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POSITION PAPER

on the proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act) – COM (2020) 842 final

Brussels/Berlin, 4 May 2021

On 15 December 2020, the European Commission presented its proposal for a Regulation on contestable and fair markets in the digital sector – the Digital Markets Act (DMA)[1]. With the DMA, the EU Commission is creating a complementary regulatory regime defining obligations (do's and don'ts) for large, systemic online platforms as so-called gatekeepers. The DMA proposes two types of obligations for gatekeepers: more specific and self-executing obligations, and obligations that are more general and which require further specification. In cases of non-compliance with the obligations of the DMA, gatekeepers might face fines or additional remedies in cases of systemic breaches, where structural break-up serves as a last resort.

While the DMA includes complementary provisions to the existing competition law, the interplay of both jurisdictions is described on numerous occasions. In Germany, the latest amendment of the German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB) via § 19a GWB[2] introduced general provisions mainly addressing digital companies that enjoy a so-called paramount significance for competition across markets. The current proposal for the DMA outlines ex ante rules that do not require demonstration of market failure on a case-by-case basis and would not appear to allow for objective justification based on pro-competitive effects.

eco – Association of the Internet Industry has followed the discussion for the development of complementary competition provisions that differ from existing competition law principles, and generally welcomes a European approach. The EU Commission rightly recognises in the explanatory memorandum to the DMA that the containment of competition issues at the Member State level will lead to a fragmentation of the Digital Single Market. With the proposal on the DMA, the EU Commission wants to launch provisions that allow direct application and enforcement for certain issues by the EU Commission. eco advocates for the further debate on the DMA in the European Parliament and the Council to be used to develop an efficient basis for the regulation of gatekeepers. For this objective, eco would like to highlight the following aspects from the first assessment.

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[1] See European Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=de

[2] See German Federal Ministry of Justice and Consumer Protection, Act against Restraints of Competition (Competition Act – GWB), https://www.gesetze-im-internet.de/englisch_gwb/index.html

- **Clear and reliable scope as a basis of the DMA**

According to Article 1 (2) DMA, "core platform services provided or offered by gatekeepers to business users established in the Union or end users established or located in the Union, irrespective of the place of establishment or residence of the gatekeepers" should be subjected to the provisions of the DMA. In this context, Article 2 DMA proceeds to describe the business areas or business models included by the DMA.
In Article 1 (5) DMA, the EU Commission also outlines the interaction of the DMA and activities of the national competition authorities. In this regard, Member States should not impose further obligations or administrative actions on gatekeepers to ensure contestable and fair markets.

In order to avoid an overlap of regulations and enforcement at national and European level and to provide clarity on the competences of national competition authorities and the EU Commission with regard to the application of the DMA, Article 1 (5) and (6) DMA should be further specified. The national competition authorities have developed extensive knowledge and measures for dealing with core platform services over the past years. Therefore, it should also be clarified as to how parallel regulations can be harmonised in the future with a focus on the Digital Single Market. A clarification of the provisions in the DMA would strengthen the legal certainty of the companies affected, the national competition authorities and the EU Commission, and ultimately ensure the interplay of individual measures.

According to Article 2 (2) DMA, core platform services offering cloud services shall also be subject to the DMA. However, not all cloud services are relevant to its goals. For example, it would not be accurate to include "Infrastructure as a Service" (IaaS) or "Platform as a Service" (PaaS), because neither of these gives the cloud provider a role in allowing a business user to reach its end users. Similarly, the cloud is also frequently used for archive storage and does not act as a go-to-market channel in this context. To ensure a targeted and proportionate application of the DMA, the relevant services should be reviewed and further specified.

- **Clarification of the thresholds for the designation of gatekeepers**

Article 3 (1) DMA defines quantitative thresholds for designating a gatekeeper. In particular, economic indicators like the annual EEA turnover of the company, the number of business and end users, and the duration of a gatekeeper's market position should be taken into account for this process.

eco endorses the agreement of fixed thresholds for the designation of gatekeepers. However, there are several concerns regarding the definition or interpretation of individual terms so that the DMA does not unintentionally capture services that are not intermediary gateways. In detail:
The intended definition of "business user" is very broad. The term "user" could be interpreted to include resellers and prime contractors (using the gatekeeper as their subcontractor). Therefore, it should be narrowed down to focus on the users that will use the gateway to offer services or goods.

It is also important to clarify that not all core platform services affected by the DMA have traditional business users. Clarifications are necessary on how to interpret the 10,000 business user threshold without affecting consumer-oriented services, like messaging or social media services. It is unclear as to whether, in these cases, thresholds should be ignored or whether an interpretation based on complementary information should be implemented instead.

In addition, the definition of "important gateway" should be clarified to reflect that the model envisaged is the one where a platform acts as a go-to-market channel for business users to promote and offer their goods or services to end users. Notwithstanding the "gateway" and "reach" terms, the current wording could be interpreted as including subcontractor-prime contractor relationships.

The DMA is intended to provide the EU Commission with a strong and effective tool to maintain contestable and fair markets. Therefore, the application of the DMA should be based on reliable, clear and realistic thresholds. Consequently, the thresholds and terminology should be reviewed again to ensure that the scope of the DMA is clearly defined. Generally, it is important to keep in mind that new business models or starting a business in new areas do not per se have negative effects on markets. What is much more crucial is their behaviour in the market and the impact of this behaviour and of business models towards market participants. In order to avoid restricting investments and innovations by gatekeepers and upcoming market participants, predictability and legally secure framework conditions in the DMA are indispensable.

- **Endowment of the EU Commission's competences for the designation of gatekeepers in a way that ensures planning reliability**

Article 3 (1) and (2) of the DMA gives the EU Commission the competence to designate gatekeepers. The designation of gatekeepers is usually based on fixed thresholds. With Article 3 (5), (6) and (7) DMA, the draft regulation includes extensive competences for the EU Commission to adjust the conditions for the gatekeeper designation and to identify core platform services as a gatekeeper beyond the fixed thresholds.

Article 3 (5) DMA empowers the EU Commission to adjust or update the methodology or qualitative thresholds for the gatekeeper designation by delegated acts. Possible reasons for the adjustment are, for example, findings from the market investigations as well as general market and technical developments. eco would recommend the support of delegated acts through a multi-stakeholder process. Possible stakeholders could be scientific researchers, representatives from industry, the companies affected by the DMA and representatives from the consumer and civil society sectors. Based on the participation of a multi-stakeholder process, proportionate and implementable adjustments can be agreed upon.

Based on Article 3 (6) DMA, the EU Commission can designate core platform services as gatekeepers as a result of the market investigation, even if these

platforms do not reach the thresholds set out in Article 3 (1) and (2) DMA. Although the elements for gatekeeper designation are clearly set out in Article 3 (6) DMA, their weighting or significance for the designation of a gatekeeper remains unclear.

eco recognises that binding regulations in dynamic markets – the digital economy is undoubtedly such a market – do not always offer an optimal solution to problems which arise. In order to provide more certainty to the companies affected by the gatekeeper designation outside of Article 3 (1) and (2) DMA, approaches for the weighting and significance of the entitled elements should be developed. It is also conceivable to develop ranges for deviations in relation to the economic and structural thresholds, which the EU Commission would use as a benchmark when designating gatekeepers in the course of market investigation.

In order to inform emerging core platform services at an early stage about a possible gatekeeper designation based on Art. 3 (6), an information obligation for the EU Commission vis-à-vis the companies affected could be added to the DMA. With the corresponding additions, possible risks that significantly reduce planning and legal certainty for the design of digital business models can be reduced. Likewise, the companies affected by the DMA could make investment and innovation decisions more reliably.

- **Ensure optimal conditions for the review of the gatekeeper designation**

According to Article 4 DMA, the EU Commission is entitled to review the continuation or discontinuation of the gatekeeper designation periodically. A time interval of two years is envisaged for the regular review of the gatekeeper designation.

In general, eco welcomes the regular review of the gatekeeper designation. The EU Commission has been right in how it has outlined the permanently changing circumstances in digital markets and the environment of a gatekeeper's business area. In its Report for the EU Digital Markets Act, the Panel of Economic Experts notes that the regulators are not always in the position to evaluate and analyse the information and specific details, e.g. data collection or algorithms of the gatekeepers business model.[3] Moreover, the evaluation requires extensive knowledge to understand the behaviour of digital platforms.

eco advocates for the review of the gatekeeper designation to be based on reliable and meaningful assessments. Therefore, the expertise for the review of the gatekeeper designation should not be limited to the EU Commission and external experts (Art. 21 and 24 DMA). Rather, the involvement of national competition authorities should be considered. These have gained extensive knowledge in dealing with gatekeepers and the behaviour of digital platforms in recent years.

[3] See Joint Research Centre, The EU Digital Markets Act – A Report from a Panel of Economic Experts, https://publications.jrc.ec.europa.eu/repository/bitstream/JRC122910/jrc122910_external_study_report_-_the_eu_digital_markets_acts.pdf

- **Review of the application and binding nature of the behavioural commitments**

Article 5 DMA comprises seven market practices of gatekeepers, whose use is generally prohibited. Prohibited practices include, e.g. the combining of personal data sourced by a core platform service with personal data from any other service offered by the gatekeeper, or the refusal of business users to offer the same product or service to other conditions to end users through third party online intermediation services.

Article 6 DMA contains eleven commitments, whose application and structuring can be further specified by the EU Commission after the gatekeeper designation. The commitments include practices like the permission for end users to uninstall any pre-installed software application, the waiver of treating products or services offered by the gatekeeper itself or by any third party more favourably in ranking services, or the provision to share data and information from the core platform service with the third party.

The ex ante obligations – prohibitions and commitments – of the DMA should be based on generally formulated behaviours of the gatekeepers and be mandatory and directly applicable. Thereby, numerous types of harmful behaviours would stand to be regulated – which could lead to positive effects in all digital markets, e.g. strengthening the contestability and fairness between the individual market participants.

However, it is also important to recognise that gatekeepers often use business models which appear very similar at first glance. On detailed inspection, it may become clear that the business models can be clearly distinguished from one another. If generally formulated, obligations can help to ensure that fair and contestable markets remain open. In order to create well-functioning provisions by the DMA, which result in applicable and proportionately designed obligations, the drafted catalogue of obligations should be reconsidered.

Regarding Article 5 (c) DMA, eco would like to point out that, while we believe we understand the Commission's intention, the third clause[4] could easily lead to unintended consequences. As the text currently stands, a gatekeeper could have to make "things" – i.e. content, subscriptions, features or other items – available to an end user which might not be legally available to the gatekeeper, nor might it be technically feasible. Accordingly, we would strongly advise the deletion of the referred clause or at least the replacement of "allow end users to access and use" with "not prevent end users from accessing and using".

[4] Third clause of Article 5 (c) DMA: " allow end users to access and use, through the core platform services of the gatekeeper, content, subscriptions, features or other items by using the software application of a business user, where these items have been acquired by the end users from the relevant business user without using the core platform services of the gatekeeper"

Based on Article 6 DMA, search engine providers can be obliged to grant third parties – upon request – access to the data created through the search function. However, it remains unclear as to whether the justification of the interested third party must contain a legitimate legal interest or give any other concrete reasoning. Two key concerns accompany such an openly formulated obligation. First, information about search engines, e.g. search algorithms, should be adequately safeguarded aspects of consumer protection. Second, the effect of such an information obligation still has to be seen. In its Report for the EU Digital Markets Act, the Panel of Economic Experts explicitly notes that a noticeable success of the obligation is not to be expected.[5]

The section also contains an obligation to strengthen the interoperability between business users and providers of ancillary services. The obligation includes the operating system, hardware or software, which will be used by an ancillary service of a gatekeeper. Interoperability through open standards is the basis for Internet growth and brought welfare to the digital economy. In order to achieve sustainable progress on interoperability, the planned obligation should apply to all products and services of a core platform as well as to end users.

To ensure contestable and fair markets, the application of the proposed prohibitions and commitments should be targeted and proportionate. In order to ensure the effectiveness of the DMA, a dialogue process about the specific application and interpretation of the relevant prohibitions and commitments between the EU Commission and the companies affected by the DMA would be desirable.

- **Clarification of the possibilities for limiting or suspending obligations**

Based on Article 8 of the proposal, the gatekeepers may submit a reasoned request to the EU Commission for limiting or suspending some or all of its obligations under Articles 5 and 6 DMA. The suspension may cover partial obligations as well as the gatekeepers' total range of obligations and shall be based on the economic viability of a gatekeeper's operation.

Likewise, a limitation or suspension of individual or all obligations can be requested by the gatekeepers with reference to the protection of public interest – Article 9 DMA.

The DMA does not create a possibility for gatekeepers to address legitimate and objective aspects to justify their specific conduct to the EU Commission. With regard to the scope of the DMA and the resulting diversity of companies and business models in digital markets affected, a communication process could help to avoid disproportionate and potentially negative impacts on the market. In order to enable the participation of companies affected by the DMA, the implementation of

[5] See Joint Research Centre, The EU Digital Markets Act – A Report from a Panel of Economic Experts, https://publications.jrc.ec.europa.eu/repository/bitstream/JRC122910/jrc122910_external_study_report_-_the_eu_digital_markets_acts.pdf

a standardised, effective and fast communication process between the EU Commission and the companies should be examined.

- **Creation of a reliable framework for updating obligations**

If the EU Commission identifies the need to update the existing obligations of Articles 5 and 6 DMA in the course of a market investigation, it can adopt updated obligations in a delegated act.

From the perspective of the companies affected, these "updating powers" in favour of the Commission entail two serious consequences, which would significantly impair them. To avoid irreversible impact for the market and gatekeepers' activities, the EU Commission's competence to update obligations needs to be described in more detail in order to define the objectives, content, scope and duration of the delegation of power. Companies should be able to rely on a certain level of predictability. In addition, it would be useful and reasonable if the adjustment of obligations were supported by certain safety measures, e.g. advice offered from an external group of experts. The participation of, e.g. scientific researchers, would allow an evaluation of the planned changes before they come into force and further support a better-founded decision-making process.

Furthermore, it needs to be weighed up whether a delegated act to update the obligations, in general, is an appropriate legal basis. The update of the obligations on the basis of a delegated act, which is initiated and decided by the EU Commission but then still requires the "consent" of the EU Parliament and the Council, will lead to uncertainties for gatekeepers. The uncertainties arise in particular with regard to the scope of the delegated acts and the timeline until they come into force. Here it must be ensured that a legally secure and timely procedure is created to adjust the obligations so as not to hinder companies from shaping and developing their business activities.

- **Clarification of rules regarding mergers of gatekeepers**

According to Article 12 DMA, gatekeepers should have an obligation to inform the EU Commission about intended mergers. The obligation applies to mergers with other providers of core platform services and other providers in the digital sector.

Acquisitions are typically part of the market activities like companies' cooperation, company closures or insolvencies. Sometimes acquisitions have the goal to adopt potential competitors and their innovative business models, products or services. Such acquisitions are referred to as killer acquisitions.

However, the draft does not specify the relationship of the obligation under the DMA and any review pursuant to the EC Merger Regulation (ECMR). Moreover, the European Commission recently revised its merger review policy relating to transactions that may not meet the jurisdictional thresholds under the ECMR. It is not clear as to how any review process under the ECMR may fit with any obligation under the DMA to apply its Articles 5 and 6 to the acquired company and how any

merger commitments may interact with such DMA obligations. In order to ensure the interaction of the DMA and the ECMR and to achieve the best possible application, further clarifications are necessary.

- **Conclusion**

eco welcomes the debate on the development of an ex ante regulatory instrument at the European level. The draft regulation on the DMA represents a good basis for further consultations in the European Parliament and the Council. In the past, the digital and Internet industry have regularly pointed out that regulatory instruments based on the "one size fits all" principle do not necessarily contribute to eliminating existing challenges in digital, highly flexible and high-growth markets, like the competition policy for the "old economy". Instead, regulatory instruments should be aimed at addressing or eliminating actual identified concerns. The current draft of the DMA is a first step towards a more precise way of regulation that takes important competition cases into consideration.

It should be recognised that an attractive and competitive regulatory framework is essential for the development of digital business models in Europe. To this end, a new ex ante regulatory instrument in the area of competition policy should be clear in scope and purpose for any companies that may be affected by the DMA. In order to prevent significant aberrations in the economic environment of the gatekeepers and to achieve fair competition conditions for all market participants, entrepreneurial details, e.g. company structure, design of business models and the associated market conditions must be subject to further discussion.

eco recommends that this discussion is accompanied by a clear specification of the regulation. In order to achieve a practicable application of the DMA for all market participants – especially the gatekeepers – improvements and clarifications should be made in the following sections: the interaction between the EU Commission and national competition authorities, the interpretation of the thresholds for the gatekeeper designation, and the limitation or suspension of prohibitions and obligations.

In order to create competitive conditions for increasingly digital markets in the future – which are the basis for investments and innovations – the planned regulation must ensure a balance between necessary measures and concurrently the preservation of attractive conditions.

About eco

With more than 1,100 member companies, eco is the largest Internet industry association in Europe. Since 1995, eco has been instrumental in shaping the Internet, fostering new technologies, forming framework conditions, and representing the interests of members in politics and international committees. The focal points of the association are the reliability

and strengthening of digital infrastructure, IT security, trust, and ethically-oriented digitalisation. That is why eco advocates for a free, technology-neutral, and high-performance Internet.