

Ecommerce Europe's Comments on the definition of 'active end users' in the Digital Markets Act

Introduction

According to the European Commission's Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act or DMA)¹, the process for the designation of gatekeepers would be defined by a set of quantitative thresholds focusing on features that would make unfair conduct weakening contestability most prevalent and impactful. The rules were intended to apply to providers of core platform services that individually constitute an important gateway for business users to reach end users, and enjoy an entrenched and durable position in its operations or it is foreseeable that they will do so in the near future.

With this statement, Ecommerce Europe would like to share its comments on the [annex](#) proposed by the Slovenian Presidency on 20 September 2021 and the currently suggested wording in the European Parliament's compromise amendments. Ecommerce Europe believes the proposed definition of an 'active end user' does not properly reflect the reality on an e-commerce marketplace, we therefore suggest differentiating between active customers and visitors. We also would like to propose alternative wording for the co-legislators to consider.

Proposed definition in the DMA's annex

The Slovenian Presidency's [annex](#) proposes a methodology for identifying and calculating the 'active end users' and the 'active business users' for each core platform service. In the European Parliament, the Rapporteur in the IMCO Committee, MEP Andreas Schwab (DE, EPP) Andreas Schwab's [Compromise Amendment C](#), dated 24 October, also adds a similar annex on the methodology.

In order to identify and calculate the number of 'active end users' and 'active business users', the annex refers to the concept of 'unique users'. The concept of 'unique users' includes 'active end users' and 'active business users' counted only once, for the relevant core platform service, over the course of a specified time period (e.g., monthly).

The annex proposed specific definitions per core platform service. For online intermediation services it suggests the following definition of 'active end users':

"Number of unique end users who engaged with the online intermediation service at least once in the month for example through actively logging-in, making a visit, making a query, clicking or scrolling or concluded a transaction through the online intermediation service at least once in the month."

Concerns

Since being designated as a gatekeeper has very far-reaching consequences for companies, Ecommerce Europe had noted that further clarity on the precise scope would be welcomed, as the rules should not create disincentives for business development or growth for start-ups and scale-ups. While we therefore strongly support the Slovenian Presidency's proposal to include an annex to the DMA to specify the

¹ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act)

definitions of “monthly active users”, we are concerned about the appropriateness of the proposed definition for the e-commerce marketplace business model.

With the DMA, the Commission has intended to regulate a great diversity of business models, services offered, and types of interaction with business users and consumers, and several members of the European Parliament seem to be pushing for even more online services to be included in the new rules. Consequently, the concepts of business users and end users can also be of a different nature and of very different relevance depending on the core platform service of reference.

Ecommerce Europe believes that the definition of ‘active end users’ for online intermediation services, as proposed in the annex, insufficiently takes into account the intricacies of online marketplaces. Should the definition be applied in its current form, the DMA could (directly or in the near future) include a higher number of e-commerce platforms in its scope. This raises two fundamental questions: (1) whether the suggested definition correctly captures the true ‘active users’ of an online marketplace, and (2) whether the proposal will not have arbitrary effects on certain businesses that could end up within the scope.

Active end users

The definition suggested by the Slovenian Presidency lacks granularity. A ‘unique end user’ is a different concept than what we consider to be an active ‘end user’. E-commerce companies, when reporting on the performance of their platforms, differentiate between ‘unique visitors’, individuals browsing through the website or app, and ‘active users’, referring to those users that are actively “using” the service. It is therefore important to clarify what “actively using” a service means. The annex suggests that this includes “actively logging-in, making a visit, making a query, clicking or scrolling or conclud[ing] a transaction through the online intermediation service”. Ecommerce Europe believes that, even within the category of intermediary services, this interpretation strongly depends on the type of service provided.

In the case of the e-commerce marketplaces, as transaction-based platforms, the active usage refers to the situation in which a transaction has been facilitated. As an intermediary service, facilitating the sale of goods or services from business users to end users, revenue is generally generated by charging a fee to the business users or via for instance a subscription to a dedicated service. While some might argue that e-commerce marketplaces also generate revenue through other means, for instance through advertising, this is often minimal, and most of the revenue is created by transactions. Additionally, within the online marketplaces’ ecosystem, multihoming is a very common practice. End users are not ‘locked in’ on a platform, but can freely choose to switch to other marketplaces. Similar to window-shopping in an offline environment, consumers may just visit and browse a marketplace and choose to buy a product or service elsewhere. According to the definition proposed, in these instances, the consumer would still qualify as a ‘active end user’. Ecommerce Europe is concerned that the definition proposed in the annex fails to take into account the diversity of business models and unjustly places transaction-based platforms in the same category as non-transaction-based platforms that generate revenue through for instance advertising. While unique visitors may be a useful concept for non-transaction-based platforms, for transaction-based platforms the concept of ‘active customers’ should rather be used.

Gatekeeper thresholds

In its proposal, the European Commission states that the DMA’s objective is “to allow platforms to unlock their full potential by addressing at EU level the most salient incidences of unfair practices and weak contestability [...]” It adds that “the proposal is [...] limited to a number of ‘core platform services’ where

the identified problems are most evident and prominent and where the presence of a limited number of large online platforms that serve as gateways for business users and end users has led or is likely to lead to weak contestability of these services and of the markets in which these intervene.”

The number of monthly active end users is one of the quantitative thresholds in the DMA proposal for being considered a gatekeeper. While it can be questioned whether quantitative criteria as such are best suited to capture gatekeepers at all, we believe in particular the current ‘active end user’ threshold is concerning. In general, the number of users of an intermediary service is already heavily dependent on the type of service offered. For instance, a marketplace facilitating the sale of goods will likely be visited more frequently than a travel booking website, considering people generally only go on holiday a few times per year. Moreover, as marketplaces by nature have much higher numbers of visitors than active customers, Ecommerce Europe is concerned that the proposed definition could lead to more e-commerce actors meeting the end users threshold, either directly or in the near future, and might consequently also fall within the scope of the DMA. As stated by the Commission in its proposal, the DMA was intended to focus on platforms serving as gatekeepers and likely creating weak contestability in the sector in which they operate. We believe that by adopting the currently proposed ‘active end user’ threshold, there might be unintended effects on certain companies that could fall within the scope, without them functioning as a gatekeeper. In addition, it could lead to the Commission having to spend extra time and resources on assessing the arguments of these companies when they would argue that they should not be considered gatekeepers.

Conclusion

Ecommerce Europe fully supports the objectives of the European Commission and co-legislators to ensure fair competition and enable all players to reap full benefits of the digital economy, but we also recognise that the complexity of the digital sector should not be easily captured in a ‘one-size-fits-all’ approach. While we understand that policymakers intend to progress quickly on this file, we believe it is important to have a debate on the issues described in this paper. The DMA should not in any way create a regulatory obstacle to growth for European businesses.

Ecommerce Europe would therefore suggest adopting a more granular approach and define ‘active end users’ of online intermediation services according to the respective business models. The definition for transaction-based online intermediaries such as e-commerce marketplaces should be based on a monetary transaction or purchase, and it would therefore be more suitable to use the definition of ‘active customer’ or ‘active end user concluding a transaction’.

Proposed changes

Ecommerce Europe would request to include an example of a transaction-based platform, such as an e-commerce marketplace in section 4 of the annex. Currently, the examples provided in 4(a) and 4(b) for the metrics used to determine active end users are limited to signed or logged-in environments and alternate metrics such as IP addresses, cookie identifiers etc. In line with our comments on the importance of transactions for an e-commerce marketplace, Ecommerce Europe would argue that transaction figures should be included as the most accurate metric to identify the number of active end users.

Additionally, for the DMA to be future proof, the rebuttal process proposed in Article 3.4 is highly important. We would therefore like to stress that it should be explicitly linked to the objective criteria of Article 3.6 and should be designed in such a way that it is not too burdensome for companies to make use of.