

Consultation on the template for compliance report under the DMA

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The Commission is consulting on the template for the compliance report that designated gatekeepers will have to submit annually under Article 11 of the Digital Markets Act ('DMA').

Gatekeepers will be required to provide the Commission with their first compliance report within six months of their designation as gatekeepers. They will then be required to update these reports annually.

With the published consultation, the Commission is seeking feedback on the draft template that specifies the minimum information that the Commission expects gatekeepers to provide in their compliance report.

The gatekeeper's compliance reports will play an important role in enabling the Commission to verify that the gatekeepers comply with the obligations and prohibitions set out in Article 5, 6 and 7 of the DMA and that the measures implemented by the gatekeepers are effective in achieving the objective of the DMA. Where necessary, the Commission can make use of its investigatory and enforcement powers to ensure effective compliance with the DMA.

Target Group

All citizens, companies and organisations are welcome to contribute to this consultation. Contributions are sought particularly from undertakings, which are potential gatekeepers under the Digital Markets Act, as well as business users and end users of the potential gatekeepers and associations representing these users.

Objective of the consultation

The objective of the consultation is to gather comments on the draft template for the compliance report to be submitted by gatekeepers under Article 11 of the DMA.

In particular, the Commission would welcome feedback on the following two items:

- Precise indicators that the Commission could use to assess whether the measures implemented by the gatekeepers to ensure compliance are effective in achieving the objectives of the DMA and of the relevant obligations as required by Article 8 of the DMA; and
- content and presentation of the non-confidential summary of the compliance report that the gatekeepers must provide pursuant to Article 11(2) of the DMA in order to ensure that the summary enables third parties to provide meaningful input to the Commission on the gatekeeper's compliance with its obligations under the DMA.

The stakeholders' feedback will enable the Commission to prepare a finalised version of the template. The Commission may regularly update this template to request further information, which it expects gatekeepers to provide.

How to provide feedback

Please submit your contribution by 5 July 2023 (midnight). Your submissions should not include any confidential information. Your non-confidential submissions will be published on the Commission's website for the Digital Markets Act.

Your answers can be in any EU language.

Template for the compliance report

[DMA template - Compliance report consultation.pdf](#)

Your details

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Your contribution

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Please find attached the comments of the European Broadcasting Union (EBU), the alliance of Public Service Media.

Please upload your contribution.

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Contact

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COMMENTS OF THE EUROPEAN BROADCASTING UNION ON THE DRAFT TEMPLATE FOR REPORTING PURSUANT TO ARTICLE 11 OF REGULATION (EU) 2022/1925 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

July, 5th 2023

ABOUT THE EBU

The European Broadcasting Union (EBU) is the world's leading alliance of public service media (**PSM**). The EBU has 115 member organizations in 56 countries who operate nearly 2,000 television, radio and online channels and services and reach an audience of more than one billion people in 160 languages. PSM organizations are entrusted with the performance of a service of general economic interest, which consists, inter alia, of the provision of high-quality content that fulfils the cultural and democratic needs of the society they serve.

The EBU and its Members welcome the opportunity to provide comments on the draft Template for Reporting (**TR**) pursuant to Article 11 of Regulation (EU) 2022/1925 of the European Parliament and of the Council (the **Digital Markets Act** or the **DMA**) released by the European Commission (the **Commission**).

The EBU supports the fact that undertakings designated as 'gatekeepers' under the DMA be required to deliver detailed information on the measure implemented to ensure compliance with the substantive obligations for each relevant Core Platform Service (**CPS**). We identified certain areas where the TR could yet be further improved. The EBU recommends the following proposals to enable a successful implementation and in particular to ensure that the Commission receives comprehensive feedback from gatekeepers but also independent experts and interested third parties.

GENERAL REMARKS

We believe that the compliance report issued by gatekeepers pursuant to Article 11(1) DMA (the **Compliance Report**) must be **comprehensive**, of **practical relevance for third parties** and should by no means be the sole source of the Commission to monitor compliance with the DMA (*i.e.* be complemented by other tools).

First, the Compliance Report must be **comprehensive** to the extent that in itself it shall enable the Commission to track compliance on every aspect of the obligations laid down in article 5, 6 and 7 DMA. The more exhaustive and accurate the annual report issued by gatekeepers, the easier it will be for the Commission to monitor compliance with the DMA. The Commission has significant leeway in setting the drafting requirement (Article 11 and recital 68 are not prescriptive in this regard) and should therefore require a high level of granularity. The design of the report will be instrumental in the enforcement of the Digital Markets Act.

Second, the Compliance Report must be of **practical relevance for third parties**. The primary goal of this report is for the Commission to assess whether the gatekeeper complies with the obligations laid down in the DMA. In this regard, third parties (in particular business users and competitors) are often better placed than regulators to identify discrepancies or inaccuracies in a compliance report or on the CPS (e.g. inaccurate data reporting, or biased ranking algorithms).

- **First-hand Experience:** Business users directly interact with the gatekeeper's services, platforms, and practices on a regular basis. They have intimate knowledge of the market dynamics, challenges, and potential anti-competitive behaviors they may encounter.
- **Market intelligence:** Business users possess access to valuable data and information related to their own operations and interactions with the gatekeeper. They can compare the gatekeeper's actions and representations with their own records, metrics, and observations.
- **Specific Expertise:** Business users, particularly those operating in the same industry or sector as the gatekeeper, often possess specialized knowledge and expertise. They understand the technical aspects, market practices, and industry standards that are essential for assessing compliance with the DMA. This expertise allows them to scrutinize the gatekeeper's conduct more effectively, especially when it comes to areas such as algorithmic transparency, data access, and non-discriminatory treatment.

Third, the Compliance Report shall **not be deemed the only source to monitor compliance** with the DMA. As a matter of fact, among the obligations laid down in Articles 5 and 6 of the DMA, certain directly contain 'negative obligations' (*i.e.* prohibitions rather than orders to do something, often beginning by "refrain from")¹. Demonstrating compliance with such prohibitions may prove challenging for gatekeepers. Monitoring of compliance by the Commission may need to involve checking whether the undertaking, as a matter of fact, engaged in a type of conduct that it was supposed not to engage in, which is close to a fully-fledged investigation.² Accordingly, the Commission should rely on third parties and their ability to provide detailed feedback in the non-confidential version of the Compliance Report published on the website of the Commission but also by setting a user friendly digital whistleblowing mechanism for business users and competitors. While Articles 8 (Compliance with obligations for gatekeepers), 9 (Suspension), 10 (Exemption for grounds of public health and public security), 18 (Market investigation into systematic non-compliance), 19 (Market investigation into new services and new practices), and 27 DMA mandate the involvement of third parties (whether business users, competitors, end users), the processes have not yet been clarified, despite calls from various stakeholders (see section 3 below).³

Against this background, we would like to address three aspects. Our observations below mainly focus on Section 2 (*Information on compliance with the obligations laid down in Article 5, 6 and 7*) and Section 4 (*Non-confidential summary*) TR.

1. Section 2 TR – Information necessary for the evaluation of the compliance with the DMA obligations (Article 5, 6 and 7)

At the outset, we welcome and support the comprehensive list of information requested by the Commission under Section 2 TR (in particular under Section 2.1.2 TR). All the sub-set of information requested "*at a minimum*" are necessary to understand the complex relationship between gatekeepers' services, end-users and business users and each of these pieces of

¹ For instance, Article 6(5) reads "[t]he gatekeeper shall not treat more favorably in ranking and related indexing and crawling [...]" and Article 5(2)(b) reads "[t]he gatekeeper shall not combine personal data from the relevant core platform service with personal data from other core platform services or from [...]". The monitoring of such obligations could require the deployment of resources close to those a regulator needs in the framework of an antitrust investigation.

² See Akman, Pinar, *Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act* (December 1, 2021). (2022) 47 *European Law Review* 85.

³ See recent letter from [BEUC](#) and other consumer and civil society associations urging the Commission to provide clarity on the role of third parties in implementation and enforcement of the Digital Markets Act (Brussels, May 30, 2023).

information should feature in the Compliance Report. Certain precisions could nonetheless further strengthen Section 2 TR.

Embedding feedback obtained from third parties directly into the Compliance Report would help the Commission to better understand how they reacted to the implementation of each measure (and address as the case may be any concerns or behavioral biases⁴).⁵ To this purpose, the indicators created to assess the effectiveness of the measures (see Section 2.1.2 (p) TR) should be subject to prior consultation of the relevant business users. Besides, the Compliance Report should outline the process of consultation, including the list of stakeholders consulted, the methodologies used and the questionnaire and/or interview transcripts. This would ensure that the compliance report reflects faithfully the considerations of a diverse range of stakeholders.

Section 2 TR could further be strengthened with a requirement for a detailed independent analysis of the effects of compliance measures on end users, in particular in relation to Articles 5(5) (lock-in), 6(3) (Modifications of default settings) and 6(5) (self-preferencing ban) DMA. To ensure that compliance measures are effective and do not inadvertently harm end users, it would be valuable to include an evaluation by independent external experts who can assess the impact on end users' experiences and rights.⁶ Such analysis would be necessary to assess the effectiveness of changes impacting the consumer experience (and listed under section 2.1.2 (f) TR).

Finally, to ensure that the measures implemented by gatekeepers are or will be effective in achieving the objectives of the DMA, a **summary table of the indicators and metrics actually transferred by type of content** should be provided in relation to certain with respect to measures implying a transfer of data to business users (e.g., Articles 6(8), (10) and (11)). This could be provided under section 2.1.2 (r). This would ensure transparency and allow business users to assess any discriminatory treatment.

2. Section 4 TR – Scope of the non-confidential summary

Third parties face significant asymmetries of information and resources vis-à-vis gatekeepers. Article 11(2) commands the publication of a non-confidential version of the Compliance Report by the gatekeeper. Such publication takes place in conjunction with the submission of the confidential version of the Compliance Report.⁷ The DMA merely provides that the non-confidential summary must be (i) '*clear and comprehensible*' and (ii) enable third parties to assess whether the gatekeepers' comply with its obligations under Regulation (EU) 2022/1925.⁸

The role of this non-confidential summary is therefore to allow third parties to contribute to the effectiveness of this instrument in the same manner as a complainant would in the framework

⁴ Gatekeepers tend to exploit end-users' biases such as *status quo effect* (where consumers have a strong tendency to remain on the default option) or *priming effects* (when consumers are repeatedly exposed to certain messages or images (e.g. via advertising) certain attributes can play an undue role in their decisions). See [OECD](#) Committee on Consumer Policy and Competition Committee, "*Applying Behavioural Insights to Consumer and Competition Policy and Enforcement*", Workshop issue paper, 14 April 2023.

⁵ Section 2.1.2 (i) TR.

⁶ Pursuant to Article 26(2) DMA, the Commission may appoint itself external experts for the purpose of monitoring compliance with the obligations laid down in Articles 5, 6 and 7. However, independent expert analysis of the expected and actual impact of the implementation measures which are highly sensitive to behavioral biases (e.g. Status quo bias which could deter end-users from changing the settings on their device) directly embedded in the Compliance report could be valuable.

⁷ See Article 11(2) DMA, first indent, "*Within the deadline referred in paragraph 1 [...]*".

⁸ See Recital 68.

of an antitrust investigation.⁹ In line with the objectives of the DMA, the information contained in the non-confidential summary shall on their own improve contestability and fairness in the market concerned. As such, Section 4 requires (i) '*self-standing text*' providing a comprehensive view of the report and to (ii) maintain all headings. That said, confidentiality requests may lead to the removal of substantial part of the report. To allow third parties (in particular business users) to assess whether gatekeepers comply with their obligations the non-confidential version of the Compliance Report should at the very least include the following elements:

- **Key findings and assessments:** highlight the key findings and assessments of the gatekeeper's compliance with its obligations under the DMA. This would help business users understand the overall performance and impact of the gatekeeper and identify areas of concern or improvement.
- **Analysis of impact on business users:** include an analysis of the gatekeeper's practices and their impact on business users (outcome of the A/B testing results or customer surveys undergone to assess the effectiveness of the implementation of the rules).¹⁰ Providing specific examples and case studies could enhance the understanding of the gatekeeper's impact on business users (e.g. information to allow business users and competitors to understand how they can concretely make use of the technical changes implemented).
- **Transparency and fairness measures:** outline the gatekeeper's measures to ensure transparency and fairness in its interactions with business users. This could include information on the scope and challenges linked to business users' data sharing requests (e.g., why certain requests have not been fulfilled), the dispute resolution mechanisms and any other relevant measures aimed at promoting fair competition and contestability in digital markets.
- **Consultation process:** describe the gatekeeper's consultation process with business users and other relevant stakeholders. This should include details on how feedback and input were sought, the methods used for consultation (e.g., surveys, workshops, meetings), and how the gatekeeper considered and incorporated the feedback received.
- **Future plans and commitments:** include any future plans or commitments made by the gatekeeper to address identified concerns or improve compliance with the DMA (including the compliance metrics to assess the evolution of the measures listed in section 2.1.2 (q)). This would allow business users to assess the gatekeeper's intentions and gauge the likelihood of meaningful changes in their operations.

Including these elements in the non-confidential version of the Compliance Report would facilitate transparency, accountability, and informed participation in the implementation of the DMA, ultimately benefiting business users and ensuring the contestability and fairness of digital markets.

Last but not least, the Commission should provide third parties with the ability to request additional information not included in the non-confidential summaries, where this is

⁹ Under Article 7(1) of Regulation 1/2003, complainants are closely associated with the proceedings since their economic interests have been or are likely to be harmed as a result of the alleged infringement of Articles 101 or 102 TFEU. The same line of reasoning in relation to the DMA since this regulation is meant to address the harmful effect of the unfair practices of gatekeepers in the digital sector (see recital 13). See e.g., Wils, Wouter P. J., Procedural Rights and Obligations of Third Parties in Antitrust Investigations and Proceedings by the European Commission (November 1, 2021). published in World Competition, Volume 45, Issue 1, March 2022, pp. 3-52, King's College London Law School Research Paper, Available at <http://dx.doi.org/10.2139/ssrn.3967057>

¹⁰ Sections 2.1.2 (i), (l), (o), and (p).

necessary to assess gatekeeper compliance with the DMA's obligations (i.e. ***on a need to know basis***).

3. Other comments – ensuring the Commission receives a comprehensive feedback outside the Compliance Report

Beyond the Compliance Report, the Commission should also **seek regular feedback from third parties and set up an efficient mechanism for such reporting**. The Compliance Report submitted by gatekeepers will be produced once a year (while their practices and terms and conditions can change all year long) and will foremost rely on information from gatekeepers. Accordingly, annual reports cannot be the main tool to monitor how gatekeepers effectively comply with the regulation. The Commission should also rely on information from third parties about any practice or behavior by gatekeepers.
