

POSITION PAPER

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

Brussels/Berlin, 08 September 2021

In December 2020, the European Commission (EU Commission) presented its proposal for a regulation on contestable and fair markets in the digital sector – the Digital Markets Act (DMA). The DMA is a framework to designate large and market-relevant online platforms (so-called gatekeepers), to implement measures to limit the market power of gatekeepers and to give enforcing power to the EU Commission. The proposed regulation has been discussed across all sectors in the past months. eco – Association of the Internet Industry has contributed a position paper on the proposal in May 2021.¹

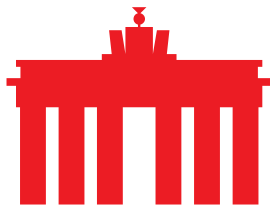
Generally, eco shares the EU Commission's assessment that the containment of competition issues at the Member State level will lead to a fragmentation of the Digital Single Market. eco welcomes the debate on the development of an ex ante regulatory instrument at the European level and would like to point out, that the DMA should be based on efficient and clear provisions. It should be recognised that an attractive and competitive regulatory framework is essential for the digital business models in Europe.

In the European Parliament, the Committee on the Internal Market and Consumer Protection (IMCO) has been designated as the leading committee to debate the DMA. Since July 2021, several documents have been published with proposed amendments to the DMA by the committee members. eco has analysed the IMCO's proposals for amendments and would like to share the following comments to the debate.

▪ **Extension of the business areas carried out by providers of core platform services**

Article 2 of the DMA defines the relevant business areas of the core platform providers. The members of the IMCO committee have proposed to add voice assistant services as well as mobile payment systems and web browsers as further relevant areas to the DMA.

¹ See eco – Association of the Internet Industry, Position Paper on the proposal for a Regulation on contestable and fair Markets in the digital sector (Digital Markets Act) – COM (2020) 842 final, <https://go.eco.de/dma>



eco has reservations about the proposed inclusion of these services or business models in the DMA. In order to ensure a fluent entry into force of the DMA, it should remain with the sectors and areas proposed by the EU Commission. The Internet industry has concerns that the regulatory oversight capacities will not be sufficient at the time the DMA enters into force to ensure complete and reliable enforcement.

▪ **Adjustments of the thresholds for the gatekeeper designation**

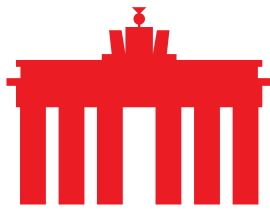
In addition to the business area, the gatekeeper designation is based on three indicators regarding the structure, the competitive position and the economic performance of the companies concerned. The IMCO committee members proposed changes to the structural and economic indicators for the gatekeeper designation. There is also a proposal that only two instead of three thresholds must be met for the designation of gatekeepers.

eco opposes the reduction of the structural and economic thresholds for the gatekeeper designation of core platform providers due to possible associated market entry barriers for innovative and fast-growing companies. The outbreak of the Corona pandemic and accompanying restrictions in all areas of life have shown that Europe's digital sovereignty needs to be strengthened. In order to guarantee digital, innovative and fast-growth technologies or business models an optimal market entry, as well as attractive framework conditions in the European Single Market, a correction of the thresholds, should be refrained from. Especially in combination with the proposed adjustment that only two of the three thresholds must be fulfilled for gatekeeper designation, this would create massive barriers to competition for entrants and companies in the digital and Internet economy.

▪ **Updating the obligations for gatekeepers**

The proposal submitted by the EU Commission last year already envisaged extensive obligations which the companies concerned would have to comply with after a gatekeeper designation. The members of the IMCO committee want to clarify Article 5 so that the obligations do not only apply to a gatekeepers' core services but also to its ancillary services. In addition, the obligations to remove pre-installed software applications by the gatekeeper, as well as the requirements for the portability of user data, shall be transferred from Article 6 to Article 5. Consequently, the obligations are to be implemented by the gatekeepers without further specification by the EU Commission.

eco welcomes the comprehensive proposals to clarify the obligations, for example, that the obligation of core platform providers to enable business customers to sell outside the platform also applies to direct sales via their own online shop, in accordance with Articles 5 and 6 DMA. Based on clear obligations, gatekeepers are enabled to adapt their business models and processes to the requirements of the



DMA. However, from the point of view of the Internet industry, there are also concerns about the proposed adjustments.

The intention of the members of the IMCO committee to eliminate the possibility of using and processing user data despite the user's consent is questionable and viewed with scepticism. The use of data provided by users is based on the users' consent, which is preceded by an unconditional right of choice. It is still unclear for what reason data collection and data processing requiring approval should be prohibited. Likewise, eco criticises that the obligations to hand over user data, for example from online search engines, are further specified but still no addition was made to the effect that the third parties interested in the data do not have to prove a legitimate interest to prevent the misuse of data.

▪ **Accelerated and efficient enforcement of the Digital Markets Act**

According to Article 3 DMA, the core platform providers which are designated as gatekeepers should notify the fulfilment of the thresholds to the EU Commission within three months. The IMCO committee members propose to reduce the notification period to one or two months. Based on this, the committee advocates for reducing the transposition period for implementing the obligations laid down under Articles 5 and 6 from six to a period of two up to four months. Procedures should also be accelerated on the side of the EU Commission. For this purpose, preliminary findings from market investigations due to systematic non-compliance with the obligations should be communicated by the EU Commission after three instead of six months.

Regarding the proposals for the accelerated implementation of the DMA's obligations, eco would ask for the envisaged deadlines to be determined appropriately and proportionately. The companies concerned by the DMA should have the opportunity to properly verify the fulfilment of the criteria according to the gatekeeper designation and thus to reliably implement the obligations imposed on them. An appropriate period is also necessary to counter systematic non-compliance with the obligations.

An acceleration of the procedures on the side of the EU Commission would provide the concerned companies with planning reliability regarding possible developments of the regulatory framework as well as its application and implementation. Therefore, it should also be considered that accelerated procedures must be realistically and reliably operable by the EU Commission within its oversight capacities. If underlying conditions are not ensured, an acceleration of the procedures should be waived when the DMA comes into force and its application should be postponed.



- **Coordinated acts of EU Commission and national competition authorities**

Based on the proposed amendments, the enforcement of the DMA by the EU Commission has been confirmed. The IMCO committee members propose several points to strengthen the cooperation between the EU Commission and the competent authorities at the national state level. In addition to the Digital Markets Advisory Committee, to which each Member State should dispatch two representatives, the committee members advocate for the establishment of a European High-Level Group of Digital Regulators, which should also be composed of representatives of the competent authorities of the Member States and relevant actors of the Union.

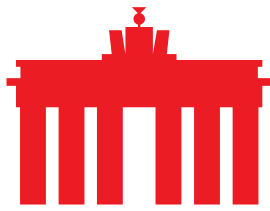
Due to the competition law developments in the individual EU Member States, eco supports the clarification that enforcement for the DMA lies solely with the EU Commission, supported by the national competent authorities. The competent authorities at the Member State level have built up extensive knowledge in the assessment of digital markets in recent years and have gained experience in the enforcement and implementation of possible competition law measures. The EU Commission should be able to draw on this know-how if necessary.

- **Conclusion**

The IMCO committee members have been submitting extensive amendment proposals to the EU Commission's draft regulation since July. In its position paper eco called for a practicable application of the DMA for all market participants – especially the gatekeepers. For this reason, clarifications and additions to the EU Commission's draft were necessary. eco welcomes the proposed amendments by the IMCO committee members which include numerous textual clarifications to ensure a targeted application of the DMA. The clarification of the obligations regarding their interpretation and the companies in its scope as well as the interaction of the EU Commission with the competent authorities at the national level, contribute to smooth processes in the application of the DMA.

Nevertheless, eco stays critical towards the proposed adjustments to the relevant sectors and business areas of the DMA, to the reduction of the thresholds for the designation of gatekeepers and to the proposed obligations. The amendments of the IMCO committee members disregard the experience that a regulatory instrument based on the “one size fits all” principle does not eliminate all existing competition challenges in digital, highly flexible, and high-growth markets. Also, a massive expansion of the regulatory proposals will not be helpful to tackle all future competition challenges but brings the danger of over-regulation of individual markets.

The amendments of the members in the IMCO committee are in part accompanied by significant consequences for the gatekeepers, whereby it has not been sufficiently clarified whether the EU Commission as the oversight authority has the



necessary personnel resources to accompany a smooth entry into force of the DMA or to ensure the permanent implementation and enforcement of the DMA. To create competitive conditions for increasingly digital markets in the future – which are the basis for investments and innovations – the planned regulation, as well as the amendments, must ensure a balance between necessary measures to ensure contestable markets 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.