EU DIGITAL MARKETS ACT (DMA)

Submission to the ACM's public consultation on Dutch Digital Markets Act Implementation Act

April 2023

Introduction

The Computer & Communications Industry Association (CCIA Europe) welcomes the opportunity to provide feedback to the Netherlands Authority for Consumers and Markets ("ACM") public consultation on the Digital Markets Act ("DMA")[1] Implementation Act.

CCIA represents large, medium, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services. CCIA is committed to protecting and advancing the interests of our members, the industry as a whole, as well as society's beneficial interest in open markets, open systems and open networks.

CCIA supports the objectives of the DMA. CCIA thinks that in order to meet its stated goals, the DMA should protect the open market economy and free competition, preserve dynamic competition and innovation for the benefit of consumers, protect business freedom, prevent distortive regulatory dependencies, and ensure a framework for digital economic regulation that provides legal certainty and harmonisation across the EU. CCIA's submission to this consultation provides constructive suggestions to help national implementation of the DMA achieve this while ensuring effective and proportionate enforcement for the benefit of consumers.

Below you will find our recommendations to the Dutch government concerning:

- Remaining ambiguities of the DMA
- Future DMA enforcement on the EU and national levels
- Interplay with EU and national laws

I. Remaining ambiguities of the DMA

1. Clarify the choice of legal instrument

Once the DMA starts to apply in May 2023, companies active in digital markets will be facing a complex legal framework comprising ex-ante and ex-post rules, on the EU and national levels. These complexities will be heightened for companies that could be considered to have a dominant position in one or more markets, or for those seeking to rely on access to dominant companies' infrastructure. In view of that, seamless cooperation

[1] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), available here.

between the European Commission and NCAs in coordinating enforcement actions is essential to ensure coherent application of these rules, legal certainty and ultimately achieving the DMA's objectives.

When a new, potentially anti-competitive practice emerges, or there is a suspicion of non-compliance with the DMA, the ECN will need to coordinate and decide which legal instrument is best suited to address it i.e., regulatory or competition law enforcement; EU or a national action. It remains unclear which factors will be taken into account when deciding. We invite the Dutch government to ask the Commission to make use of DMA Article 47, and issue guidelines on DMA enforcement, clarifying which factors will be taken into account when allocating cases.

Articles 37 and 38 of the DMA provide that the Commission and the NCAs should coordinate their enforcement actions and avoid parallel or inconsistent application of the laws, including enforcement based on the DMA, i.e., EU / national non-compliance investigations, and enforcement based on other EU / national laws. To the extent that enforcement involves a Core Platform Service and conduct addressed by DMA obligations, the DMA should be the exclusive enforcement instrument to achieve pro-competition objectives in a harmonised way within the internal market.

Furthermore, we encourage the Commission and the NCAs not to underestimate the workload and complexity of the future implementation of the DMA. Given that the DMA will start to apply in a few weeks and it will take a few years for the courts to develop the DMA case law, businesses would welcome guidance on how cases will be allocated and prioritised as soon as possible. This will provide legal certainty for the businesses, ensure effective DMA enforcement and at the same time, support efficient use of the ECN resources.

2. Clarify and provide guidelines on effective DMA compliance

The term "effective compliance" mentioned on multiple occasions in the DMA remains ambiguous. It is clear that the obligation to ensure that the compliance measures foster the objectives of contestability and fairness is on the companies designated as the gatekeepers. However, it is not clear what constitutes contestability and fairness and how it will be assessed, particularly given the dynamism of the digital sector. The presence of such ambiguity, in the context of ever evolving market circumstances, could result in overcompliance and reduction in innovation efforts, particularly due to the high fines for non-compliance.[2] Such outcome could increase costs and reduce the quality of consumer facing services without any tangible increase to contestability or fairness for business users. Therefore, it is essential for effective compliance that the Commission clarifies how each of the obligations will apply in the specific circumstances of each designated Core Platform Service, and to further ensure that this assessment is fair, transparent, and non-discriminatory. For this reason as well, CCIA invites the Dutch government to ask the Commission to issue topical guidelines, in line with Article 47 DMA.

[2] Up to 10% of the company's total worldwide turnover or up to 20% in case of consequent same or similar infringement - Article 30 para 1 and 2 DMA.

II. Role of the NCAs in supporting the European Commission in monitoring effective DMA compliance & enforcement

3. Avoid parallel enforcement

Article 37(1) DMA states that the Commission and Member States shall ensure "complementary enforcement of available legal instruments applied to companies designated as gatekeepers under the DMA." This however, should not lead to Member States prohibiting or mandating conduct already covered by the DMA merely by invoking a "competition law" objective. A situation where the regulator launches DMA non-compliance proceedings and in parallel, an NCA launches a competition case against the same company, service and conduct, should also be avoided. Such parallel enforcement could potentially lead to the imposition of contradictory remedies and thus, further fragment the internal market.[3] This could also go against the *ne bis in idem* principle enshrined in Article 50 of the EU's Charter of Fundamental Rights.[4]

Following, according to Article 39(2) DMA, Member States should inform the Commission of any written judgement of national courts deciding on the application of the DMA. To support harmonisation, we suggest that the NCAs monitor developments in their respective national courts, like new private claims being filed, and assist the Commission in keeping track of private actions based on the DMA. This will make it easier for the Commission to submit written observations to national courts to support the coherent application of the DMA across all EU Member States.[5]

Therefore, to ensure the harmonisation purpose of the DMA and provide legal certainty for businesses, we encourage the Commission and the NCAs to refrain from the above mentioned parallel enforcement, to monitor and report on private DMA litigation, while avoiding that NCA's DMA monitoring spills-over to the enforcement of national competition rules.

4. Safeguard single market harmonisation with national implementation acts

Any national DMA implementation acts should be strictly in line with the DMA's relevant articles.[6] Moreover, to avoid conflation with national competition law, such implementation acts should not add provisions going beyond what is strictly necessary for DMA enforcement. Ensuring this will further contribute to the harmonisation of the EU single market, in line with the DMA's purpose.

Article 38(7) of the DMA states that when an NCA launches a non-compliance investigation on its respective territory, and before taking a first formal investigative measure, it shall inform the Commission in writing. The NCA shall also inform the Commission of the "findings of such investigation in order to support the Commission in its role as sole

[3] "We must not compete with the DMA", comments by Benoît Cœuré in an interview with Contexte, 20 February 2023, available here.
[4] Case C-117/20 *bpost*, Judgment of 22 March 2022, available here.
[5] As foreseen in Article 39(3) DMA.
[6] Article 1(5) DMA.

enforcer of this Regulation." In this regard, we would like to draw the attention of the Dutch government to two points.

First, any information gathered in the course of the mentioned investigation should remain confidential and the findings of the investigation should not be made public. This is particularly important in the early years of enforcement while the rules and obligations remain ambiguous and untested. Despite being an ex-ante regulatory instrument, companies designated as gatekeepers face significant legal risks, including from private litigants. The regulatory dialogue envisaged by the DMA means encouraging open communication and cooperation in understanding and modifying business models, not a continuation of the old competition law paradigm of adversarial proceedings.

Second, CCIA would like to point out that DMA Article 38(7) gives the NCAs power to investigate and, following, refer a respective non-compliance case to the Commission. The DMA does not empower the NCAs to issue decisions in such cases. This derives from the fact that the Commission is the "sole enforcer" of the DMA. Thus, CCIA encourages the Dutch government to monitor and ensure national compliance with this provision in order to prevent fragmentation of the EU's internal market and achieve the DMA's objectives.

5. Avoid spill-over effects into antitrust and non-gatekeepers

The DMA is a new ex-ante regulatory tool designed to address issues around fairness for business users and contestability for rivals. It is not a competition law instrument, nor is it based on an assessment of effects. Rather, it is a complement to competition law[7] grounded in a distinct legal basis. Therefore, DMA provisions and future DMA non-compliance decisions should not be treated as a proof of dominance, anticompetitive harm or any other constitutive element of a competition claim.

Contrary to more recent statements by some at the Commission,[8] the DMA should also not become a benchmark for antitrust cases against non-gatekeepers. The 2022 DMA paper by King & Spalding underlined that the DMA relies extensively on the notion of fairness, and appears to presume that the behaviours it targets are inherently harmful and unfair.[9] However, the behaviours have not been proven to be harmful and many of them can be pro-competitive. For example, the Commission's 2019 expert report[10] outlined how certain behaviours prohibited by the DMA, such as self-preferencing, are not always harmful, and should be subject to case-by-case analysis and examination. If the DMA's *per se* rules become a benchmark for antitrust cases, companies active in digital markets will be

[7] "The DMA will complement the enforcement of competition law at EU and national level. The new rules are without prejudice to the implementation of EU competition rules and national competition rules regarding unilateral behaviour." European Commission, *Digital Markets Act: Commission welcomes political agreement on rules to ensure fair and open digital markets*, 25 March 2022, available here.

[8] "It is a benchmark already (...) if you're dominant, in principle, you should expect that we will find detrimental impact on the working of competition and it is relatively unlikely that you will be successful with an efficiency defence", comments by Olivier Guersent, Director General of DG COMP during European Commission's Legal Service Conference, 16 March 2023, recording available here.

[9] King & Spalding, *The Digital Markets Act's Per Se Prohibitions Increase Legal Risks for Non-Gatekeeper Platforms*, February 2022, available here.

[10] Crémer J, de Montjoye Y, Schweitzer H, *Competition Policy for the digital era*, 2019, available here. See also: Oxera, *How do online platforms create value? Implications for the DMA*, 2021, available here.

disincentivised to grow and innovate, and will be prevented from engaging in behaviours that can create value for users. This would ultimately have negative consequences for Europe's digital ambitions, and for European consumers of digital products and services.

6. Ensure application of the proportionality principle in the DMA enforcement

Any enforcement action, including non-compliance investigations initiated at the national level, should respect the proportionality principle. This could be done, among others, by taking into consideration compliance efforts of companies designated as gatekeepers, and the characteristics of their products and services. It should also confront respective compliance efforts against the DMA's and other policy and regulatory goals, such as undistorted competition and the preservation of an open market economy with free competition favouring an efficient allocation of resources,[11] privacy, security, safety, protection of intellectual property, freedom to contract, freedom to conduct a business, and others.

We note that ensuring compliance with the DMA is a complex and long-term process, requiring significant investment in new technological infrastructure and adaptation of business models for both companies designated as gatekeepers, and business users and rivals who seek to benefit from the DMA's access provisions. The compliance solutions are currently being designed so that they can be implemented from March 2024, and at this stage, it is still unclear what effective compliance should ultimately look like. All stakeholders should continue to assess the specific circumstances of each core platform service of each company designed as the gatekeeper to help determine what is necessary to help the DMA achieve its stated objectives.

Conclusion

CCIA Europe appreciates the ACM's efforts to consult stakeholders on the Dutch DMA Implementation Act. We hope that our suggestions will be useful in preparing for DMA enforcement. We remain available to further discuss our comments.

About CCIA Europe

- The Computer & Communications Industry Association (CCIA) is an international, not-for-profit association representing a broad cross section of computer, communications, and Internet industry firms.
    - As an advocate for a thriving European digital economy, CCIA Europe has been actively contributing to EU policy making since 2009.
    - CCIA's Brussels-based team seeks to improve understanding of our industry and share the tech sector's collective expertise, with a view to fostering balanced and well-informed policy making in Europe.
- For more information, visit: twitter.com/CCIAeurope or www.ccianet.org

[11] TFEU, art. 120 ("The Member States and the Union shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119"); *Ibid.*, protocol 27 ("the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted").