

Joint submission to European Commission's consultation on template for compliance report under DMA

5 July 2023

Introduction

We, a group of civil society organisations active in the European Union, welcome the opportunity to contribute to the European Commission's consultation on the template for compliance reports under the Digital Markets Act (DMA). These reports, to be submitted by gatekeepers under Article 11 of the DMA, will play a key role in effective enforcement of the DMA, and thus for the achievement of the latter's goals. As such, it is essential that the European Commission provides clear, precise and detailed instructions on the information gatekeepers need to include in their reports, to allow for the effective monitoring and assessment of compliance, and to ensure that other relevant parties are able to contribute substantively to the enforcement process.

While the draft template published by the European Commission is a good start, our submission provides some additional suggestions, which we believe would further strengthen compliance.

1. Section 2

Tailoring reporting to individual obligations

Section 2 of the draft template instructs gatekeepers to respond to a list of questions about each obligation. As the template is designed to be used for a variety of different obligations, we acknowledge that this section has to strike a fine balance between the need to have precise and detailed language, and the need to allow some flexibility. However, the European Commission must ensure that Section 2 does not give gatekeepers the opportunity to claim ambiguity, or to return incomplete or misleading information. This will undermine the Commission's ability to assess gatekeepers' compliance with Article 8.1 of the DMA and put at risk the achievement of the latter's objectives.

As such, we believe that the language of Section 2 should be more specific, precise and exacting. In particular, as far as possible, Section 2.1 should itemise each obligation and, where they are foreseeable, specify individual requirements for each. Without intending to be exhaustive, we include below a couple of examples of what this might look like:

Article 5.2(a) of the DMA requires gatekeepers not to '*process, for the purpose of providing online advertising services, personal data of end users using services of third parties that make use of core platform services of the gatekeeper*'. In this case, the template should also ask for (i) details about measures that the gatekeeper has put in place to ensure that the

personal data referred to in that point is isolated from the gatekeeper's online advertising services; and (ii) details on the ongoing monitoring of those measures.

Article 5.2(b) of the DMA establishes that relevant gatekeepers should refrain from '*combining personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services*'. In relation to this specific obligation, the template should ask: (i) what technical and organisational measures specifically keep personal data collected through a core platform service isolated within that service and prevent those data from being processed by or for other services offered by the gatekeeper or combined with data from third-party services, and (ii) how will the effectiveness of those measures be monitored.

When it comes to information from gatekeepers' consultations with end users or business users as per Section 2.1.2(i), this should include details about the methodology of consultation, and independent verification of their objectivity. For example, if the gatekeeper claims to have tested a solution with 10,000 end users, the template should include verifiable data about it, and/or cite an independent expert or body who was involved and can confirm the test and its results.

Similarly, information from gatekeepers' market analysis or testing, in particular A/B testing or consumer surveys in Section 2.1.2(o) and (p), should also include details about methodology of testing, and independent verification of their objectivity.

A framework for measuring compliance

More generally, we believe that gatekeepers should demonstrate compliance under three main dimensions: **process**, **output** and **impact**. Across all of these dimensions, it is essential that gatekeepers provide information and data that can be easily measured and compared with that provided by other gatekeepers.

With regards to **process**, the gatekeeper should show in detail, with robust and effective tools what measures they have put in place and how. For example, they should be required to use visuals, demos and documentation with explanatory screenshots showcasing in an easily understandable way how certain obligations would work in practice. This requirement should address, but not be limited to, obligations concerning tying and bundling, data portability, switching and default settings. Indeed, the effectiveness of such obligations depends to a greater extent on the fact that the experience of end users (or business users) is not artificially degraded via dark patterns, design choices etc. In this context, step by step visual guides or demos would help third parties and the European Commission to visually and easily assess the effective implementation of the relevant obligations.

With regards to **output**, the gatekeeper should provide information (including metrics) on the direct effect of a given compliance mechanism. These can vary depending on the specific obligation, and include, by way of example, data on app installs (e.g., number of non-gatekeeper app downloads from a choice screen vs total screen impressions), data on switching, etc. (we note that section 2.1.2 (r) should not be considered an exhaustive list).

With regards to **impact**, the gatekeeper should provide information on how compliance measures influence contestability and fairness in the relevant market(s), for example by giving an account of developments concerning market shares, new entries, multi-homing, switching etc. The impact dimension should also be taken into account by gatekeepers when responding to section 2.1.2(m). Indeed, in line with the spirit and goals of the DMA, it is essential that compliance with an obligation is seen not as a quick and narrow tweak to a specific behaviour, but rather as an effective change to be made to the relevant part of a business model. The Commission should work with other players to make sure the impact indicators are representative.

We finally note that the ordering of Section 2.1.3 and 2.1.2 is mis-numbered. 2.1.4 is missing.

2. Section 3

In Section 3.1.4 the word 'whether' should be eliminated. The compliance function has to be independent; therefore, the gatekeeper only has to explain the why, and cannot retain discretion as to the whether.

3. GDPR

Monitoring gatekeepers' compliance with relevant obligations under Regulation (EU) 2016/679 is a necessary part of monitoring compliance with Article 8 of the DMA.

Article 8.1 of the DMA requires that measures to comply with Articles 5, 6 and 7 must also comply with Regulation (EU) 2016/679. We recall the Commission's statement that "gatekeepers must adhere to these concepts and principles as defined in the GDPR and interpreted in that context."¹

We further note that Article 36.3 of the DMA, in the context of Article 15 and Recital 68 of that same Regulation, empower the Commission to monitor gatekeepers' relevant obligations under Regulation (EU) 2016/679.

The template should require gatekeepers to demonstrate how they comply with relevant provisions of Regulation (EU) 2016/679. This should include specification of the legal basis of processing personal data and of how they obtain consent for each "processing purpose" of personal data. It should also include specification of how they internally separate personal data in order to distinguish between processing purposes. This is a critically important matter that generated significant concern among observers during the finalisation of the text of the DMA.² Related to this is gatekeepers' compliance with accountability, data minimisation, storage limitation, security, and data protection by design and default provisions in Regulation (EU) 2016/679. The template should include specific queries about each of these, and may also tailor some of those queries to each processing purpose for which a gatekeeper collects and uses personal data.

¹ Letter to Dr Johnny Ryan dated 4 May 2022.

² See letter to the Commission from competition experts, economists, consumer groups, rights groups, and academics, 19 April 2022, <http://www.iccl.ie/wp-content/uploads/2022/04/ICCL-to-DMA-co-legislators-19-April-2022.pdf>

4. Section 4

Non-confidential (i.e. public) summaries will play a key role in ensuring effective enforcement of the DMA. Indeed, they constitute a fundamental entry point into the enforcement process for a variety of relevant stakeholders, enabling them to contribute their feedback, perspective, arguments and evidence to any assessment of compliance. This not only will add legitimacy to the enforcement process, but also lead to a more solid and evidence-based assessment.

Of course, there is a balance to be struck between the need for transparency to allow democratic accountability and the availability of relevant information for all businesses, on the one hand, and the commercial confidentiality concerns of gatekeepers, on the other. While performing this balancing exercise, due account must be taken of the fact that asymmetry of information in the market represents one of the main challenges for a proper enforcement of the DMA, and that the involvement of business users, end users and other relevant stakeholders constitutes a fundamental check and an essential help to remedy this asymmetry.

As such, it is essential that the summaries contain as much information as possible on the key elements of the compliance reports, and cover the three dimensions of reporting (process, output and impact) mentioned with regards to Section 2. The European Commission should also be vigilant in preventing gatekeepers from using unsubstantiated confidentiality claims to undermine the role and goals of the summaries.

We thank you for the attention you will dedicate to our recommendations, and remain at disposal to further discuss and elaborate any of the above.

Signatories

ARTICLE 19
Balanced Economy Project
Irish Council for Civil Liberties
Open Markets Institute
Privacy International