Contribution ID: 65acfee4-866f-4748-b935-a64882a427c6
Date: 05/07/2023 22:51:14

Consultation on the template for compliance report under the DMA

Fields marked with * are mandatory.

Please fill your details and input/upload your contribution at the bottom of this page.

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] (please publish only the company name)

* Your organisation
Mozilla

* 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

Please upload your contribution.

3175af33-359a-46ce-bf97-cc13e2fb1b20/Mozilla_-_template_DMA_compliance_report_-_consultation_response.pdf

Contact

EC-DMA@ec.europa.eu

July 2023

EUROPEAN COMMISSION CONSULTATION ON TEMPLATE DMA COMPLIANCE REPORT

MOZILLA RESPONSE

Summary:

The template compliance report represents a good starting point towards ensuring that gatekeepers comply with the Digital Markets Act. We have focused our comments across three key areas in order to ensure that Article 11 is effective and contributes to the objectives of the DMA:

- **Transparency for the European Commission and third parties:** it is crucial that both the Commission and third parties are provided with sufficient information to be able both to scrutinise gatekeeper compliance measures and to benefit from or interoperate with them. Where possible, this information should be provided in machine-readable formats with permissive licences that enable independent researchers to meaningfully derive insights that benefit the ecosystem as a whole and aid the Commission in its enforcement mandate.
- **Review of user interface design:** a particularly important area for transparency is the choice architecture deployed by gatekeepers. This should be properly assessed through gatekeeper and Commission reports and auditing.
- **Rationale for gatekeeper compliance decisions:** understanding the reasons for specific measures that gatekeepers take to comply with Articles 5, 6 and 7 will be a key element of evaluating compliance. This applies equally to those measures which gatekeepers choose not to take. Requiring such explanation in the compliance report and non-confidential summaries will assist all parties, including the Commission, business users, end users and independent researchers.

We have addressed each of these in more detail below through our comments on: (1) the template compliance report; (2) the non-confidential summaries; and (3) compliance indicators.

1. TEMPLATE COMPLIANCE REPORT

As noted above, the template compliance report represents a good baseline in relation to the level of transparency and granularity of detail that gatekeepers should be expected to provide. Given the scale and resource of companies reaching gatekeeper status under Article 3, the requirements of the template report are proportionate and not overly burdensome. In many cases, it may be possible to update the indicators and information every quarter or half-year with little extra effort and due public consultation. As such, we would expect that the

requirements in sections 2 and 3 of the template report are only supplemented following the consultation and not watered down.

At a high level, the compliance report should meet the following requirements in order to contribute to the DMA's objectives:

- Enable the European Commission to understand in detail the specific compliance measures put in place by gatekeepers for each relevant obligation of the DMA.
- Provide the Commission with the background documentation (including plans, research, auditing and other internal documents) of gatekeeper compliance proposals. This includes being able to evaluate the compliance proposals against alternative means of compliance which the gatekeeper may or may not have considered.
- Provide business users, end-users and third parties with sufficiently granular information to understand the gatekeeper's compliance proposals and the rationale for implementing them in chosen way supplemented with internal documentation while accounting for confidentiality. This includes providing data in machine readable formats with open licences to enable independent assessment by researchers.
- Provide business users with sufficiently granular information about gatekeeper proposals to enable interoperability and use with their own services. This should include enough information for business users to understand the specific steps they may need to take to interoperate with core platform services and a plan or contact information for internal liaisons that can assist them with issues that they may face.

In terms of the content and presentation of the draft compliance report, we would note the following points:

- **Reflecting the importance of user interface design:** it is clear that even small changes to user interface design can significantly influence the actions of consumers.[1] The Commission has correctly remarked in footnote 3 that A/B testing and user surveys are particularly useful to demonstrate: (a) compliance with obligations necessitating changes to user interfaces; and (b) the absence of dark patterns. We would note that a combination of user testing (including A/B testing, quantitative **and qualitative surveys**) will assist in demonstrating compliance with several obligations (such as Articles 5(2) and 6(3) among others), including the absence of deceptive design/negative choice architecture. Given the asymmetry of information in favour of gatekeepers and the subtle nature of user interface design decisions, the burden should be placed on gatekeepers to demonstrate that their user interface design offers choice in a neutral manner and does not subvert autonomy or decision-making or free choice, as required by Article 13(6). The Commission could also instruct and explicitly enable third party experts to

[1] Luguri, Jamie and Strahilevitz, Lior, Shining a Light on Dark Patterns (March 29, 2021). 13 Journal of Legal Analysis 43 (2021), page 81

conduct audits and surveys assessing the choice architecture, as explained in section 3 below.

- **Provision of full datasets and methodologies:** in order to provide appropriate transparency, it is essential that full datasets of reports, testing and surveys are made available to the Commission in machine readable formats with permissive licences. Methodologies should also be clear both to the Commission and to third parties to enable proper scrutiny and to assist with understanding the impact of compliance proposals with minimum friction.

- **Breakdowns of data by Member State:** where gatekeepers typically collect data and undertake testing on a country-by-country basis, this should continue under the DMA. The Commission should request information (for example, under Articles 13 and Article 21) to enable it to make such assessments on intercountry differences on the quality of testing pre/post the DMA.

2. CONTENT AND PRESENTATION OF THE NON-CONFIDENTIAL SUMMARY

The consultation rightly sets out that the non-confidential summaries prepared by gatekeepers under Article 11(2) must enable third parties to provide meaningful input to the Commission on gatekeeper compliance with DMA obligations. There are a range of third parties including civil society and consumer organisations, business users, competitors and consumers who must be able to provide meaningful feedback to the Commission on the implementation of the DMA by gatekeepers. They can only do so if they are provided with sufficiently detailed information in machine readable formats on the steps taken; this includes the technical steps taken by gatekeepers in relation to the way third party services interact with core platform services.

One such example might be to list the APIs in relation to a particular core platform service that a gatekeeper has made accessible to third parties, as well as the APIs for which they have chosen not to do so. This is particularly important for APIs which remain available to a gatekeeper's own core platform services but not to business users. It should also include the rationale for such decisions and sufficiently detailed technical information to enable a business user to access and implement the relevant APIs where they are made available.

Another example might be the specific changes to a user interface made to comply with a particular obligation. For instance, in the context of a choice screen under Article 6(3), relevant information which must be provided to third parties would include: the specific design of the choice screen; the information provided to users; the services included; the users to which it is shown and when; the impact of making a selection etc. It should also include the rationale for the decisions taken under each of these categories of information and a summary of the outcomes of any research conducted (including methodologies) in relation to the obligation, and the reasoning for alternatives which were considered but not adopted.

These are just two examples setting out at a high level the types of information which gatekeepers should be required to provide in their non-confidential summaries for particular

DMA obligations. It will be important to set clear expectations that gatekeepers should address each of the points in the compliance report and provide non-confidential summaries only where specific commercially sensitive information would otherwise be disclosed. In such cases, ranges or aggregated data should be provided to ensure that interested third parties can effectively engage, as set out under Article 8(6).

3. INDICATORS TO ENSURE MEASURES MEET THE OBJECTIVES OF THE DMA AND RELEVANT OBLIGATIONS

Section 2.1.2(q) of the template compliance report requires gatekeepers to include an explanation of the measures taken to comply with each obligation by reference to a set of indicators. While indicators will be an important tool for assessing compliance with the DMA obligations, in order to be effective the Commission should require a minimum set of indicators against which gatekeepers must report. Without setting the specific indicators, there is a risk that gatekeepers will be incentivised to report on fewer and less insightful indicators. Moreover, different gatekeepers may report against different indicators across the same core platform services, preventing meaningful comparison. These indicators should be created via public consultation and should be regularly updated to ensure that they remain relevant to business users and researchers alike.

Indicators can take many forms, including:

- those relating to the **process** of complying (for example, setting out the actions taken by the gatekeeper to comply with the obligation);
- those measuring the **outputs** of compliance (for example, how users and business users are engaging with those changes); and
- those measuring the **outcomes** for competition and market structure (for example, how market shares have changed over time).

Each of the three categories serves an important purpose and should be considered in combination with each other to provide a whole picture of compliance.

There are also a number of principles which will assist in ensuring the effectiveness of indicators in achieving the objectives of the relevant obligations and the DMA, as set out in Article 8:

Timing of measurement is important: indicators should be measured before and after compliance steps are taken in order to assess accurately the impact of such steps. The precise timescales for measurement may depend on the relevant core platform service. For some it may be appropriate to measure against the month prior to entry into force of the relevant DMA obligations. However, for other core platform services, usage may be seasonal and it may therefore be necessary to measure against the same period in the previous year, at quarterly or half yearly intervals, or over a longer time period, in order to make a meaningful comparison.

Choice architecture indicators can help to understand the quality of choice provided by gatekeepers: there is an important role for the assessment of choice architecture in the indicators against which gatekeepers report. Without such data it is likely that the Commission will not have sufficient context to assess compliance. For example, a choice screen could lead to minimal switching for many reasons, including because of the position of the default products, or because it displays negative choice architecture. Solely measuring the number of switches would provide an incomplete picture.

The Commission may therefore wish to consider requiring independent audits of choice architecture to ensure compliance with Article 13(6) and to instruct its own audits of gatekeeper choice architecture as envisaged under Article 26(2). Examples of indicators in relation to the *quality of choice* provided under a compliance proposal such as a choice screen or consent request could include the proportion of surveyed end-users who found the choice box: (a) comprehensible; (b) useful; (c) desirable; (d) engaging. Similarly, while the number of steps required to change default settings will be insightful, the design of those steps is equally important to evaluate compliance.

Indicators should report on access to hardware/software features: many of the DMA obligations are intended to address harmful gatekeeper self-preferencing practices and encourage interoperability. This can occur on a technical level, as well as in the provision of its core platform services. Precise indicators can assist in understanding the steps taken (and the steps available but not taken) by gatekeepers. For example, Article 6(7) requires gatekeepers to provide access to the same hardware and software features as it does to own core platform services in order to address self-preferencing and to promote interoperability at a technical level. An indicator which reported the proportion of APIs/features made available to gatekeeper core platform services which are also made available to third parties would be insightful in this regard. A further indicator which would help to assess the ease of access (and the extent to which the gatekeeper has made third parties aware) is to measure the proportion of those offered APIs which are taken up by business users.

Reporting and explaining negative decisions: in some cases, a gatekeeper may elect not to apply certain obligations in particular circumstances, for example where it considers a measure is not technically possible (Article 6(3)) or where it would compromise the integrity of a service or feature. Such decisions should be reported against an indicator and the rationale properly explained to enable the Commission and third parties to understand the effectiveness of both the compliance proposals and the obligation more generally.

***