

Dutch position on the Digital Markets Act

In December 2020, the European Commission published its proposal for a Digital Markets Act (DMA). This document contains the position by the Dutch government on this proposal.

a) Dutch position regarding regulation for gatekeeper platforms

Within the EU, the Dutch government has advocated for regulation for big platforms with a gatekeeper role. A non-paper on the issue was drawn up with France and Belgium and published in October 2020.¹

Platforms offer many advantages for businesses and consumers. For instance, they enable businesses to sell products online that they would normally sell in physical stores, and they also help facilitate online communication. These advantages are particularly valuable during the current COVID-19 pandemic. At the same time, the digital economy is characterised by a small number of large platforms, a result of 'winner takes all' or 'winner takes most' dynamics. The vast majority of users make use of just a handful of platforms, or even only one. These platforms may moreover expand their position into other markets. The market position of some platforms may become entrenched. This might obstruct competitors' market access and growth and consumers must pay higher prices for lower quality products and services and have less freedom of choice. These risks must be addressed if we want to retain the advantages such platforms offer businesses and consumers. Existing competition policy does not offer sufficient guarantees in this regard. The Dutch government's problem analysis aligns with that of the European Commission which led to the Digital Markets Act (DMA).

The Dutch position comprises three pillars: (i) a European authority should be given the competence to impose ex-ante obligations on gatekeeper platforms; (ii) European competition guidelines should be amended, in light of the fact that they cannot always be sufficiently applied to the digital economy; and (iii) the thresholds for reporting mergers or acquisitions to the Commission should be updated, so that the Commission will be able to look at mergers and acquisitions in the digital economy that may currently escape scrutiny.

There are three major principles underlying the Dutch position for gatekeeper platforms. First, the measures must specifically target the largest platforms that consumers and businesses cannot avoid. It is vital that small platforms have sufficient scope to innovate and grow and that they are not adversely affected by the measures. Second, the right balance must be found between legal certainty and speed on the one hand, and a flexibility and future-proofness on the other. This applies both to determining which platforms have a gatekeeper role (scope) and to the measures imposed. Third, measures should be imposed at an EU level by a European authority, since the most prominent gatekeeper platforms are active across the entire EU.

¹ <https://www.government.nl/documents/publications/2020/10/15/considerations-of-france-and-the-netherlands-regarding-intervention-on-platforms-with-a-gatekeeper-position>.

b) *Assessment of the DMA*

The Dutch government welcomes the DMA. It recognises that the underlying principles and many elements of the Dutch position can also be found in the proposal. Nevertheless, the Dutch government has some suggestions for further improvement and has identified several points requiring further clarification. These are set out below.

Scope

The government welcomes the proposal to use a combination of quantitative and qualitative criteria to determine whether a platform has a gatekeeper position. Using objective quantitative thresholds will help to ensure legal certainty and fast action. In addition, the possibility for the Commission to carry out a market investigation on the basis of qualitative criteria and to use this to determine whether a platform has a gatekeeper position will ensure flexibility and future-proofness. However, it is unclear exactly how the quantitative criteria should be interpreted. It is unclear, for instance, how turnover and the number of active users should be measured. More clarity is needed in this regard.

The Dutch government has two specific points for attention when it comes to the scope. First, it is vital that the quantitative thresholds do not unnecessarily deter platforms from growing. The thresholds must only be exceeded by the largest platforms that consumers and businesses cannot avoid using. The Dutch government is of the opinion that the current thresholds appear to be sufficiently high, but will first request more clarity on how the thresholds should be interpreted (as mentioned above).

Second, the government believes that, when determining whether a platform has a gatekeeper position, it is important to bear in mind that platforms can acquire such a position by combining different services. The proposal mentions online search engines and social networking services as examples of core platform services. But a platform can become more powerful by combining a range of such services. This is because the creation of an ecosystem of services plays a significant role in the extent to which users are locked into a platform and the extent to which a platform's role as a gatekeeper can be contested. The government will ask the Commission to clarify the extent to which the creation of an ecosystem is taken into account when determining whether a platform has a gatekeeper role and, if necessary, will push for a designation procedure in which more account is taken of the role of ecosystems.

Measures

The Dutch government supports the inclusion of lists of obligations and prohibitions in the Regulation itself. This will help ensure fast action and legal certainty. In addition, the Dutch government welcomes the efforts by the Commission to create a tailored approach by creating the possibility to further specify the implementation of certain obligations and prohibitions. The Dutch government also supports the idea of imposing more limited obligations on emerging gatekeeper platforms. Furthermore, the option of adding further measures to the lists following a market investigation contributes to a future-proof Regulation.

The measures to tackle unfair trading practices appear to match the measures proposed in the Dutch mentioned in chapter a. The DMA and the Dutch position both include a prohibition of combining data, a prohibition of self-preferencing in rankings, and rules on fair contracts, such as the possibility for businesses to offer products or services outside a gatekeeper platform. In both the Commission's proposal and the Dutch position, these measures apply to all platforms with a gatekeeper function.

The measures that aim to enhance the contestability of gatekeeper platforms to a large extent also match the Dutch position. Both contain an obligation to share certain data and interoperability obligations. However, the Commission has opted for a different approach when it comes to imposing these measures. Whereas the Dutch government has opted for a more flexible approach, with further-reaching access measures that, following an analysis by a regulator, are imposed on platforms on a case-by-case basis, the Commission has opted for a list of measures that apply to all platforms with a gatekeeper function.

The Commission's decision to use a list of measures that apply to all gatekeeper platforms results in greater legal certainty and faster action than an approach in which measures are imposed on a case-by-case basis. The option of updating the list is also a way of future-proofing the Regulation; something which is welcome. The disadvantage, however, is that the Commission's approach is less tailor-made, and thus takes less account of the differences between platforms. For the Dutch government, it is important to prevent a situation whereby measures go too far for certain platforms, while for other platforms they do not go far enough. The Commission is also unable to immediately impose a measure if, following a market investigation, it notices an issue not yet covered by the lists of measures set out in the DMA. The Commission can only impose a measure after updating the lists. During the negotiations, the Dutch government intends to highlight the importance of a sufficiently tailored approach when imposing access measures. The Dutch government will ask the Commission to provide more clarity on how it intends to apply the measures that are susceptible of being further specified (set out in article 6 of the DMA). The Dutch government will also draw attention to the option of incorporating a case-by-case analysis in creating a more tailored approach and in responding more quickly to future developments.

Under the DMA, gatekeeper platforms must allow businesses to offer their products or services on other platforms at a lower price. The Dutch government wonders why this obligation does not extend to businesses' own sales channels, so that businesses can offer their products or services for a lower price on their own website, for example. Whenever a platform has a gatekeeper function, the question arises whether an obligation that only focuses on prices on other platforms is sufficiently effective. Often, businesses will have no other option than to use the gatekeeper platform, because they cannot circumvent it. The Dutch government is therefore more in favour of an obligation that makes it possible for businesses to offer products and services at lower prices on both other platforms and their own sales channels.

The Dutch government is aware of the obligation for gatekeepers to report all mergers and acquisitions in digital markets to the Commission. It welcomes that the Commission is paying attention to mergers and acquisitions in the digital sector. It is unclear, however, whether the Commission will assess a merger or acquisition once it has been reported. The Dutch government has been pushing for amending the European merger thresholds, so that acquisitions by major tech companies are assessed by the Commission more frequently. In order to achieve the same objective through the provision in the DMA, the Dutch government will push for an obligation for the Commission to scrutinise mergers and acquisitions by gatekeeping platforms once they have been reported. The reporting obligation set out in the DMA is limited to acquisitions of digital services. The Dutch government supports an approach whereby all mergers and acquisitions by gatekeeping platforms can be assessed, regardless of whether they relate to digital services.

Monitoring and enforcement

Enforcement by the Commission is in line with the Dutch position, which sets out that enforcement should take place at EU level. This also aligns with the Dutch position that the Commission's existing experience with respect to the application of competition law in the tech sector should be used. The Dutch government believes it is important that the Commission cooperates with national authorities, such as the Netherlands Authority for Consumers and Markets, in monitoring and enforcing the DMA. It may, for instance, be easier for small businesses to bring complaints to national authorities. In addition, national regulators can also use their expertise to help the Commission in monitoring compliance with the DMA. This would require national regulators to be closely involved with monitoring and with market investigations carried out by the Commission. The Commission intends to appoint an advisory committee. At present, it is unclear whether this offers sufficient guarantees for sufficient involvement of national authorities. It is also unclear whether policy makers or regulators from Member States will participate in this committee. If the committee will be supporting the Commission in individual cases, the Dutch government believes it would be logical that national regulators participate in the committee.

The Dutch government welcomes the sanctions the Commission can impose when gatekeeping platforms fail to comply with the Regulation. Periodic fines ensure that non-compliance quickly becomes expensive. If this approach fails, behavioural remedies and, as a last resort, structural measures such as splitting up platforms can be imposed. This aligns with the Dutch government's position that breaking up big platforms is a measure of last resort.

Relationship to other legislation

The government will ask for more clarity regarding the applicability of competition law in relation to the DMA. It is unclear to what extent the Commission and national regulators will still be able to use existing competition law (such as the prohibition to abuse a dominant position) once the DMA enters into force. The relationship between market investigations under the DMA and competition investigations is also not clear. Even when the DMA enters into force, there is still added value in applying competition law to gatekeeper platforms.

In addition, it is not exactly clear what scope the DMA leaves for drawing up national rules, to supplement European legislation, for platforms that are for instance only active on the Dutch market and potentially play a gatekeeper role there. The Dutch government is of the opinion that such platforms rightly fall outside the scope of the proposal. Despite the Dutch government not currently seeing a need to draw up national legislation specifically for the Dutch market, it still believes that the proposal should keep this option open for the future.

Furthermore, the government takes, in principle, a positive view of the proposals to further reflect the obligations resulting from the General Data Protection Regulation (GDPR) and other measures that increase data protection levels. Nevertheless, clarity is still needed as to how these proposals relate to the GDPR and how the Commission envisages them working in practice. The government will request more information from the Commission on this point.