

Regulation on contestable and fair markets in the digital sector (Digital Markets Act)

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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RECOMMENDATIONS

A. Scope of the DMA

Provide clarity over the concept of ‘active end-user/business user’ (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). We therefore welcome the proposed amendment in the draft IMCO report for a list of indicators to be provided in the Annex to the future Regulation.

Include web browsers in the scope of the future regulation (Art.2.2)

As “gateways to the internet”, web browsers play a crucial role in shaping the users’ experience in the digital landscape, including how they interact with business users. Their significant influence is, for instance, reflected in Google’s decision to phase out third-party cookies in Chrome and replace them with its own web tracking system, thus forcing thousands of companies to adopt structural changes to their business operations. Shifting functionalities to browsers could therefore, as it is already happening, would also allow gatekeepers to circumvent certain DMA obligations. Against this background, FEDMA strongly supports the proposed amendments in the draft IMCO that web browsers should also be included in the list of core platform services and fall in the scope of the DMA.

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.

B. Gatekeepers' obligations

Strengthen price transparency and access to measurement data for advertising services

FEDMA welcomes the proposed Articles 5(g) and 6(g) which will provide relevant information in terms of price transparency and performance data, to marketers relying on the gatekeepers' advertising services. As pointed out by the Observatory on the Online Platform Economy¹, the lack of transparency and limited data provided to business users enable a few dominant platforms to consolidate the oligopoly-like market structure in the online advertising market. Accordingly, we believe that the current obligations should not only be preserved during the legislative process, but they could also be strengthened in line with the objective of the DMA to further contestability in digital markets. Specifically, FEDMA supports the proposed amendments to the draft IMCO report that while price transparency requirements (Art.5(1)g) should also include the pricing conditions in ad auctions, gatekeepers should also unconditionally provide access to measurement of user-level data (Art.6(1)g), including to independent third parties authorized by the business user. Both increased price transparency and access to measurement data will help marketers to better optimize advertising budgets and switch to different providers.

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.

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

¹ Observatory on the Online Platform Economy, [Market power and transparency in open display advertising – a case study](#), March 2021

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 basis 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 protection².
- While some amendments to the IMCO draft report go to the right direction by enabling business users to directly ask for end-users' consent, FEDMA believes that the use of legitimate interest as a basis for data sharing would be better aligned with the objective of the proposed Regulation without compromising users' fundamental right to data protection.

Ensure fair and non-discriminatory general conditions of access across all core platform services (Art.6(k))

As reflected in some amendments to the draft IMCO report, FEDMA believes that the requirement for gatekeepers to apply "fair and non-discriminatory general conditions of access" as per Art. 6(1)k should not be limited to app stores, but rather extended to all core platform services provided by the gatekeepers. Along with the inclusion of web browsers in the scope of the future regulation, this obligation will thus prevent gatekeeper web browsers and operating systems such as Google Chrome and Apple from taking unilateral decisions that adversely affect their marketer business users (e.g. Chrome's phase-out of third party cookies and Apple's iOS 14 tracking changes) while further undermining contestability in digital markets.

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 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.

Include further possibilities for interested parties' input on gatekeepers' tailored obligations (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

² [Joint industry letter on Legitimate interest and EU competitiveness competitive market](#)

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.
- Introduce reporting mechanisms to lodge complaints involving competitors, business users, and end users.

C. Implementation and enforcement

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.

Provide enforcers with adequate resources

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. Accordingly, policymakers should ensure adequate resources, tools and cross-areas expertise enabling the Commission to effectively analyze gatekeepers' data processing practices in view of taking swift actions. The Commission new powers should also be matched 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.

Refrain from using structural remedies and interim measures as tools of last resort

FEDMA considers that the use of both structural remedies and interim measures as per Article 16(2) and Article 22 respectively should not be based on excessively onerous conditions as suggested in the current proposal. Structural remedies 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. Furthermore, as a rarely relied upon solution, interim measures would also help dissuading gatekeepers from engaging in unfair practices, should the standard of proof set by the CJEU be lowered.

PROPOSED AMENDMENTS

II. FEDMA's proposed amendments

European Commission's text	FEDMA's proposed amendments
Scope of the Digital Markets Act	
<p>Art.2(2) (2) 'Core platform service' means any of the following: (a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communication services; (f) operating systems; (g) cloud computing services; (h) advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by a provider of any of the core platform services listed in points (a) to (g);</p>	<p>Art.2(2) (2) 'Core platform service' means any of the following: (a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communication services; (f) operating systems; (g) cloud computing services; (h) web browsers; (i) advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by a provider of any of the core platform services listed in points (a) to (h);</p>
<p>Art.3(2)b (b) the requirement in paragraph 1 point (b) where it provides a core platform service that has more than 45 million monthly active end users established or located in the Union and more than 10 000 yearly active business users established in the Union in the last financial year;</p>	<p>Art.3(2)b (b) the requirement in paragraph 1 point (b) where it provides a core platform service that has more than 45 million monthly active end users established or located in the Union and more than 10 000 yearly active business users established in the Union in the last financial year. Monthly active end users and yearly active business users should be measured taking into account the indicators set out in the Annex to this Regulation.</p>
Gatekeepers' obligations	
<p>Art.5(1)a from combining personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third party services, and from signing in end users to other services of the gatekeeper in order to combine personal data, unless the end user has been presented with the specific choice and provided consent in the sense of Regulation (EU) 2016/679.</p>	<p>Art.5(1)a from combining personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third party services, and from signing in end users to other services of the gatekeeper in order to combine personal data, unless the end user has been presented with the specific choice and provided consent in the sense of Regulation (EU) 2016/679.</p>
<p>Art.5(1)g (g) provide advertisers and publishers to which it supplies advertising services, upon their request, with information concerning the price paid by the advertiser and publisher, as well as the amount or remuneration paid to the publisher, for the publishing of a given ad and for each of the</p>	<p>Art.5(1)g (g) provide individual advertisers and publishers to which it supplies advertising services, upon their request, with free of charge, high-quality, effective and continuous access to information on the visibility and availability of advertisement portfolio as well as pricing conditions concerning</p>

<p>relevant advertising services provided by the gatekeeper.</p>	<p>the bids placed by advertisers and advertising intermediaries, the price paid by the advertiser and publisher, as well as the amount and remuneration paid to the publisher, for the publishing of a given ad and for each of the relevant advertising services provided by the gatekeeper.</p>
<p>Art.6(1)g provide advertisers and publishers, upon their request and free of charge, with access to the performance measuring tools of the gatekeeper and the information necessary for advertisers and publishers to carry out their own independent verification of the ad inventory.</p>	<p>Art.6(1)g provide advertisers and publishers, or third parties authorised by advertisers and publishers, upon their request and free of charge, with access to the performance measuring tools of the gatekeeper and granular, user-level and high-quality information necessary for advertisers and publishers, or third parties authorised by advertisers and publishers, to carry out their own independent verification of the ad inventory.</p>
<p>Art.6((i) 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;</p>	<p>Art.6(i) 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 as the legal basis for the processing of the users' personal data in the sense of the Regulation (EU) 2016/679;</p>
<p>Art.6(1)k apply fair and non-discriminatory general conditions of access for business users to its software application store designated pursuant to Article 3 of this Regulation.</p>	<p>Art.6(1)k apply fair and non-discriminatory general conditions of access for business users to its core platform service(s) to its software application store designated pursuant to Article 3 of this Regulation.</p>
<p>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</p>	<p>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</p>

<p>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.</p> <p>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. [...]</p> <p>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.</p>	<p>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.</p> <p>2. Where the Commission finds that the measures that the gatekeeper intends to implement pursuant to paragraph 1, following a trial period with the involvement of the business users of the gatekeeper, 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. [...]</p> <p>5. In specifying the measures under paragraph 2 Article 6, the Commission, in consultation with the business users of the gatekeepers, shall ensure review annually 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</p>
<p>Art.30(4)a new</p>	<p>Art.30(4)a new 4a. Natural or legal persons who can show a legitimate interest shall be entitled to lodge complaints with regard to the non-designation of gatekeepers and noncompliance and systematic noncompliance by gatekeepers with their obligations under this Regulation.</p>
<p>Implementation and enforcement</p>	
<p>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).</p>	<p>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)-, following consultations with providers of core platform services, business users, civil society and other interested parties.</p>

<p>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.</p>	<p>Art. 16(2) The Commission may only impose structural remedies pursuant to paragraph 1 either (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.</p>
<p>Art.22(1) 1. In case of urgency due to the risk of serious and irreparable damage for business users or end users of gatekeepers, the Commission may, by decision adopt in accordance with the advisory procedure referred to in Article 32(4), order interim measures against a gatekeeper on the basis of a prima facie finding of an infringement of Articles 5 or 6.</p>	<p>Art.22(1) 1. In case of urgency due to the risk of serious and irreparable immediate damage for business users or end users of gatekeepers, the Commission may, by decision adopt in accordance with the advisory procedure referred to in Article 32(4), order interim measures against a gatekeeper on the basis of a prima facie finding of an infringement of Articles 5 or 6.</p>