Digital Markets Act

Position of France Digitale

April 2021

Position of the association

Startups need visibility and predictability in their relationships with systemic platforms: the Digital Markets Act sets the conditions for fairer commercial relationships.

France Digitale is pleased with a text that preserves innovation while also establishing necessary safeguards against monopolistic behaviour and rent-seeking. However, we remain vigilant to ensure that the text does not create unnecessary regulatory barriers to entry, which would strengthen the position of existing players to the detriment of startups.

We also welcome the Commission's adoption of a list of new prohibitions and obligations that will be imposed on web giants. Some points should be clarified in order to achieve a more ambitious text. Thus, France Digitale recommends :

1. *The integration of a reporting procedure for professional associations and federations such as France Digitale, allowing them to play a role as whistleblowers and contribute to the designation of gatekeepers (art. 3);*
2. *Allowing developers to engage in in-app communications with end-users (Art. 5c);*
3. *An extension of the prohibition of certain forms of tie-in by gatekeepers to payment services (Art. 5e);*
4. *Reinforcing fair and non-discriminatory general terms and conditions by adding an obligation to maintain reasonable costs for app stores (Art. 6k);*
5. *Keep intact the existing obligations and prohibitions in the DMA regarding: interoperability, self-referencing, side-loading and access to payment transaction data by app developers.*

The current technological challenges demand continental responses and we call on decision-makers in Europe to accelerate the adoption of the DMA, rather than building a patchwork of national regulations. Entrepreneurs are concerned that France is getting ahead of the Digital Services Act and Germany of the Digital Markets Act.

With one year to go before the French Presidency of the Council, France will play a decisive role in this regulatory process and will be able to significantly influence the outcome of this text.

Finally, it is important to remember that the construction of European digital champions cannot be based solely on the regulation of platforms and on defensive measures by the EU. An offensive continental strategy must emerge, encouraging transnational investment, directing public procurement towards innovation and training tomorrow's innovators while also enabling them to move across borders with the same visa. This way, a truly digital single market will emerge.

The Board of France Digitale

Context : Relations between startups and Big Tech

How to rebalance the relation between web giants and tech startups? The Covid-19 crisis, from which the technology giants have emerged strengthened, has resulted in an increased imbalance in the digital platform market. While the Digital Markets Act is still to be analysed by the European Parliament and the Council of the EU, France Digitale presents here its recommendations for a text that favors the growth of startups in Europe.

Startups can benefit from the network effects of Big Tech. Their business models are often designed to be part of giant platforms that open up new commercial opportunities for them thanks to:

- targeted online advertising to millions of consumers;
- advantageous referencing on search engines;
- distribution of their solutions on global app stores;
- distribution of their products on online marketplaces, etc.

These digital tools boost the growth of many companies. But the price to pay is increasingly unsustainable. **The anonymous testimonies collected by France Digitale[1] point to several unfair practices faced by entrepreneurs:**

- **Discriminatory access** conditions;
- **Abusive exclusion** of platforms; unjustified closure of business users' accounts; unclear reasons for delisting (without possible recourse to the competent administrative authorities);
- **Random refusal** of advertisements with unclear explanations;
- **Data retention**;
- **Disintermediation**: confiscation of the direct relationship with users; refusal to provide developers with user data despite the fact that customers have the possibility to withdraw their consent at any time, thus depriving companies of important information to, for example, improve their products;
- **Exorbitant commissions** on sales;
- **Impossibility for users to buy freely** outside the platform's services;
- ***Sherlocking*, a.k.a. copying of applications:** being one of the most popular applications in the App Store can be a dangerous victory for a start-up. Some app shops (notably Apple's) spot user-favourite features, integrate them into its own apps, integrate them by default into iOS, sometimes even wiping out copied apps.

The 30% commission charged by Apple on all financial flows in the Apple Store
When a developer wants to publish an app in the App Store, they must first pay $99 for a developer account. For each app published, Apple will take a 15% or 30% commission on the price of the app (if the app is paid for) and 30% on payments made within the app to unlock a feature or access an additional service. If it is a subscription, the same 30% rate applies for the first year and drops to 15% from the second year.

[1] 50+ témoignages reçus entre le 1er janvier 2021 et le 22 mars 2021 après un appel à témoigner

Obligation to integrate the sign-in service provided by the gatekeeper

The Apple Sign-In service has recently been mandated for all users. Apple requires that all applications distributed in the App Store offer the Apple Sign-In service as part of its authentication options, although other third-party authentication services are available on the application (i.e. logging in to Google or Facebook). With this mandatory service, Apple further extends its ability to disintermediate its customers' applications, and is another example of linking two services (App Store and sign-in services).

Why is the DMA an opportunity for startups ?

More than 10,000 online platforms operate in the European digital economy, most of them SMEs and startups. Startups are often highly dependent on gatekeepers, making them particularly vulnerable to unfair market behaviour.

The current ex-post control of competition law, in the form of fines or behavioural remedies against certain giants, **is insufficient to deter these very large platforms from deploying anti-competitive strategies**.

- **Competition law investigations are too slow** to address anti-competitive practices in rapidly evolving digital markets. As a result, by the time investigations are completed, the market has generally tilted in favour of the offender and it becomes difficult to re-establish fair competition.
    - A case of abuse of dominant position takes between 4 and 6 years at DG COMP, sometimes EVEN more (the Intel, Microsoft and Google cases are closer to 10 years);
    - The Commission has only adopted interim measures once in 18 years. It did so in one year.
    - At the national level, in France for example, the Competition Authority can act more quickly, but a case still takes 3-4 years. Interim measures are more frequent, but they take 5-6 months.

- **Competition law investigations are *ad hoc***, limited to the narrow facts of the case in question. Moreover, the remedies adopted by competition authorities are limited to addressing specific competition problems and hardly address the same issues when they arise in different contexts.

Denouncing an anti-competitive practice is particularly burdensome and dangerous for a start-up for three reasons:

1. **The fear of retaliation** in the commercial relationship between the startup and the targeted actor
   ➔ Gatekeepers are both judge and jury of the respect of the general terms and conditions of their platforms. Startups have no recourse (other than the internal appeal procedures of these same platforms) to contest any measures deemed abusive. Most of them therefore choose to remain silent;

2. **The cost of proceedings** and lawyers' fees when faced with digital giants
   ➔ The length of proceedings, which take several years, coupled with the high costs of specialised lawyers, can lead to a hefty bill of over a million euros. This is an unaffordable cost for a young technological company;

3. **The unrealistic time frames** of the procedures compared to the life of a startup, and the rapid evolution of the digital market.
   ➔ It is worth noting the high mortality rate of startups after 3 years, at the time of industrialisation of their production (located between the start-up and growth periods). This phenomenon, known as the "valley of death", justifies their reluctance to engage in legal proceedings over such long periods (3 to 10 years).

Market access is essential for startups (new entrants). **We therefore support the approach of the Digital Markets Act to take proactive measures *ex ante*.**

Our recommendations

1. A text to be rapidly adopted

The DMA must be adopted quickly because :

- Individual interventions at Member State level create a serious risk of fragmentation of the EU internal market;
- Implementation should be considered as soon as possible to allow for the *ex ante* prevention of the abuses described above.

2. Preserve a robust definition of gatekeeper

We support the definition of gatekeeper set out in the DMA (Art. 3.1), according to which providers of essential platform services can be considered as gatekeepers if they fulfil the following conditions:

QUALITATIVE CRITERIA - Art. 3(1)	QUANTITATIVE CRITERIA - Art. 3(2)
1. has a **significant impact on the internal market**	**a.** **EEA annual turnover** equal to or above **EUR 6.5 billion** in the last 3 financial years **OR average market capitalisation** / equivalent fair market value of at least **EUR 65 billion** in the last financial year **+** provides a core platform service in at least **3 Member States**
2. operates a **core platform service** serving as important gateway for business uses to reach end users	**b.** **more than 45 million monthly active end users** established / located in the EU + **more than 10, 000 yearly active business users** located / established in the EU in the last financial year
3. enjoys an **entrenched and durable position** in its operations or is foreseeable that it will enjoy it in the near future	**c.** the end users and business **users thresholds** in point b are met in the **last 3 financial years**

For France Digitale, these proposals are set at the right level to cover the most problematic platforms, without creating side effects on European scale-ups. However, it is important that these quantitative thresholds are not lowered during the legislative process to cover a wider range of platforms, as this would significantly weaken the Commission's operational capacity to properly implement, monitor and enforce the obligations contained in the DMA. Furthermore, lower thresholds could be detrimental to the growth of start-ups.

3. Strengthen the gatekeeper designation process

The process of designation of gatekeepers should be strengthened to allow Member States to notify the European Commission of the presence of a gatekeeper in their market. Voluntary declarations may not be sufficient to identify existing gatekeepers.

A complaint system should be put in place to allow interested parties to complain to the Commission, including if the gatekeeper fails to notify the fact that it meets the quantitative thresholds for designation or if a designated gatekeeper fails to fulfil its obligations under Articles 5 and 6 of the proposal.

In addition to the alternative procedure described in Art. 3 of the draft DMA and without triggering a formal "market investigation", we believe that :

- **Professional associations and federations**, such as France Digitale, **should be allowed to report gatekeepers.** A formal complaint system, such as the one implemented under Council Regulation (EC) No 1/2003 on the implementation of the competition rules laid down in Articles 101 and 102 of the TFEU, would contribute to the effective application of the DMA. Such a complaint system, which would allow France Digitale to bring cases of non-compliance to the attention of the Commission, would ensure a more effective and efficient monitoring of gatekeepers' conduct.

- **Individual Member States, and the relevant authority** to be designated under the DSA, **should be allowed to notify the Commission** whenever they suspect that a gatekeeper platform is operating in their markets. This is particularly relevant given the cross-border nature of gatekeepers.

4. Renforce obligations and prohibitions

France Digitale is generally satisfied with the obligations in Articles 5 and 6. While the DMA already imposes a wide-range of obligations on gatekeepers, there is a need to **clarify the extent to which the application of Art. 5 (obligations) and Art. 6 (obligations capable of being specified) differ in practice**.
We believe that additional obligations should also include :

- Allow developers to engage in in-app communications with end-users: Article 5(c) of the proposal should allow business users not only to "promote offers to end-users acquired via the core platform service" but also to **"communicate in-app with end-users"**. This provision should be broadened to prohibit interference in any communication between business users and their customers, and not be limited to "offers" alone. Consumers should have access to the best offers and information on products and services in the internal market.

- Include all ancillary services, including payment services: France Digitale believes that Article 5(e), which obliges gatekeepers to stop imposing their sign-in system, **should not be limited to identification services but extended to all ancillary services, including payment services** of the gatekeeper. This provision would prevent app stores from forcing app developers to use the gatekeeper's in-app payment system when selling "digital goods or services". The proposal would thus effectively contribute to introducing and/or maintaining competition between gatekeepers and their business users in the provision of ancillary services.

- Strengthening the level playing field: Article 6(1)(k) aims to "apply fair and non-discriminatory terms and conditions of access to business users" to their app stores, by levelling the playing field. This obligation would provide a valuable tool to the Commission, empowering it, *inter alia*, to assess the exchange of value between app developers and Apple and to determine whether a 30% commission is "fair" and applied in a "non-discriminatory" manner. This provision must be maintained and strengthened, for instance by **including an obligation to apply "reasonable costs".**

- Introduce a three-month notice period: **any decision to modify, restrict or prohibit access to the platform must be preceded by a notice period of at least three months.** This notice period should be suspended if the beneficiary lodges an appeal with a supervisory authority.

We believe that certain provisions should not be weakened:

- Maintaining the openness of operating systems: Article 6(1)(c) requires gatekeepers to open up the download of applications to new distribution channels (notably directly from business users' websites) and to third-party app stores. France Digitale congratulates the Commission for this measure which would, for example, open Apple (iOS) to new app stores and improve app distribution channels.

- Preserve data openness: Article 6(1)(i) obliges app stores to provide high-quality, continuous and real-time access to transaction data processed by their integrated payment systems, provided that the end-user has given his consent. France Digitale considers this a necessary and effective solution to the problem of disintermediation by app developers vis-à-vis their users. With this measure Apple would no longer be able to deprive business users of valuable data on customer transactions and data.