

Explanatory statement

1) Clarifying the scope to cover ancillary retailing activities

Over the years, some online marketplaces have become essential for publishers and booksellers to reach out to their customers, even more so since the outbreak of the covid pandemic. The ever increasing dominance of these marketplaces and the multiplication of unfair and uncompetitive behaviours they implement have turned them into real gatekeepers of unparalleled scope and scale. These fast growing monopolies are affecting the whole book ecosystem by increasing the sector's vulnerability and impoverishing cultural diversity, while being ultimately detrimental to consumers.

A number of marketplaces acting as gatekeepers relies on a business model that combines two different activities, running alongside each other, in a manner that is indistinguishable by the average consumer: an intermediation service (e.g. a bookseller selling books as a third party through the marketplace) and a retailing activity (i.e. the marketplace selling books directly). In the latter, publishers act as direct suppliers of the marketplace, while in the former, booksellers act as business users of the marketplace. In both cases, gatekeepers have been using their position to engage in unfair and uncompetitive behaviour against publishers and booksellers, whether in terms of self-preferencing, lack of data-sharing, the imposition of Most-Favoured Nation clauses or a lack of interoperability.

While the intermediation activity falls within the scope of the DMA, it is currently unclear if the parallel retailing activity of marketplaces acting as gatekeepers would be subject to the obligations of Article 5 and 6. Indeed, the definition of "online intermediation services" only covers the facilitation of direct transactions between third party business users and consumers. Book publishers (and other suppliers to the retail activity) not being business users of the marketplace and not selling directly their books to end users, the marketplace would not be subject to the obligations of the DMA for this side of its business model, despite this retailing activity targeting consumer alongside the intermediation activity.

Should this unclarity remain, it would maintain the great vulnerability the book sector has been suffering from ever since gatekeepers entered the market. It would also be detrimental for users who would not be able to use interoperable books in many cases when they are using the marketplace services of a gatekeeper (the offer of the gatekeeper being intertwined with the offer of third party business users like booksellers).

Clarifying that the parallel retailing activity of gatekeepers are also covered by the DMA is therefore necessary to ensure that the DMA fulfils its ambitions.

2) Fair treatment of gatekeepers' suppliers

In their relationship with gatekeepers as a supplier, publishers face a number of unfair practices and abuses, notably through the unilateral and disproportionate enforcement of the gatekeeper's terms and conditions, amounting to the gatekeeper inflicting a « death by a thousand cuts » to its suppliers, especially when those also act as their competitor on the market. Among the common abuses figure disproportionate sanctions and fines that are very difficult for the supplier to contest due to a lack of mechanism or by the impossibility for the supplier to use its own language, despite the gatekeeper being active in the supplier's own Member State.



3) Broader interoperability requirements

The DMA proposal includes some provisions for interoperability. However, the scope for interoperability is severely limited, applying only to ancillary services, applications services (apps) and applications stores (app stores). Furthermore, no definition for interoperability is provided in the proposal, which leads to potential ambiguity on the precise meaning of interoperability in this context.

The interoperability of digital services and digital content, along with the required software and hardware with which they operate, is essential to ensure that consumers can truly choose how to access the digital content and services that they wish to purchase.

Therefore, the DMA's Article 6 obligations should be reinforced to ensure further and broader interoperability requirements not just for ancillary services or apps/app stores, but to include a wider range of digital services, formats, software and hardware used by digital gatekeepers that bind consumers to them.

Consumers should be able to switch and choose alternative services and not remain locked into the digital ecosystems and formats provided by the gatekeeper.

To achieve a fair, open and competitive internet ecosystem, we call for an ambitious definition and scope for interoperability, which should build on the definition in the EU Directive 2019/770 on contracts for supply of digital content.

4) Further clarifications to ensure future proofness

Clarifying the scope to cover ancillary retailing activities, ensuring fair treatment of gatekeepers' suppliers and broadening the interoperability requirements represent the main clarifications that are needed for the DMA to have a true impact on the sustainable development of the book sector.

However, a few other points have to be taken into account to ensure the DMA regulation includes more clarity, legal certainty and future proofness for the benefit of the European book sector.

A. Stricter obligations for gatekeepers on most-favoured-nation (MFN) clauses and contractual obligations with third-party sellers.

Currently, a number of online gatekeepers restricts, through contractual conditions, the ability of third party business users to offer their products and services at different prices and/or conditions through other channels to end users. Very often these contractual conditions apply not only to the use of other intermediation services, but also to the business user's own online direct sales channels. Business users should be allowed to freely conduct their trade on the online direct sales channels they own and at conditions that are not set by the gatekeeper. Therefore, it should be clearly specified that obligations for gatekeepers on MFN clauses also apply to the business user's own online direct sales channels.

B. Clear information on the jurisdiction of specific courts

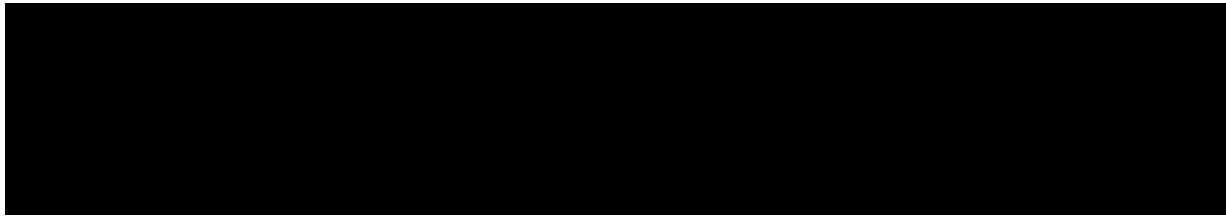
If the DMA provides for third party business users to raise concerns about unfair behaviour by gatekeepers with any relevant administrative or other public authorities, it should also be clear for the business user and, from the start, which court jurisdiction applies. Too often, when seeking available redress, business users learn, at their personal expenses, that the applicable law for settling the dispute with a gatekeeper is not the one of the country where they are established. Therefore, information on court jurisdiction should be drafted in plain and intelligible language and communicated to the business users in a clear and straightforward way from the start of his using the gatekeeper's core platform service.



C. Review clause and future proofness

It should be brought to the attention of the regulator, that if the DMA current quantitative thresholds to designate gatekeepers apply to providers of core platform services that achieve a substantial annual turnover and operate in at least three Member States, these thresholds do not cover 'smaller' gatekeepers. These 'smaller' gatekeepers operate on regional or neighbouring markets, thus not falling under the financial thresholds set up in the DMA. However, it doesn't mean that they are less harmful than gatekeepers falling under the scope of the DMA, neither that they do not implement the same unfair behaviours. On the contrary, some of them have developed a regional monopoly that surpasses 'bigger' gatekeeper's entrenched position on a given market.

As the DMA will be subject to a review clause, we therefore suggest to take stock of the lessons learned until the first review, and then take into consideration the possible benefit that its application to 'smaller' gatekeepers might bring to regional markets.



Suggested wording

1) Clarifying the scope to cover ancillary retailing activities

Recital 14a (new)

<i>Text proposed by the Commission</i>	<i>Suggested wording</i>
–	<i>Gatekeepers may also provide other ancillary services, for instance retailing or distribution activities, that are targeted at end users alongside their core platform services and in a manner that is indistinguishable for the average user. Such ancillary services can compete with business users of the core platform service and contribute significantly to the imbalance in a given market and ultimately increase unfairly the gatekeeper's power, including in relation to the gatekeeper's business partners, such as suppliers of goods or services, relying on such ancillary service. To prevent gatekeepers from unfairly benefiting from the leverage provided by provision of parallel services, such ancillary services should also be subject to the obligations applicable to core platform services.</i>

Recital 43

<i>Text proposed by the Commission</i>	<i>Suggested wording</i>
<p>A gatekeeper may in certain circumstances have a dual role as a provider of core platform services whereby it provides a core platform service to its business users, while also competing with those same business users in the provision of the same or similar services or products to the same end users. In these circumstances, a gatekeeper may take advantage of its dual role to use data, generated from transactions by its business users on the core platform, for the purpose of its own services that offer similar services to that of its business users. This may be the case, for instance, where a gatekeeper provides an online marketplace or app store to business users, and at the same time offer services as an online retailer or provider of application software against those business users. To prevent gatekeepers from unfairly benefitting from their dual role, it should be ensured that they refrain from using any aggregated or non-aggregated data, which may include anonymised and personal data that is not publicly available to offer similar services to those of their business users. This obligation should apply to the gatekeeper as a</p>	<p>A gatekeeper may in certain circumstances have a dual role as a provider of core platform services whereby it provides a core platform service to its business users, while also competing with those same business users in the provision of the same or similar services or products to the same end users, including as part of an ancillary service. In these circumstances, a gatekeeper may take advantage of its dual role to use data, generated from transactions by its business users on the core platform or from transactions on its ancillary service, for the purpose of its own services that offer similar services or goods to that of its business users or of its suppliers. This may be the case, for instance, where a gatekeeper provides an online marketplace or app store to business users, and at the same time offer services as an online retailer or provider of application software against those business users or against its suppliers. To prevent gatekeepers from unfairly benefitting from their dual role, it should be ensured that they refrain from using any aggregated or non-aggregated data, which may include anonymised and personal data that is not publicly</p>

whole, including but not limited to its business unit that competes with the business users of a core platform service.

available to offer similar services to those of their business users. This obligation should apply to the gatekeeper as a whole, including but not limited to its business unit that competes with the business users of a core platform service **or with the supplier of an ancillary service.**

Article 2 – point 14

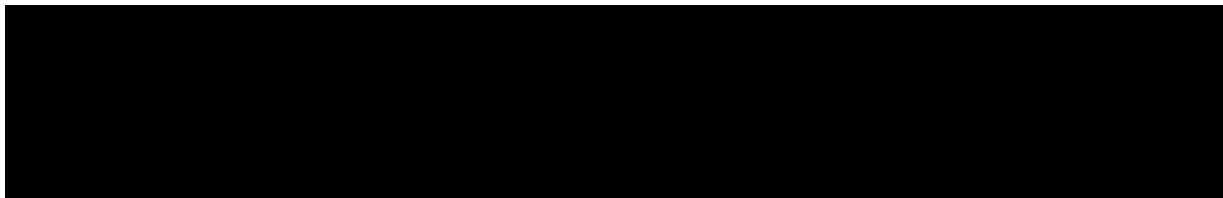
<i>Text proposed by the Commission</i>	<i>Suggested wording</i>
‘Ancillary service’ means services provided in the context of or together with core platform services, including payment services as defined in point 3 of Article 4 and technical services which support the provision of payment services as defined in Article 3(j) of Directive (EU) 2015/2366, fulfilment, identification or advertising services;	‘Ancillary service’ means services provided in the context of or together with core platform services, including retailing activities , payment services as defined in point 3 of Article 4 and technical services which support the provision of payment services as defined in Article 3(j) of Directive (EU) 2015/2366, fulfilment, identification or advertising services;

Article 5 – points b and d

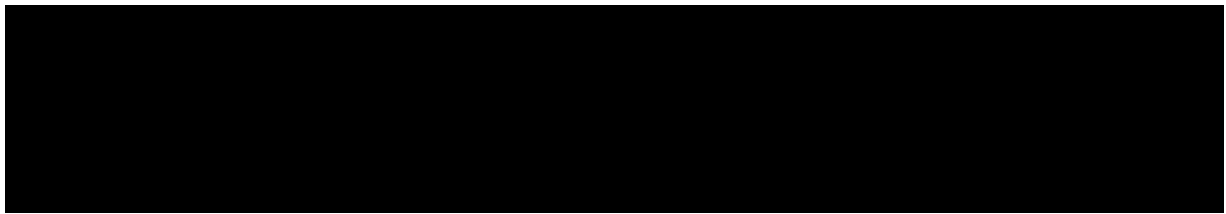
<i>Text proposed by the Commission</i>	<i>Suggested wording</i>
In respect of each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall: (b) allow business users to offer the same products or services to end users through third party online intermediation services at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper; (d) refrain from preventing or restricting business users from raising issues with any relevant public authority relating to any practice of gatekeepers;	In respect of each of its core platform services identified pursuant to Article 3(7) and its ancillary services , a gatekeeper shall: (b) allow business users and supplier to the gatekeeper’s ancillary service to offer the same products or services to end users through third party online intermediation services at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper; (d) refrain from preventing or restricting business users or supplier to the gatekeeper’s ancillary service from raising issues with any relevant public authority relating to any practice of gatekeepers;

Article 6 – paragraph 1 – point a, h, i and j

<i>Text proposed by the Commission</i>	<i>Suggested wording</i>
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	1. In respect of each of its core platform services identified in accordance with Article 3(7) and its ancillary services including distribution , the gatekeeper shall: (a) refrain from using, in competition with business users and ancillary service (notably distribution) suppliers , any data non-publicly available, which is



<p>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;</p> <p>(h) provide effective portability of data generated through the activity of a business user or end user and shall, in particular, provide tools for end users to facilitate the exercise of data portability, in line with Regulation EU 2016/679, including by the provision of continuous and real-time access ;</p> <p>(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>(j) provide to any third party providers of online search engines, upon their request, with access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data in relation to free and paid search generated by end users on online search engines of the gatekeeper, subject to anonymisation for the query, click and view data that constitutes personal data;</p>	<p>generated through activities by those business users or suppliers, including the end users of these business users, of its core platform services or provided by those business users or suppliers of its core platform services or by the end users of these business users;</p> <p>(h) provide effective portability of data generated through the activity of a business user or generated by goods and services provided by a supplier to the gatekeeper's ancillary service notably distribution or an end user and shall, in particular, provide tools for end users to facilitate the exercise of data portability, in line with Regulation (EU)2016/679, including by the provision of continuous and real-time access ;</p> <p>(i) provide business users, or third-parties authorized 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 and ancillary platform services by those business users and the end users engaging with the products and services provided by those business users, to user businesses and supplier to the gatekeeper's ancillary service and notably distribution services, 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 (EU) 2016/679;</p> <p>(j) provide to any third party providers of online search engines, upon their request, with access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data in relation to free and paid search generated by end users on online search engines of the gatekeeper, subject to anonymization for the query, click and view data that constitutes personal data;</p>
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Article 6 – paragraph 2

<i>Text proposed by the Commission</i>	<i>Suggested wording</i>
2. For the purposes of point (a) of paragraph 1 data that is not publicly available shall include any aggregated and non-aggregated data generated by business users that can be inferred from, or collected through, the commercial activities of business users or their customers on the core platform service of the gatekeeper.	2. For the purposes of point (a) paragraph 1, data that is not publicly available shall include any aggregated and non-aggregated data generated by business users <i>or generated by goods and services provided by a supplier to the gatekeeper's ancillary services notably distribution</i> , that can be inferred from, or collected through, the commercial activities of business users or their customers on the core platform, <i>distribution or other ancillary</i> service of the gatekeeper.

2) Guarantee the fair treatment of gatekeeper' suppliers

Recital 14b (new)

<i>Text proposed by the Commission</i>	<i>Suggested wording</i>
–	<i>The impact of gatekeepers on the market makes their business partners, whether business users or suppliers of ancillary services, highly vulnerable to unfair terms and conditions of the gatekeepers they rely on. As such, gatekeeper should ensure that their terms and conditions are transparent and fair. While appropriate and proportionate sanctions in case of in breach of such terms and conditions should be allowed, they should be formally justified and allow for the sanctioned party to contest them. For this purpose, gatekeepers should provide for an internal system for handling swiftly the complaints of their business users and suppliers of ancillary services, including in their national language if the gatekeeper's service actively targets the Member State concerned.</i>

3) Broader interoperability requirements

Recital 38

<i>Text proposed by the Commission</i>	<i>Suggested wording</i>
(38) [...] Conversely, end users should also be free to choose offers of such business users and to enter into contracts with them either through core platform services of the gatekeeper, if applicable, or from a direct distribution channel of the business user or another indirect distribution channel such business user may use. This should apply to the promotion of offers and conclusion of contracts	(38) [...] Conversely, end users should also be free to choose offers of such business users and to enter into contracts with them either through core platform services of the gatekeeper, if applicable, or from a direct distribution channel of the business user or another indirect distribution channel such business user may use. This should apply to the promotion of offers and conclusion of contracts between business



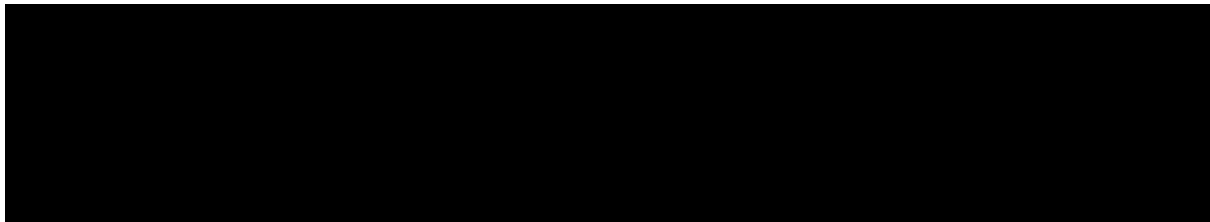
between business users and end users. Moreover, the ability of end users to freely acquire content, subscriptions, features or other items outside the core platform services of the gatekeeper should not be undermined or restricted. In particular, it should be avoided that gatekeepers restrict end users from access to and use of such services via a software application running on their core platform service. For example, subscribers to online content purchased outside a software application download or purchased from a software application store should not be prevented from accessing such online content on a software application on the gatekeeper's core platform service simply because it was purchased outside such software application or software application store.	users and end users. Moreover, the ability of end users to freely acquire digital content and services , subscriptions, features or other items outside the core platform services of the gatekeeper should not be undermined in any way or restricted, especially through the use of technical restrictions . In particular, it should be avoided that gatekeepers restrict end users from access to and use of such legally acquired digital content and services via hardware or software features that are used by that gatekeeper when providing a similar digital content or digital service , simply because it was purchased outside the gatekeeper's core platform service .
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Article 2 (24) (new)

Text proposed by the Commission	Suggested wording
-	<i>'interoperability' means the ability of the digital content or digital service, legally acquired, within a given ecosystem, to function with hardware or software ecosystems different from the one in which the digital content or digital service was originally provided, including the ability to access the digital content or digital service without having to use an application software or other technologies for conversion.</i>

Article 6f a) (new)

Text proposed by the Commission	Suggested wording
-	<i>Allow end users of technologically protected digital content or digital service, legally acquired through third party services, access to and interoperability with the hardware or software features that are used by that gatekeeper when providing a similar technologically protected digital content or digital service; and allow end users of technologically protected digital content or digital service acquired through that gatekeeper access to and interoperability with the hardware or software features that are used by third party when providing a similar technologically protected digital content or digital service. Gatekeepers' suppliers, as well as third-party hardware providers should have the possibility to require gatekeepers to provide the necessary interoperability information to comply with the purpose of this Regulation.</i>



4) Further clarifications to ensure future proofness

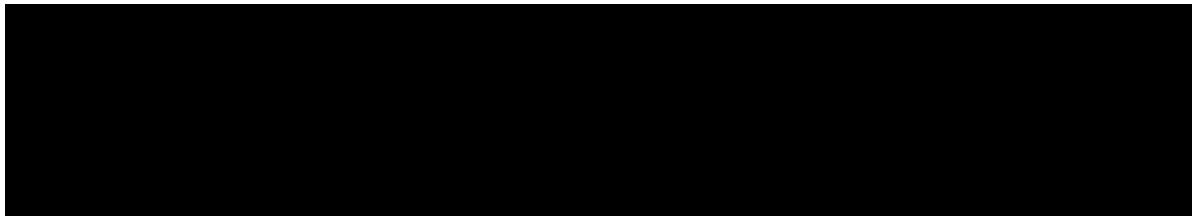
- A. Stricter obligations for gatekeepers on most-favoured-nation (MFN) clauses and contractual obligations with third-party sellers.

Recital 37

<i>Text proposed by the Commission</i>	<i>Suggested wording</i>
Because of their position, gatekeepers might in certain cases restrict the ability of business users of their online intermediation services to offer their goods or services to end users under more favourable conditions, including price, through other online intermediation services. Such restrictions have a significant deterrent effect on the business users of gatekeepers in terms of their use of alternative online intermediation services, limiting inter-platform contestability, which in turn limits choice of alternative online intermediation channels for end users. To ensure that business users of online intermediation services of gatekeepers can freely choose alternative online intermediation services and differentiate the conditions under which they offer their products or services to their end users, it should not be accepted that gatekeepers limit business users from choosing to differentiate commercial conditions, including price. Such a restriction should apply to any measure with equivalent effect, such as for example increased commission rates or de-listing of the offers of business users.	Because of their position, gatekeepers might, in certain cases, <i>through the imposition of contractual terms and conditions</i> , restrict the ability of business users of their online intermediation services to offer their goods or services to end users under more favourable conditions, including price, through other online intermediation services <i>or the direct online sales channels they own</i> . Such restrictions have a significant deterrent effect on the business users of gatekeepers in terms of their use of alternative online intermediation services, limiting inter-platform contestability, which in turn limits choice of alternative online intermediation channels for end users. To ensure that business users of online intermediation services of gatekeepers can freely choose alternative online intermediation services and differentiate the conditions under which they offer their products or services to their end users, it should not be accepted that gatekeepers limit business users from choosing to differentiate commercial conditions, including price. Such a restriction should apply to any measure with equivalent effect, such as for example increased commission rates or de-listing of the offers of business users.

Article 5 – paragraph 1 – point b

<i>Text proposed by the Commission</i>	<i>Suggested wording</i>
allow business users to offer the same products or services to end users through third party online intermediation services at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper;	<i>refrain from applying contractual obligations that prevent business users from offering</i> the same products or services to end users through third party online intermediation services <i>or the direct online sales channels they own</i> at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper;



B. Clear information on the jurisdiction of specific courts

Recital 39

<i>Text proposed by the Commission</i>	<i>Suggested wording</i>
(39) [...] This should be without prejudice to the right of business users and gatekeepers to lay down in their agreements the terms of use including the use of lawful complaints-handling mechanisms, including any use of alternative dispute resolution mechanisms or of the jurisdiction of specific courts in compliance with respective Union and national law	(39) [...] This should be without prejudice to the right of business users and gatekeepers to lay down in their agreements the terms of use, <i>drafted in plain and intelligible language</i> , including the use of lawful complaints-handling mechanisms, including any use of alternative dispute resolution mechanisms <i>and including clear information on</i> the jurisdiction of specific courts in compliance with respective Union and national law

For further information, please contact:

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or [REDACTED] [REDACTED]

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About [REDACTED]: [REDACTED] represents national booksellers associations in the European Union and beyond. [REDACTED] Members in turn have in membership booksellers of all kinds: brick and mortar bookshops, online bookshops, independents, chains.