AmCham EU
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Consultation response

Ex-ante regulatory instrument of very large online platforms acting as gatekeepers (Digital Markets Act)

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3 trillion in 2020, directly supports more than 4.8 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

American Chamber of Commerce to the European Union
Speaking for American business in Europe

Avenue des Arts/Kunstlaan 53, 1000 Brussels, Belgium • **T** +32 2 513 68 92
info@amchameu.eu • amchameu.eu • European Transparency Register: 5265780509-97

Executive summary

The Digital Markets Act (DMA) is intended to complement existing EU competition laws and ensure digital markets remain fair and open. As the EU considers how best to design the DMA, it is vital that any such new tool is clear in terms of its scope, including the companies to which it may apply; the obligations they may be subject to; and the DMA's interaction with existing legislation at both EU and Member State level. It is also important that the DMA contains appropriate procedural safeguards. Ultimately, the DMA should be an effective and proportionate tool that supports the potential of the EU's Internal Market.

In the below paper, we set out six areas where we seek further clarity from the European Commission in its proposed regulation.

Issue	Recommendation
Interface with existing legislation	Where both the DMA and existing EU competition law could potentially apply, it is important for companies to know how the European Commission will determine whether to address potential concerns under the DMA or existing EU competition laws.
Definition of gatekeepers	It is important that the range of core platform services and applicable thresholds ultimately included within the DMA is unambiguous. The current proposals carry significant uncertainty for a wide range of core platforms service providers as to whether or not they may be subject to gatekeeper designation and, in turn, subject to the obligations proposed.
Scope of, and interaction between, Articles 5 and 6	It is not clear what circumstances may allow a company to present arguments that a particular obligation should not be applicable, even if it is designated with gatekeeper status. Further consideration could be given to how best to design the DMA to ensure the DMA is an effective but flexible tool.
Scope and role of market investigations	Businesses need to understand the purpose and scope of any market investigations conducted by the European Commission under the DMA. Though Articles 14 – 17 set out to provide clarity, material questions remain.
Investigation and enforcement powers	Given the wide range of proposed investigation and enforcement powers, the European Commission should clarify which body will be responsible for applying such powers.
Scope of information obligation about concentrations	Broad information notification obligations should not be imposed by a regulation that does not form part of a merger control system. Thus, further clarity as to the interaction between the DMA and EU Merger Regulation is needed.

Introduction

Evolving digitisation has resulted in a wide range of business and consumer benefits across several sectors of the economy. In this context, the European Commission has proposed the DMA as an additional necessary tool to focus principally on structural issues and sit alongside existing competition laws to ensure that digital markets remain fair and open.

The American Chamber of Commerce to the European Union (AmCham EU) welcomes the opportunity to set out a series of high-level principles that should be taken into account as the European Commission and other European institutions further evaluate how best to design the DMA.

1. Interface with existing legislation (including at Member State level)

The DMA is intended to complement existing EU competition laws. The EU has also already advanced worthy proposals (including the Data Governance Act, Digital Services Act, Artificial Intelligence Regulation and forthcoming Data Act) as well as existing legislation such as the General Data Protection Regulation (GDPR)and the EU regulation on platform-to-business relations (P2B Regulation) that could impose duplicative or even conflicting obligations with those proposed under the DMA.

Where both the DMA and existing EU competition law could potentially apply, it is important for legal certainty to know how the European Commission will determine whether to address potential concerns under the DMA or EU competition rules. Will the Commission conduct a preliminary analysis to determine which tool is the most appropriate (for example, a market investigation into new services or practices under the DMA or an Article 102 TFEU investigation)?

Moreover, companies need to understand how the DMA is intended to interact with competition law and other laws (such as data protection laws) enforced by individual Member States as well as any private actions before national courts or even cases before the European courts (such as preliminary references). For example, it is not clear how Article 1 would apply where a Member State has planned or passed competition laws for the purposes of ensuring fair and open digital markets or where a Member State has a case or investigation pending at the time that the DMA becomes applicable. More specifically, it is not clear whether the European Commission intends to grant authority to Member States to make market investigation requests beyond requesting a designation of a gatekeeper (pursuant to Articles 15 and 33).

The EU must ensure that the scope of the DMA is clear in terms of its interaction with existing EU competition law but also with both existing and proposed Member State legislation and other EU laws. Such clarity is essential to help companies potentially affected understand the DMA's operation in practice. Examples of such interactions requiring clarity include:

- how Article 5 (a) interfaces with GDPR;
- how Article 5 (c) could be interpreted in a fair and reasonable manner;
- how Article 5 (d) is intended to interface with the P2B Regulation (Regulation 2019/1150); and
- how Article 5 (g) is intended to interface with existing legislation such as the French Loi Sapin.

2. Definition of gatekeepers

Core platform services

While the proposal references a range of different services, often borrowing definitions from other legislation, it is important that the range of core platform services ultimately included within the DMA is unambiguous. Companies must be able to assess whether or not they fall within scope, while potentially affected companies require clarity as to the interaction between the DMA and other regulations that may already impact defined services.

Any final list of core platform services should not undermine the intended purpose of the DMA by inadvertently capturing a range of services that may not have gatekeeper characteristics the European Commission deems appropriate for DMA regulation. Specifically, certain cloud computing services may not act as a gateway or intermediary as envisaged by the DMA. It would, for example, not be accurate to include Infrastructure as a Service (IaaS) which is equivalent to virtual hardware and gives the cloud provider no role in operating services which allow 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. As the DMA Impact Assessment recognises, these may instead be a service offering by certain B2B providers that do not demonstrate multi-sided market characteristics or an asymmetry in bargaining power.

Gatekeeper criteria and thresholds

The European Commission has stated that the intention of the gatekeeper thresholds is to provide both flexibility and presumptive thresholds so that businesses may readily identify when they fall within the scope of the DMA. This flexibility is laudable; however, the current proposals carry significant uncertainty for a wide range of core platforms service providers as to whether or not they may be subject to gatekeeper designation and, in turn, subject to the obligations proposed under Articles 5 and 6. It would be preferable to instead have a clear and definitive set of thresholds, such that if a company does not meet such thresholds it falls outside the scope of the DMA. If the European Commission intends to continue with a hybrid regime, it must clearly set out what additional factors may be relevant where the presumptive thresholds in Article 3 (2) are not met, including identifiable safe harbours below which the DMA would not apply at all.

Pursuant to Article 3(6), the European Commission could conduct a market investigation to determine gatekeeper designation even if a firm does not meet the criteria in Article 3(2). Article 3(6) provides a list of potentially relevant factors at a high level but currently there is no definition or guidance as to what is an 'important gateway' or how these listed factors will be applied. For example, will market shares be a relevant indicator as to whether a core platform service is an important gateway? How will the factors be assessed where a company may have a material number of users but where there are multi-sided markets, a high degree of competition or low barriers to entry? In addition to comments in the preceding section on 'core platform services', it is important that the definition of 'important gateway' is clarified and more guidance provided in relation to the relevant factors.

While AmCham EU appreciates the appeal a flexible regime may have for the EU, without more detailed guidance it is unclear when companies and their services may be potentially subject to the DMA. In relation to the current draft text, AmCham EU also submits the following more detailed observations and questions:

- Will the DMA apply with immediate effect, requiring companies to consider the 3 financial years preceding passage of the DMA?

- Are revenues of €6.5 billion (referred to in Article 3 (2) (a)) determined in the aggregate across the relevant 3 year period, as an average, or is €6.5 billion meant instead to be the figure for each of those 3 years?

- What is meant by 'active' business or end users in Article 3(2)(b)? For example, in the context of a communications service, how often must a user make use of such service to be considered 'active': would using a dial-in service once per month make a user 'active'? In addition, does the notion of 'end users' refer solely to the *direct* end users of the core platform service'? Or does it include the end users that are not direct customers of the platform but customers of the platform's 'business users'?

- Could the definition of business users be better defined? Notwithstanding the term 'user', it could be interpreted to include individual employees of a company but also resellers and prime contractors (using core platform services as subcontractors). It is not clear whether the current definition could inadvertently include a broad range of potential business users (such as those making use of a core platform service for their own purposes rather than using the core platform service as a way of reaching end users). Consideration could be given to focus only on the users that will use the gateway to offer services or goods.

- What is meant by the 'largest' part of the year in Article 3(2)(b)?

- What constitutes a 'substantiated argument' pursuant to Article 3, where a company would refute designation of gatekeeper status? For example, would factors such as low market shares, existing competition or absence of market power be relevant? Is the intention that any arguments relating to pro-competitive effects and efficiencies be considered at a later stage in relation to determining whether specific obligations may not be applicable to particular core platform services?

Finally, beyond the potential application of the DMA, there should be no negative implication attached by default to companies designated as 'gatekeepers' including in relation to any application of existing competition laws to such companies.

3. Scope of, and interaction between, Articles 5 and 6

Articles 5 and 6

These articles set out the core intent of the DMA, so it is important that potentially affected companies have clarity around their expected obligations and the potential harms they seek to address. The explanatory memorandum recognises the importance of quality, choice and innovation and states the purpose of the DMA is to allow end users and business users alike to reap the full benefits of the platform economy and the digital economy at large in a contestable and fair environment. As such, it is important that the effects of the obligations on user benefits and innovation should also be taken into consideration, particularly where services may be multi-sided in nature.

It is unclear if Articles 5 and 6 are intended to be immediately applicable, as Article 6 refers to '*obligations for gatekeepers susceptible of being further specified*' which may reflect an intention for further evaluation by the European Commission. If the obligations are not immediately applicable further clarification should be provided as to the process for determining when Article 6 obligations may apply and, if applicable, to determining which ones apply in each specific case. This process should be based on a dialogue between the relevant core platform service provider and the European Commission. As the proposal currently reads, Article 3 envisages that a company may submit substantiated arguments as to why it should not be a gatekeeper or why certain core platform services should not be designated as an important gateway to which Articles 5 and 6 apply. The recitals envisage a dialogue between a designated gatekeeper and the European Commission regarding the specific measures implemented, or to be implemented, by the gatekeeper to ensure compliance with the Article 6 obligations assigned to it, with the possibility under Article 7 for the gatekeeper to request a market investigation under Article 18. The interaction between these steps is unclear and, in turn, creates uncertainty as to the process for determining when the obligations under Article 6 in particular may apply.

Further, it is not clear to AmCham EU whether the intention is to have a general set of obligations applicable to all gatekeepers and then specific obligations that apply to some depending on the relevant core platform service. The list of obligations set out in Articles 5 and 6 are both general and specific. In some circumstances, the obligations listed in Article 5 are very specific - for example, applying only to advertising services. Conversely, some obligations listed in Article 6 are broad in nature. Furthermore, many obligations are described in vague terms such that it is difficult to determine their purpose, appropriateness, or anticipated effect. Ensuring compliance with such obligations could require complex engineering solutions or adversely impact particular business models. These obligations would benefit from clarification.

It is not clear what circumstances may allow a company to present arguments that a particular obligation should not be applicable, even if it is designated with gatekeeper status (eg where the relevant service offered is pro-competitive and efficient). It may also be that in certain circumstances a specific obligation which could create an overall efficiency loss if implemented should not apply because it is not applicable to a specific service; is technically impossible or difficult to implement (eg because it may undermine the functioning or integrity of a service or undermine cybersecurity or fraud prevention measures); or is contrary to other legislative requirements. Designing a regime that provides for such issues to be considered, including for potential exemption from a specific obligation in certain situations (including whether some of the examples above could

fall under Article 9), would prevent unintended consequences and allow for a more flexible, measured, regulatory approach.

Further consideration could be given to how best to design the DMA to address such points and ensure the DMA is an effective but flexible tool. For example:

- Clarity regarding the process for determining when Article 6 obligations may be applicable; and
- Guidance regarding the types of factors that could justify an Article 6 obligation not being applicable to a specific service whether initially or subsequently through a suspension or exemption regime. This could be done by revising Article 3(6), Article 7, Article 8 or Article 9.

Ongoing dialogue pursuant to Article 7

More broadly, the DMA would benefit from the introduction of better defined ongoing regulatory dialogue. In the current draft such dialogue is principally referred to in the recitals. In the context of Article 7 it would appear that a reasoned opinion may be submitted as part of a market investigation request by the potentially affected company. However, as noted above, it is not clear whether prior to that stage a company may have the opportunity to explain its conduct or proposed compliance measures in light of the objectives of the DMA and other applicable legislation. Such an opportunity would be a useful step, clarifying how compliance with each obligation could be achieved in practice and taking into consideration the impact on business users, particularly SMEs and consumers.

Ongoing dialogue would help deepen a mutual understanding on platform markets, the sometimes competing interests of platform users and the technical implications of certain obligations. This will ultimately lead to more targeted and faster decisions; achieving the goals of the DMA efficiently, based on evidence and limiting the possibility of unintended consequences. It will also diminish the prospect of appeals in courts, which would further delay positive impact of the DMA. This dialogue could be led by the European Commission and would not impact the DMA's regulatory timelines nor limit its powers.

4. Scope and role of market investigations

Affected businesses need to understand the purpose and scope of any market investigations conducted by the European Commission under the DMA. Though Articles 14 – 17 set out to provide clarity, material questions remain. For example:

- While the European Commission may carry out an investigation into new services and practices, may such an investigation be conducted where new services and practices may themselves be subject to new legislation? Following such a market investigation may the European Commission recommend new legislation as an alternative to amending Articles 5 and 6 of the DMA? Moreover, is the intention that such market investigations could lead to specific tailor-made remedies being made applicable only to certain designated gatekeepers or only to certain services?
- Is it intended that Article 30 (1) will apply to market investigations conducted pursuant to Article 17?
- Pursuant to Article 14, the European Commission may reopen a market investigation where there is a material change of facts. Is such a provision time-bound? Under what circumstances may the European Commission open a new investigation?
- Where the European Commission receives a request for a market investigation from three or more Member States, the European Commission then has four months to determine whether there are reasonable grounds to open an investigation. Will the European Commission publish such requests and its decisions (including where it decides there are no grounds for action)?

5. Investigation and enforcement powers

Given the wide range of proposed investigation and enforcement powers, the European Commission should clarify which body will be responsible for applying such powers. For example, if the intention is that DG Competition will have such responsibility, will DG Competition set up a dedicated unit specifically for DMA enforcement? How will it liaise with other parts of DG Competition or existing bodies that may be carrying out their own enforcement powers (or, indeed, have other specialist relevant knowledge such as that relating to data protection, cybersecurity or consumer protection), whether at Member State level or in relation to enforcement of other laws, such as data protection laws?

In light of the complexity of some of the obligations, Article 30's 14-day deadline relating to the right to be heard should be extendable in specific situations to ensure proportionality. Moreover, the proportionality principle - currently only referenced in the recitals - should better integrated into a broader set of the Articles, including those governing information requests.

6. Scope of information obligation about concentrations and interface with existing merger control rules

Under the DMA, it is proposed that the European Commission would be informed about relevant concentrations even if they do not meet the jurisdictional thresholds of the EU Merger Regulation (EUMR) or of a Member State's merger control regime. Broad information notification obligations should not be imposed by a regulation that does not form part of a merger control enforcement system. Further clarity as to the interaction between the DMA and EU Merger Regulation is needed.

For example, when read with the European Commission's proposal to begin accepting merger referrals from Member States under Article 22 of the EUMR even for proposed transactions that do not meet the jurisdictional thresholds of a Member State's merger control regime (which itself as a proposal creates significant legal uncertainty), a consequence could be that such potential transactions may be subject to review by the European Commission.

If the DMA is to include an information notice obligation, it should clarify:

- What the consequences of such an obligation and the procedural steps related to that could be. For example, AmCham EU assumes any review of proposed transactions notified to the European Commission under the DMA would take place solely under the EUMR and only if the EUMR jurisdictional thresholds are met;

- How and whether information provided under the DMA may be used in any merger cases and vice versa (for example, Article 31 of the DMA would suggest that such information cannot be used other than in relation to the DMA); and

- How any merger control commitments may interface with any obligations arising under the DMA as a result of the transaction and whether there may be potential for duplication or for merger commitments to later be subject to a market investigation and be included within Articles 5 or 6.