
The European Publishers Council (“EPC”), considers that the DMA proposal requires some essential amendments to fulfil its early promise to ensure fair and non-discriminatory access to the gatekeeping platforms through clear obligations and prohibitions. If we do not get these amendments adopted by Member States, publishers will not reap the anticipated benefits of this legislation, and worse could find their efforts to exploit the publisher’s right will be yet further undermined. Our amendments are the necessary pre-conditions for vibrant, independent press publishers and media companies to thrive in their digital transformation, and to ensure that the democratic system remains healthy, diverse, uncorrupted and functional, without fear of censorship, and uncontrolled self-preferencing by the gatekeepers.

- It is very important that EPC Members make contact with their governments urgently to impress upon them the need for the key changes we are seeking. A list of your relevant Ministers is enclosed.
- Time is now very short to get these changes through at the Council level as the Slovenian Presidency is caving in to pressure from the Commission, who are using the weak Presidency to finalise a text by end-October, after which very few changes would be possible. Indeed, we expect a new draft from the Slovenians this week.
- Note that many of our amendments have already been tabled in the European Parliament but we need the Council to make these changes too for there to be a chance of success in the final trilogues with the European Commission next year.

Our members use all the dominant gatekeeper platforms and intermediation services in order to provide their publications to European citizens, meaning that they are dependent on the “core platform services” in the DMA. The impact of global platforms, search and social networks has never been experienced previously in the history of free media where these players get raw materials for free, deploy discriminatory tactics and self-preferencing to maximize revenues to their own superior benefit. The DMA is designed to change this. But we need some key changes to the text if democratic debate and the right to be informed is no longer mediated by commercial policies of platforms with no transparency to citizens as to how content appears where.

The designation of who is a gatekeeper under the DMA lies at the heart of the proposal together with the definitions of core platform services: The DMA is quite correctly targeting only a small number of large digital platforms that are unavoidable gateways between digital service providers.
and their large user base, threatening the contestability and fairness of digital markets. We do not want this narrow scope to change.

**The EPC proposes the following highly targeted amendments** to the definition of core platform services, and to the obligations and prohibitions in articles 5 and 6, to ensure fair and non-discriminatory access to the designated gatekeeping platforms for our members through clear obligations and prohibitions. Our full position paper and amendments are available [here](https://www.epc-europe.eu).

I. **Definition of core platform services**

The EPC is generally content with the core platform services identified by the Commission but **two changes are needed**:

a) Web browsers should also be included in the list of core platform services that fall within the scope of the DMA, meaning that providers of browsers could then be designated as gatekeepers and thus be required to comply with the DMA obligations. We have seen with the Google Privacy Sandbox how Chrome – the dominant browser, will be strategically very important for Google to maintain its dominance on the advertising ecosystem.

b) The DMA should explicitly include voice assistant technologies and “smart” (internet connected) TVs and voice activated speakers. The future of search for information and media services will be voice activated, creating a new, untransparent gatekeeping bottleneck for publishers and broadcasters.

II. **The obligations and prohibitions imposed by the Proposal under Articles 5 & 6**

The draft proposals are quite broad but the following changes are definitely needed:

1. **The obligation for non-discriminatory general conditions of access for business users** in Article 6(1)(k) surprisingly only applies to users of “App Stores”. Logically, and in order for the DMA to be effective also for search and social networks, this must be amended to
   - oblige all the designated gatekeepers to “apply fair and non-discriminatory general conditions of access for business users”
   - to ensure all core platform services in particular, the gatekeeping search engine, and social network, apply “fair and non-discriminatory treatment” and do not require advantages from business users that are disproportionate to the intermediation service of the gatekeeper.

2. **A broader prohibition of self-preferencing should be added to Article 6(d)** beyond ranking to cover further conducts which confer an advantage to gatekeepers’ own products or services to the detriment of competing products or services provided by third parties, future-proofing the DMA as follows:
a. **On fair and non-discriminatory conditions:** Article 6(1)(d) obligation on gatekeepers to “apply fair and non-discriminatory conditions” to ranking should be complemented by an obligation to perform regularly an algorithmic audit to ensure that gatekeepers indeed comply with the Article 6(1)(d) obligation.

b. Article 13 should also be amended to impose on gatekeepers engaging in ranking of products and services the obligation of a regular independent audit of their algorithms.

3. **On Data:** Article 5(a) of the Proposal prohibits gatekeepers from combining personal data sourced from the gatekeeping platform with personal data from any other services. This is good but two amendments are needed to avoid gatekeepers finding loopholes:
   
   - To prohibit gatekeepers from combining and using, for their own purposes, data sourced from their core platform services with personal data collected from sources or services where they are present as third parties. This is to ensure that the DMA will put an end to gatekeepers’ practices that oblige end and business users to agree to any practices as a precondition for the use of the gatekeepers’ core platform services.
   - The end-user’s ‘consent exception’ must be deleted in order for the prohibition of Article 5(a) above to be effective. After all, gatekeepers could, in practice, circumvent this data combing prohibition by including clauses for end-users to give consent in their Terms of Service and Privacy Notices as they do today - i.e. delete: unless the end user has been presented with the specific choice and provided consent in the sense of Regulation (EU) 2016/679."
   - Access to granular information and data in Article 6(1)(g): gatekeepers should be required to provide access to granular, user-level and high-quality information, so publishers can carry out their own verification of the ad inventory. Moreover, an obligation should be added on the gatekeeper to provide such granular information to independent third parties authorised by advertisers and publishers, which are part of the measurement system.
   - Real-time access to data: Article 6(1)(i) would oblige gatekeepers to grant effective, high-quality, continuous and this obligation should not be restricted to data provided for or generated in the context of the use of core platform services provided by gatekeepers, but also extended to data provided for or generated in the context of the use of ancillary services offered by gatekeepers (e.g., payment services).
   - The user’s consent requirement for data sharing included in Article 6(1)(i) is a hurdle and should be deleted as it should be possible for such data sharing to take place on the basis of any of the grounds envisaged in Article 6(1) of the GDPR.

4. **On App Stores:** Article 5(c) should be amended explicitly to oblige gatekeeping app stores to allow app developers to engage in any type of in-app or out-of-app communication with their end users (and not only to “promote offers” to them) and
5. Article 5(e) should not be limited to ‘an identification services of the gatekeeper’ but extended to all “ancillary” services that gatekeepers may wish to tie to their core platform service, including payment services.

6. An explicit obligation for gatekeepers to negotiate, on fair and non-discriminatory terms, for the use of content on their core platform services should be added to Article 6(1)(k). This obligation would play a significant role in effectively addressing the power imbalance that exists between gatekeepers and their business users, and which allows gatekeepers to undermine the new Publisher’s Right, and continue to exploit publishers’ content for free, or through their own products. This should be complemented by an obligation imposed on gatekeeper platforms to participate in final offer arbitration, whereby an independent arbitrator will determine what is a fair price, if agreement between the gatekeeper and the business user cannot be reached. The inclusion of such a mechanism in the DMA will ensure that all publishers are treated fairly and in a non-discriminatory manner and avoid situations whereby gatekeepers conclude agreements only with certain actors of the press ecosystem, e.g., after the intervention of a national competition authority (as happened in France with regards to the remuneration of publishers by Google). The implementation of such a mechanism in the DMA is the next logical step after the introduction of the press publishers right in the Copyright Directive, in order to guarantee independent journalism in all its breadth and diversity in the digital era and give a future perspective to a free and sustainable press.

7. Article 6(1)(k) should also require gatekeepers to refrain from making it more difficult for business users to advertise or provide their offers thus limiting the fairness and contestability of digital markets.

III. Enforcement and the interplay between the EU and national levels

The DMA envisages an over reliance on the European Commission for the enforcement of the DMA. There is merit in allowing Member States to not only request the Commission to open a market investigation for the designation of a gatekeeper, but also to open market investigations for non-compliance and / or systematic non-compliance. Instead, each Member State should be allowed to request the Commission to initiate such proceedings. Moreover, we are concerned about the way the Proposal addresses the interplay between the DMA and existing national laws concerning large online platforms which could undermine existing national laws. This would not be helpful.

The EPC considers that a significant gap in the Proposal is the lack of a formal complaint system, to enable business users that continuously use the gatekeepers’ services and thus are in the best position to witness whether the gatekeepers comply with the DMA. A complaint system would furthermore increase transparency, allowing third parties who are directly affected by the gatekeepers’ conduct to be involved in the enforcement of the DMA, an instrument that aims to make digital markets fair and contestable for the millions of third-party business users.