



Nordic position on the DMA proposal

The emergence of the platform economy has in many ways benefited the commerce sector, by allowing also smaller companies to reach customers globally. At the same time companies are becoming more and more dependent on a few global platforms which provide services such as payment processing, advertising, logistics, cloud services, and not least online marketplaces. The unparalleled success of these new business models is not problematic by default, but it becomes an issue when the platforms use their size to impose unfair and restrictive practices, on their business users, i.e., our members.

The Nordic commerce sector therefore welcomes the Commission's proposal for a Digital Markets Act (DMA) and strongly support the aim of ensuring a fair and contestable digital market.

In particular, we welcome the fact that the proposal is a regulation (and not a directive) as it will become directly applicable in the member states and thus ensure a high level of harmonisation, targets specific practices shown by member state and EU authorities to be problematic, and allows for the designation of gatekeepers to be supported by qualitative elements when needed.

To ensure that the final DMA is a truly workable and self-executing regulation, we urge the co-legislators to strengthen a few key areas of the proposal, which may benefit from additional attention. These key areas include:

- Terms, definitions and obligations, which should be strengthened and clarified, to prevent any misunderstanding or misuse by the relevant market players.
- Relevance and proportionality, which must be ensured, both when designating gatekeepers and when imposing obligations.
- Overlap with existing EU legislation, which must be avoided to ensure legal certainty for both gatekeepers, business users and end users.

Furthermore, we are concerned that whilst the DMA is not defined as competition law, it is blurring the lines between competition law and internal market regulation. As such, the DMA should remain a targeted solution for this specific situation considering the rapidly changing digital environment.

Designation as a gatekeeper

The key to unlocking the obligations of the DMA, are the criteria for designating gatekeepers. As such, the criteria must be objective, easily ascertainable and considerate of the difference between the different core platform services (CPS). We therefore welcome the designation process in Article 3 which allows for the initial use of quantitative thresholds, to be supported by qualitative elements where needed.

We would however encourage the co-legislators to include additional relevant qualitative elements to the list, such as the user's ability to multi-home and the gatekeepers market share.

Furthermore, we are concerned that the current quantitative thresholds in Article 3(2)(b) does not sufficiently take into account the differences between CPSs, when it comes to determining whether a CPS does in fact serve as an important gateway for business users to reach end users.

The presumption in Article 3(2)(b) is, that a CPS which is present in more than 3 member states and which has in excess of 45 million monthly active end users and 10.000 yearly active business users established or located within the EU, will fulfil the "important gateway" requirement for being designated a gatekeeper.

To our knowledge, there is currently no industry standard of when a user is "active", as the interaction required between a user and a CPS, for that user to be categorised as active, may, to our understanding, be different from CPS to CPS, or even from company to company. Due to the significance of this definition in complying with the DMA, this definition should not be left to the gatekeepers or the Commission (via delegated acts). We therefore encourage the co-legislators to further clarify what is meant by "active", preferably with respect to each of the eight CPSs.

By that same token, we also encourage the co-legislators to consider whether the current presumption of 45 million monthly active end users and 10.000 yearly active business users, is proportionate when applied to all providers of all the CPSs or if the presumptions could benefit from being differentiated with respect to each of the CPSs.

Obligations for Gatekeepers

Article 5 and 6 contains 18 obligations which gatekeepers either must or most not apply. We welcome the inclusion of several of these obligations as we believe these will benefit our members, not at least smaller retailers who are particularly dependent on the gatekeepers to reach their consumers.

We are however generally concerned by the application of such lists, as they come with certain drawbacks, including the risk of being disproportionate if directly applicable to all gatekeepers and CPS, as well as the risk of quickly becoming irrelevant and obsolete, or at least requiring very frequent updates.

We therefore encourage the co-legislator to clarify the scope and application of the obligations, and to ensure that these are applied only where relevant and proportionate.

A possibility could be a combination of the two ideas proposed by BEREC in their 11 March 2021 opinion on the DMA proposal and by the Commissions Economic Experts in the JRC rapport on the DMA, to create a black and a grey list of obligations.

The black list would include obligations which are clearly anti-competitive and as such directly applicable to all gatekeepers across all CPSs, without adaptation. One such obligation could be the current obligation in Article 5(d) requiring that gatekeepers may not prevent or restrict business users from raising issues with any relevant public authority relating to any practice of gatekeepers.

The grey list would include obligations which are presumed anticompetitive and thus only directly applicable to gatekeeper(s) providing a specific CPS and/or subject to a pro-competitive defence with the burden of proof being on the gatekeeper(s).

Furthermore, we firmly believe that delegated acts should only be used for technical updates, while the addition of new business practices is of a political nature and should therefore follow the normal legislative procedure. We are therefore unable to support the approach suggested in Article 10 of granting the Commission the mandate to update the lists through delegated acts.

Comments on specific obligations:

Article 5

Point (b) – Most Favoured Nation Clauses

We welcome that the proposal contains a ban on so called broad price parity clauses. This means that Gatekeepers will not be able to stop ecommerce companies from offering the same goods at different terms and prices on other platforms. This will increase competition and benefit both business users and consumers.

Point (c) – Promotion of offers outside the core platform

With a similar rationale as the point above we welcome 5c as this will enable business users to conclude contracts with consumers outside the core platform, even if the first point of contact between seller and buyer was on the platform.

Point (d) – Complaint prohibition

We strongly agree with this obligation which ensures that business users, without risk of retaliation, always have the possibility to complain to relevant authorities in case they feel that the platform is not fulfilling their part of the contract.

Article 6

Point (a) – Use of data in dual role situations

We welcome this provision that deals with a situation where the platform acts both as a platform and as a seller. We welcome a ban on using data generated by the business to compete against that same user as this constitute an unfair advantage for the retail part of the platform.

Point (d) – Self-preferential ranking

We believe that self-preferencing should be possible under certain conditions. However, it should always be made in a transparent manner.

Furthermore, the current wording requires the gatekeeper to refrain from treating its own products/services more favourably and, at the same time, to apply fair and non-discretionary conditions to its ranking. Presumably, if fair and non-discretionary conditions are used, then it would not be possible for the gatekeeper to simultaneously treat its own products/services more favourably. As such, the wording of the obligation could benefit from a clarification.

Point (i) - Businesses can access their own data

We welcome this provision that requires gatekeepers to allow their business customers to access the data about their sales, customers, and other commercial activity and that this access must be high-quality, continuous and realtime.



Nicklas Lindström
Policy advisor
nicklas.lindstrom@svenskhandel.se
+46 73 693 8382



Ilari Kallio
Chief Policy Adviser, EU Affairs
and Corporate Law
ilari.kallio@kauppa.fi
+358401396912



Lasse Hamilton Heidemann
Head of EU- and International
Affairs
lhh@danskerhverv.dk
+45 3374 6595



Jarle Hammerstad
Head of Policy / Commerce
j.hammerstad@virke.no
+47 918 71 526