparency in the ad tech supply chain). EUTA therefore invites the Commission to explore alternative (and less restrictive) ways to implement these provisions, and in particular to introduce more flexible consent mechanisms.

Second, in relation to information provided when advertisers or publishers do not give their consent to sharing pricing data, it does not seem that Google will provide "information concerning the daily average price paid by that [advertiser/publisher], as required by the DMA, but rather "an aggregate amount or an amount based on the standard rate paid by [advertisers/publishers]".[4] EUTA invites the Commission to investigate this aspect in more detail; In particular, the Commission should consider with special caution Google's justifications based on privacy laws[5].

Meta

Article 6(8): Meta must provide event-level reports on attributed conversions, such as a transaction ID report including clickId and ImpressionId, to allow third parties to verify measurements. Meta asserts that its existing tools, particularly access to non-aggregated data at the individual advertisement level through Ads Manager, fulfil this requirement. However, Meta's provision of information falls short of the requirements outlined in the DMA. Despite attempts by some EUTA members to access non-aggregated data within Ads Manager for verifying Meta's measurement, they were unable to locate the necessary information. Currently, there is no apparent method for a

[4] See Google Compliance report, p. 85 and 93.
[5] As a reminder, Article 6(c) of the GDPR enables the processing of personal data where such processing is necessary for compliance with a legal obligation to which the controller (Google) is subject.

third party to discern Meta's attributed sales, whether through reporting or web tracking. The process for accessing these tools lacks clarity. Meta must offer more detailed information.

Access to end user data

Article 6(10): As data-driven advantages are considered to be among the core hurdles for contesting digital gatekeepers, the Commission should be very careful in guaranteeing such effective access, free of charge, to high quality data. EUTA is concerned that such access rights as set forth in Art.6(10) are not effectively granted in practice, due to obstruction implemented by gatekeepers. Namely, EUTA draws the Commission's attention that certain of its members faced difficulties or even refusal to access conversion data from Google, including lead tracking and views, which significantly hinders their ability to carry on advertisers campaigns, while there is no alternative to Google.

About the European Tech Alliance

EUTA represents leading European tech companies that provide innovative products and services to 500 million users[6]. Our 30 EUTA member companies from 14 European countries are popular and have earned the trust of consumers. As companies born and bred in Europe, for whom the EU is a crucial market, we have a deep commitment to European citizens and values.

With the right conditions, our companies can strengthen Europe's resilience and technological autonomy, protect and empower users online, and promote Europe's values of transparency, rule of law and innovation to the rest of the world.

The EUTA calls for boosting Europe's tech competitiveness by having an ambitious EU tech strategy to overcome growth obstacles, making a political commitment to clear, targeted and risk-based rules, and enforcing rules consistently to match the globalised market we are in.

Our members

Adevinta, AirHelp, allegro, appJobber, bol., Bolt, Booking.com, Cdiscount, CRITEO, DAILYMOTION, deliveroo, Delivery Hero, dreamstime, eMAG, FREENOW, Glovo, hellowork group, meetic, MIRAKL, Proton, Schibsted, SEZNAM.CZ, Spotify, stripe, tomtom, trivago, Trustpilot, Vinted, Wolt, zalando

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[6] It reflects users, consumers and business customers from EUTA member companies, per year. It includes overlaps but illustrates the reach and impact of our services.