

Executive summary

Christophe Carugati
(christophe.carugati@bruegel.org) is an Associate
Fellow at Bruegel

Under the European Union's Digital Markets Act (DMA), six 'gatekeepers' (Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft) have been designated in relation to 22 core platform services (CPS). The gatekeepers have until 6 March 2024 to propose to the European Commission how they will comply with their DMA obligations.

The DMA gives



1 Introduction

Europe's landmark Digital Markets Act (DMA) is entering its compliance phase, in which the law's obligations for large online platforms acting as gatekeepers, or hard-to-avoid digital

- **Fair condition (Principle 2):** Gatekeepers shall propose non-discriminatory treatment. This relates to provisions related to control over data (Article 6(2) DMA), price-parity clauses (Article 5(3) DMA), unfair terms and conditions (Articles 5(6), 6(12) and 6(13) DMA) and anticompetitive self-preferencing (Article 6(5) DMA).
- **Information (Principle 3):** Gatekeepers shall provide information that will allow users to



3.1.1 Access (Principle 1)

- **Easily actionable:** The conditions should enable a simple and understandable action with minimal steps, as illustrated by conditions on service termination (Box 3)¹⁴.

Box 3: Conditions imposed on service termination

Firms often make it very easy to subscribe to a new service to ensure frictionless access. However, to retain customers, some firms make it difficult to unsubscribe and terminate a service. For instance, in the United States, the Federal Trade Commission (FTC) alleged in June 2023 that Amazon's conditions of termination are not easily actionable. According to the ongoing complaint, Amazon allegedly makes it simple to subscribe to its service, Amazon Prime, but makes it difficult to unsubscribe by requiring multiple steps, in order to deter consumers from cancelling their subscriptions¹⁵. Amazon has denied the allegations¹⁶.

engines, to be free. Most users are unwilling to pay even a small price to use them (Akman, 2022). Also, users often choose a free product over a paid-for one, even when the latter is of superior quality, indicative of the free effect (Ariely and Shampan'er, 2006). Accordingly, when platforms offer a choice between a paid version and a free version of their products or services, users tend to choose the free version because of their unwillingness to pay and the free effect.

Users also often have difficulties choosing when they face too many options and repeated choices – choice overload and consent fatigue (Alal and Sunstein, 2021)¹⁹. Finally, users often encounter dark patterns and other misleading practices, such as dropping cookies to track the user's web activity, even when users do not consent to cookies²⁰.

The choice principle should be based on the following underpinning principles:

- **Genuine:** Users should have a real choice that takes into account users' cognitive biases, such as status-quo bias.
- **Unbiased:** Users should be able to choose freely without manipulation or misleading practices, especially those arising from dark patterns.
- **No burden:** Users should be able to choose easily between a few options, based on objective criteria to avoid choice overload, as shown with the Google Android choice screen for the choice of general search providers (Box 5).
- **One-time choice:** Users should only choose once at the appropriate time, such as during setup, to avoid consent fatigue.
- **Understandable:** Users should understand their choice with the necessary description and consequence of the choice being given in simple, neutral terms and without unnecessary and unjustified warning messages²¹.

Box 5: The Google Android choice screen for the selection of general search providers

In 2018, the European Commission found that Google abused its dominant position by tying the provisions of its general search engine, Google Search, and web browser, Google Chrome, with its app store, Google Play, when licensing its mobile operating system, Google Android, to smartphone manufacturers²². Following the Commission's decision, Google changed its practice by offering a choice screen for the selection of general search providers. The choice screen displays at the top the five primary providers, and then seven other providers based on market share data from the public source StatCounter. Participation in the choice screen is free of charge based on objective eligible criteria, after the dropping of an auction-based mechanism that would have remunerated Google²³.

¹⁹ For instance, users express consent fatigue when they must consent to a consent banner on every website, making consent burdensome for users.

²⁰ Molly Killeen, 'Le Figaro publisher fined €50,000 for GDPR violation,' *Le Figaro*, 29 July 2021 <https://www.euractiv.com/section/data-protection/news/le-figaro-publisher-fined-e50000-for-gdpr-violation/>.

²¹ Gatekeepers should enable the use of alternative services to those of the gatekeepers (Article 5(7) and Recital 43 DMA). Gatekeepers should ensure businesses and consumers can access other CPSs without subscribing to a CPS (Article 5(8) and Recital 44 DMA). Gatekeepers should enable users to uninstall any software applications on the operating system. Gatekeepers should allow consumers to easily change the default setting of certain services by prompting a choice screen at the moment of the user's first use (Article 6(3) and Recital 49 DMA). Gatekeepers should allow consumers to download third-party applications or software application stores. They should also enable third parties to prompt consumers to be the default third-party app (ed-23 (par)-8.9 (ty a)5 (9 (ed-23 (par)-8.9 (ty a)5 (9)b8.1 (d-

3.1.5 Flexibility (Principle 5)

Under the flexibility principle, users should be able to change and ease multi-homing when users use more than one service for the same purpose. Users often multi-home, for example by using a range of messaging services (Akman, 2022). However, they sometimes have difficulties in switching to or using actively another service. Indeed, switching might not be an available option – for example for downloading applications outside the Apple App Store – or might be burdensome because of the time and effort required to create an account²⁴. When switching, users might even lose their data and connections, requiring them to rebuild their profiles again from scratch. Users also face cognitive biases that make switching more difficult, such as with pre-installed services²⁵. Observance of the flexibility principle should follow the underpinning principles set out below to minimise switching costs:

- **Contextual:** Users should be able to retain the context of their profile (eg data about posts, likes, comments, customer reviews, connections) when switching to another provider, to minimise the efforts required to create a new profile on the alternative provider's platform, in line with appropriate laws, including the GDPR to protect the privacy of others.
- **Easy:** Users should be able to change easily from one service to another with minimum steps that would otherwise discourage switching.
- **Frictionless:** Users should be able to change without any restrictions, including technical restrictions.
- **Free of charge:** Users should be able to change without cost. When otherwise allowed, prices should be objectively justifiable²⁶.

3.2 Monitoring

Gatekeepers are responsible for ensuring that they comply effectively with their obligations. They have the flexibility to implement compliance solutions. Our compliance principles can help gatekeepers implement their compliance solutions. They might even help third parties in proposing alternative compliance solutions to those of the gatekeepers to show to the gatekeepers and the Commission that other solutions exist. In this circumstance, compliance principles might be the baseline for a consensus between the solutions proposed by a gatekeeper and a third party when they engage together in a regulatory dialogue, as encouraged by the Commission²⁷.

In this context, gatekeepers should show that the implementation of the compliance solutions is workable. Thus, they should provide in their annual compliance reports to the Commission methodologies, tests and any other relevant documents that provide evidence of a workable compliance solution (Article 11 DMA).

In addition, they should also put in place internal reporting systems that monitor that their compliance solutions work as intended once implemented. This system should enable gatekeepers to engage regularly with third parties and consumers in order to identify and adapt their compliance solutions quickly to technical issues and cognitive biases (Carugati, 2023d).

Finally, the Commission should monitor that gatekeepers follow the compliance principles. They should do this by engaging regularly with gatekeepers, third parties and consumers before and after the implementation of the compliance solutions.

²⁴ M.8124 *Google v. Commission*, 6 December 2016, para. 345.

²⁵ Ibid, para. 309.

²⁶ Gatekeepers should ensure that consumers can switch freely between software applications and services without undue restrictions (Article 6(6) and Recitals 53 and 54 DMA).

²⁷ The European Commission (2023) has issued a template for the compliance report, which encourages regulatory dialogue between the Commission, third parties and the gatekeepers.

References

- Akman, P. (2022) 'A Web of Paradoxes: Empirical Evidence on Online Platform Users and Implications for Competition and Regulation in Digital Markets,' *Virginia Law and Business Review* 16(2), available at <https://doi.org/10.2139/ssrn.3835280>
- Ariely, D. and K. Shmueli (2006) 'How Small is Zero Price? The True Value of Free Products,' *FRB of Boston Working Paper* No. 06-16, available at <https://doi.org/10.2139/ssrn.951742>
- Carugati, C. (2023a) 'The Digital Markets Act is About Enabling Rights, Not Obliging Changes in Market Conditions,' *Analysis*, 6 September, available at <https://www.bruegel.org/analysis/digital-markets-act-about-enabling-rights-not-obliging-changes-market-conditions>
- Carugati, C. (2023b) 'The Duty of Designating Gatekeepers Under the EU Digital Markets Act,' *Bruegel Blog*, 20 February, available at <https://www.bruegel.org/blog-post/duty-designating-gatekeepers-under-eu-digital-markets-act>
- Carugati, C. (2023c) 'The antitrust privacy dilemma,' *European Competition Journal* 19(2): 167-190, available at <https://doi.org/10.1080/17441056.2023.2169310>
- Carugati, C. (2023d) 'The "pay-or-consent" challenge for platform regulators,' *Analysis*, 6 November, Bruegel, available at <https://www.bruegel.org/analysis/pay-or-consent-challenge-platform-regulators>
- CMA (2022) *Online Choice Architecture How digital design can harm competition and consumers*

