

FACEBOOK

March 2021

Facebook Comments on the Regulatory Design of the Digital Markets Act

Introduction

The Digital Markets Act (DMA) is a significant proposal that will sit at the centre of the EU's regulatory framework for digital markets and technologies. It is not only an important measure for a company like Facebook but also for the EU's ambitious plans in the digital economy. The DMA truly is exceptional in that it is a completely novel way of regulating large companies in certain digital activities rather than markets more broadly. Its reliance on established concepts in competition law or on other regulatory frameworks is minimal at best. This increases the need for clarity, legal certainty, and accountability.

As Facebook has engaged in constructive conversations with various stakeholders throughout the last months, it became clear that ***questions on the regulatory design of the DMA are and should be an important part of the conversation***. That is because the regulatory design will matter greatly in the practical operation of the DMA, including by laying out the framework for interactions between the regulator and companies falling in scope. This in turn will be a crucial element for companies' compliance efforts which will ultimately be important for the DMA's ability to meet its objectives.

With this paper Facebook seeks to contribute to this conversation and to make a range of suggestions which Facebook believes would help in the practical applicability of the DMA. Facebook is fully aware of the political aim for the DMA to work efficiently and swiftly. While time-consuming processes are also not in Facebook's interest there will be a need to make sure some provisions will not be applied in a disproportionate way unduly increasing legal uncertainty and ultimately hindering innovation and reducing consumer benefits. Facebook views the following suggestions as the start of a wider dialogue and looks forward to discussing those with various stakeholders.

Facebook believes that the following suggestions could improve the regulatory framework of the DMA:

1. A framework with more avenues for regulatory dialogue would benefit both the regulator and the companies in scope.

Dialogue between the regulator and companies would allow the regulator to ensure that the objective of the DMA provisions are met from the beginning while reducing non-compliance risk for companies.

For Facebook, meeting the DMA's regulatory obligations will be the overarching priority. The DMA does not only include very strong enforcement measures but it is likely to lead to significant compliance efforts. It is in Facebook's interest to make sure that these compliance efforts meet the regulatory requirements from the very beginning. The DMA currently does not envisage *any* consultative procedure for Article 5 provisions and the regulator is under no obligation to answer to a gatekeeper's specification request under Article 7(7) for Article 6 provisions.

Facebook believes that a more participatory approach based on more opportunities for dialogue can be achieved through:

1. ***Protected 'first attempt' for Article 5 provisions.*** Currently there is no consultative procedure for Article 5 provisions even though some provisions will involve important product design decisions Facebook believes could merit from an exchange with the regulator. This gap could be addressed in two different ways. First, Article 7(2) could be extended to Article 5 provisions and be made a necessary step before the Commission can take enforcement action under Article 25 (see sub-Point 2 below).

Second, companies could file their good faith compliance measures for each Article 5 provision with the regulator which would trigger an 'in compliance presumption' unless the regulator objects to it within a specified timeframe. If it objects, the company would get a chance to address that objection through a change in its compliance measures. This process could be part of the commitments procedure under Article 23. If the regulator does not object within the specified timeframe, the company is presumptively compliant. The regulator can always object to compliance measures down the line and order proceedings under Article 23 but then the company should not be subject to fines nor should a potential non-compliance decision count for the purposes of a systemic non-compliance investigation under Article 16(3).

2. ***A decision under Article 7(2) for Article 6 provisions should be a necessary step before the Commission can take action under Article 25.*** This form of procedural sequencing would allow for a regulatory dialogue as suggested in Recital 58 and for companies to ensure compliance without facing enforcement action against their good faith compliance measures. This would also prevent the Commission from treating gatekeepers inconsistently when applying Article 16 on systematic non-compliance, if some gatekeepers go through an Article 7(2) process and others not. This would not prevent the Commission to take action under Article 25 if a gatekeeper does not comply with the measures specified in a decision pursuant to Article 7(2). Article 7(3) would have to be amended accordingly.
3. ***The consultative process for Article 6 provisions should be improved.*** Whenever a company asks for clarification under the Article 7(7) process, the Commission should be obligated to provide an answer. Currently it does not have to do so which leaves companies in compliance uncertainty even though they have explicitly signaled that uncertainty to the Commission under an Article 7(7) request.

4. ***The Commission should be barred from opening any enforcement proceedings for non-compliance pending the outcome of an Article 7(7) request.*** The Article 7(7) process currently is a key element in facilitating regulatory dialogue, as laid out in Recital 58. That process, however, could be seriously undermined if companies find themselves exposed to enforcement action while they seek guidance from the Commission.
5. ***Introduce provisions that allow the Commission to issue guidance.*** Guidance on specific obligations could provide greater clarity to companies, especially if preceded by consultations with gatekeeper companies and other affected parties.

2. The introduction of an efficiency defense would mitigate unintended consequences and lead to more proportionate outcomes.

Currently the DMA imposes a list of self-executing obligations and prohibitions on companies. There are no provisions that would be applied on a case-by-case basis, i.e. “greylist” obligations as they were termed in the run-up to the DMA. The suspension and exemption processes in Articles 8 and 9 respectively are the only two avenues available to suspend the applicability of provisions in whole or in part. Both articles may only take effect on the basis of very narrow grounds. In the current DMA proposal, gatekeepers cannot justify that a given behaviour prohibited by the DMA actually has economic advantages for business users and/or end users that on balance is positive for the market and leads to increased consumer welfare.

Likewise, companies do not have the possibility to demonstrate that a given practise is incapable or unlikely to have anticompetitive effects or reduce market contestability in a particular instance and should hence not apply. Admittedly, while it may not make sense to subject every provision to an efficiency defense (which would also reduce administrative burden for the regulator), companies should be given the opportunity to demonstrate the net positive effects of behaviour that may fall under one of the Article 5 and 6 provisions - especially for practices that are capable of improving services for consumers. For Article 6 provisions, Article 7(5) could provide an obligation for the Commission to take into account efficiencies brought forward by companies during the specification process.

3. Exemptions from obligations should also be granted on grounds of objective justifications.

Related to the point above, the DMA currently does not allow companies to be exempted from obligations on grounds of objective justifications such as protecting users from harm or service integrity. Facebook believes that such objective justifications could be introduced in Article 9. Importantly, as a company requests an exemption it should be protected from a finding of non-compliance under Article 25 for as long as the Commission is assessing this request. For Article 6 provisions, Article 7(5) could also provide an obligation for the Commission to take into account any objective justifications brought forward by companies. Alternatively, objective justifications could be introduced within specific obligations in that a company could justify a given practise for a specific purpose such as protecting its users from harm. For example, Article 5(a) should still allow companies to use and combine data for safety, integrity, and security purposes such as identifying behaviour that poses safety risks across services, or applying protection measures across services (e.g. removing an account that has shared child sexual abuse material from all services owned by the company)

4. To ensure clarity the Commission should clearly define the relevant Core Platform Service (CPS).

Article 3(7) obliges the Commission to list the relevant 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 / a combination of services that falls into scope of the CPS. For example, Facebook runs services that provide an integrated experience consisting of various different services and features that together make up the Facebook experience. However, not all of these parts of the Facebook experience would necessarily meet the definition of a “social networking service” which is why the Commission should be obligated to clearly list the services within a CPS that fall in scope as that determination will be the anchor point for all subsequent regulatory obligations.

5. In determining that a CPS should not fall in scope despite meeting the quantitative thresholds greater consideration should be given to the competitive environment.

It should be clarified that Article 3(4) allows companies to argue that a CPS (and not only a gatekeeper) should not fall in scope of Article 3(7) because they do not meet the requirements of Article 3(1) despite meeting the quantitative thresholds in Article 3(2). In coming to a decision on gatekeepers, the Commission is asked to consider the various elements in Article 3(6). This should apply *mutatis mutandis* to a decision on CPSs as well. These elements largely relate to the size and scale of the gatekeeper/CPS and miss an important consideration: an assessment of the CPS’s competitive position in the market. Introducing this element is important as a CPS could be a relatively ‘large’ service but still operate in an environment of dynamic competition and competing against more established players. The DMA should be careful in not chilling competition coming from these kinds of challenger CPSs. Equally important, the applicability of obligations and enforcement against a CPS that is pending an Article 3(4) review should be suspended for the period of the review.

6. EU-wide regulatory coherence will be critically important.

The DMA is a complex piece of regulation that will require companies to undertake careful balancing and compliance exercises. At the same time it is an harmonization measure based on Article 114 of the TFEU. Against this background, the possibility to apply additional national competition rules as enshrined in Article 1(6) needs to be critically assessed, not least because those rules might well seek to impose obligations on gatekeeper companies that deviate from those in the DMA. As a general rule, regulatory issues that are covered by the DMA should preempt the applicability of national rules on those same issues.

7. It is unclear if and when regulatory obligations are to be removed.

Other asymmetrical regulatory regimes such as the EU telecoms regime operate under the premise to be ultimately removed once competition in a given market has been restored. The idea is that competition law would be sufficient as a ‘background regime’ to ensure a competitive market. The DMA does not anticipate the removal of regulatory obligations which it should once a sufficient level of ‘market contestability’ and ‘fairness’ has been achieved. In order to do that, the proposal would have to more closely define when the two objectives, market contestability and fairness, are met.

8. The operation of the DMA will require a well-resourced regulator.

It is in companies’ interest to engage with a well-staffed regulator who has the necessary resources to oversee and advise on the applicability of the obligations across a considerable number CPSs provided by a diverse group of gatekeeper companies.

Facebook is concerned that the number of staff currently foreseen is very likely to be insufficient. This is particularly critical as on top of compliance specifications and enforcement, the regulator will also be responsible for resource-consuming processes such as the various market investigations.

9. There are various ways in which due process and the level of accountability could be improved. The following is a non-exhaustive list of suggestions:

1. ***Companies should be given more time to respond to preliminary findings.***
Companies are subject to extremely short timelines to respond to any preliminary findings. In contrast to the Commission's open-ended timelines under Article 25, companies must respond to any preliminary findings within 14 days pursuant to Article 30. That number should be extended to at least four weeks.
2. ***Right to be heard prior to Article 8 and 9 decisions.*** Article 30 DMA specifically refers to the right for an undertaking to be heard prior to the EC adopting a decision under Articles 8 and 9. However, Articles 8 and 9 do not set out any requirement for the EC 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.
3. ***Companies' rights of defence during interim measures proceedings.*** While Article 30 refers to the companies' right to be heard and access to file in relation to any preliminary findings (and specifically refers to Article 22), Article 22 does not in turn require the EC to provide any preliminary findings to the gatekeeper regarding the need for interim measures.
4. ***The market investigation into systemic non-compliance (Article 16) should be improved and clarified:***
 - a. As long as the Article 7(2) process remains optional for the Commission, Article 16 is at risk at being applied unfairly as some companies may benefit from an Article 7(2) decision while others could be subject to immediate Article 25 enforcement action counting as a 'strike' for the purposes of Article 16(3). For that reason an Article 7(2) should be a necessary step before any enforcement action under Article 25 (see also Points 1.1. and 1.2. above).
 - b. (i) Should a company collect three 'strikes' for non-compliance in relation to three different CPSs or in relation to three different provisions and (ii) should a company collect three 'strikes' for the non-compliance without any regard to the gravity of those infringements, there will be a legitimate question of this measure's proportionality to the non-compliance at stake
 - c. There should be a causal link and a significance test between the established non-compliance and the gatekeeper having further strengthened or extended its position. The absence of a causal link and significance test would punish companies for having competed on the merits by e.g. having served users with more attractive and/or innovative products.

With these suggestions Facebook hopes to meaningfully contribute to the ongoing discussions on the DMA's regulatory design and looks forward to continuing the dialogue with stakeholders.