Committed to Europe

Orange's position on the European Commission's proposal for a Digital Markets Act Regulation

Executive Summary

Orange welcomes the Digital Markets Act (DMA) as proposed by the European Commission. We believe that this proposal goes into the right direction to ensure that the online world remains fair and contestable. We support a scope limited to certain specific services and to digital gatekeepers defined by a set of cumulative criteria. Such a targeted approach focused on large digital players acting as gatekeepers is adapted to tackle structural competition problems proper to such actors which the existing regulation and competition law cannot address efficiently.

Orange deems that the list of obligations and prohibitions proposed in the Articles 5 and 6 of the DMA, which aims at tackling a number of practices considered problematic per se, are well-designed. They cover most of the identified concerns related to certain problematic practices of large digital platforms. Those lists could still further be enriched by some additional measures, such as on bundling, priority placements for software applications, discriminatory conditions applied to business users or standardisation.

Furthermore, the safeguards foreseen in Article 15 for market tipping and the market investigation tools provided in the Articles 15, 16 and 17 of the DMA should be improved. In particular, the timing provided for investigations should be reduced to avoid any risk of lengthy and not sufficiently efficient processes be it regarding systematic non-compliance with obligations and prohibitions defined in Articles 5 and 6 of the DMA or the extension of the current scope of the DMA.

Finally, Orange supports an enforcement of the DMA at the EU level by the Commission. It is the only efficient way to tackle structural issues raised by digital platforms acting as gatekeepers across the EU. Further clarifications as to the institutional set-up would be welcomed, in particular to ensure the overall coherence of the implementation of the Regulation with the competition law doctrine. Orange further expects that the political momentum will also be translated in an appropriate allocation of human and financial resources within the Commission administration to ensure an appropriate enforcement of the Regulation.

A scope rightly limited to gatekeepers for core platform services

We welcome the dual system introduced by the European Commission to define the scope of the DMA, namely to define specific areas of activities as core platform services, and cumulative criteria designating gatekeepers. This targeted approach is much more proportionate and efficient to tackle structural competition problems derived by large digital platforms compared to certain previous scenarios foreseen by the Commission (so called "New Competition Tool") where a larger intervention scope was discussed.

We agree with the list of core platform services and with the cumulative criteria to define gatekeepers. We note however that current levels of turnover or market capitalization are much lower than the corresponding indicators for the largest existing gatekeepers, leading to the risk of over regulation for undertakings which do not raise the same type of structural competition issues as those gatekeepers as they do not have the necessary scale and reach. Orange therefore believes that the thresholds in Article 3(2)(a) should be sufficiently high to exclusively cover gatekeeping situations where most of the structural competition problems are identified.

We also welcome the legal certainty introduced by the DMA, clearly excluding from its scope electronic communications networks and electronic communications services which are already subject to a sector-specific regulation and do not raise the issues at stake with large digital gatekeepers. It should however be further clarified in article 1.3 (b) that the scope includes number-independent interpersonal communications services (NI-ICS), as defined in Article 2(7) of the EECC, which, contrary to number-based ICS, are exempted from most EECC provisions and are not subject to the general authorization regime.

Obligations and prohibitions: a step into the right direction calling for some improvements

Orange welcomes the list of obligations and prohibitions proposed in Articles 5 and 6 of the DMA. These are very important elements for evolving in a competitive and fair economic environment for innovation and for improving investment and consumer's choice.

Those two articles are well-designed and cover a large scope of concerns related to certain problematic practices of large digital platforms. The lists could still further be enriched with some other practices of gatekeepers which could be considered as problematic per se by either introducing new obligations in Articles 5 and 6 or clarifying already defined obligations:

- In Article 5 (e), prohibiting the bundling of gatekeepers' core services not only with other core services but also with non-core services. This practice could be used by gatekeepers to lock users in the platform ecosystem and to monopolise the whole value chain;
- In Article 5, adding a new prohibition regarding priority placements which would forbid the gatekeepers to condition the access of business users (including device manufacturers) to core platform services to providing a priority placement or a default installation for any of the platform software applications on such business users devices. Also forbidding any practice of gatekeepers limiting the right of business users (including device manufacturers) to attribute priority placements or default installations to third party software applications on such business user's devices.
- In Article 5 adding a new obligation which would refrain digital gatekeepers from imposing de facto standards to business users without going through established open standardisation processes or from imposing abusive and disproportionate conditions related to the Intellectual Property policy of business partners as a condition to access to gatekeeper's core platform services (such as forcing to give up Intellectual Property Rights).
- In Article 6 (1) (c) any refusal of third party software application or software application store installation and effective use should be justified.
- In Article 6 (1) (d), not limiting the scope to ranking services but include also other self-preferencing practices which result in a discriminatory treatment between the gatekeeper's own services and third party services.
- In Article 6 (1) (f) not limiting the interoperability obligation to ancillary services but expand it to any unconnected services to further encourage the development of innovative services.
- In Article 6 (k) clarifying that the access conditions for business users to gatekeeper's software application store shall not be less favourable than the conditions applied by the gatekeeper for its own services.

Orange also welcomes the obligation for gatekeepers to inform about their concentration projects, as detailed in Article 12, and expects that the impacts of killing acquisitions on competition and the single market will be taken into account in the revision of the Merger Control Regulation.

Market Investigation Tool: need for more legal certainty and a more efficient timeframe

Overall, Orange welcomes the provisions on the market investigation provided in Articles 15, 16 and 17 to ensure that the DMA remains future-proof and is complied with in due time, but calls for some improvements.

We understand the Commission willingness to keep a certain flexibility in the DMA in order to be able to intervene before markets tip. However we consider that the current market investigation mechanism for designating a gatekeeper as described in articles 3 (6), 15 (1) and 15 (4) leaves excessive leeway to the Commission. The lack of reasonable safeguards in these Articles paves the way to a high level of legal

uncertainty and unpredictability for all market actors. We propose to amend Article 3(6) by specifying that the Commission may identify as a gatekeeper through a market investigation only those services providers which do not fulfil the 3 years threshold pursuant to Article 3 (2) (c) but still meet the turnover and gateway thresholds (Article 3 (2) (a) and 2(b)). This approach would only target services and providers that have reached a certain scale and it would substantially limit the uncertainty and unpredictability for the rest of the market.

Moreover, the processes provided in Article 16 to impose remedies in case of systematic non-compliance are too lengthy and might not ensure a timely and efficient intervention which is the primarily goal of the DMA. A shorter timeframe and more efficient processes would be necessary to ensure that necessary measures are rapidly taken to stop any non-compliance and to remedy the breach. We propose, in the paragraph 3 of the Article 16, to reduce the number of decisions of non-compliance from three to two within the last five years preceding the opening of the market investigation. In addition, the Commission should be able to impose remedies on gatekeepers that would have faced two non-compliances decisions for the same obligation within a period of two years prior to opening a market investigation. If the platform has twice failed to comply with its obligations under the DMA, it should be considered as a sufficient basis to impose remedies to ensure the compliance with the DMA.

Similarly, we believe that the future-proof character of the DMA is only partially safeguarded through the market investigation foreseen in Article 17 which allows the Commission to expand the scope of the DMA to new gatekeeping services and harmful practices emerging over time. Indeed, we consider that the processes provided in Article 17 could be lengthy and non-efficient to capture new digital activities or services which are fast-moving. Therefore we call for a shorter timeframe for Article 17, with the report as a result of a market investigation to be issued within 12 months instead of 24 as proposed by the Commission.

Clarify the institutional set-up and ensure coherence with competition law

Finally, Orange deems essential that the DMA is enforced at EU level by the European Commission. This is the only relevant and efficient way to tackle structural competition issues raised by large digital platforms acting as gatekeepers across the single market.

Considering the practices and remedies at stake in the Regulation, ensuring a strong consistency with competition law doctrine is necessary. Orange therefore calls for a large involvement of DG Competition in the implementation of the Regulation (namely for Article 16). It will also be important to ensure that the relevant resources – human and financial – are dedicated to address this new task, including data and digital specialists.

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