

eu travel tech

Digital Markets Act: need for a more targeted and more efficient tool

eu travel tech position paper

Eu travel tech strongly supports the proposal of the European Commission for a Digital Markets Act. Digital platforms bring important benefits for European consumers and contribute to the internal market by increasing consumer choice, opening new business opportunities and facilitating cross-border trading. But longstanding concerns have been raised by many stakeholders, including eu travel tech members, regarding unfair practices of a few large platforms acting *de facto* as ‘gatekeepers’. Intervention based on competition law alone has proven insufficient to address and deter such conducts. Eu travel tech therefore believes that *ex post* enforcement should be complemented by *ex ante* rules such as those proposed by the Commission, ensuring EU markets remain fair and contestable to the benefit of consumers.

We identify the following areas for improvements in the Commission proposal.

Regarding the definition of gatekeepers and the scope of the Regulation:

- **The concept of “user dependency”, characterised by the lack of multi-homing, shall be a core element of the definition of gatekeeper, as the key feature of such platforms is the lock-in effects that they have on consumers and businesses.** If consumers and business users retain wide possibilities to circumvent the gateway by transacting outside the platforms, then the platform cannot be considered a gatekeeper.
- **The notion of “active end users” shall be adequately defined, taking into account the specificities of each business model and their ability to monetise their core platform services.** Indeed, for certain type of platforms such as marketplaces, a high number of “visitors” combined with a lower number of “transactors” could actually be a clear sign of wide multihoming for end users.
- **The designation procedure shall be as efficient as possible to avoid unnecessary delays.**

Regarding the obligations imposed on gatekeepers:

- **The horizontal approach of the proposal may limit its effectiveness** as improperly defined obligations could have for effect a slowing down of the application of the text. All prohibitions under articles 5 and 6 shall be sufficiently well tailored to avoid this impediment. **To this end, we suggest for these obligations to be adapted for each specific business model.**
- **The ban on self-preferencing (article 6 (d)) shall be made more prescriptive by taking into account the specific issues raised by the search engine business model.** In order to be effective, the ban shall cover not only discriminatory ranking but also discriminatory display in favour of the services offered by the search engine.

Finally, sufficient resources shall be allocated to the enforcement of the Regulation to ensure its effective implementation, and a clear framework shall be provided for the participation of third parties in proceedings.

As the European lawmakers are starting their work, eu travel tech would like to present its views regarding the refinements that can be brought to the text.

I. DEFINITION OF GATEKEEPERS AND SCOPE OF THE REGULATION (ARTICLE 3)

- **The concept of “user dependency”, characterised by the lack of multi-homing, shall be a core element of the definition of gatekeeper.**

The DMA’s objective is to tackle unfairness and incontestability issues raised by the emergence of “gatekeepers”: dominant online platforms controlling access to a critical mass of users, who are not reachable elsewhere. These gatekeeper platforms are therefore inclined to engage in unfair practices that reduce competition and digital innovation. In order to reach its goal, **the DMA scope should capture only those gatekeeper platforms in its scope, as the issues they all raise are unique to them and must therefore be tackled by appropriate, tailored measures.**

The general definition of a gatekeeper (Article 3 (1)) does not entirely reflect the notion of dependency which is an integral feature of the gatekeeper concept. It refers to an ‘*important gateway*’ for business users, without clearly establishing the link with the proposal’s objective to tackle the issue of dependency.

In line with recital 2 of the proposal, one of the characteristics of “gatekeepers” is a “*significant degree of dependence of both business users and end users*” resulting in “*lock-in effects, a lack of multi-homing for the same purpose by end users*”. Indeed, it is not just about the mere size of a platform, but about the lock-in effect that the platform has on consumers and businesses. If consumers and business users retain wide possibilities to circumvent the gateway by transacting outside the platforms, then the platform cannot be considered a gatekeeper.

To better reflect this, eu travel tech proposes the following refinements to the gatekeeper criteria:

- Article 3(1) should directly refer to the dependency of business users.
- Article 3(6) should explicitly refer to multi-homing as one of the criteria that should be assessed in the rebuttal process and market investigation.

- **The notion of “active end users” shall be adequately defined in relation to the different business models**

The threshold of 45 million monthly “*active end users*” (point (b)) seems relatively low in light of the number of monthly ‘visitors’ for many platforms in the EU. In parallel, the definition of an “*active end user*” could be subject to many interpretations. An “*end user*” is defined as “*any natural or legal person using core platform services other than as a business user*” (article 2) but the notion of ‘using a core platform service’ can vary greatly according to the different business models. **The concept of ‘end user’ should relate to the platforms’ ability to monetise their use, which will inevitably vary according to their business model.**

Case study: Marketplaces and price comparison platforms

While they are both providing “*online intermediation services*”, they may have different ways to monetize their services. Where some price comparison platforms generate income when a visitor clicks on or goes to book an offer (independently from the actual conclusion of the transaction), a marketplace generates income only when a visitor transacts (‘purchases’) on the platform. Further, some price comparison platforms use a hybrid model of visitor clicks and visitor transactions in order to generate revenue. Shall a visitor clicking on an offer be considered as an “*active end user*” in both cases, although he/she could be a source of income in one case and not the other?

For full marketplaces, the existence of a significant gap between the number of visitors consulting the website without transacting (the “viewers”) and the number of visitors actually transacting on the website (the “bookers”) is a clear testimony of the existence of wide multi-homing, as visitors are consulting several marketplaces before transacting¹. As such, for marketplaces and some price comparison platforms using a hybrid model, basing the designation as a gatekeeper of a platform on the number of visitors browsing the offers without transacting (as the transaction is actually taking place through another channel) would certainly be running against the very objective of the text.

Eu travel tech therefore calls for an adequate definition of “active end users”, taking into account the specificities of each business model, to be added to the text. The proposal foresees the adoption of a delegated act to “*specify the methodology for determining whether the quantitative thresholds [...] are met*”. While the methodology should clearly be determined by secondary regulation, the definition of users is central to the gatekeeper concept and should be defined in the regulation. As the user definition will also determine which platform falls above or below the thresholds, it is only when such clarification will be brought to the Regulation itself that potential gatekeepers will be able to identify themselves properly under Article 3.3. Solving this matter too late could therefore lead to a delay in the application of the text by such gatekeepers.

➤ **The designation procedure shall be as efficient as possible to avoid unnecessary delays**

The procedure provided by the proposal for the designation of gatekeepers is significantly lengthy. Indeed, the additions of the different delays between the application date of the Regulation and the definitive implementation of their obligations by their newly designated gatekeepers will bring us to 2024 at the earliest².

Such delays will have for consequence that existing unfair practices will continue for many more years, with the risk of eliminating all or severely limiting competition until then in many sectors. **All efforts should be made to ensure an efficient process for designating gatekeepers.**

¹ See “*The Billboard effect: still alive and well*”, Chris K. Anderson and Saram Han, [Cornell Hospitality Report](#), April 2017

² Article 3.3: 3 months for the gatekeeper to notify its self-designation (if it satisfies the quantitative thresholds; Article 3.4: 2 months for the Commission to confirm this self-designation; Article 3.8; 6 months for the gatekeeper to comply with the obligations laid down in articles 5 and 6 (notwithstanding the regulatory dialogue foreseen for the application of article 6).

II. OBLIGATIONS IMPOSED ON THE GATEKEEPERS (ARTICLES 5 AND 6)

➤ The horizontal approach of the proposal regarding the obligations imposed on gatekeepers may limit its effectiveness.

We see two major risks with the horizontal approach adopted by the proposal: (i) the horizontal application of the conducts, as they are intended to apply in most cases to all gatekeepers, means that they are not detailed or prescriptive enough to resolutely address problematic conducts, with the consequence that they slow down or hamper the effectiveness of the instrument; (ii) the conducts are based on very specific antitrust cases and investigations which, when taken out of their original context, can have many unintended and unhelpful consequences.

For the sake of time and efficiency, all prohibitions under articles 5 and 6 shall be sufficiently well tailored to avoid any lengthy discussion between the Commission and designated gatekeepers under articles 7.7, 8 and 9. Improperly defined obligations could have for effect a slowing down of the application of the text that would go counter to its objective of overcoming the lengthy delays of common antitrust investigations.

We therefore believe that the obligations should be adapted to specific business models.

Within the platform economy, and even within eu travel tech, business models can be very different (see above). Adopting a one size fits all approach to regulating very different business models can have unintended consequences and unnecessarily restrict competition and innovation.

➤ The ban on self-preferencing (article 6 (d)) shall be made more prescriptive by taking into account the specific issues raised by the search engine business model.

On the search results page (SERP) of a search engine, the more favourable treatment of its own services by the gatekeeper can take place not through more favourable “ranking” within organic search results but through more favourable positioning on the page, with the vertical services of the gatekeeper being displayed above the organic search results, which are in most cases relegated ‘below the fold’ (especially on mobile).

In order to be effective, the ban shall cover not only discriminatory ranking but also discriminatory display in favour of the services offered by the search engine³.

Furthermore, the obligation should acknowledge the existence of vertical leveraging: using market power in one market to favour a position in an adjacent or related market at the expense of their rivals.

Finally, in order to ensure its swift and undisputed application by designated gatekeepers, the ban on self-preferencing should be moved from article 6 to article 5, as the needed clarification would be integrated into the regulation itself. Such position has indeed also been expressed and supported by a high-level Panel of Economic Experts on Platform issues in “The EU Digital Markets Act – A report from a Panel of Economic Experts” (section 3.2 page 13). Alternatively, an additional obligation could be added to article 5, targeting specifically self-preferencing through preferential display on online search engines,

³ This approach has been adopted by the recently adopted German Competition Law.

whereas the ban on self-preferencing in article 6 would apply to other core platform services.

- **The anti-steering obligation (article 5 (c)) may have a negative, and most likely unintended, impact on marketplaces.**

Although it is clearly targeting a conduct currently investigated by the Commission in a case relating to app stores, it could have significant consequences when transposed to the marketplace business model. Indeed, allowing marketplaces' business users to promote offers to end users acquired via the core platform service can have unintended consequences and actually encourage free-riding⁴.

Case study: the online travel agencies

Online Travel Agencies work on the basis of refundable services. If wrongly interpreted, this provision would mean that end users could make a refundable reservation on an OTA, be contacted directly by the hotel to make a more attractive booking directly and cancel their original booking with the OTA. In the app store context, where the issue is about businesses being able to develop customer relationships bilaterally once the initial customer acquisition has been made, the provision makes a lot of sense, but not when applied to marketplaces. This shows that certain obligations, designed when looking at specific business models, cannot be transposed directly to other business models.

- **The ban on misuse of data (article 6.1 a) for gatekeepers is strongly supported by eu travel tech.**

The ability to internally combine and use data across products and services may enable a gatekeeper to engage in 'envelopment' strategies aimed at conquering new markets through cross-subsidization. This is, for instance, illustrated by the Google Flights service, which Google does not monetize by charging a fee, but by collecting data that it will monetize through search or display ads. In order to preserve efficiencies stemming from data crossusage, it is necessary for gatekeepers to be prohibited from using data collected from one service in order to improve advertising for another.

III. ENFORCEMENT AND PROCEDURAL RIGHTS FOR THIRD PARTIES

- **The enforcement of the Regulation shall be backed by sufficient resources to ensure its effective implementation.**

The European Commission foresees the allocation of 80 new staff members (full time equivalent) for the implementation of the Regulation. It is likely to be insufficient to deal with all the cases they will have in their hands. **Eu travel tech therefore calls for adequate resources to be devoted to the enforcement of the Digital Markets Act.**

⁴ Benefiting of the visibility offered by a marketplace without any cost, as the transaction would eventually take place outside of the platform without paying any commission. See "*The Billboard effect: still alive and well*", Chris K. Anderson and Saram Han, [Cornell Hospitality Report](#), April 2017

- **The Regulation shall also provide a framework for the participation of third parties in proceedings.**

As shown by the many antitrust investigations initiated over the last years on the basis of complaints of individual companies, many business users and competitors of gatekeepers, victims of their abusive conducts, are willing to contribute to the restoration of fair digital markets by providing their input to the Commission. It is necessary for the text to set adequate rules for their contribution to the proceedings led by the Commission: filing of complaints, hearings, access to files....

About eu travel tech

eu travel tech represents the interests of travel technology companies. eu travel tech uses its position at the centre of the travel and tourism sector to promote a consumer-driven, innovative and competitive industry that is transparent and sustainable. Our membership⁵ spans Global Distribution Systems (GDSs), Online Travel Agencies (OTA), Travel Management Companies in business travel (TMCs) and metasearch sites.

⁵ eu travel tech's members include Amadeus, Booking.com, eDreams Odigeo, Expedia Group, Skyscanner and Travelport. Associate members include American Express GBT, etraveli and Tripadvisor. Strategic Partners include Lastminute.com, Trainline, Travix, Travelgenio and CWT.