

EUROPEAN MEDIA ENCOURAGES SWIFT ADOPTION OF DIGITAL MARKETS ACT WITH TARGETED IMPROVEMENTS & A CLEAR FOCUS ON GATEKEEPERS



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Europe's media sector, represented by the undersigned organisations, welcomes the Commission's proposal on the Digital Markets Act (DMA) as a much needed and urgent step towards establishing a fair, balanced and contestable digital market.

A combination of lax regulation, harmful and unfair practices by Gatekeepers, and ineffective European competition remedies, means that a handful of global players have used their monopoly positions to become the Gatekeepers to the digital economy. Gatekeepers drive the vertical integration within the wider media ecosystem, using platform policies to squeeze independent media businesses and locking out new entrants, extracting revenues from the creative ecosystem through monopoly rents, that would otherwise be reinvested in production and media plurality.

We therefore welcome the European Commission's proposal to adopt an internal market instrument, with its much-needed ex-ante regulatory approach. This is vital to address the harmful practices of gatekeepers through the imposition of mandatory obligations and prohibitions. This Proposal is a clearly targeted and sound document which acknowledges the need to control the conduct of digital gatekeepers in order for digital markets to remain fair and contestable. This is why the media sector strongly believes that it is imperative that the Proposal is not watered down as it goes through the European Parliament and the Council. However, we consider that certain amendments can be made to the Proposal in order to ensure that the DMA will be a comprehensive instrument that captures and effectively addresses harmful – existing and potential future – conducts of gatekeepers.

Scope

It is essential that the scope remains tightly focused, as proposed by the European Commission, to the gatekeeper platforms whose size, reach and exercise of monopoly power justify the prohibitions and obligations enshrined in the DMA proposal. In our view, the Commission's proposal strikes the right balance in restricting the scope to the entities it seeks to capture. We are concerned that, if the DMA targets a group of platform services that is too broad - or that could be quickly broadened over time - the material obligations may be diluted and the enforcement may be slowed down, without additional benefits. There is an important correlation between the threshold for regulating a service and the intensity of such regulation. An effective control of the immense powers of genuine Gatekeepers to structure today's digital economy requires intensive oversight, as such we would suggest that the co-legislators abstain from attempts to widen the scope of the proposal. However, we believe that the list of core platforms services should include web browsers, as defined by the European Commission in its Android decision¹, and clarify that the term "operating system", as defined in Article 2(10), includes operating systems for any "smart" (internet connected) TVs, speakers and voice assistants. This will ensure that rules in Articles 5 and 6 apply to all activities where gatekeepers control access to online audiences - including content intermediation.

¹ See definition at section 5.7. Case AT.4099, 18/7/2018 - Google Android

Timing

Recent profit announcements by the biggest gatekeeper platforms demonstrate how rapidly they are using their monopoly positions to extract revenues from markets in which they operate ². The scale of these profits is abnormal, prompting an urgent need for the harmful market practices identified to be banned before any remaining competition to these platforms is eliminated. It is crucial that the obligations foreseen in Articles 5 and 6 apply as soon as possible after adoption of the Regulation. We caution against any attempt by gatekeepers or other entities, to delay the application of the obligations. As such, we call for the obligations to be directly applicable to Gatekeepers after designation and to ensure that the regulatory dialogue does not have a suspensive effect on the obligations foreseen in Articles 5 and 6. In addition, we recommend that interested stakeholders, including consumer organisations, should have the right to participate in the regulatory dialogue, as they often are victims of the practices that the DMA seeks to address.

Opt-in for personal data combination

The DMA should include a prohibition on Gatekeepers from combining and using data for their own purposes. Currently Article 5(a) prohibits the bundling of data from various sources only if the user does not consent to such combination in the sense of an opt-in. When dealing with Gatekeepers, such a solution could instead render the provision empty of any substance. By nature, the gatekeepers' position gives them critical leverage to offer incentives or force users into consenting to certain data processing operations ³. Therefore, the ban on combining personal data sourced from a gatekeeper's core service with personal data from other services should be strengthened and apply irrespective of the end user's consent to effectively address gatekeeper's data power.

Access to data generated by intermediating between end users and business users

Article 6(1)i has the potential to resolve many competitive issues that currently exist in the digital market. Access to data generated by media content is an essential requirement for all industries which have a digital presence. However, currently, the obligation to share personal data is connected to the gatekeeper's capacity to obtain consent for data sharing. Given the experiences that our industries have with consent management, relying on the gatekeepers to manage consent would empty the obligation of any meaning. Gatekeepers should be incentivized to facilitate the obtention of end-users' consent for sharing data with business users, for instance by limiting Gatekeepers' capacity to re-use the data collected if business users cannot equally access it.

Audience measurement

We welcome the provision on audience measurement in Article 6(1)g, however, in order for it to ensure meaningful access to information for the media sector we would insist on the need for granular, reliable and transparent information; independently verified by trusted, approved and neutral third parties.

² <https://www.theguardian.com/business/2021/may/01/its-just-the-beginning-covid-push-to-digital-boosts-big-tech-profits>

³ For example, Facebook forcing WhatsApp users to accept new terms and conditions by limiting functionality of the WhatsApp product: more info [here](#)

Unfair bundling and tying of services

The proposed DMA prohibit bundling practices that require a user to subscribe to or register with one service in order to use another service (Article 5(f)). Such approach falls short of addressing equally unfair bundling practices which do not focus on subscription/registration such as: i) forcing business users to offer content on a subscription-based core platform service as a condition to make that content equally available on the free version of that core service, or ii) proposing aggressive multi-product rebates (or mixed bundling⁴) which hamper competition even from the most efficient companies in their field. To effectively address leveraging before markets have 'tipped', this provision should cover the tying of one gatekeeper service with another core service for which the undertaking does not yet enjoy a gatekeeper position.

Self-preferencing & third-party favouritism

A ban on self-preferencing in ranking as foreseen in Article 6.1.d is a necessary precondition for the well-functioning of the digital single market. The DMA proposal however only prohibits giving preferential treatment to own services in ranking but does not prohibit giving preferential treatment to selected third parties. We indeed believe that gatekeeper platforms are able to circumvent the prohibition of self-preferencing by favouring selected services and partners, thus creating the same anticompetitive effects for competitors and undermining the free choice of the user. We therefore recommend that the ban on self-preferencing is extended to selected third parties. Additionally, this provision must apply beyond search engines to all core platform services operated by designated gatekeepers; it should also be extended to cover other self-preferencing practices that go beyond ranking. This includes ensuring that users are accurately and impartially directed to the content they have requested via the gatekeeper platform's electronic programme guide or voice activated ranking services, instead of being directed to the platforms' own competing services. Moreover, the algorithms which underpin the discoverability of content must be transparent.

Fair and non-discriminatory general conditions of access

The principle foreseen in Article 6(1)k is limited to App stores. We recommend that in order to ensure the effectiveness of the DMA, the obligation must be applied beyond App stores to all core platform services, in particular to search engines and social networks.

The DMA therefore must prohibit gatekeepers from imposing unfair conditions, such as the granting of a royalty-free license, demanding data that is not necessary to provide the intermediation service, or tying the ability of users to exercise statutory remuneration rights to their participation in platform services. The accompanying Recital 57 which already provides – although only for App Stores – that pricing or other general access conditions are unfair, in particular if they provide an advantage for the gatekeeper that is disproportionate to the intermediary service, must also cover the scenario whereby a Gatekeeper would make the access to the gatekeeper platform dependent on a free licence for rights or for the transfer of data. This is vital to ensure Europe can maintain its core objectives of cultural diversity, media pluralism and competitiveness which benefits European citizens. Therefore, article 6.1k should be expanded to include an obligation refraining Gatekeepers from inserting sponsorship and advertising around third party content, without the express consent of the content provider.

Gatekeepers should be obliged to negotiate on fair and non-discriminatory terms, for the use of content on their core platform services. In the event of a dispute about the conditions of access for business users to core platform services pursuant to Article 3(7), the Commission should have the option to impose specific procedures, including through binding codes of conduct to govern aspects of the gatekeepers' relationship with business users, for instance through arbitration to contribute to the proper application of the Regulation.

Disclaimer: This document presents the common position of multiple organisations representing several media industries. Individual entities/media sectors may support additional demands that are not reflected here.

⁴ Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02, para. 48.