Gateways, Not Gatekeepers: New Data Access Avenues Under the DMA

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Since March 7th, all core platform services that the European Commission has designated as gatekeepers under the Digital Markets Act (**DMA**) so far, must comply with the DMA's obligations and had to submit comprehensive compliance reports. In these reports, they must show in a detailed and transparent manner all relevant information needed by the European Commission to assess the gatekeeper's effective compliance with the DMA.

In our series of briefings, we recap the key milestones of the DMA implementation, deep dive into the various obligations that gatekeepers are facing, lay out the DMA's implications for stakeholders who are not (currently) within the direct scope of the legislation and update you on the current status of affairs in the DMA's implementation.

This time we focus on: access to data and services

What do the provisions say?

Have you ever wondered why, as a business user selling through a major online marketplace, you're unable to fully understand or engage with your customer base, despite generating significant sales? Certainly, the marketplace retains all customer data. This prevents you from effectively tailoring your marketing strategies and product offerings, while simultaneously allowing the marketplace to enhance its own product placements and solidify its position as a gatekeeper.

And have you, as an end user driven by a desire for diverse viewpoints and fresh content, ever ventured beyond the dominant search engine, only to find yourself inevitably drawn back to the gatekeeper's platform? This cycle occurs because the dominant search engine leverages vast amounts of user data to refine its algorithms, making its search results more relevant and compelling. As a result, alternative search engines, lacking access to similar data, struggle to compete on quality, leaving you with no real incentive to leave the gatekeeper. This not only limits your access to a wider range of information but also reinforces the monopolistic power of dominant search engines, stifling competition, and innovation in the digital space.

With Art. 6, paras. 10-12, the DMA introduces three provisions aimed at fostering fair competition and innovation within the digital sector, especially concerning access to data by business users. While each addressing different aspects of data access, Articles

6(10), 6(11), and 6(12) share the common objective of diminishing power imbalances and ensuring a more competitive digital market landscape. They recognize the critical role of data in the digital economy and seek to empower businesses by granting them more control over data related to their activities. By doing so, the DMA aims to encourage innovation while preventing gatekeepers from leveraging their control over data to unduly advantage their services or disadvantage competitors.

While the overarching goal is consistent across these provisions, their scope and applicability diverge significantly:

- **Article 6(10)** focuses on business users of core platform services (CPS), granting them free of charge permanent real-time access to data generated in the context of their use of these services. This right can be exercised by business users themselves or they can authorize a third party, such as a cloud or edge service provider they have engaged for data processing activities. The relevant data can include both data made available knowingly and willingly (name, address, e-mail address, customer reviews) and observed data (search behavior, views, clicks, location data and other raw data that can be processed in activity logs, website and search histories).

  The goal is to break up data monopolies and enable business users to analyze the data that was generated by their own activities and use it for competitive and operational enhancements. The provision addresses the power imbalance between gatekeepers, who control vast data silos, and business users, who often lack sufficient access to their data.

- **Article 6(11)** shifts the focus specifically to companies providing online search services, allowing them access to ranking, query, click, and view data generated by end users on the gatekeepers' online search engines. It encompasses both free and paid (ads) search results, with access to be granted on FRAND terms. This means access is provided in exchange for fair, reasonable, and non-discriminatory remuneration, introducing a cost element that mirrors the value of the data provided. The right to access this data is not limited by time, enabling the inclusion of historical data. Unlike Article 6(10), a direct contractual relationship between the entitled party and the gatekeeper is not a prerequisite for accessing data. The provision is intended for third-party competitors on the market for online search engines enabling them to optimise their own search engine services using data from the gatekeeper. Yet, direct competition with the gatekeeper is not required.

- **Article 6(12)** serves as a broader regulation, targeting business users of app stores, search engines, and social networks. It mandates that gatekeepers grant FRAND access to their CPS. This ensures that a startup's innovative app is easily findable in app stores, a local bookstore's website is discoverable through search engines, and an independent artist's portfolio reaches interested followers on social media. The FRAND requirement applies to various usage terms, encompassing fee structures,

data sharing policies, app design, content, and security protocols. The provision emphasizes the importance of equal access conditions and addresses the often-skewed negotiation dynamics between powerful gatekeepers and business users. Moreover, it requires gatekeepers to transparently disclose their access conditions, empowering users with clarity and a reference point. This transparency not only aids users but also facilitates the Commission's proactive oversight, ensuring effective compliance and enforcement.

What's the provision's context?

The concept of granting access on FRAND terms is not new to antitrust law. It has evolved over time, from guidelines on horizontal cooperation under Article 101 of the Treaty on the Functioning of the European Union to its significant application in digital policy. A landmark moment came with the European Court of Justice's decision in *Huawei v. ZTE*, establishing that denying a license on FRAND terms for standard-essential patents could constitute an abuse of market dominance under Article 102 TFEU. This principle was further endorsed in cases like *Microsoft*, where the company was required to share interoperability information under FRAND conditions to foster competition. The adoption of FRAND terms to the relationship between gatekeepers and business users, focusing particularly on equitable data access and control reflects the need for fair and transparent practices to place business users in a position to compete effectively in an environment largely controlled by gatekeepers.

What's the provision's implication for businesses?

The provisions empower business users with a direct claim against gatekeepers for access to vital data generated on their platforms. This unprecedented move aims to dismantle the monopolistic control gatekeepers have held over user data, levelling the playing field for smaller businesses. The EU Commission's backing of this claim with the possibility of fines and periodic penalty payments underscores its significance and the EU's commitment to enforcing these rights.

Despite this advancement, the practical implementation of data access presents its own set of challenges. The heterogeneity of platforms, marked by varying systems and data formats, could significantly complicate the technical feasibility of transferring data across platforms. Moreover, the context-specific nature of much of this data may further hinder its applicability and usefulness when moved to a different platform. These technical barriers not only impede the seamless utilization of data by business users but also add a layer of complexity to enforcing the direct claim provisions of the DMA.

The lack of concrete definitions and practical benchmarks for FRAND terms sets the stage for challenging negotiations and intricate legal battles. The uncertainty of what constitutes FRAND conditions in the context of access to data might hinder the competition and innovation the DMA aims to foster, with both business users and gatekeepers facing challenges in adapting to these unclear guidelines.

In conclusion, while the DMA promises to open up new avenues for competition and innovation, the journey ahead for business users will require careful navigation of the technical and legal challenges that lie in wait. Especially concerning the technical details of implementation and determining what conditions meet FRAND criteria, it is anticipated that the Commission will utilize its authority to issue specific implementing acts or guidelines, thereby refining the provisions further.

BLOMSTEIN will continue to monitor and assess the developments and practical application of the DMA provisions. If you have any questions on the topic, Elisa Theresa Hauch, Pia Hesse and the entire BLOMSTEIN competition law team will be happy to assist you.