FEDERATION OF EUROPEAN DIRECTAND INTERACTIVE MARKETING

A FIRST LOOK AT THE DIGITAL MARKETS ACT (DMA)

I. Summary

The European Commission proposal for a Digital Markets Act (DMA), released on 15 December 2020, is one of the cornerstones of the Commission's 'A Europe Fit for the Digital Age' political agenda. In the form of a Regulation, the DMA is intended to address unfair practices by platforms which act as digital gatekeepers to the Single Market and do not fall within the scope of the existing EU competition control rules or cannot effectively be tackled by them. In doing so, the proposal lays down criteria for the designation of these gatekeepers and a list of *ex ante* obligations/prohibitions they would need to comply with. Overall, the Commission seems to have put forward a balanced proposal which will inevitably be subject to changes across the legislative process. In this regard, there remain questions related to the methodology to calculate the thresholds for the designation of gatekeepers, the impact of some provisions on the advertising sector, , and the overall enforcement of the proposal.

II. Overview of the proposal for a Digital Markets Act (DMA)

The proposed DMA applies to "designated gatekeepers", defined as **companies that control "core platform services**", meaning online intermediation services, online search engines, online social networking services, video sharing platform services, certain messaging services, operating systems, cloud services and **advertising services** "provided by a provider of any other core platform services", to businesses and end-users established in the EU, irrespective of the place of establishment or residence of the gatekeepers.

Designated gatekeepers are subject to the DMA if they provide "core platform services":

- in at least three Member States,
- meet certain thresholds of EEA turnover or market capitalization and fair market value which will be calculated on the basis of separated delegated acts,
- as well as have a minimum number of active end or business users in the EEA in the last three financial years.

Identification as a "designated gatekeeper" would trigger the application of a number of obligations either absolute (Article 5) or "susceptible of being further specified" considering of how they apply to the relevant "core platform service" (Article 6).

Specifically, the DMA would establish a series of obligations and prohibitions relating to:

- **self-preferencing** such as the prohibition to use "any data not publicly available" which are provided or generated by "business users" and their "end users" (Art. 6.1a)
- **Interoperability** such as to "allow business users and providers of ancillary services access to and interoperability with the same operating system, hardware or software features that are available or used [by themselves] in the provision of any ancillary services" (Art. 6.1f)
- **data-related practices** such as the obligation to "provide business users, or third parties authorized by a business user, […] access and use of aggregated or non-aggregated data generated in the context

Federation of European Direct and Interactive Marketing
Avenue des Arts, 43, 1040 Brussels, Belgium
Tel: +32 2 779 42 68; Fax: +32 2 778 99 22 VAT: BE 0464 157 569
E-mail: info@fedma.org or membership@fedma.org ; Web site: http://www.fedma.org

of the use of the relevant core platform services by those business users and the end users engaging with the products or services provided by those business users" (Art. 6.1i).

- **tying** whereby designated gatekeepers would need to "refrain from requiring business users or end users to subscribe/register with any other core platform services […] as a condition to use any of their core platform services" (Art. 5f)

In terms of **enforcement**, the draft DMA would grant the Commission new enforcement and sanctioning powers, including the power to (i) conduct investigations to identify designated gatekeepers and their core services, (ii) ensure their compliance with the DMA, (iii) impose fines and periodic penalties of up to 10% and 5%, respectively, of an undertaking's worldwide annual turnover. In the event of "systematic non-compliance", the Commission would have the power to impose structural remedies, such as requiring the sale of units or assets.

III. Key takeaways & questions

The proposed DMA seems to have taken into account the input provided by gatekeepers' business users over the consultation phase. The starting point of the proposed text is that the *modus operandi* of digital markets has facilitated the growth of gatekeeper platforms and their ability to combine/leverage huge amount of data from different sources and set the rules of the game for both businesses and end-users, thus creating barriers to entry and undermining the contestability of digital markets.

a) Which "advertising services" are impacted?

Taking into account that the proposal covers both B2B and B2C platforms/services, there remain questions on whether data brokering services fall under the scope of the draft DMA. Article 2.2h seems to suggest that only advertising services (i.e. advertising networks, advertising exchanges and any other advertising intermediation services) which are "attached" to the provision of any other core platform services (i.e. online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communication services, operating systems, cloud computing services) will be covered by the proposed Regulation. However, further clarifications are necessary.

b) Does the proposal adopt a tailored approach to tackle specific business models?

Taking into account the features of the digital sector and the experience gained in the enforcement of EU competition rules, the set of *ex ante* obligations laid down by the Commission has the ambition to **apply horizontally across the digital sector**. While some critics have already argued that such obligations may miss to address unfair practices typical of specific business models, **the Commission seems willing to ensure a tailored approach by means of a "regulatory dialogue" with a gatekeeper for the imposition of specific implementing measures taking into consideration "the features of core platform services".**

c) Could key provisions relating to advertising services effectively tackle unfair practices by gatekeepers?

Recognizing both the non-transparent conditions under which gatekeepers provide online advertising services as well as the important role that data play in the advertising sector, the proposed Regulation requires gatekeepers to:

- provide advertisers and publishers, upon their request, with information on the conditions of the advertising services they purchased (Art. 5)
- provide advertisers and publishers, upon their request, access to the performance measuring tools of the gatekeeper and the information necessary to carry out their own independent verification of the provision of the relevant online advertising services (Art. 6).
- Refrain from using data of business users where the core platform service providing advertising has a dual role, as intermediary and as provider of advertising services (Art. 6).

d) Could delegated act ensure a fair and transparent process with the involvement of all stakeholders?

The choice of the Commission to rely on delegated acts to set the methodology for determining the quantitative thresholds for designation of gatekeepers has the advantage to ensure more flexibility to the overall proposal, favoring its future-proof character. However, given the significant implications for a platform identified as a gatekeeper**,** it is unclear to what extent the decision-making process for such delegated acts will ensure transparency and the possibility for stakeholders to provide their input given the vague definition of certain terms, e.g. active end-users/business users (Art. 3(b)).

e) Is the European Commission fit for ensuring effective enforcement?

The DMA proposal provides the Commission with extensive power for the enforcement of the new rules. Effective and timely enforcement will indeed be the key for achieving the objectives laid down in the proposal. However, this raises questions on whether the Commission can act as an independent enforcer and/or has adequate resources to take on this task.

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