



Digital Services Act package Public consultation

FEDMA would like to share its views with the European Commission on its public consultation for the Digital Services Act package.

The role of the European data and marketing industry in the context of COVID 19

The European Data Marketing industry plays a crucial role in helping marketers to effectively communicate reliable information and services to individuals seeking more and more to navigate these difficult times, stay safe and healthy. Reaching the right audience is particularly important for European small on medium sized enterprises which are trying to survive in a highly competitive environment. Data marketing contributes to a vibrant European business community, by giving them the opportunity to communicate to consumer alternative offers to well established brands and large commonly known online platform.

In order to survive, many businesses have accelerated their transition towards digital, or strengthened their online presence. The data marketing industry supports them in this move, ensuring that their communications stay visible, relevant in a fast-changing environment and reach the right audience, whichever the channel of communication. Privacy, data protection and consumer trust are keys to the sustainability of the data marketing industry and are at the core of FEDMA's activities. People need to be able to rely on the brand they interact with, especially in this difficult time where consumers are forced to substantially change their habits. In the close future and progressive deconfinement, the data marketing industry will play an even more fundamental role in helping the European economy by connecting businesses with relevant audiences.

In this context, FEDMA welcomes the work of the European Commission on the Digital Services act, and the challenges it seeks to address. In order to contribute fully to the economic relaunch that will take place, FEDMA is calling for a legislative and regulatory environment which will support us in our efforts, with the following considerations:

Strengthening the role of data as a driver for the economic relaunch. Data will play a key role in the relaunch of the economy. Any future legislations should ensure the EU can derive the full benefit from data while ensuring balanced user's privacy. Economic impact assessment, including assessment of the impact of COVID-19 on the economy, should play a key role in the development and adoption of legislation, ensuring that everything is done to support Europe's economic relaunch.

Ensuring the industry can leverage the flexibility provided by existing legislations. Interpretation of the GDPR at national level should maintain the existing balance adopted by legislator, between the protection of personal data, and the ability to process data, and should not attempt to limit

the use of the flexibility afforded by the law (such as the risk based approach of the GDPR). In addition, interpretation of the GDPR should not lead to additional administrative burden for companies and the right to data protection and privacy should be balanced against the other fundamental rights.

Supporting businesses towards compliance during this economic crisis. In a time when all businesses are fighting for their very survival, we are calling on Data Protection Authorities to support the effort of the industry, and to do their best to accompany the industry towards compliance, and to limit strict enforcement actions to extreme cases.

The issues deriving from gatekeeper platform and how to tackle them

Existing issues

With the consultation on the Digital Services Act, the European Commission aims at supporting the European Digital Industry by identifying the ongoing challenges deriving from the market power of a handful of very large platforms that currently dominate the European digital market.

FEDMA is concerned by 3 specific sets of issues:

Competition issues - Vertical integrations of platforms, where one company control different layers of an ecosystem, provide platform with the ability to influence the market in their favour, by self-preferencing their own services, at the expense of independent businesses in downstream market. In addition, this integration raises the issue of interoperability in a highly integrated ecosystem, making it difficult for businesses to change service provider. The size and integration of gatekeeper platform also provide them with a substantial leverage to impose their own terms and conditions to all business players in the ecosystem, including publishers, who may not be in a position to negotiate favourable terms, while not having the alternative of another business partner.

Innovation issues - Large platform by multiplying Business to Consumer services are in a favourable position to collect and combine personal data from user across all their services, strengthened by the network effect of some the services, and by offering an easy user experience (User have to log in once to benefit from all services). These high-quality data sets provide a substantial leverage to develop new services in adjacent market.

Right of access/ fairness issue - Gatekeeper platforms have a decision-making power over other players' ability to access their infrastructure and consequently to access a market. This decision-making power can also be reflected in the way platforms design their user privacy settings, which can limit the ability of other market players to reach out to users, and for users to make meaningful and granular choices with regard to their privacy.

DSA and ePrivacy - the need for a more harmonised approach

FEDMA is highly concerned by the issue deriving from gatekeeper platforms decision power over access to their infrastructure. This power is to be substantially strengthened by the need for all

digital players to obtain user’s consent as defined in the ePrivacy legal framework and in the proposed ePrivacy Regulation currently being discussed.

The ePrivacy Regulation as currently discussed raises serious concerns regarding its potential impact on the business models of a multitude of sectors. The European Parliament’s Report, far from addressing these issues, would have disastrous effects on the competition and thus on the sustainability of the media and marketing sector. We already see gatekeeping platforms using privacy and data protection rules to justify restriction of access to other players. In July 2020, FEDMA, together with other trade associations, [alerted on the upcoming changes that Apple has announced for the Apple Identifier for Advertiser \(IDFA\)](#) and the substantial impact such changes would have on the entire mobile app industry, and on advertising revenue for online publisher. Similarly, the announce by Google in January 2020 with respect to their browser Chrome’s handling of third-party cookie will have significant impact on an entire industry. These moves by gatekeeper platforms restrict the ability for players in the online advertising ecosystem to directly access users on their devices and request granular consent while providing users with transparency. Such platform de facto imposes their definition of privacy, and their interpretation of the GDPR to an entire ecosystem, limiting the ability for publisher to derive revenue from online advertising, and limit the ability for user to make meaningful choice with regard to the services they which to access, and their privacy.

The proposed draft ePrivacy Regulation in its current form, would consolidate market dominance for the same handful of players it seeks to curtail, by strengthening their gatekeeper position. Our industry is under extreme competitive pressure from platforms and the ePrivacy Regulation will only exacerbate and accelerate this effect to the detriment of users (it seeks to protect). The ePrivacy Regulation adds new competition issues and will (indirectly) only benefit large platforms.

FEDMA believes that the European Commission should reassess the appropriateness and sustainability of the ePrivacy proposal in the light of the ongoing consultation of the Digital Services Act and ensure full consistency of the Union’s objective for the digital single market.

Defining a gatekeeping platform

In order to efficiently tackle the issues raised by platform in the position of gatekeeper, it is essential to properly define the notion of gatekeeping platform. In addition, it is essential to carefully craft the scope of the instrument which will address the issue in order to avoid any collateral damages.

The concept of gatekeeping platforms in the digital market should be defined using a set of cumulative criteria assessed at EU level, to properly identify anticompetitive behaviour implemented by such platforms.

<u>Quantitative criteria:</u> - Financial valuation - User base	<u>Qualitative criteria:</u> - Access to large quantity of data, including from the provision of BtoC services and the
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<ul style="list-style-type: none"> - Vertical integration or the degree of control of an ecosystem by one player, including the ability of said player to limit access to market (and to consumer) to other players. - Market share 	<ul style="list-style-type: none"> ability to - develop more services based on such access - The capture of a large share of revenue of a market - The intensity of the network effect
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Setting up rules for gate keeping platforms

Anticompetitive behavior in the platform economy must be designed in a way that the digital advertising market is comprehensively protected against abusive competitive behavior and any violations of European antitrust law by companies that are dominant in the market are effectively and efficiently stopped. Currently there are still considerable weaknesses with regard to gatekeeper platforms that are of paramount importance across the market

FEDMA believes that the current ex-post control of anti-competitive behaviour is not efficiently addressing the challenges raised by large platform in the position of gatekeeper. This approach (ex-post control and fine) is no longer acting as a sufficient deterrent to anti-competitive strategy by platforms. In addition, the fast pace of the digital industry means that market players can be driven out of business very quickly.

Monitoring, and proactive regulatory intervention is needed to better address the specific challenges raised by the gatekeeping platform. FEDMA believes that an ex ante proposal with a carefully defined scope tailored specifically to the challenges created by gatekeeper platform could address them efficiently.

In particular, FEDMA believes that an ex ante instrument designed specifically for gatekeeper platforms and adopted at European level should lay down a series of restriction and obligations, including:

- the prohibition of self-preferencing the platform own services, at the expense of competing independent services.
- The obligations to provide fair access to their services: Gatekeeping platforms decision-making power concerning other players' access to market should be limited, and based on fair, transparent, and non-discriminatory principles. In addition, any change on the right of access should be supported by a detailed explanation of the reasoning as well as a substantial notice period to allow players enough time to adapt to the decision. This notice period should be suspended if the recipient lodges an appeal before a supervisory authority.
- The obligations to guarantee a certain degree of interoperability, in order to ensure the existence of alternative services and mobility for businesses and consumers. This would also support better market vitality, competition and innovation.

A specific regulatory authority

Considering the globalized nature of the digital market, the supervision of large online platforms should be carried at European level by a dedicated regulatory authority under the lead of the European Commission Competition services. The substantial size of some of the gatekeeping

platforms could be a deterrent for smaller regulatory authorities to effectively implement and enforce the rules, strengthening the need for a European body. Such body should ensure full coordination with national regulators, such as Data Protection Authorities, Consumer protection authorities, and other relevant regulatory bodies. However, the European body should be exclusively competent for issues related to gatekeeper platform, thus avoiding any risk of regulatory fragmentation.

The regulatory authority should be competent to monitor the market with the ability to gather information to ensure efficient oversight, the power to impose behavioural and structural remedies, impose interim measures, and settle disputes.

Regulatory intervention should be specifically adapted to gatekeeping platform with case by case adapted remedies. In particular, these remedies could include obligations for gatekeeping platform to provide fair and non-discriminatory access to their infrastructure, or to unlock access to data sets necessary for competition.

Transparency in online advertising

Transparency is essential in building trust in the advertising industry, and in the data economy in general. The [2018 GDMA Global data privacy report](#) showed that 88% of consumers cite transparency as the key to trusting organisations.

This consultation on the Digital Services Act covers a vast area of activities, including commercial advertising, criminal activities and online disinformation/political advertising. It is worth pointing out that commercial advertising is already subject to a high number of legislations to ensure the full protection of the consumer/ user, ranging from the Unfair Commercial Practices, the ongoing consumer rights legislation work, to data protection and privacy rules. Each issue may need to be looked at separately in order to assess the appropriate solution, as one approach may not be appropriate to address all issues together.

Existing legislations already imposes a high standard of transparency and information to individuals about, among other aspects, how their personal data is processed for the purposes of advertising and marketing communication. In many cases, the user's consent is required (ePrivacy Directive/Regulation). In case where consent is not legally required, the GDPR ensures that users are equally well protected by mandating a broad range of data subject rights, in addition to the transparency requirement.

In addition, the industry has put in place several self-regulatory programmes to increase user's transparency over digital advertising they receive.

FEDMA is a founding member of the European Digital Advertising alliance. A pan European self-regulatory programme which provides transparency and control over digital advertising through the use of an icon. EDAA's self-regulatory "AdChoices Icon" and interstitial, are an optimal vehicle to provide consumers a meaningful overview about the ad placement process (including how, and by whom, data may be collected and processed). This AdChoices Icon has been running across online ads since 2012 and has become an increasingly used and widely recognisable symbol for all internet users.

