Contribution ID: af1a5c46-a8d9-4039-8b40-956da5bc25e3
Date: 02/07/2023 11:54:18

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

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* Your first name
[redacted]

* Your family name
[redacted]

* Your organisation
Epic Games, Inc.

* Your email address
[redacted]

Your contribution

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

Type in your contribution (3000 characters maximum)
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Contact

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Response of Epic Games

Consultation on the Template for DMA compliance reports

1. Gatekeepers must comply with the Digital Markets Act ("**DMA**")'s obligations by March 2024[1] and, by the same deadline, must submit to the European Commission ("**EC**") a report describing the measures implemented to ensure compliance with those obligations ("**Compliance Report**"). This note sets out Epic's observations on the EC's public consultation on the draft Compliance Report ("**Compliance Report Template**")[2], with a focus on ensuring gatekeeper adherence to DMA provisions addressing mobile app ecosystems. These observations are divided into three parts: (I) overarching observations; (II) relevant performance metrics; and (III) soliciting feedback on the Compliance Report from third parties.

I *Overarching observations*

2. Epic welcomes the EC's public consultation on the Compliance Report Template. The DMA seeks to establish a more competitive mobile app ecosystem through the opening-up of competitive and alternative means for consumers to install software on their mobile devices Article 6(4), and by opening-up dominant app stores to alternative in-app payment solutions Article 5(7). The DMA's success depends on adequate monitoring mechanisms and transparency to ensure that dominant app stores cannot circumvent these provisions through the imposition of unreasonable and anticompetitive terms and fees Article 6(12). Below, Epic sets out its specific observations on the process for compliance with Articles 6(4), 5(7) and 6(12), as well as observations on Section 2 of the Compliance Report Template.

3. ***Article 6(4) (Alternative App Distribution) and Article 5(7) (Alternative Payment Systems)***. The most effective way to ensure that Apple and Google offer competitive terms for access to their stores is to subject them to competition from alternative app distribution models and in-app payment systems. Therefore, particular focus should be placed on the measures that gatekeepers put in place with respect to Article 6(4) regarding alternative app distribution channels such as third-party app stores and the direct downloading of individual mobile applications. Attention also should be paid to measures complying with Article 5(7), concerning alternative in-app payments solutions, which can compete with Apple's and Google's in-app payment systems and potentially lower the cost to consumers.

4. ***Article 6(12) (FRAND Obligations)***. Article 6(12) requires gatekeepers to apply fair, reasonable, and non-discriminatory ("**FRAND**") general conditions of access for business users to their software application stores. The Compliance Report Template already offers a roadmap for the type of information required: (i) a full breakdown of their fee structures for access to their respective app stores; (ii) an explanation for the level of fees required; (iii) an explanation for any introduction of new fees; and (iv) generally, an explanation for conditions for access to their stores (see paragraph 2.1.2(g) of the Compliance Report Template).

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[1] Assuming the gatekeepers are designated in September 2023.

[2] Available at: https://ec.europa.eu/eusurvey/runner/dma_compliance.

5. Article 6(12) plays a critical role in ensuring that the competitive purpose of Articles 6(4) and 5(7) are not thwarted by Apple and Google imposing terms or fees that could undermine consumers' and developers' ability to choose competitive options for mobile app distribution and payment processing.

6. This is not a speculative danger. In other jurisdictions Apple and Google have already imposed monopoly rents that undermined regulations designed to increase competition. For example, legislators and regulators in South Korea, the Netherlands and India have adopted measures aimed at requiring Google to allow developers to utilise alternative payment solutions to Google Play Billing ("**GPB**") in apps distributed through Google Play. In response to these measures, Google introduced a brand new 'service fee' of 26 - 27% of all in-app sales of digital goods, which Google imposes on transactions processed through payment solutions *other than* GPB – *i.e.*, transactions Google is not involved with in any way. The result is that sellers of in-app digital goods in these jurisdictions are given an option: they can continue paying Google its typical 30% fee if they utilise GPB, or they can elect to pay Google 'only' 27% (in the Netherlands)[3] or 26% (in Korea and India)[4] and then on top of that pay an additional fee to another payment solution – one that invariably brings the developer's total fees to 30% *or more*.

7. Compliance Reports should require information to assess whether Apple and Google are circumventing the competitive aims of the DMA through the imposition of unreasonable and anticompetitive fees, or by shifting existing anticompetitive fees to a different level of the supply chain (*e.g.*, for access to toolkits for developers to create apps that operate within their app stores). Full disclosure of relevant fee structures, and justifications for any fees, will mitigate this risk.

8. Apple and Google should disclose a complete breakdown of their fee structures covering (as a minimum): (i) the payments they receive from developers for access to app stores set against the cost of running the app stores; (ii) the level of profit they make as a result of payments from developers; and (iii) gross profits attributable to their app stores generally. Apple and Google should disclose any internal documents reflecting profit and loss statements specific to their app stores. Apple, for example, should

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[3] See "*Offering an alternative billing system for users in the European Economic Area (EEA)*", Play Console Help, available at:

https://support.google.com/googleplay/android-developer/answer/12348241?hl=en&ref_topic=3452890&sjid=4231795017615233004-NA.

Notably, in the EEA, game developers are still subject to the tie and have no choice but to pay Google's 30% tax. Id. ("*In order to be eligible [to use an alternative billing system in the European Economic Area] [y]our app may not be a gaming app*.")

[4] See "*Changes to Google Play's billing requirements for developers serving users in South Korea*", Play Console Help, available at:

https://support.google.com/googleplay/android-developer/answer/11222040?hl=en.

See also "*Changes to Google Play's billing requirements for developers serving users in India*", Play Console Help, available at:

https://support.google.com/googleplay/android-developer/answer/13306652?hl=en.

Google has proposed a similar approach in the United Kingdom. See Oliver Bethell, "*An update on Google Play billing in the UK*" (19 April 2023), available at:

https://blog.google/around-the-globe/google-europe/an-update-on-google-play-billing-in-the-uk/amp/.

produce profit and loss statements following the same methodology reflected in Apple's "*internal documents reflecting profit and loss ("P&L") statements specific to the App Store and presented to Apple executives*" disclosed in the US proceedings. [5] Conversely, without full disclosure of this information, it is difficult to determine whether the fees charged to developers are reasonable and non-discriminatory or are part of a fee-shifting shell game designed to circumvent the competitive aims of the DMA.

9. During the initial stages of DMA compliance in March-2024, the assessment of compliance and the corresponding reporting in the Compliance Reports should focus on the actual measures that gatekeepers have put into place to comply with the DMA. Specifically:

- Early Compliance Reports should provide details on (i) any interest in third-party app stores and third-party in-app payment solutions from (a) suppliers of those systems, (b) other app developers, and (c) end users, as well as (ii) the progress made with respect to onboarding of each of those third-party app stores and in-app payment solutions.

- The likely unavailability of third-party app stores immediately after March 2024 makes it all the more important that developers and end-users can also choose to distribute and download their apps via direct downloading, as foreseen by Article 6(4).

- With respect to the actual measures implementing Article 6(4), Apple and Google should justify any purported security measures that in any way affect the installation or effectiveness of apps downloaded directly from the internet, or via third-party app stores. Pursuant to paragraph 2.1.2(n) of the Compliance Report Template, Apple and Google should explain "*where applicable, any actions taken to protect security or data pursuant to the relevant provisions in Regulation (EU) 2022/1925 and why these measures are strictly necessary and justified and there are no less restrictive means to achieve these goals*."

10. Subsequent Compliance Reports should focus on the effects of the gatekeeper's DMA implementation measures (as set out in the Compliance Report Template; see above) with reference to relevant performance metrics (see below), as well as any changes in the gatekeeper's DMA implementation.

II *Relevant performance metrics*

11. Section 2 of the Compliance Report Template sets out detailed information that gatekeepers should provide to demonstrate compliance with specific DMA provisions.

- Epic supports explicit reference to the "*changes to customer experience*" (*e.g.*, changes in customer interfaces, choice screens, warning screens, customer journey to access functionalities).[6]

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[5] United States District Court Northern District of California, *Epic Games, Inc. v Apple Inc*, p. 43.

[6] Compliance Report Template, paragraph 2.1.2 (f).

For many obligations, such as Article 6(4), which obliges gatekeepers to permit users to download third-party apps and third-party app stores onto the operating system, the user experience will be crucial to ensure that the DMA's obligations are implemented in an effective manner.

- Similarly, as foreseen in the Compliance Report Template[7], market testing (*e.g.*, A/B testing, consumer surveys) helps to ensure that gatekeeper solutions are adequate.

- Epic approves of the requirement in paragraph 2.1.3 for gatekeepers to provide details of any external or internal projects that have assessed compliance with the DMA obligations, in particular to provide details as to the output of those assessment projects.

- For this requirement to be effective gatekeepers must also provide details, in the Compliance Report, of external or internal assessment projects which found that the implemented measures did not (or may not) comply with the DMA.

12. As the EC has recognized, Compliance Reports should make express reference to performance indicators.[8] Below, Epic comments on specific performance indicators for Articles 6(4) (direct downloads and third-party app stores), 5(7) (in-app payment solutions), and 6(12) (FRAND).

13. ***Article 6(4).*** In relation to the Article 6(4) obligation to permit installation and effective use of third-party app stores and direct downloads of apps, the following metrics would be helpful to monitor the effectiveness of this obligation over time:

    (a) % of active end users who have downloaded an app from the gatekeeper's app store during the relevant period;

    (b) number of apps downloaded from the gatekeeper's app store during the relevant period;

    (c) % of active end users who have directly downloaded an app onto the gatekeeper's operating system during the relevant period;

    (d) number of apps directly downloaded onto the gatekeeper's operating system during the relevant period;

        - This metric will be particularly important for the assessment of compliance in the initial period after March 2024, as few third-party app stores are likely to be immediately available.

        - Furthermore, Apple's App Store and Google's Play Store, as the only pre-installed app stores, will continue to benefit from consumer inertia and status quo bias even after March 2024.

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7 Compliance Report Template, paragraph 2.1.2 (o), (p).

8 Compliance Report Template, paragraph 2.1.2 (q).

- Due to indirect network effects, end users will therefore be even less likely to download third-party app stores, and app developers may wait until third-party app stores have been installed on a sufficient number of devices.

- At least initially, consumers will be more likely to directly download apps than alternative third-party app stores which have yet to establish themselves as an alternative to Apple's and Google's app stores. Moreover, there are many trusted brands and websites that consumers may always prefer to go to directly for their software, just as they currently do via their laptop and desktop computers.

- For the EC and business users to gather any useful insights, it is crucial that gatekeepers do not limit their implementation of Article 6(4) to third-party app *stores*, but enable downloading and provide information on *any* app directly downloaded through the internet.

- It follows that, pursuant to Article 6(4), Apple and Google must offer both direct downloads of apps and direct downloads of, and downloads via, third-party app stores. To the extent Apple (or Google) erroneously permits only direct downloads of apps, or only third-party app stores, this would fail to comply with the DMA. In this non-compliance scenario, further to paragraph 2.1.2(k) of the Compliance Report Template (which requires gatekeepers to report on "*any alternative measures whose feasibility or implications has been assessed and the reasons for not choosing them*"), Apple (or Google) should explain the reasons for not permitting one or other of the download channels.

(e) % of active end users who have directly downloaded a third-party app store onto the gatekeeper's operating system during the relevant period;

(f) number of third-party app stores directly downloaded onto the gatekeeper's operating system during the relevant period;

(g) % of active end users who have downloaded an app from a third-party app store during the relevant period;

(h) number of apps downloaded from third-party app stores during the relevant period;

(i) % of active end users who have started a direct download of an app but have not completed it;

(j) % of active end users who have started downloading an app from a third-party app store but have not completed it;

(k) number of app developers who have expressed an interest in making their app store available on iOS or Android;

(l) number of app developers who have successfully made their app store available on iOS or Android;

(m) number of app developers who have successfully made their app available via direct downloading on iOS or Android; and

(n) % of active end users that have set the option to download from gatekeepers' app stores, download from third-party app stores, or direct download app as default during the relevant period.

14. Article 5(7). With respect to the Article 5(7) obligation, which requires gatekeepers to allow business users to use alternative third-party in-app payment systems, Epic suggests the following metrics:

(a) % of app developers and number of apps that use the gatekeeper's in-app payment solutions.

(b) % of app developers and number of apps that use third-party in-app payment solutions.

(c) % and number of active end users who have used the gatekeepers' in-app payment solutions.

(d) % and number of active end users who have used third-party in-app payment solutions.

(e) % and number of active end users who have attempted to use the gatekeeper's in-app payment solution but have not completed the process.

(f) % and number of active end users who have attempted to use a third-party in-app payment solution but have not completed the process.

15. ***Article 6(12).*** In order for the DMA FRAND provision to be effectively measured and enforced, Apple and Google should explain which apps and in-app payment solutions they have rejected from their app stores, and on which basis. The following metrics would be helpful to monitor the effectiveness of this obligation over time:

(a) % of active end users and active business users who have raised disputes for resolution during the relevant period;

(b) % of those disputes that are resolved at the end of the relevant period

III *Soliciting feedback on the Compliance Report from third parties*

16. For business users and end users to provide any meaningful input on gatekeepers' Compliance Reports, it is essential that the non-confidential summary of those reports provide sufficient detail. As Compliance Reports will likely be data-heavy, the right balance needs to be struck between (a) gatekeepers' right to protect their business secrets on the one hand and (b) transparency and ability to provide feedback on the other. Epic therefore suggests that data in Compliance Reports should not be marked as confidential and redacted in full. Instead, for example in relation to the metrics above, Apple and Google should provide data in ranges (in sufficiently small increments) to enable meaningful analysis of their Compliance Reports. The specific performance metrics relied upon must also be public.