POLICY BRIEF

AT A GLANCE

The Digital Markets Act (DMA) proposed by the European Commission is intended to supplement EU competition law with an upstream regulatory instrument for digital markets.

- The addressees should be limited in a targeted manner by an ecosystem criterion in Art. 3 DMA.
- The behavioral obligations of data portability and interoperability should be applied consistently to core functions of core platform services.
- Self-preferencing in the form of default settings of core platform services within an ecosystem should be prohibited in Art. 5 DMA.

Align the DMA more closely with ecosystems acting across markets!

The Digital Markets Act (DMA) proposed by the European Commission should explicitly target gatekeepers that operate an ecosystem. Behaviour that serves to leverage economic power into other areas, especially through self-preferencing, should be prohibited.

The European Commission presented a proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act or DMA) on 15 December 2020. The Proposal proceeds from the finding that, in the digital economy, a *"few large platforms […] enjoy an entrenched and durable position, often as a result of the creation of conglomerate ecosystems around their core platform services, which reinforces existing entry barriers. […] [S]ignificant dependencies of many business users on these gatekeepers [evolve], which leads, in certain cases, to unfair behaviour vis-à-vis these business users. It also leads to negative effects on the contestability of the core platform services concerned."*[1]

In order to address the aforementioned problems in digital markets more quickly, the DMA dispenses market definition, the determination of a dominant position, an examination of the effects of the addressed conduct in individual cases, and the possibility of an efficiency defence, and thus appears consistent in its starting point, since the DMA is intended to remedy problems that have become apparent in the proof of abusive conduct and the procedural enforcement of EU competition rules against large Internet corporations.

Limiting DMA to ecosystems

The addressees of the DMA are digital platform operators that have a gatekeeper position. The gatekeeper status is assigned to undertakings pursuant to Art. 2(1) DMA as "providers of core platform services". The proposed Regulation (Art. 2(2) DMA) contains an enumerative list of such providers. The Proposal defines "gatekeeper" in Art. 3(1) DMA so that the gatekeeper a) has a significant impact on the internal market, b) operates a core platform service which serves as an important gateway to end-users for business users, and c) enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future. To meet these requirements, certain quantitative (Art. 3(2) DMA) or qualitative (Art. 3(6) DMA) criteria must be met.[2] This approach certainly bears the risk of covering too few or too many undertakings, and possibly the wrong ones, on the basis of the presumption thresholds of Art. 3(2) DMA, since only the sheer size and scope are taken into account.[3] In addition, ecosystems pose particular threats to competition that go beyond the threats posed by single digital platform services. **In order to keep the identification of an ecosystem context accurate and yet simple, the Monopolies Commission believes that an ecosystem criterion should be added to the definition of gatekeepers as addressees of the DMA.**[4]

The development of digital ecosystems is particularly successful for companies that are positioned broadly. This can be attributed to factors such as organic growth, overcapacities, modularity, reuse of digital resources, multi-market contacts, cross-subsidisation and start-up financing or acquisitions. The undertakings concerned feature hardware, software and/or services that are in a compatible and complementary relationship with each other and are interlinked (also via databases). This allows the undertakings to develop a cross-product, cross-service, cross-market or cross-sector offering.

ECOSYSTEMS[5]

- *"Multi-product ecosystems"*: Here, a range of mutually compatible, mutually reinforcing products or services is offered that together create a (unique) package or attractive solution, e.g., operating system + app store + web browser + voice assistant.
- *"Multi-actor ecosystems"*: Here, a platform offers services to a number of partners and providers of complementary services, thus enabling complementarities[6] in order to generate added value to end-users, e.g., interplay of app store suppliers and app developers.
- Large Internet corporations often combine both types of ecosystem.

At the same time, the undertakings derive competitive advantages from the way actors, products or services interact and/or how data is aggregated and used. This opens up further diversification and expansion opportunities and enables the digital value chain to be linked through gatekeeper platform services that can exercise control over key components of the ecosystem; e.g., app stores, operating systems, voice assistants, search engines and web browsers. As a consequence, platform users may be bound through "lock-in" effects.

Platform services within an ecosystem (e.g., operating system, app store, web browser, app) can occupy a gatekeeper position from an economic perspective. Control over access to information, content, products, services, inputs, assets, as well as functionality and positioning in rankings can contribute to this gatekeeper position. Platform services can become a gatekeeper platform service if they have a very high number of users across all user groups and enjoy enduring economic power.[7]

A special feature of gatekeeper platform services in the economic sense, as compared to other digital platform services with a high number of users, is that they are part of an ecosystem characterised by one of the following two features:

- *"Multi-platform integration"*, i.e., the ecosystem here consists of several platform services of the same operator that are linked or interrelated and complementary, also via databases, e.g., operating system, app store, web browser, app; or
- "*Dual role*" of the platform service operator, i.e., the platform ecosystem is operated, e.g., by a) an operator of a digital marketplace who is also a provider of goods/services (part of a group of users of the platform service) and thus competes with third parties; or b) an operator of an app store who is also a developer or provider of apps (part of a group of users of the platform service) and thus competes with third parties; or c) a developer of an operating system who is also a manufacturer of devices and thus competes with third parties; or d) a developer of an operating system who is also a manufacturer of devices and thus competes with third parties.[8]

In both cases, significant complementarities arise both between the platform services and/or the actors of the ecosystem and on the operator side in the aggregation and further processing of data and in the (further) development of (new) products or services which enable the leverage of economic power in other areas and thus an expansion of the ecosystem (platform development).[9] At the same time, the entry barriers for third parties increase.

Against this background, the Monopolies Commission advocates the inclusion of an ecosystem criterion in a new Art. 3(1)(d) DMA as a fourth cumulatively necessary condition, which should be defined as follows:

An operator of core platform services is designated as a gatekeeper if it …

d) "orchestrates a product and/or actor-based ecosystem with the ability to raise barriers to entry and/or expand its ecosystem into new areas."

Then, the two indicators of multi-platform integration and dual role should be inserted into a new Art. 3(2)(d) DMA as follows:

It is assumed that a provider of core platform services …

d) "meets the criterion in paragraph (1)(d) if it meets the thresholds in subparagraphs (a) and (b) and subparagraph (c) and there is a multi-platform integration with at least two core platform services or a dual role by the provider."[10]

As a consequence of such an ecosystem criterion, an undertaking that offers, e.g., an online intermediation service, would no longer be covered by the DMA unless it offers at least one additional core platform service (within an ecosystem) or has a dual role. The inclusion of such an ecosystem criterion would have the effect of limiting the group of addressees of the DMA to companies that pose particularly serious threats to competition.[11] This ecosystem criterion would also allow for a more effective use of resources to enforce the DMA.

Preventing tipping of further digital markets

Ecosystem-specific problems arise particularly due to the complementarities in the processing of data and the (further) development of (new) products or services which allows the platform operators to leverage their economic power from a core platform service into other or new markets (platform envelopment) and to foreclose them. This is where the DMA's behavioural obligations should come into play. On the one hand, the DMA should prevent behaviour that may allow the platform operator to leverage the economic power of a core platform service in order to expand its ecosystem. This notably includes a prohibition of self-preferencing strategies, such as the abuse of competitors' data. On the other hand, the DMA should impose behavioural obligations that are suitable for keeping competition open in and for digital markets. These include, above all, obligations for data portability and interoperability.

The more users consume platform services, the more data can be collected to train and improve algorithms, e.g., to increase the relevance of the results of a search engine or the quality of the response of a voice assistant, which in turn

attracts more users (user feedback effect). This also has an effect on the other sides of multi-sided platforms. Advertisers can place their ads in a more targeted manner, allowing platform operators to generate higher advertising revenues. These funds can in turn be invested to improve the platform service, thus further strengthening the data-driven network effects (monetisation feedback effect).[12] Platform services that have been established on the market for longer benefit from these data-driven network effects to a particular extent, as they have a larger number of users and consequently more data than their competitors. In an ecosystem context, network effects play out multiple times on several platforms and/or markets and thus strengthen the position of the ecosystem operator as a whole.

In addition, platforms benefit from economies of scope, as the costs of data collection are incurred only for the provision of one platform service, but afterwards they can be used to develop multiple services. As a result, it may be cheaper to develop and create multiple products or services within one company than in separate companies. Data generated at one service can lower the marginal cost of innovation in other platform services.[13]

If a platform evolves into an ecosystem, it can attract additional users that have not used the original service. This increases the breadth of data, which further strengthens the data-driven network effects. If the ecosystem operators can also track the behaviour of users across services and contexts, the depth of data increases as well.[14] In particular, information can be obtained from the aggregation of data from different platform services, which can be used not only to improve and personalise existing products and services, but also to develop new ones.

If these services are increasingly personalised due to the increasing depth of data and if different services within the ecosystem can be accessed with one user account, the users' loyalty to the services of the ecosystem operator likely increases. The costs of parallel use of other services outside the ecosystem (lock-in) increase and the simultaneous use of several platforms from different providers (multi-homing) become more difficult. As a result, platform services can make it more difficult for potential competitors to enter other markets in the ecosystem or displace competitors already active in these markets. It is imperative that such cross-market foreclosure strategies are prevented.

This is where the DMA intervenes by imposing behavioural obligations potentially suitable for breaking up lock-in effects and facilitating multi-homing. These include data portability and interoperability obligations.

Facilitating data portability and interoperability

Data portability and interoperability are intended to make it easier for end-users and business users to switch to other offers in competition with the core platform services, and thus promote market entry. Data portability refers to the right to transfer the (personal) data generated by one's own activities when switching providers. Data interoperability also defines common interfaces that are intended to ensure permanent and real-time access to data transmission between sender and receiver.

Article 6(1)(h) of the DMA stipulates that core platform services must guarantee permanent real-time access to data transmission. This allows the aforementioned lock-in effect to be broken up if users can also reach their contacts at a core platform service via alternative platform services. The users can thus benefit directly from the network effects of the core platform services. That is to say, Art. 6(1)(h) DMA aims both to weaken these network effects on the part of the core platform services and to allow them to have an effect on alternative providers.

The DMA does not state how the technical implementation of the obligation is to be carried out.[15] In the current formulation of the DMA, gatekeepers are not explicitly required to transmit data in a consistent format or via application programming interfaces (APIs). Standardised data formats and APIs are often lacking.[16] In this respect, a platform-specific application of the obligations must be made in practice.

In addition, it must be clarified which data or which APIs at which core platform service should be covered by the obligations of Art. 6(1) DMA. In the case of an obligation encompassing all data and APIs of the core platform services,

the gatekeepers' incentives to innovate may be reduced if these have to be shared with competitors.

The Monopolies Commission therefore recommends limiting the obligation for data portability and interoperability to established core functions. Which functions are to be regarded as core functions is likely to be different for each core platform service. A platform service-specific application of the data portability and interoperability obligations is therefore recommended.[17]

Effectively stopping self-preferencing

The designated gatekeepers often not only operate one or more core platform services but are also active there as players themselves. For instance, Amazon acts as a retailer on its Marketplace, and Google and Apple sell their own apps alongside third-party app offerings in their app stores. These vertical or hybrid structures offer potential for self-preferencing and foreclosure of competitors, which the DMA addresses in several provisions.

First, gatekeepers may engage in self-preferencing by steering end-users to their own offerings, e.g., by displaying their own offerings more prominently on marketplaces and app stores than those of competitors (Art. 6(1)(d) DMA).

As a second form of direct self-preferencing, gatekeepers may engage in bundling strategies, e.g., when the use of a core platform service is made dependent on the use of another core platform service (Art. 5(f) DMA) or other platform services of the gatekeeper (Art. 5(e) DMA).

Third, gatekeepers with a dual role can exploit their privileged market overview (e.g., of demand and price data, of search behaviour or reasons for returns) by copying successful products and services of third parties and competing with them (Art. 6(1)(a) DMA).

Self-preferential strategies are competitively significant for several reasons. They help to leverage the economic power of a core platform service into other areas and foreclose competition there, e.g., for identification services or digital payment services (Art. 5(e) DMA). For instance, incentives for innovation and investment for business users are reduced if they fear rapid imitation by gatekeepers. Finally, complementarities arise in data collection, aggregation, and utilisation. Data on user behaviour can be collected in multiple contexts across platform services that further amplify the data-driven network effects of gatekeepers.

The Monopolies Commission recommends prohibiting self-preferential treatment of core platform services comprehensively in the ecosystem context.

A specific form of self-preferencing is not currently addressed by the DMA. Gatekeepers often choose their own core platform services as default for other core platform services. This often limits the ability of users to make an informed decision and steers them in the interest of the core platform service (nudging).[18]

Network effects and default settings also lead to a form of path dependency, where core platform services can generate more data about pre-set platform services, which then can be used to leverage economic power into other areas and thus to expand the ecosystem.

Against this background, the Monopolies Commission recommends that default settings in favour of core platform services should generally be prohibited. Hence, Article 5 DMA should be expanded to include a new lit. h:

In respect of each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall…

h) "refrain from setting these as default."

This provision would apply, e.g., where an operator of core platform services provides numerous choices for end-users in the web browser and search engine settings instead of a default setting.[19]

The Monopolies Commission's recommendations in this Policy Brief cover selected key provisions of the proposed Regulation which in the view of the Monopolies Commission suggests readjustment. In addition, there remains a need for discussion, inter alia, with regard to the further content and the systematics of the behavioural obligations as well as the competence and the relationship of the DMA to national law.

1 European Commission, Proposal for a Regulation of the European Parliament and the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final, 15 December 2020, p. 1 (in the following: DMA).

2 The quantitative criteria of Art. 3(2) DMA for an operator of core platform services include a) an EEA annual turnover of at least EUR 6.5 billion in the last three financial years or an average market capitalisation or equivalent market value of the company to which it belongs of at least EUR 65 billion in the last financial year and that it operates a core platform service in at least three Member States; b) operation of a core platform service which, in the past financial year, had more than 45 million monthly active end-users established or residing in the Union and more than 10,000 annually active business users established in the Union; c) reaching the thresholds referred to in b) in each of the past three financial years. The qualitative criteria of Art. 3(6) DMA for a core platform service operator are a) the size of the central platform service operator; b) the number of business users; c) barriers to entry; d) economies of scale and scope; e) the retention of business users and end-users; f) other structural market characteristics.

3 The difference could lie, for example, in the (non-)coverage of simple digital platform services such as hotel booking portal services, music streaming services, etc.

4 According to the report by European Parliament rapporteur Andreas Schwab on the DMA, companies should have to operate "at least two core platform services" with 45 million active monthly users each in order to be considered gatekeepers (ecosystem criterion). (see https://www.europarl.europa.eu/doceo/document/IMCO-PR-692792_EN.pdf)

5 Jacobides, M./Cennamo, C./Gawer, A., Towards a Theory of Ecosystems, Strategic Management Journal 39(8), 2018, S. 2255-2276.

6 Complementarity in this context means that at least two actors or products/services must act together to achieve a benefit or value creation. In order to complement each other in terms of value creation, these actors or products/services must therefore be coordinated with each other, since they are jointly demanded by users.

7 Easley, R./Guo, H./Krämer, J., From Net Neutrality to Data Neutrality: A Techno-Economic Framework and Research Agenda, Information Systems Research 29(2), 2018, S. 253-272.

8 Cf. recitals 43 and 52 DMA. A problematic dual role may also include multiple roles.

9 Eisenmann, T./Parker, G./Van Alstyne, M., Platform Envelopment, Strategic Management Journal 32(12), 2011, S. 1270-1285.

10 The indicator of "multi-platform integration" should be further defined in the recitals. The dual role is set out in recital 43.

11 In addition, there would be some leeway in adjusting the presumption thresholds of Art. 3(2) DMA, which could – if necessary – also be lowered.

12 Krämer, J./Schnurr, D./Broughten Micova, S., The Role of Data for Digital Markets Contestability: Case Studies and Data Access Remedies, CERRE Report, September 2020.

13 Prüfer, J./ Schottmüller, C., Competing with Big Data, forthcoming in: Journal of Industrial Economics.

14 Krämer, J./Schnurr, D./Broughten Micova, S., The Role of Data for Digital Markets Contestability: Case Studies and Data Access Remedies, CERRE Report, September 2020.

15 De Streel et al., Making the Digital Markets Act more resilient and effective, CERRE, 2021. The implementation modalities should be specified in the recitals, e.g., recitals 54 and 55.

16 This is evident, for example, in the case of data portability in accordance with the GDPR, since although many platform services enable data export, many services do not technically provide for or regulate data import.

17 It would be conceivable to apply such obligations, for example, to number-independent interpersonal communications services provided by ecosystem operators. For example, a gatekeeper messenger service could be obliged to make text messages interoperable with other messenger services such that text-based communications would be possible across messenger services.

18 As a study by the British competition authority CMA also shows, default settings have a major impact on competition and restrict consumers in their self-determination as to which services they want to use; see Competition & Markets Authority, Online platforms and digital advertising, Market study final report, 2020.

19 European Commission, Decision of 18 July 2018, AT.40099 – *Google Android*.

The Monopolies Commission is a permanent, independent body of experts that advises the Federal Government and legislative bodies in the fields of competition policy, competition law and regulation. The Monopolies Commission consists of five members that are appointed by the Federal President on the recommendation of the Federal Government. Prof. Dr. Jürgen Kühling, LL.M., is the chairman of the Monopolies Commission.

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