

FACEBOOK

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Preliminary Comments on the EU Digital Markets Act

Facebook recognises that the nature of competition and the markets our company operates in has rapidly evolved and that requires a new approach built on sound principles. The Digital Markets Act (DMA) proposal is a significant change in the way in which regulatory processes are managed and regulatory remedies are applied. This requires very careful scrutiny to ensure the proposal will get the balance right, not least because it is likely to set the standard for all future regulatory measures, regardless of sector.

Facebook has been working for a number of years in trying to develop ways in which our company can facilitate a more open ecosystem, such as through user-initiated data portability. There is value in ensuring ecosystems remain open and competitive as opposed to imposing heavy restrictions on businesses that have the main purpose of restricting innovation and reducing consumer welfare.

As a general rule, Facebook is convinced that automatic, self-executing rules that are applicable to all companies and irrespective of the market realities in which they operate will lead to unintended, disproportionate, and damaging consequences. More nuance and regard to companies' ability to continue providing their users with useful and innovative products should be given due consideration in upcoming discussions. Facebook strongly believes it is possible to build a robust and future-oriented DMA. It will depend on the regulation's ability to address legitimate concerns while not reducing the ability and incentive of companies to experiment, innovate, and react swiftly to new user demands. Remedies that will make it harder for a gatekeeper company to run its business in the most efficient manner by no means automatically translate into greater market contestability and consumer welfare.

Facebook looks forward to continuing the dialogue with policymakers and stakeholders. This contribution represents Facebook's preliminary comments on a few elements of the DMA that will evolve further over time.

Gatekeeper designation

For the most part, Facebook is unlikely to be a fringe case in designating gatekeeper companies. Nonetheless, any gatekeeper designation and the process around it should be transparent, rebuttable and consistent with legal norms. Article 3 gives a lot of leeway in the designation process. Whilst Article 3(2) presents quantitative criteria for the gatekeeper designation, Article 3(6) specifies that the Commission can identify gatekeepers even if these criteria are not met (see below). Further, Article 3(4) refers to specific "circumstances in which the relevant core platform service operates" which may prevent the designation as gatekeeper even though the criteria in Article 3(2) are met. Equally, the proposal fails to define the criteria for a removal of such gatekeeper status.

Article 4 merely refers to a “substantial change in any of the facts on which the decision was based”. These provisions will require further clarification.

As mentioned, the Commission also reserves the right to impose gatekeeper status as part of a market investigation, even in lieu of said gatekeeper achieving the quantitative thresholds. This includes the power of determining whether the gatekeeper is enjoying an entrenched and durable position in its operations or whether it is foreseeable that it will enjoy such a position. If the latter, the Commission reserves the right to pick and choose the obligations to impose on such gatekeeper companies amongst a more limited subset of obligations (Article 15(4)). Taken as a whole, this gives the Commission far-reaching oversight and intervention powers. There is a need for greater clarification of which evidentiary thresholds the Commission will have to meet when designating gatekeepers on the basis of qualitative criteria. It will be essential to establish effective ‘guard rails’ to ensure companies can rely on a predictable regulatory environment

Lastly, the identification and delimitation of each core platform service provided by a gatekeeper will have to be thoroughly thought through, especially with respect to services providing integrated, multi-feature services. Given the far-reaching obligations gatekeepers will have to abide by with respect to each of their core platform services, the precise identification and delimitation of those services will matter greatly with respect to the value proposition companies will be able to offer to their users. It will be paramount to avoid unintended consequences in this area and to provide greater clarification on how to define a service.

List of self-executing obligations for gatekeeper companies

Facebook remains sceptical about the value of self-executing rules, including prohibition lists, as contained in Article 5. The companies that are expected to fall in scope of the DMA are incredibly varied in the way they operate. The speed of innovation is also not going to slow down in the technology sector. Facebook believes that this raises a valid question about the suitability of an one-size-fits-all approach that such rules would bring. To put it another way, a necessary assumption for the application of self-executing prohibition and obligation lists is that the European Commission has ‘got it right’ with respect to all companies falling in scope and will continue to be able to preempt the market and innovation into the future.

Prohibition lists are a very ‘expensive’ remedy as they lack any nuance and should hence be reserved for overarching principles such as transparency, accountability, and universally valuable inputs to businesses to improve market contestability (such as data sharing). A more flexible and targeted approach is far more efficient and will minimise unintended consequences. Such an approach would be more future proof and better equipped to preserve efficiencies that bring consumer benefits and competition.

List of obligations that may require further specifications

The purpose of Article 6 needs careful consideration. It is still unclear as to whether the right balance between the immediate imposition of remedies vs. the ability to apply fit for purpose, case-by-case remedies has been achieved. This could be clarified through a clearer and more participatory Article 7 and Article 8. Overall, it seems that the approach proposed under Article 6 is a more desirable approach than self-executing obligations as it enables regulated companies to request guidance on the applicability of these provisions to their specific business models through the Article 7 process. If value is to be given to

'participatory regulation' as a model, it should be further expanded and be the basis for the establishment of regulatory obligations in Article 6.

Greater need for flexibility

As mentioned above, broadly applicable lists of prohibitions and obligations are not the most appropriate tool for a very diverse set of companies, products and consumers. Those companies run a whole range of different business models with different revenue models and different customers, they operate in very different environments. We believe there are better models of regulation that can be designed that would fulfill the purpose of the regulation and offer better regulatory outcomes in terms of protecting innovation and consumer welfare and favouring more growth and investment in EU markets.

Currently, there is no objective justification or efficiency defence which would exempt a particular firm from a specified measure. These safeguards play an important role under competition law, meaning the regulator must clearly weigh the anti-competitive effects of a given practice with its pro-competitive effects. The DMA should draw inspiration from this approach to make sure companies are not unnecessarily prevented from innovating and thereby providing more competition in markets.

Facebook also considers the threshold for suspension requests contained in Article 8 sets a very high bar for companies to challenge Article 5 and Article 6 obligations, and it is unclear how economic viability risks could be objectively evidenced or measured.

Interplay with other pieces of regulation & national competition law

It will be important to bear in mind that the DMA will not operate in a vacuum but will interact with other, potentially overlapping, pieces of legislation. The most obvious one is competition law enforcement which will remain the most appropriate tool for dealing with abuses of market power. It is a tool that has effectively worked for decades, including in digital markets. Notably, the DMA aims to introduce investigative and enforcement measures that are comparable, and some cases go further, than those found under competition law. The DMA could also raise questions about its interplay with other regulations such as the very recent platform-to-business Regulation (P2B) as well as existing data protection and telecommunications laws. These regulatory interplays will require careful consideration to ensure consistency across the various laws and regulations.

Furthermore, the importance of pan-EU coherence cannot be overstated. The DMA is a complex piece of regulation that will require companies to undertake careful balancing and compliance exercises. But at the same time it is also an harmonization measure based on Article 114 of the TFEU. Against this background, the ability to apply additional national competition rules needs to be critically assessed, not least because those rules might well seek to impose obligations on gatekeeper companies that deviate from those in the DMA.

Further considerations

Exemptions. In Article 9 the Commission lays out a series of exemptions (public morality, public health, and public security) that seem broad and vague. It may be worth considering if these are the right list of exemptions or if others should apply also, including those that would protect gatekeepers from bad actors who could try to take advantage of some obligations to siphon off value for themselves without contributing meaningfully to - or even decreasing - consumer value.

Updating obligations. Article 10 gives the Commission the right to update the list of regulatory remedies at their discretion via implementing acts. It is particularly difficult for businesses to plan and invest if the regulation was to remain in a constant state of flux. Hence, those powers should be exercised with care and be subject to appropriate safeguards such as the requirement to take decisions based on sufficient evidence and with sufficient participation of the ‘gatekeeper’.

Obligation to inform about concentrations. There now seems to be an overlap with current EU merger procedures by creating an “obligation to inform about concentrations” in Article 12, which in fact goes further current EU merger procedures. The purpose of such a procedure seems unclear and it would be prudent to see how this can be streamlined within the Commission given the current procedures and enforcement practices already in place.

Regulatory capacity. The burden the DMA will set up for the new regulator should not be underestimated. The regulator will have to oversee a substantial amount of often complex obligations applicable across a variety of gatekeeper companies’ core services. Appropriate resourcing will be crucial in ensuring the smooth functioning of the regulation’s key provisions.

Final comments

Facebook takes the concerns that the DMA is intended to solve extremely seriously. Facebook fully supports the goal of a competitive digital environment and has already taken measures to that effect. While it is appropriate to address persistent concerns with regulation, it needs to make sure that it does not ‘overshoot’. Just like consumers benefit from a more competitive environment, they equally benefit from experimentation, innovation, and often considerable risk-taking on the part of companies. Facebook considers itself as being one of the best in class when measured against those parameters. This has driven Facebook’s success which at its core is about the continuous ability to create value for both consumers and business users. Our company created this value in an environment that allowed for fairly fast product experimentation and innovation. The more regulation will move companies into an ‘innovation by permission’ environment, the more it will dampen these positive dynamics. Hence, the key will be to find the right balance between achieving the objectives of the DMA with as little negative side effects and unintended consequences as possible.

Facebook looks forward to engaging with EU stakeholders and to sharing its experience and views on how this balance could be best achieved.