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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

* Publication of your details

- (●) I agree to the publication of my details along with my contribution
- ( ) My contribution should be published anonymously.

Privacy statement

Consultation_on_DMA_compliance_report_template_privacy_notice.pdf

* Your first name

[redacted]

* Your family name

[redacted]

* Your organisation

Coalition for App Fairness

* Your email address

[redacted]

Your contribution

You can insert a text and/or upload your contribution.

Type in your contribution (3000 characters maximum)

3000 character(s) maximum

CAF represents a large number of SMEs, entrepreneurs, and app developers who are dependent on access to large mobile online platforms to distribute their innovative products and services to the benefit of smartphone users. CAF was originally formed by Basecamp, Blix, Blockchain.com, Deezer, Epic Games, the European Publishers Council, Match Group, News Media Europe, Prepear, Proton, Spotify, and Tile. CAF has rapidly grown from 13 to over 70 members since launching in September 2020.

We thank the Commission for the opportunity to comment at this stage of this important process. We welcome steps taken by the Commission to prepare for effective and timely enforcement of the Digital Markets Act. The compliance template reflects a comprehensive inventory of questions and information that will be necessary to ensure that designated gatekeeper companies are complying with the requirements of the DMA and doing so in ways that achieve the goals of the DMA. Our comments are with respect to Section 2 (substantive compliance with Articles 5, 6, and 7), and Section 3 (information about compliance function).

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Contact

EC-DMA@ec.europa.eu

Coalition for App Fairness - Comments on the template for compliance report under the DMA

About the Coalition for App Fairness (CAF):

CAF represents a large number of SMEs, entrepreneurs, and app developers who are dependent on access to large mobile online platforms to distribute their innovative products and services to the benefit of smartphone users. CAF was originally formed by Basecamp, Blix, Blockchain.com, Deezer, Epic Games, the European Publishers Council, Match Group, News Media Europe, Prepear, Proton, Spotify, and Tile. CAF has rapidly grown from 13 to over 70 members since launching in September 2020.

Our comments on the template for compliance report under the DMA:

We welcome steps taken by the Commission to prepare for effective and timely enforcement of the Digital Markets Act. The compliance template reflects a comprehensive inventory of questions and information that will be necessary to ensure that designated gatekeeper companies are complying with the requirements of the DMA and doing so in ways that achieve the goals of the DMA. Our comments are with respect to Section 2 (substantive compliance with Articles 5, 6, and 7), and Section 3 (information about compliance function).

With respect to Section 2, while 2.1.2.(h) is arguably broad enough to capture all relevant information, we would propose adding some specific complements to items (e), (f) and (g) of that section to ensure that the Commission has a clear picture not only of steps taken to comply, but also of related steps that might limit the effectiveness of that compliance or even circumvent compliance.

Those paragraphs ask for technical and contractual changes “required by the implementation of the measure concerned.” However because those paragraphs only ask for “required” changes, it is possible that the gatekeeper might omit to report related, but not required, changes made. For example, the only “required” change for compliance with the anti-steering provision of the DMA (Article 5(4)) is to strike the contractual terms that prohibit steering. But it is possible, and even likely that gatekeepers will make additional, but not “required” changes to their contractual terms or user interfaces that might impose costs or other deterrents on developers or the end-users being steered. Similarly with respect to the tying of in-app payment services (Article 5(7)), the only “required” change would be to strike the existing contractual requirement. Nevertheless, gatekeepers may attempt to make other changes in connection with the implementation of this DMA provision (including the imposition of commissions or other requirements) which would make using alternative in-app payment services less attractive to developers or end-users.

Also, with respect to Section 2 in general, the gatekeeper should declare not only the measures proposed to ensure compliance, but also all the alternative measures which were eventually not chosen, and explain in detail the reason for the decision and why the proposed measure is more suitable than the discarded ones to achieve the DMA objectives.

With respect to Section 4 (“non-confidential summary”) it is of utmost importance that the summary is as detailed and meaningful as possible to all third-parties. Omitted confidential information should be replaced with as precise as possible indications of key elements to allow third parties to understand why the gatekeeper is proposing to adopt the compliance measure, and to criticize the proposal if necessary, as well as be able to assist the Commission in launching potential investigations for non-compliance as promptly as possible.

Thus we would propose modifying paragraph (h) to use the words “relevant to or made in connection to” rather than “required by” in order to ensure that the Commission receives all the information it needs to evaluate the compliance activities of the gatekeeper, including the anti-circumvention obligation under Article 13(4).

With respect to paragraph (j) we would propose adding a requirement that any consultants also disclose their methodology as to how they arrived at their “output.”

With respect to paragraph (n) we would propose including a disclosure as to the basis (if any) upon which the gatekeeper’s own products, service or functions might be exempted from the specific actions taken to protect security or data in connection with the gatekeeper’s compliance with the DMA. Moreover, paragraph (n) refers to any actions taken to protect “security or data” according to the relevant DMA provisions and an explanation of why these measures are strictly necessary and justified. However, this point does not refer to the term “integrity”; the DMA allows gatekeepers to take contractual or technical measures to protect “integrity” of the operating system, hardware, etc. However, the term is not defined in the DMA and can be interpreted broadly. An explicit reference to the measures that gatekeepers have taken to protect “integrity” should be included in Section 2.1.2.(n) so that the Commission can monitor measures affecting app developers, which rely on the gatekeepers’ operating systems and hardware to reach consumers.

Paragraph 2.1.2 (i) refers to “consultations” with users that have been conducted at the stage of elaborating the measure. And Paragraph 2.1.6 also refers to the “feedback” the gatekeeper has received on the measure. However, the template does not refer to any consultations or feedback on measures the gatekeeper has taken to implement *derogations* from the rules, notably measures purported to protect integrity, security, and privacy/data. Business users should be able to comment on measures enabling gatekeepers to derogate from their requirements under the DMA. An amendment to that effect would allow business users to express their concerns on the implementation of those derogations, and it will also enable the Commission to assess whether they are necessary and justified. In addition, in order to avoid getting some false impressions about the nature of third-party communications and feedback (e.g. arranging “friendly” feedback from allied organizations) we believe it would be useful to include in the summary the nature of the communications (e.g. email, meetings, video conference) and with whom the gatekeeper communicated. Gatekeepers should also explain why the sample of businesses/end users consulted is representative. Finally, for transparency reasons, the gatekeeper should declare any

affiliation or financial contribution made to organizations (like trade associations or members thereof) which have provided such feedback.

With respect to Section 3, we believe that it is important that the incentives for the individuals and teams involved in ensuring compliance with the DMA are actually aligned with compliance. A team or individual within a corporation charged with ensuring compliance, but whoes reviews and compensation are not directly tied to being compliant, will seldom prioritize actual compliance. Thus we would propose adding a paragraph 3.1.5 that requires: “a description of the financial and performance review related incentives that the head of the compliance function, and members of their team, have for ensuring compliance and/or the financial and performance review consequences that failure to comply would have on that individual and their team.”

We thank the Commission for the opportunity to comment at this stage of this important process. We remain at your disposal.