Position Paper on Digital Markets Act

POST EUROP

YOUR LINK TO POSTAL EXPERTISE

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ABOUT POSTEUROP

POSTEUROP is the association which represents European public postal operators. It is committed to supporting and developing a sustainable and competitive European postal communication market accessible to all customers and ensuring a modern and affordable universal service.
Our Members represent **2 million employees** across Europe and deliver to **800 million customers daily** through over 175,000 counters.

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BACKGROUND & CONTEXT

PostEurop is the trade association representing Universal Service Providers (USPs) for post. As USPs, PostEurop's members ensure everyone is connected and has access to postal services, enabling consumers and SMEs to send and receive letters and parcels wherever they are. This contributes to economic growth and social cohesion across the EU. As such, PostEurop shares the European Commission's ambition to ensure fair and open markets in the platform economy.

In principle, PostEurop's members welcome the European Commission's proposed Digital Markets Act (DMA) and the new rules related to large and systemic online platforms, acting as gateways and evolving into broad digital ecosystems. The new rules should be drafted in order to benefit online shoppers and e-retailers across the EU, providing them with better choice in core platform services and in ancillary services.

Postal operators as ancillary service providers

While postal operators do not fall within the scope of the DMA, they are "business partners" to marketplace platforms, providing them with ancillary delivery services, and competitors to these platforms where they have expanded into the adjacent market of parcel delivery services. Some marketplaces have established themselves as gateways or gatekeepers by size and relevance to the market and vertically integrated into other ancillary services, such as the provision of parcel delivery services. Their role as gateways or gatekeepers allows them to provide an unavoidable interface to core and ancillary services for their business-users and end-users. Gatekeepers gather vast amounts of non-public data from end-users, business users and delivery service providers. They can then leverage their position and the data to further develop both their core platform services and their ecosystems with ancillary services. Ultimately, they may enter into competition with third party ancillary service providers on unequal terms and conditions to the detriment of fair competition and consumer choice.

The European Commission is investigating this, when a marketplace's business practices might artificially favour its own retail offers and those of marketplace sellers that use the marketplace's own logistics and delivery services (press release IP/20/2077).

The European Commission's DMA proposal addresses the challenges that arise when gatekeeper platforms vertically integrate:
"A number of other ancillary services, such as identification or payment services and technical services which support the provision of payment services, may be provided by gatekeepers together with their core platform services. As gatekeepers frequently provide the portfolio of their services as part of an integrated ecosystem to which third-party providers of such ancillary services do not have access, at least not subject to equal conditions, and can link the access to the core platform service to take-up of one or more ancillary services, the gatekeepers are likely to have an increased ability and incentive to leverage their gatekeeper power from their core platform services to these ancillary services, to the detriment of choice and contestability of these services." (Recital n. 14, emphasis added).
"'Ancillary service' means services provided in the context of or together with core platform services, including payment services as defined in point 3 of Article 4 and technical services which support the provision of payment services as defined in Article 3(j) of Directive (EU) 2015/2366, fulfilment, identification or advertising services." (Article 2 (14), emphasis added).

However, from PostEurop's perspective, the DMA proposal does not fully reflect the potential harmful effects unfair practices imposed by gatekeepers may have on the service providers in ancillary markets, and on their customers, including consumers and SMEs.

Thus, PostEurop has several recommendations to policy makers, set out below.

POSTEUROP RECOMMENDATIONS

Article 2 – the definition of ancillary services should clearly and explicitly include delivery services and capture B2B

Parcel delivery is an "ancillary service" to the core platform service of "online intermediation" in the form of e-commerce marketplaces. The reference to "fulfilment" does not seem to properly capture "delivery or freight transport services" given the definition of "fulfilment" in Regulation (EU) 2019/1020 *("fulfilment service provider' means any natural or legal person offering, in the course of commercial activity, at least two of the following services: warehousing, packaging, addressing and dispatching, without having ownership of the products involved, excluding postal services as defined in point 1 of Article 2 of Directive 97/67/EC, parcel delivery services as defined in point 2 of Article 2 of Regulation (EU) 2018/644 and any other postal services or freight transport services.").* Consequently, for the avoidance of doubt, legal clarity and legal consistency, "delivery or freight transport services" should be added as a further example of "ancillary services" within the definition in Article 2 (14).

The vertical integration of gatekeepers is not limited to business-to-consumer (B2C) delivery or B2C freight transport services. A B2C ancillary service can easily be rolled out to businesses as well. To that extent, business-to-business (B2B) transactions, in relation to ancillary services, should also be captured under the DMA.

Articles 5 and 6 – amendments to better capture the potential harm with regard to the ancillary service of parcel delivery in the gatekeepers' obligations and prohibitions

PostEurop would argue that the DMA should address the recognised anticompetitive conduct of gatekeepers in a self-executing way wherever possible, i.e. under Article 5 and not 6. This would provide for legal clarity and speed up the process in the dynamic and rapidly changing digital markets.

Additional obligations

A. <u>No restriction on choice</u>

Online gatekeepers operating as marketplaces provide an essential gateway to consumers for a large number of online retailers. They provide the interface for the core platform service and in some cases for ancillary services. This may make it easier for the gatekeeper to leverage its power from the core platform service to the ancillary services, especially where the gatekeeper provides the same ancillary service. To address the potential harm and ensure fair competition, a further self-executing measure should refrain the gatekeepers from preventing or restricting their business users from freely choosing between alternative ancillary service providers.

B. <u>Access to end user information</u>

Article 5 (c) allows business users to promote offers to end users acquired via the core platform service, and to conclude contracts with these end users regardless of whether for that purpose they use the core platform services of the gatekeeper or not. To that end, the business users need access to the end users' contact details. Otherwise, the business user cannot promote offers or conclude contracts outside the core platform service. Ancillary service providers need the same access to information. With the end user's consent, the business user must be able to provide the end user's contact details to the parcel delivery provider of choice. This would allow the parcel delivery provider to offer various add-on services, e.g. track and trace or parcel re-routing options, which are valued by end users and therefore the business users. In the absence of such information, the ancillary service providers are put at a competitive disadvantage as they are effectively unable to offer these valuable add-ons.

Comments on existing obligations:

Article 6.1(a)
Article 6.1(a) should be extended to prevent gatekeepers from using data which is not publicly available when competing with third party ancillary service providers i.e. they should be prevented from using data which is generated through activities on their platforms or provided directly by users of, or third-party ancillary service providers to, the platform. Access by gatekeepers to such information when they also offer ancillary services could distort competition to the detriment of third parties and ultimately business-users and end-users who will have fewer options as a result.

Article 6.1(b)
Tying, bundling and other related practices may be used as means to reduce competition when they are used by gatekeepers to leverage their power from the core platform to the ancillary services. Article 6.1(b) of the DMA proposal addresses tying and bundling concerns for pre-installed applications – these should also be addressed under Article 5. Moreover, these practices are not exclusive to situations where applications are involved and the scope of the Article should therefore be broadened. They may also occur when platforms start offering ancillary services that were previously provided only by third parties. For example, some platforms offer e-retailers a bundle of services, i.e., access to the platform and ancillary services such as the platform's own delivery or freight transport service. This could be problematic where e-retailers are given a strong incentive, such as a financial incentive or improved functionalities on the platform, to use the platform's own bundle of services.

Article 6.1(d)
Self-preferencing should be "blacklisted" under Article 5 of the DMA (not Article 6). For the avoidance of doubt, the term "services" mentioned with reference to self-preferencing should also capture "ancillary services", in order to make the provision applicable to these services too.

Article 6.1(f)
Finally, we believe Article 6.1(f) is an appropriate measure to enhance interoperability and create a level playing field. It is listed among those obligations susceptible of being further specified but we believe it is sufficiently clear and directly applicable to be included in Article 5.

Further Recommendations
Application of the obligations at group level
The gatekeeper designation under the current DMA proposal applies at the level of the core platform service provider only (see Article 3(1)). To ensure that the obligations and prohibitions related to ancillary services are effective, the rules should apply to the designated gatekeeper and to any businesses belonging to the same undertaking (group level, see definition of undertaking in Article 2 (22)) and which are directly or indirectly involved in providing the core platform and/or ancillary services.

Active end users and business users
The definition of a gatekeeper in Article 3 para 2 (b) refers to "active end users" and "active business users" without giving an exact definition of the term "active". Given the relevance of this requirement, the DMA should provide for a definition of "active users" under Article 2.

For more information,
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