

DMA – Questions raised by the draft proposal

Legal Basis and objective of the Regulation

The general objective of the proposed Regulation is to “to ensure the proper functioning of the internal market by promoting effective competition in digital markets, in particular a contestable and fair online platform environment “, with the objective of addressing gaps in the competition framework that are currently not covered by Article 101 and 102 TFEU.

- With this in mind, why was Article 114 TFEU selected as the legal basis for this Regulation? Why was Article 352 TFEU not chosen as the legal basis when Protocol 27 of the TFEU states that this should be used when the EU needs new powers to address competition in the internal market?
- Are the policy goals of fairness and contestability sufficiently well-defined to ensure both legal certainty and proportionality in the application of the regulation? Should other goals, such as consumer welfare and the importance of a predictable environment for the business users of such platforms, particularly smaller ones, be taken into consideration as well?

Uncertainty over scope, procedure and responsibilities

The scope of the Regulation relies on a set of requirements outlined in article 3.1 (“significant impact”, “important gateway to reach user”, “entrenched/durable position”), relying on a set of absolute quantitative criteria and further qualitative criteria. The requirements outlined in 3.1 and the qualitative criteria are vague, making it difficult for service providers to assess whether there are in scope, thereby leaving important discretion to the European Commission.

- Given the broadness of the criteria outlined in article 3,1 and the lack of clarity over the qualitative criteria outline in article 3.6, how will the European Commission ensure that there is sufficient legal certainty for services providers to prepare for compliance? Has the European Commission assessed the impact of such uncertainty on the market, in particular with start-ups aspiring to contest the position of gatekeepers? How will the courts be able to assess the validity of a European Commission decision in this context?
- Given the goal of ensuring contestability, does the process of designating gatekeepers, including those falling in scope the quantitative criteria outline in article 3.2, sufficiently take into consideration existing and future contestability in the market, including the possibility of multi-homing and the availability of alternative routes to business users to access users?
- Successful players that reach a critical size may anticipate the risk of being captured by additional regulation, and may be concerned by being captured by qualitative criteria. Has the European Commission taking into consideration in its impact assessment how the scope may disincentivise contestability?

The details on the role that MS competent authorities will play in the various DMA procedures is not clearly stated in the Regulation proposal. The DMA states that to integrate the national expertise in the platform economy with the Commission thinking, the Commission could consult before taking certain decisions (e.g. on non-compliance or fines) a committee composed of representatives of Member States – the Digital Markets Advisory Committee. The Regulation proposal also sets out a monitoring role for the Commission, and states that “at the request of the Commission, the governments and authorities of the Member States

shall provide the Commission with all necessary information to carry out the duties assigned to it by this Regulation”.

- What role does the Commission envisage for MS competent authorities during the processes included in the DMA (e.g. designating gatekeepers, amending list of core platform services, market investigation deciding on infringement, etc)? Is this role limited to opinions of the Advisory Committee (e.g. on market investigations, interim measures, suspension, etc.), or is it wider (e.g. will they have opportunities to participate in important decisions such as the designation of gatekeepers, the update of obligations, etc?)
- What will be required from MS in terms of monitoring gatekeepers present in their territories (e.g. whether they meet the thresholds for intervention, monitoring of compliance with rules, monitoring as a trigger for a market investigation, etc)?

Budgetary and resourcing implications for the European Commission and Member States, and proportionality

The proposal focuses regulatory oversight in the hands of the European Commission. This oversight includes important enforcement powers and very short deadlines in some cases (such as the communication withing three months of preliminary findings in the context of investigations).

- Has the European Commission developed its thinking as to whether the regulatory oversight will stand in the institutions?
- Has the European Commission made an assessment of budgetary and resourcing implications of such power?
- How will the European Commission ensure that compliance with the obligations imposed on targeted service providers and the Commission’s assessment of such compliance, including in the specification of article 6 obligations, will be sufficiently proportionate?

The Commission recognised that national authorities would have to bear some relatively modest administrative costs, however, there is still significant uncertainty as to the costs and administrative burden that the DMA may impose on Member States. In addition to their roles on monitoring and participation in decision-making (e.g. as part of the Digital Markets Advisory Committee), the DMA contemplates stringent timelines. For example, the Commission will have 12 months from the beginning of the proceedings to issue a decision on systematic non-compliance.

- Given the uncertainty on Member States responsibilities, how can the Commission estimate the cost in terms of time and resources and administrative burdens for Member States?
- Could this uncertainty have an impact on the ability of Member States competent authorities to plan its priorities and conduct national investigations?
- Do the proposed DMA timelines give enough time to Member States to be able to technically assess the investigation and effectively input in the process?
- Would these impacts be different for different Member States (e.g. have a higher impact on smaller Member State)?

- Will there be safeguards in place to make sure that all Member States will be able to equally participate in the process and that the balance of powers is maintained?

Ex-ante Prohibitions and Obligations

The Commission Impact Assessment on the DMA does not include a detailed assessment of the potential unintended consequences of the Regulation. Although it mentions to the potential benefits that digital platforms can bring to the economy, there is no detailed analysis of how some of these benefits may be lost or significantly reduced by the introduction of regulation. For example, it does not consider the potential loss of benefits of vertical integration and efficiencies arising from economies of scale and scope that size can bring, the risks of reducing smaller or newer companies' incentives to grow and innovate.

- Has the European Commission considering the impact of certain obligations on the ability of service providers to protect their investment and business models? For example, article 5c would make it easy for business users to free ride of a service providers investment, without taking into consideration whether that business model deliberately exclude its competitors.

Furthermore, it does not address sufficiently the difference between different platforms' business models. Several MS have already emphasised that the effectiveness of the ex-ante tools lies in a tailored approach by specifically taking into account the business model of different large players.

- Is a case-by-case approach sufficiently secured in the proposal? Has the Commission sufficiently taken into account the various business models in setting obligations in Articles 5 and 6, and how applicable these obligations are across the different services and business models?
- How will the new ex ante framework consider the unintended consequences that could arise by the implementation of the DMA (e.g. at the point of designating gatekeepers, at the point of designing remedies), such that measures do not have a detrimental impact on innovation, new entrants, consumers welfare (e.g. their preferences for privacy), etc.

Regulatory dialogue and article 6

The draft proposal mentions the importance of regulatory dialogue, in order to specify the application of obligations, particularly those outlined in article 6. However, the parameters and principles framing such dialogue are not defined in draft regulation. Yet, given the complexity of targeted markets, the asymmetric nature of the regulation and the potential for unintended consequences, developing effective proportionate and predictable procedures and an environment of trust will be key ensuring positive regulatory outcomes.

- Can the European Commission explain in further details how differently it will approach compliance with article 5 and 6, and whether it believes that services providers falling in scope will need to comply with both sets of obligations?
- How does the European Commission foresee such regulatory dialogue to take place in practice? Given the threat of important fines for non-compliance, and the lack of certainty over how a service provider may comply with article 6 obligations, how will the European Commission ensure proportionality in such compliance?