EU DIGITAL MARKETS ACT (DMA)

Submission to European Commission's public consultation on the template for compliance report under the DMA

July 2023

Introduction

The Computer & Communications Industry Association (CCIA Europe) welcomes the opportunity to provide feedback to the European Commission's public consultation on the template for compliance report ("draft template") under Article 11 of the Digital Markets Act ("DMA")[1].

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 is concerned that the draft template, if adopted in the current form, would go against the DMA's stated objectives. Therefore, CCIA's submission to this consultation provides constructive suggestions as to how the implementation process can achieve the DMA's goals while ensuring effective and proportionate enforcement for the benefit of consumers.

Below you will find our recommendations to the European Commission concerning:

- The nature and content of the compliance reports.
- The role of compliance reports in the DMA compliance assessment.
- Tools the Commission could use in the compliance assessment process.
- Legal principles which should guide the compliance assessment.

[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.

I. General remarks

1. Clarify the legal nature of the compliance report template

Article 46(1f) DMA empowers the Commission to adopt an implementing act specifying "the form, content and other details of the regulatory reports delivered pursuant to Article 11." However, CCIA notes that neither the draft template nor the public consultation announcement specify that the draft template will become an implementing act. In light of the lack of clarity as to the legal nature of the compliance report template, CCIA understands that the draft template, when adopted, will remain a non-binding guidance.

Considering that the DMA compliance measures will be specific for each designated company and their designated Core Platform Services (CPSs), and will rely on the specific circumstances surrounding the provided service, it is logical that the draft template has a non-binding character. By offering guidance on the information that could be pertinent for the Commission to evaluate compliance reports, the non-binding framework enables greater flexibility for gatekeeper-designated companies to determine the most relevant information and use the information that is available for demonstrating their compliance. This flexibility holds particular significance in light of the constantly evolving dynamics of digital markets and fosters innovation, adaptability, and responsiveness to market and consumer demands.

In view of all that, CCIA would like to reiterate that the draft template should remain a non-binding guidance. If, however, the Commission envisions the draft template to become a binding instrument, CCIA would like to ask the Commission to make an appropriate clarification and ensure that the content of the draft template is aligned with what is necessary and proportionate for the DMA enforcement, and required by law. This includes, among others, converting the minimum information requirements into an indicative list and removing certain requirements, such as the one relating to geographical scope of the implementing measures, which raise doubts as to their lawfulness.

For companies that will be subject to the DMA, having clarification as to the legal nature of the draft template is key to ensure legal certainty pertaining to the processes and requirements of the DMA. This is particularly significant considering the DMA's novelty as a recently introduced regulation.

2. Engage in regulatory dialogue to ensure effective compliance

CCIA would like to emphasise the importance of the regulatory dialogue envisioned by Article 8(3) DMA in the compliance process. The regulatory dialogue is especially important since 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 lies with the companies designated as gatekeepers. However, it is not clear what constitutes contestability and fairness as these terms are not

defined. The presence of such ambiguity, in the context of ever-evolving market circumstances, could result in overcompliance, i.e., gatekeeper-designated companies' implementing measures that go beyond what is required by the DMA. Such outcome could increase costs and reduce the quality of consumer facing services without any tangible increase to contestability or fairness for business users. It could also reduce innovation efforts, particularly due to the high fines for non-compliance. Therefore, it is key for effective compliance that the Commission clarifies how each of the obligations will apply in the specific circumstances of each designated CPS. The regulatory dialogue was designed to provide an opportunity to do that.

Thus, CCIA would like to encourage the Commission to engage in a substantive regulatory dialogue when requested by the gatekeeper-designated companies. According to Article 8(3) DMA, it is under Commission's discretion whether or not to engage in this process. However, to ensure swifter DMA implementation and maximum effectiveness of the DMA compliance to the benefit of businesses and consumers in Europe, the Commission could consider extending its successful "open door" policy in this regard.

3. Ensure that compliance reports form a part of a compliance assessment but do not replace one

Article 8(1) DMA states that "the gatekeeper shall ensure and demonstrate compliance with the obligations laid down in Articles 5, 6 and 7 of the DMA." The compliance report, established by Article 11 DMA, which requires the gatekeeper-designated company to describe measures it has implemented to ensure compliance with the mentioned obligations will be essential in demonstrating and assessing the DMA compliance. However, it needs to be noted that the DMA does not consider the compliance report as an ultimate means to demonstrating and assessing gatekeeper-designated companies compliance with the DMA. To provide legal certainty for companies both under and outside the scope of the DMA and to achieve the goals of contestability and fairness in digital markets, the compliance assessment needs to be fair, transparent, and non-discriminatory. Therefore, CCIA invites the Commission to clarify in the draft template that the compliance report forms a part of compliance assessment but does not replace one.

II. Information about the reporting undertaking (Section 1 of the draft template)

4. Preserve the freedom to contract external counsels

Section 1.2.2 of the draft template requires gatekeeper-designated companies to "indicate if external counsels involved in drafting the compliance report present guarantees similar to the approval requirements for monitoring trustees under EU merger control, in terms of independence, qualifications and absence of conflicts of interests." The necessity of this requirement appears to lack justification. Gatekeeper-designated companies, while

exercising their contractual freedom, should be afforded the autonomy to exercise discretion in selecting external counsels they deem suitable for their needs.

Imposing the same stringent criteria used for monitoring trustees in EU merger control in relation to external counsels contracted by the gatekeeper-designated companies is also inefficient from the enforcement standpoint. Ensuring compliance with the DMA is already a complex and long-term process, which requires substantial investments in new technological infrastructure and adaptation of business models by the companies designated as gatekeepers. Adding requirements such as those in Section 1.2.2 will therefore put an additional burden on gatekeeper-designated companies' resources, potentially diverting them away from designing effective compliance measures.

III. Information on compliance with the obligations laid down in Articles 5, 6 and 7 (Section 2 of the draft template)

5. Convert minimum information requirements to an indicative list

Section 2 of the draft template requires the gatekeeper-designated companies to demonstrate their DMA compliance by providing the Commission with a 26-element list of information. This is to be done individually for each designated CPS and in relation to each obligation / prohibition separately (2.1. of the draft template).

According to Article 11 DMA, the compliance reports are required to describe "in a detailed and transparent manner the compliance measures." The DMA does not state what information should be provided, but rather outlines the manner in which the information should be provided. Therefore, the extensive minimum information requirements delineated in Section 2 of the draft template exceed legal requirements of the DMA and exhibit a disproportionate magnitude in relation to the necessity for ensuring the efficient enforcement of the DMA.

The compliance measures, which are currently being designed, will be tailored to specific circumstances in which CPSs are provided. Fundamentally, it is the primary duty of the gatekeepers to ensure compliance and furnish the most relevant information within the compliance report. Consequently, the gatekeeper-designated companies are in the best position to generate the most pertinent information for their CPSs thereby showcasing their compliance efforts. This is why it is imperative that those companies retain the discretion to determine what information most effectively showcases their compliance with the DMA's prohibitions and obligations.

Mandating minimum information requirements by the draft template is not warranted by the DMA. Such minimum information requirements hamper gatekeeper-designated companies' ability to adapt to evolving market dynamics and create an additional burden on

them by requiring them to provide information that is not necessary for the compliance assessment. Consequently, the efficiency of the compliance assessment itself is jeopardised from its inception, potentially undermining the anticipated benefits of the DMA for its beneficiaries. Finally, it is worth noting that to avoid imposition of hefty fines for non-compliance, gatekeeper-designated companies should be incentivised enough to present the most relevant information and should not be subject to minimum information requirements.

Therefore, to ensure proportionate enforcement of the DMA, CCIA suggests that the information listed in Section 2 of the draft template remains indicative and serves as a non-binding guidance.

6. Ensure that all the requirements are proportionate and necessary

Within the draft template, certain information requested by the Commission for gatekeeper-designated companies raises concerns regarding its necessity and proportionality in view of the enforcement of the DMA.

First, given that the primary objective of the compliance report is to outline the implemented or planned compliance measures, the inclusion of disclosures regarding business practices predating March 2024, prior to the application of DMA obligations and prohibitions (requirement in 2.1.2 point a), appears unnecessary to fulfil this obligation. Moreover, such disclosures do not appear to contribute any discernible value to the assessment of the DMA compliance, which should be focused on the gatekeeper-designated companies behaviour from March 2024 onwards. On the contrary, sharing information about past or present practices, even with the DMA in effect, could potentially subject gatekeeper-designated companies to considerable legal risks, including from private litigants.

Second, the draft template requires the gatekeeper-designated companies to inform the Commission whether the implementation of the compliance measure extends beyond the EEA (2.1.2 point d). Given that the DMA is an EU Regulation, it seems unlawful to request information whether the geographical scope of the measure goes beyond the EU. As such, the objective behind this requirement remains unclear.

Third, the draft template also requires the gatekeeper-designated company to specify “any alternative measures whose feasibility or implications has been assessed and the reasons for not choosing them” (2.1.2 point k). It needs to be noted that given that it is gatekeeper-designated companies’ responsibility to design compliance measures, it is under their discretion to decide which measure will eventually be implemented. Submitting information on the considered alternatives, which were never or will never be implemented, seems inefficient and disproportionate. Companies designated as the gatekeepers cannot be obligated to present every potential compliance scenario. To conform with the DMA, a singular plan, which has actually been implemented, should suffice, especially given that it

is the gatekeeper-designated companies' duty to evaluate whether their measures guarantee compliance. It is also worth noting that the requirement from 2.1.2 point k imposes additional burden on the companies concerned and mandates an unwarranted use of resources.

Taking all that into consideration, CCIA recommends that the Commission review the list of requirements in the Section 2 of the draft template. If the Commission is to make it a binding document, it should ensure that all the requirements are proportionate and necessary to achieve the DMA's objectives and thus, not mandate extensive minimum information requirements as presented in the current draft template.

7. Do not mandate DMA complaint-handling mechanism

Section 2.1.6 of the draft template requires the gatekeeper-designated companies to provide the Commission with a list of complaints from the companies' business or end-users about companies' non-compliance with the DMA and an explanation of any action taken following the feedback received. This may be interpreted as a potential requirement on gatekeeper-designated companies to establish or maintain a complaint-handling mechanism specifically for the purpose of complying with the DMA. As this is not required by the DMA and the DMA states specifically that business and end-users are able to raise any issue of non-compliance with any relevant public authority directly (Article 5(6) DMA), CCIA recommends that the Commission remove the subject-matter requirement from the draft template.

8. Base compliance assessment on scrutiny of each implemented compliance measure

Sections 2.1.2 points q and r discuss the use of indicators to assess effectiveness of the DMA compliance measures and data that will help in this assessment, such as data on evolution of the number of active business and end-users. CCIA recognises the need for some tools or processes in place to assess the effective compliance with the DMA of each company designated as a gatekeeper and each service designated as a CPS. However, CCIA questions whether the use of indicators *per se* will allow for drawing an accurate picture of whether effective compliance has been achieved.

Digital markets exhibit a dynamic nature characterised by continuous change, driven by disruptive innovations and various external factors, often beyond the control of gatekeeper-designated companies. For instance, the entry of new market players may occur independently of the implementation of DMA compliance measures. Gatekeeper-designated companies cannot be held accountable for the lack of entry of market players, as numerous external factors unrelated to the gatekeepers' compliance measures may influence their entry, or lack thereof. Companies may seek to expand their operations based on strategic considerations such as forging new partnerships or responding to consumer demand. Similarly, the assessment of DMA effectiveness should

not be contingent upon whether business and end-users of gatekeeper-designated companies actively make use of the benefits provided by the DMA. Such decisions are ultimately driven by personal or business considerations influenced by a multitude of factors. Consequently, the effectiveness of DMA compliance should not be defined by the market effects, or lack thereof, resulting from the implementation of compliance measures. It is noteworthy that the DMA itself does not anticipate such causality.

Additionally, it is crucial to acknowledge that the utilisation of indicators by the Commission may necessitate companies to provide data that might not be under their possession, either due to deliberate decisions or legal limitations. Such a requirement would be unnecessary and disproportionate in attaining the objectives set forth by the DMA. Moreover, the collection of data regarding the entry and operations of competitors could potentially give rise to concerns from an antitrust standpoint.

In conclusion, the compliance assessment and any indicators employed for this purpose should solely pertain to the scrutiny of compliance measures implemented by individual gatekeeper-designated companies to ensure compliance with DMA obligations. The compliance assessment should focus on compliance by design, mentioned in Recital 65 DMA and no causality should be inferred between DMA compliance measures and the emergence of market effects. The way compliance assessment is done could be agreed in bilateral talks between the Commission and each company designated as the gatekeeper as part of the regulatory dialogue. To avoid the risk of heavy fines for non-compliance or other penalties and to efficiently allocate the resources for compliance, companies designated as gatekeepers are already incentivised to demonstrate their compliance in the most efficient and comprehensive manner.

IV. Non-confidential summary (Section 4 of the draft template)

9. Safeguard business secrets and other non-confidential information in a public non-confidential summary of compliance reports

Article 11(2) DMA requires the gatekeeper-designated company to "publish and provide the Commission with a non-confidential summary of that compliance report." Recital 68 further explains that while this obligation aims to enable third parties to make their assessment of companies' compliance, it should respect "the legitimate interest of gatekeepers in the protection of their business secrets and other confidential information." CCIA would like to underline that it is prominent that business secrets and other non-confidential information are fully protected. It is not justified to expose these sensitive details to the risk of disclosure, as doing so would entail substantial legal risks for companies designated as the gatekeepers. This is particularly important in the early years of enforcement while the DMA rules and obligations remain ambiguous and untested.

Conclusion

CCIA welcomes the Commission's efforts to offer guidance on the draft template for compliance reports. In this regard, it is crucial for the Commission to provide clarification on the role of these reports, which, in CCIA's perspective, should serve as non-binding guidance. While compliance reports undoubtedly hold a central role in evaluating companies' adherence to the DMA, they should not supplant the entirety of the compliance assessment process. Such assessments ought to concentrate on the specific measures implemented by each gatekeeper-designated company and avoid establishing causal links between DMA implementation measures and their impact, or lack thereof, on the market. The Commission could use the regulatory dialogue envisioned by Article 8(3) DMA to discuss with companies designated as gatekeepers how the effectiveness of their compliance with the DMA will be assessed.

Turning to the specifics of the draft template's content, certain listed requirements appear to contravene the principles of necessity and proportionality, needlessly burdening gatekeeper-designated companies and potentially diverting their resources away from designing compliance measures and effective reporting thereof. Thus, the requirements outlined in the draft template should serve as indicative and non-exhaustive guidelines, from which gatekeepers should be able to choose to demonstrate effective compliance in light of their own CPSs.

Finally, it is imperative to emphasise the significance of safeguarding business secrets and confidential information, particularly during the initial years of DMA enforcement. Therefore, the development of a non-confidential version of the compliance report should take this aspect into careful consideration.

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