

The Digital Markets Act: Ex Ante Regulation of Digital Gatekeepers to Promote Contestability in Digital Markets

At a glance summary

- **Competition law has failed** to address issues in relation to dominant digital gatekeeper platforms
- On the possible legislative options outlined by the Commission, we support a **dynamic ex ante framework based on a case-by-case assessment and application of tailored remedies**
- This should apply to **digital gatekeepers, present in 3 or more Member States.**
- Remedies imposed on **digital gatekeepers should be targeted** and could include:
 - Requirements to provide information to relevant authorities
 - Prohibition of unfair commercial terms and conditions and anticompetitive practices
 - Access to certain key facilities (software/hardware, APIs) which are critical to compete
 - Access to data
 - Structural separation

Detailed views

The European Commission in its Digital Strategy recognises that certain “platforms have acquired significant scale, which effectively allows them to act as private gatekeepers to markets, customers and information” and goes on to state that “we must ensure that the systemic role of certain online platforms and the market power they acquire will not put in danger the fairness and openness of our markets”.

Achieving fairness, contestability and competitiveness within digital markets has never been more important. Digital adoption will play a key part in our recovery from the Coronavirus pandemic, but this must be done in a way that allows European small businesses to thrive, and does not result in further concentration market power in the hands of a few small digital gatekeepers. Instead, we need a positive regulatory agenda, which imprints EU values and norms on the conduct of large digital gatekeepers, establishing some clear boundaries around what commercial behaviours are permissible, and those that are not. We need clear metrics to establish when such rules should apply and to whom and we need coordinated and harmonised monitoring and enforcement powers across the EU to ensure the integrity of the single market.

As one of the few pan-European operators built on the single market project we are strong supporters of harmonisation and strong enforcement of European rules. We firmly believe that a well-functioning Single Market is the foundation of Europe’s digital autonomy. For this reason we welcome the proposed ex ante regulatory regime for Digital Gatekeepers outlined in the public consultation and Roadmap Inception Impact Assessment, and have submitted some detailed proposals on how such a regime could be constituted and enforced.

Our starting position is that the time is right for a targeted and robust model of intervention. Concerns have arisen about the ability of ex post competition law enforcement to address issues in relation to dominant digital gatekeeper platforms, in particular when defining digital markets and dominance and assessing certain types of conduct in relation to data funded, multi sided markets. In addition, competition law enforcement often takes too long, meaning that irreversible

foreclosure has taken place before any remedies are implemented. Remedies also tend to be specific to individual cases and difficult to apply more generally. We believe that EU should take the lead in addressing the regulatory challenges of digital markets and that competition law and ex ante regulation both need to evolve to address these challenges.

The Problem Statement and Markets in Scope

There are two particular challenges that we have identified in relation to digital gatekeepers: (i) lack of choice/lock-in for our customers; and (ii) a lack of access and entry to markets and unreasonable conditions attached to access. These issues arise in markets where there exists a digital gatekeeper that acts as an unavoidable trading partner and is able to leverage its systemic position to artificially suppress competition and to further entrench its dominance. These characteristics are present in a number of the digital markets identified above, including but not limited to online search, intermediation platforms (eCommerce), social media platforms, operating systems and app stores.

For European consumers, detrimental impacts occur through the restriction of their choices of products and services available to them. We see our customers increasingly locked into digital ecosystems, rarely switching between apps stores or operating systems (and therefore devices), while providing ever-increasing amounts of personal data that further ties these customers into an ecosystem. This trend is likely to be exacerbated in the future by the limited choice in voice assistants, which in turn only provide one or two options for consumers, leading to the growth of closed ecosystems (for example in relation to home hub devices) and the limited use of new data portability rights. As alternatives dwindle, this is leading to a lack of choice for consumers. In particular we believe that a number of markets need fall within scope of the ex ante regulation for it to be effective:

1. online intermediation services (i.e. market places, app stores and social networks)
2. online search engines
3. operating systems
4. cloud services

Defining Digital Gatekeepers

In the context of digital platforms, the “digital gatekeeper” concept is associated with the gatekeeper having a privileged relationship with a customer (which may be an end consumer) which is critical in directing the customer’s access to services or apps, while at the same time allowing that provider to take advantage of the consumer’s frequency of use of its digital platform so as to tailor ever more sophisticated and varied services to that customer. In this sense, the larger the network effects generated by the gatekeeper, the more difficult it is for consumers to avoid dealing with them.”

Vodafone considers that a range of criteria should apply with equal force in relation to the proposed new ex ante regulatory tool to address online digital gatekeepers. These criteria should encompass the following:

1. a non-contestable and concentrated market structure should be identified;
2. the digital gatekeeper in question is an unavoidable trading partner; and

3. the application of competition rules would be ineffective in addressing the identified market failures arising from the exercise of the gatekeeping function.

Such an approach would ensure both proportionality and a high burden of proof, and a swift regulatory solution in case competition law is inadequate to address systemic market failures.

Impact on industry and consumers in Europe

The European Commission has the ambition to create an economy that works for people. A central plank in this agenda is to support and strengthen SMEs across Europe and do so by ensuring fairness in competition between businesses of all sizes and different geographies. In the digital economy, the emergence of digital gatekeepers has created barriers for European start-ups and SMEs, which are looking to innovate and scale-up their products and services.

There are two particular challenges which we have identified: lack of choice/lock in for consumers and lack of access and entry to markets.

For European consumers there are detrimental impacts through a restriction in choice of products and services. We see our customers locked into digital ecosystems, rarely switching between apps stores or operating systems, providing ever increasing amounts of personal data which further ties customers into an ecosystem. This is likely to be exacerbated in the future by the limited choice of voice assistants which in turn only provide one or two options for consumers, growth of closed ecosystems (for example in relation to home hub devices) and the limited use of the new data portability rights. This is leading to a lack of choice for consumers, as alternatives dwindle.

Closed ecosystems also prevent innovative new services emerging which affects companies of all sizes and is particularly harmful to smaller European companies. For example, the consumer and competition authority in the Netherlands has recently stated that where popular online platforms or devices refuse access to competing payment services, or make it difficult for competitors to function on their platform or device, it hampers competition and thus further innovation:

"Big Tech companies can play a driving role in competition and therefore innovation in the Dutch payment market. But it does require the Big Tech companies to open up their platforms and devices to competing payment services. Just like the banks have to do," ACM chairman Martijn Snoep said. "Only in such a level playing field will payment services continue to compete and innovate and will consumers remain free to choose. It would be good that before the market is dominated by one or a few major players, European rules on this point are tightened."

The same point applies to other areas, such as voice assistants and identity. A more open environment going forward will enable Europe to accelerate out of the current crisis and develop a strong foundation for all businesses to thrive.

Remedies

The types of harms generated by digital platforms are varied and therefore the remedies need to be varied and sufficiently flexible to be able to address the particular concerns raised by certain problematic practices. Remedies must be tailored to address the specific issues arising. In extreme situations, or where it is felt that leveraging into neighbouring, adjacent or ancillary markets is likely to be abusive, the option of structural separation might be necessary.

Possible behavioural and structural remedies available to competent regulatory authorities could include:

1. Prohibition of some harmful and anti-competitive conduct such as:
 - a. restrictions on content/service interoperability (e.g., allowing multiple app platforms onto an Operating System and the possibility to provide services in different Operating Systems);
 - b. bundling/tying with 'must have' services and apps where this is capable of leading to anti-competitive foreclosure;
 - c. predatory pricing;
 - d. unfair terms and conditions in contracts based on unequal bargaining power.
2. Access to key assets and innovation capabilities such as non-rivalrous data, certain key facilities (software/hardware, APIs) which are critical to compete, and the provision of sufficient advance notice to competitors of changes in the configuration of the digital platform or ecosystem's services and protocols. This can also be encouraged through standards.
3. Separation (accounting, functional, structural) where justified in very exceptional cases, i.e., where there has been a persistent failure to achieve effective non-discrimination and where it is unlikely that fair competition would be achieved, even after recourse to other remedies

In our view, it would be inadvisable to define a closed list of remedies that comprehensively address all the competition problems in the digital sphere. As issues arise, remedies will have to be designed, tested, and adjusted by competent authorities in an iterative process. In the alternative, a widely drawn list of potential remedies could be drawn up, within which there could exist sufficient flexibility for the tailoring of those remedies to address particular competition problems. This could occur through the regular issuance of guidance by the Commission, much the same as in the manner practiced in the EU through the adoption of guidelines or recommendations under the existing electronic communications regulatory regime. The regime should consider the active participation of industry stakeholders in the creation of remedies, along with the possibility that appropriate regulatory bodies could adapt existing measures over their lifetime where they are shown to be ineffective and even act as dispute settlement bodies in the event that the scope of remedies is challenged or proves to be problematic in practice.

The approach to remedies can be implemented in a range of ways. Again, this can take a "light touch" approach (such as Codes of Conduct or voluntary commitments) through to mandatory requirements. It is important to recognise that there can be no "one-size-fits-all" solution given the different dynamics displayed by the different types of digital platform. For example, not all gatekeeping concerns in the online economy could or should be resolved via mandatory access to data obligations. In some cases, the anti-competitive actions of digital gatekeepers may derive from undue self-preferencing practices and the leveraging of the control of the platform ecosystem to provide an unfair advantage to the platform's own vertical services.

Oversight and Enforcement

Supervision and enforcement of rules for online gatekeepers should be carried out at EU level. Large online platforms operate in global ecosystems and competition concerns arising in digital markets have an important cross-border dimension. Nevertheless, the effects of platforms' abusive conducts may differ across Member States, especially given the different linguistic and demographic traditions that exist across the EU Member States. Accordingly, coordination

between an institution operating at the pan-European level and national competent authorities is likely to be important.

We would therefore welcome an adequately resourced EU level body to be primarily responsible to enforce dedicated rules for large online platforms acting as gatekeepers, in close coordination with national competent authorities. The EU level authority would also coordinate and advise national competent authorities with a view to ensuring the harmonised enforcement of rules. Where a single Decision is made affecting the Single Market, a single right of appeal at an EU level should be provided. Centralising appeals at European level would be the ideal scenario, as the appeals system in the electronic communications sector has given rise to conflicting approaches being taken under those national appeals procedures. One can also envisage a role to be played by the equivalent pan-European gatherings of competition regulators (the ECN) or sector-specific electronic communications regulators (BEREC). These pan-European bodies would be able to act in their own right or as institutional intermediaries for their national member authorities.

The combination of (coordinated) national and European regulatory oversight should be achieved on the basis of the principles of maximum harmonisation and respect for subsidiarity. We envisage a number of alternative institutional models being considered fit for purpose, although the cost/benefit analysis for the ideal federal/national combination of competences will no doubt differ depending on the threshold test deployed for intervention, the nature of the analysis to be conducted and the nature of the remedies to be adopted.