I. Executive Summary

The European Data and Marketing industry plays a crucial role in helping marketers to effectively communicate reliable information and services to individuals. 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.

As the leading voice for the data and marketing industry in Europe, FEDMA welcomes the European Commission’s proposed Regulation for a Digital Markets Act (DMA) and fully supports the objective to lay down “harmonized rules ensuring contestable and fair markets in the digital sector across the Union”. In doing so, we believe that the DMA has the potential to tackle the current imbalances in the online ecosystem dominated by a small number of gatekeeper platforms, thus fostering the uptake of the digital economy for a larger number of players in the EU while supporting innovation and consumer choice.

FEDMA defends a thriving environment for marketers powered by user’s trust.

The DMA should establish a robust framework which provides legal certainty and comprehensive ex ante rules addressed to all digital players in the EU jeopardizing the contestability of digital markets. In this regard, policymakers should also ensure that the new rules contribute to a fair data ecosystem to support both contestability and competition while protecting personal data. In doing so, FEDMA believes that the DMA should aim for a future-proof approach which puts flexibility at the core of the new rules in order to reflect the fast-evolving and diversified character of most digital markets. Finally, FEDMA stresses the need to ensure timely and effective implementation of the DMA based on the experience accumulated under the current EU competition framework along with the governance dynamics of the digital economy.

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A. Clear & comprehensive framework

1) Clarify the scope of the DMA (Art.3)
FEDMA agrees with the gatekeeper definition set out in the DMA whereby gatekeepers are defined as companies with substantial market power active in certain digital sectors which meet three main cumulative criteria based on their annual turnover and anchored position as a major gateway for professional providers to end users and business users. We believe nevertheless that further clarity on the two terms “active end users” and “active business users”, under Art.3.2(b) is needed in order to strengthen legal certainty and avoid any potential “knock-on” effect on EU SMEs. Such clarity is also paramount to ensure consistency with other legislations, especially the Digital Services Act which also refers to “active recipient of a service” (Art.25(1) DSA).

2) Keep clear criteria for the designation of alternative gatekeepers (Art.3.6)
FEDMA strongly welcomes an ex ante approach put forward by the Commission in the proposal for a DMA. The current ex-post control of anti-competitive behaviour cannot efficiently address the large-scale unfair trading practices and the harms to innovation stemming from a small number of large online platforms acting as gatekeepers. Therefore, FEDMA concurs that proactive ex-ante regulatory intervention is better suited to ensure that digital markets remain fair and contestable for innovators, businesses, and new market entrants. In this context, we support the provisions in Art.3.6 which would allow the Commission to identify gatekeepers which do not meet all criteria in Art.3.2, but still present some characteristics resulting in a gatekeeper designation. This also represents an opportunity to align the proposed DMA with the recent changes to Germany’s antitrust rules whereby, a company is considered to have ‘relative market power’, if another company (not only SMEs) is dependent on it in such a way that sufficient and reasonable possibilities of switching to other third companies do not exist and provided that there is a clear imbalance to the countervailing powers of the other company. With this in mind, FEDMA stresses the importance of sufficiently circumscribed criteria even for this form of gatekeepers to avoid any side effects impacting traditional players who are entering in the digital economy.

3) Clarify prohibitions to leverage users and business users’ data across other CPS or for ancillary services (Art.6)
FEDMA supports effective and proportionate obligations for gatekeeper platforms. As such, we believe that the DMA can also address the gatekeepers’ practice to leverage their advantages (economies of scale, network effects and data assets) in one of their CPS to improve or develop new CPS or ancillary services in adjacent areas, thus possibly preventing other players from competing on the merits or even exclude them from the market. In this context, Art.6(1)a seems to overlook the possibility for a gatekeeper to leverage business users’ data collected for a specific purpose in one CPS, where the gatekeeper designation applies, into another CPS for which gatekeeper does not apply or to ancillary services and for a different purpose without any agreement with the business users. We believe that the lack of a regulatory framework for this gatekeepers’ practice will continue to raise entry barriers for other players, thus weakening contestability for non-gatekeeper companies. Accordingly, FEDMA urges policymakers to extend the prohibition to use business users’ data, including the data of the end users of these business users, from the CPS for which the gatekeeper designation applies to the CPS for which gatekeeper does not apply or to ancillary services.
B. Fair data ecosystem

4) Ensure gatekeeper platforms fully comply with data sharing obligations (Art.6(i))

In light of the gatekeepers’ preeminent position, Art.6(i) requires gatekeeper platforms to provide business users with the data that is provided for or generated in the context of the use of the CPS by those business users and their end-users. FEDMA welcomes this provision which addresses the significant asymmetry in access to data between gatekeeper platforms and their business users by acknowledging their equal right to access over the data coming from them. In doing so, the data provided to business users should indeed enable them to leverage such data in a way that enhances the contestability of digital markets. In the data marketing sector, for instance, marketers need data generated from their engagement with customers in order to offer relevant products and services. As such, FEDMA calls on policymakers to ensure that any interplay with the GDPR does not jeopardize the objective of this Regulation. Specifically, even though we support the alignment with GDPR, gatekeeper platforms should not be able to rely on the exceptions in Art.20(4) GDPR for data transfers, i.e. own business secrets or involvement of other people than the data subject, to refuse to handover data to the business users, thus potentially restricting the effectiveness of this obligation to improve access to data.

5) Ensure business users’ equal right to access data originating from them (Art.6(i))

FEDMA believes that the requirement on gatekeepers to ask for end users’ consent to provide business users with the end users’ personal data resulting from their engagement with the business users’ products and services goes against the objective of this Regulation and beyond the GDPR. First, the Commission seems indeed to overlook that gatekeepers have direct access to end users’ personal data as a result of those end users engaging with the business users. As such, setting consent as the legal basis for the sharing of this data disregards the business users’ equal right to access the data indirectly originating from them, thus consolidating the gatekeepers’ privileged access to data that the proposed Regulation tries to tackle. Second, also considering the competitive advantage that the gatekeeper would gain over its business users by not sharing end users’ personal data, the requirement risks resulting in consent requests, drafted by the gatekeeper, who has a clear interest to disincentivize end users’ consent. Third, the GDPR does not set a hierarchy among the possible lawful bases to process personal data. As such, while consent does not necessarily ensure the highest level of protection for the end users’ personal data, other legal basis, including legitimate interest, must be always accompanied by strong safeguards that do not undermine the level of protection. FEDMA therefore calls on policymakers to adopt a different legal basis for data processing to align the provision with the objective of the proposed Regulation.

C. Proportionate & flexible obligations

6) Tailor the technical challenges to provide real-time access to business users’ data (Art.6(i))

Art.6(i) requires gatekeeper platforms to provide business users with “continuous and real-time access” and use of aggregated or non-aggregated data” that is provided for or generated in the context of the use of the CPS by those business users and their end-users. However, we are aware that the provision of “continuous and real-time access” to such data could pose clear technological challenges even to gatekeeper platforms which could pass the cost of new technical solutions for

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1 Joint industry letter on Legitimate interest and EU competitiveness competitive market
compliance with this provision to their business users. Accordingly, FEDMA suggests removing the “real time” requirement while ensuring that business users can still have access to their data.

7) Strengthen the tailor-based approach (Art.7)
FEDMA welcomes the Commission’s objective to capture the diversified ecosystem of digital markets through a list of obligations which applies generally to all the designated gatekeepers independently of their characteristics and business models (Art.5). We also support the Commission’s proposal for a “grey list” of obligations (Art.6) susceptible of being further specified according to the circumstances of the CPS and the gatekeeper through a dialogue between the Commission and the gatekeeper itself. The DMA should indeed provide the possibility of additional tailor specific obligations as to address specific barriers that harm market contestability. With this in mind, we believe that such tailored approach must be further clarified and strengthened in the current proposal, without prejudice to the blacklisted practices. Specifically, FEDMA recommends to:

- Make the possibilities for tailored obligations more explicit without prejudice to the blacklisted practices.
- Clarify the format and modality of the proposed regulatory dialogue (which should not apply to the blacklisted practices).
- Involve gatekeepers’ business users and competitors in the dialogue with the Commission, drawing lessons from the stakeholders’ dialogue for the implementation of the Copyright Directive.

8) Clarify the link and impact on ongoing antitrust investigations
Articles 5 and 6 are the key provisions of the Proposed Regulation. They include a long list of conduct-specific obligations which recognizably draw inspiration from previous competition law decisions and investigations of the European Commission. Recital 33 openly states that such obligations are also the result of the experience gained in the enforcement of the EU competition rules. In this context, it appears that some obligations can be clearly related to European Commission’s investigations which are still ongoing. For example, the provision under Art.6a prohibiting gatekeepers to unfairly leverage business users’ data to compete with those business users can easily be referred to the ongoing antitrust investigation into the possible preferential treatment of Amazon’s own retail offers and those of marketplace sellers that use Amazon’s logistics and delivery services. As such, FEDMA believes that the proposal should better clarify the impact that the application of these obligations will have on future Commission’s decisions.

D. Timely & effective implementation

9) Ensure openness and transparency in the decision-making process of delegated acts (Art.3)
Art.3.5 of the proposal provides that the methodology for determining the quantitative thresholds for designation of gatekeepers will be specified by the Commission via delegated acts. In this regard, FEDMA recognises that the Commission’s choice to rely on delegated acts to set such methodology as well as on the possibility to adjust it to market and technological developments has the advantage to ensure more flexibility to the overall proposal, favouring its future-proof character. However, given the significant implications for a platform identified as a gatekeeper, FEDMA stresses the need to ensure the involvement of all interested stakeholders in the technical discussions and broader decision-making process of these delegated acts.
10) Assess the impact of transparency on market contestability (Art.13)

Art.13 sets out an obligation for gatekeeper platforms to submit annually “to the Commission an independently audited description of any techniques for profiling of consumers that the gatekeeper applies to or across its core platform services”. The obligation aims to increase transparency of profiling practices employed by gatekeepers “to prevent making deep consumer profiling the industry standard”. Though FEDMA welcomes the objective to increase transparency, which is essential to build trustworthy relationships with end users, we believe that the purpose of this provision must be kept in mind throughout. Recital 61 specifies that the proposed measure should facilitate contestability by promoting enhanced transparency as a competitive advantage among other providers of Core Platform Services (CPS) while also mitigating the asymmetry in access to data with potential entrants or start-up providers. Accordingly, FEDMA calls on the Commission to regularly assess, along with the gatekeepers’ annual report, the overall impact of such obligation on the contestability of the designated market.

11) Foster enforcement through governance

FEDMA welcomes the provision of new extensive powers to the Commission but draws attention to the role played by national competition authorities which can help to ensure a timely and effective enforcement of the proposed DMA. The complex and fast-paced nature inherent to many digital markets will indeed require an in-depth and responsive oversight of the gatekeeper platforms subject to the proposal. In this context, enforcement should build upon the concept of governance, maximizing resources and expertise while also relying on multiple players. Specifically, adding to the provisions under Chapter IV & V, FEDMA calls on policymakers to:

- Provide adequate resources, tools and cross-areas expertise enabling the Commission to effectively analyze gatekeepers’ data processing practices in view of taking swift actions.
- Require gatekeeper platforms to conduct regular independent audit and demonstrate the contestability-neutral character of new business practices.
- Encourage the drawing up of CPS-specific Codes of Conduct involving representatives of the relevant gatekeepers, business users and end users. This is without prejudice to the obligations of this Regulation.
- Lower the standard of proof set by the ECJ for imposing interim measures under Art.22 given that this solution has rarely been relied upon.
- Consider the adoption of structural remedies beyond the conditions set out in Art.16(2) in order to avoid collusion between intermediation services and the offering of goods and services. Such measures have proved their effectiveness in other sectors such as the banking sector, where the EU introduced a principle of subsidiarization forcing banks to separate any proprietary speculative activities from traditional services offered to individual clients or businesses to avoid systemic risks.
- Provide the Commission with a dispute settlement competence, to settle all kind of disputes directly or indirectly related to the right of access to the platform or leveraging strategies by gatekeeper platforms.
- Match the Commission’s new powers with regular accountability mechanisms through the European Parliament and the ECJ. Higher accountability will increase trust and credibility towards the Commission, and it will also foster transparency over its independence from gatekeeper platforms and other political actors.
### III. FEDMA’s proposed amendments

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<td>Art.6 1. In respect of each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall: (a) refrain from using, in competition with business users, any data not publicly available, which is generated through activities by those business users, including by the end users of these business users, of its core platform services or provided by those business users of its core platform services or by the end users of these business users;</td>
<td>Art.6 1. In respect of each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall: (a) refrain from using, in competition with business users, any data not publicly available, which is generated through activities by the those business users, including by the end users of these business users, of its core platform services or provided by those business users of its core platform services or by the end users of these business users, to compete with those business users or for the purpose of expanding its operations into core platform services which do not meet the gatekeeper definition pursuant to Article 3(7).</td>
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| **Proportionate and flexible ex ante rules** | |
| Art.6 1. In respect of each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall: (i) provide business users, or third parties authorised by a business user, free of charge, with effective, high-quality, continuous and real-time access and use of aggregated or non-aggregated data, that is provided for or generated in the context of the use of the relevant core platform services by those business users and the end users engaging with the products or services provided by those business users; for personal data, provide access and use only where directly connected with the use effectuated by the end user in respect of the products or services offered by the relevant business user through the relevant core platform service, and when the end user opts in to such sharing with a consent in the sense of the Regulation (EU) 2016/679; | Art.6 1. In respect of each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall: (i) provide business users, or third parties authorised by a business user, free of charge, with effective, high-quality, continuous and real-time access and use of aggregated or non-aggregated data, that is provided for or generated in the context of the use of the relevant core platform services by those business users and the end users engaging with the products or services provided by those business users; for personal data, provide access and use only where directly connected with the use effectuated by the end user in respect of the products or services offered by the relevant business user through the relevant core platform service based on the legitimate interest of that business user, and when the end user opts in to such sharing with a consent in the sense of the Regulation (EU) 2016/679; |

| Art.7 1. The measures implemented by the gatekeeper to ensure compliance with the obligations laid down in Articles 5 and 6 shall be effective in achieving the objective of the relevant obligation. The gatekeeper shall ensure that these measures are implemented in compliance with Regulation (EU) 2016/679 and Directive 2002/58/EC, and with legislation on cyber security, consumer protection and product safety. | Art.7 1. The measures implemented by the gatekeeper to ensure compliance with the obligations laid down in Articles 5 and 6 shall be effective in achieving the objective of the relevant obligation. The gatekeeper shall ensure that these measures are implemented in compliance with Regulation (EU) 2016/679 and Directive 2002/58/EC, and with legislation on cyber security, consumer protection and product safety. |
2. Where the Commission finds that the measures that the gatekeeper intends to implement pursuant to paragraph 1, or has implemented, do not ensure effective compliance with the relevant obligations laid down in Article 6, it may by decision specify the measures that the gatekeeper concerned shall implement. The Commission shall adopt such a decision within six months from the opening of proceedings pursuant to Article 18.

5. In specifying the measures under paragraph 2, the Commission shall ensure that the measures are effective in achieving the objectives of the relevant obligation and proportionate in the specific circumstances of the gatekeeper and the relevant service.

Procedural openness and transparency

Art.3
5. The Commission is empowered to adopt delegated acts in accordance with Article 37 to specify the methodology for determining whether the quantitative thresholds laid down in paragraph 2 are met, and to regularly adjust it to market and technological developments where necessary, in particular as regards the threshold in paragraph 2, point (a).

Timely & effective enforcement

Art.7a
1. Without prejudice to the provisions and obligations of this Regulation, the Commission shall encourage the drawing up of codes of conduct at Union level to contribute to the proper application of this Regulation, taking account of the specific features of each core platform service under Article 2(2) and the interests of the providers of those core platform services, their business users and end users and other interested parties.

2. When giving effect to paragraphs 1, the Commission shall aim to ensure that the codes of conduct clearly set out their objectives, contain key performance indicators to measure the achievement of those objectives and take due account of the needs and interests of all interested parties, including citizens, at Union level. The Commission shall also aim to ensure that participants report regularly to the Commission on any measures taken and their outcomes, as
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<th>Art.13</th>
<th>Within six months after its designation pursuant to Article 3, a gatekeeper shall submit to the Commission an independently audited description of any techniques for profiling of consumers that the gatekeeper applies to or across its core platform services identified pursuant to Article 3. This description shall be updated at least annually.</th>
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3. The Commission shall assess whether the codes of conduct meet the aims specified in paragraphs 1 and 2, and shall regularly monitor and evaluate the achievement of their objectives. They shall publish their conclusions.

4. The organisations that perform the audits shall establish an audit report for each audit. The report shall be in writing and include at least the following:

(a) the name, address and the point of contact of the gatekeeper subject to the audit and the period covered;
(b) the name and address of the organisation performing the audit;
(c) a description of the specific elements audited, and the methodology applied;
(d) a description of the main findings drawn from the audit;
(e) an audit opinion on whether the gatekeeper subject to the audit complied with the obligations and with the commitments referred to in paragraph 1, either positive, positive with comments or negative;
(f) where the audit opinion is not positive, operational recommendations on specific measures to achieve compliance.
5. Gatekeepers receiving an audit report that is not positive shall take due account of any operational recommendations addressed to them with a view to take the necessary measures to implement them. They shall, within one month from receiving those recommendations, adopt an audit implementation report setting out those measures. Where they do not implement the operational recommendations, they shall justify in the audit implementation report the reasons for not doing so and set out any alternative measures.

Art. 16(2)
The Commission may only impose structural remedies pursuant to paragraph 1 either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the gatekeeper concerned than the structural remedy.

(a) where there is no equally effective behavioural remedy or
(b) where any equally effective behavioural remedy would be more burdensome for the gatekeeper concerned than the structural remedy or
(c) where the structural remedy is necessary to avoid collusion between gatekeepers and the offering of goods and services that compete with the goods and services provided by the business users of the gatekeeper.