Federal Ministry
for Economic Affairs
and Climate Action

Proposals from Germany for a strong enforcement of the DMA

The Federal Government has been an early advocate of a credible and rigorous European competition law framework vis-à-vis digital gatekeepers. Therefore, we have been a strong supporter of the Digital Markets Act (DMA) from the beginning of the negotiations in December 2020 and – together with France and the Netherlands – have continuously highlighted the need for an effective Digital Markets Act. Together, Member States, the European Parliament and the European Commission have created a DMA that is stricter than the text initially proposed.

The DMA has the potential to usher in a new era for digital markets in Europe. The DMA will strengthen fair competition in a social and ecological market economy, affect the daily lives of most European businesses and citizens and benefit our social welfare. Furthermore, the DMA might serve as a role model for other jurisdictions that are considering legislation of their own. If others follow, positive effects will be multiplied.

The need to set enforcement priorities

Now, the challenge is to implement and enforce this new legislation. To ensure that the DMA can unfold its full potential, its timely and vigorous enforcement is key. At the same time, the European Commission has limited resources, while it can be expected that gatekeepers will operate with unprecedented large teams of lawyers as well as economic and technical experts. This potential asymmetry of resources will require careful enforcement choices.

We ask the European Commission to develop an enforcement strategy and devise clever ways to implement its new tool as effectively as possible. Only an adequate enforcement

strategy will ensure short-run effectiveness and long term-impact of the DMA. Member States must play an important role in this process.

The Federal Government aims to contribute to and give input for the definition of a potential enforcement strategy of the European Commission as the sole and independent enforcer. To this end, the Federal Government has published a call for comments in autumn 2022 and exchanged views with affected companies, civil society and competition experts in order to identify those business models and behaviours placing a particular burden on consumers, SMEs and other competitors. The feedback provides a sample of a diverse and complex field; nevertheless, it gives a good indication for possible enforcement priorities.

First: Focusing on major players

With a view to the designation of gatekeepers and their central platform services, the European Commission should – as foreseen in the DMA – first focus on the major digital players, i.e. those that are very likely to meet the thresholds of Art. 3 DMA, namely Amazon, Apple, Google, Meta and Microsoft. Furthermore, comments indicated that Booking.com's terms and conditions have the potential to negatively affect SMEs. In addition, those companies whose business models pose a risk not only to competition, but play an important role for democracy, freedom of information and freedom of the press like Twitter, should also be considered for designation timely.

Second: Focusing on tangible benefits for SMEs and consumers

The provisions of the DMA are directly applicable and designed to be self-enforcing. At the same time, the European Commission must monitor compliance with these obligations and vigorously enforce them in case of non-compliance. This will turn out even more difficult than the designation process.

Generally, the strategy according to which the European Commission will take enforcement decisions could mirror comparable cost-benefit analysis in competition law enforcement. However, we encourage the European Commission to extend the cost-benefit analysis. In addition to factors such as the probability of finding an infringement,

the gross benefit of a finding including deterrence as well as the cost of procedure, the tangibility of the implementation in particular for small and medium enterprises as well as for consumers should be taken into consideration. Tangible benefits might result either from the number of users, its economic importance or from the improvement being very salient for users.

Building on the feedback we received, we have identified the following areas as enforcement priorities, which are expected to have a beneficial effect on SMEs in particular:

- Unfair terms and conditions, especially those set by major intermediation platforms, affect business and end users equally. To safeguard a fair commercial environment, the Commission should closely monitor whether the imposition of contractual terms and conditions is in line with gatekeepers' DMA obligations, in particular Art. 5 (3)-(5) DMA. It should not be accepted that gatekeepers limit business users from choosing to differentiate commercial conditions, including price. Furthermore, to prevent further lock-in effects, their business users should be free to promote and choose the distribution channel that they consider most appropriate for the purpose of interacting with their end users.
- Free choice is an essential prerequisite for competition. Therefore, business and end users should be free to offer and choose alternative services to those of gatekeepers. In order to enable free choice and avoid situations in which gatekeepers indirectly impose on business users their own services, where switching is prevented in cases of preinstalled services or applications, or where changing default settings is made unreasonably tricky or the installation and effective use of third-party offers is made impossible, effective monitoring of Art. 6 (3) and Art. 6 (4) DMA as well as of Art. 5 (7) is key.
- Data is a major driver in the digital economy. The accumulation of data is *the* relevant competitive advantage of most gatekeepers. Therefore, Art. 5 (2) DMA rightly sets narrow limits to combine data for gatekeepers. However, the significance of the provision exceeds a purely horizontal competitive dimension, since the provision enables users to decide freely to whom they want to make available which data, touching another competitive dimension. Against this

background, Art. 5 (2) DMA and its vigorous enforcement has a high political significance.

Third: Leveraging antitrust enforcement

An equally important question is the future relationship of competition law enforcement and DMA enforcement to the extent there is an overlap. Many DMA obligations are derived from antitrust cases. Some of those cases are still ongoing. While it would be inefficient to generally and always combine both tools, it would be premature if the European Commission gave up its antitrust enforcement tool and close all overlapping antitrust proceedings. Overall, a strategic approach should be adopted ensuring that the existing knowledge from the competition procedures is used in a meaningful way in order to safeguard that competition law enforcement can be leveraged for the DMA enforcement. However, in some cases where the competition law case is already in a final stage and where appropriate commitments will solve both the antitrust and DMA issues, such an approach might enable the Commission to end unfair behaviour even before the DMA obligations become applicable in March 2024.

Fourth: Designing an efficient enforcement process

Another factor that can maximise the impact of the DMA is the enforcement process. The process must ensure enforcement in a timely manner, while at the same time respecting due process.

In December 2022 the European Commission has put forward the draft implementing regulation, which provides further practical details as to the implementation of the DMA. We welcome that the draft demands an active gatekeeper involvement and sets tight time constraints. We also support the proposed strict page limits imposed by the European Commission, since Art. 4 IR leaves sufficient room for extensions where adequate.

Furthermore, the European Commission should try to maximize the compliance mechanism's effectiveness. Annually, gatekeepers will have to submit compliance reports in which they spell out their belief that they satisfy the DMA. The European

Commission should demand that these reports are comprehensive, contain in particular legal and verifiable technical and economic facts as well as a detailed description of concrete behavioural changes undertaken to achieve compliance. Also, the European Commission should set the right reporting incentives to establish a veritable "compliance culture". Stakeholders should have the possibility to provide feedback on the compliance reports.

Fifth: Having a close look at mergers

According to Art. 14 DMA, gatekeepers will have to inform the European Commission on certain intended concentrations. The European Commission should make use of this enhanced transparency and look into gatekeepers' mergers where possible. Against the background that currently only a small fraction of the big tech acquisitions can be looked into due to the turnover-based thresholds in the EU Merger Regulation, the European Commission should consider to introduce additional, transaction-based thresholds.

Sixth: Ensuring sufficient resources

At the same time, a broader reform of the Merger Regulation may increase the turnover-based thresholds. This could free up resources from other areas for the DMA enforcement and a sufficient diligence vis-à-vis gatekeeper acquisitions. In addition, we will advocate for additional staff for the Commission with a view to the implementation and enforcement of the DMA in upcoming budget negotiations with the European Parliament.

Seventh: Establishing an active role of Member States and National Competition Authorities

The European Commission is the sole enforcer of the DMA. While the German Government has opted for a decentralized enforcement throughout the negotiations, we

will now support all actions that may enhance the enforcement efforts of the Commission.

Furthermore, we will make use of the leeway provided in the DMA to contribute to its effective enforcement through legislative action. With the 11th Amendment of the Act Against Restraints of Competition (GWB), we will, on the one hand, authorise the Bundeskartellamt to conduct investigations into cases of possible non-compliance. On the other hand, we will facilitate private enforcement and align it to "classic" competition law private enforcement. Creating a good national infrastructure for private enforcement of the DMA will allow national courts to enforce cases that look somewhat simpler.

National competition authorities are well positioned to assist with gathering input from the general public, including business users, competitors and end-users of services offered by gatekeepers, due to their language and geographic advantages. In the future, third parties can contact the Bundeskartellamt not only concerning complaints based on competition law, but also inform it about possible DMA non-compliance by designated gatekeepers. The Bundeskartellamt can exchange relevant information with the Commission, ensuring an efficient allocation of competition cases and contributing to effective DMA enforcement.

Finally, the Bundeskartellamt will complement the DMA enforcement in close cooperation and coordination with the Commission by using § 19a GWB in those cases where the DMA leaves the leeway for national rules and their application. The Bundeskartellamt has already taken action pursuant to Sections 19 and 19a GWB against all of the big players frequently criticised by interested third parties.