Additional comments from media industry associations on the Digital Markets Act following the meeting with DG COMP representatives on 6 October 2021.

Inclusion of Digital Voice Assistants (DVAs)

We recommend including digital voice assistants in the scope of the proposal. This can be done either by (i) clarifying expressly (in the recitals) that this service constitutes an **online intermediation service**, or (ii) adding this service as a new **core platform service**.

The inclusion of DVAs would imply limited amendments to the current proposal. If DVAs were added as standalone core platform services, the definition of ranking (article 2(18)) would need to be clearly extended to voice assistant services to make sure that article 6(1)d is applicable to such services.

To the extent that DVAs constitute online intermediation services, their formal inclusion would not bear consequences with respect to the scope of the obligations of article 5 and 6. Besides, the Commission has already gathered evidence of the practices in which those core platform services may engage.[1]

Inclusion of web browsers

We would also recommend adding web browsers to the list of core platform services. In its *Android* Decision, the Commission distinguished between "web browsers" and "operating systems"[2].

Google's Chrome web browser has a market share above 60% in Europe. The service forms a central part of Google's ecosystem. By determining the conditions for consumers' access to websites, web browsers fulfil traditional gatekeeper intermediation functionalities. As acknowledged by the Commission Impact Assessment, "*browsers* […], *provide a gateway for users to access the diverse range of content available on the Internet*".[3]

The current investigation of the CMA into Google Chrome's "Privacy Sandbox"[4] illustrates the need of subjecting web browsers to regulatory oversight, not only to preserve competition in digital advertising markets but also to ensure a meaningful enforcement of certain provisions enshrined in the current DMA proposal (e.g. Article 6(1)(i)).

We take the view that the inclusion of web browsers in the DMA proposal would not necessitate any further adjustment to other obligations in articles 5 & 6. For our members and based on the recent CMA investigation, the main harm pertains to their ability to hold back data. Therefore, web browsers should at least be subject to article 5(a) and article 6(1)(i).

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1 See e.g. on self-preferencing - DMA Impact Assessment support study, pp. 311-312.

2 Case AT.4099, 18/7/2018, section 5.2. vs section 5.7 – *Google Android.*

3 DMA Impact Assessment support study, p.7.

4 See CMA, Press release, 8/01/2021, CMA to investigate Google's 'Privacy Sandbox' browser changes, https://www.gov.uk/government/news/cma-to-investigate-google-s-privacy-sandbox-browser-changes.

Fair and non-discriminatory conditions of access (article 6(1)k)

We believe that an obligation for gatekeepers to afford business users FRAND terms to access all their CPS is warranted and would help enact more meaningful and inclusive change in digital markets to promote fairness and contestability.

In addition, **ensuring FRAND terms solely for app stores also appears to constitute an arbitrary approach** in light of current and past concerns associated with other CPS. Below, we provide concrete concerns and precedents to substantiate our arguments.

Advertising services: most gatekeepers hold uniquely strong if not dominant positions in online advertising markets (Google in search and Facebook in display). In light of ongoing and systemic concerns about the functioning of these markets, following major investigations by many competition authorities globally, and ongoing (in FR, ES and DE) and past probes within the EU (AdSense – abuse of exclusivity clauses), it seems warranted to introduce such terms to prevent harmful practices. This is particularly important since some of these gatekeepers are very active both on the buy and sell side of these markets.

Search engines: the strong position of Google in search has led to concerns about discrimination in different contexts. One current example relates to the implementation of the publishers' right where Google initially imposed royalty-free licences as a condition for access, before attempting to impose Google's News Showcase product, a search-related product, which arbitrarily determines which publishers should benefit from the publishers' right and which should not. A pending case before the Autorité de la Concurrence in France is examining whether Google acted in good faith when it asked publishers to choose either to waive their right and to release their content without compensation or to be penalised in the search results. A similar probe into the news platform Google News Showcase was launched in June 2021 by the Bundeskartellamt in Germany, to examine whether the new product could result in discrimination between individual publishers.

Another example is the Google Shopping case which highlighted unfair practices which FRAND terms could address.

Social networks: Facebook's new hyperlink policy, which mimics Google's initial reaction to the implementation of the publishers' right in France, seeks to coerce publishers into providing their rights for free or to risk effective exclusion from participation on the platform by way of removing the rich content that ought to appear in snippets. It also appears that Facebook is striking selective agreements with some publishers but not others. FRAND terms are therefore needed.

Voice assistants: the Commission's interim report on the IoT sector inquiry clearly identifies the risks associated with voice assistants and reflects the need for FRAND terms.

Browsers: the privacy sandbox investigation of the Commission and the shift of problematic conduct and monopolization strategies by Google to its browser highlights the need to ensure fair and non-discriminatory conditions for business users.

Intermediation services (marketplaces): the e-books investigation into Amazon showed that marketplaces can also prove to be problematic for media companies. Here the abuse of MFN clauses and its discriminatory use was a source of unfairness. This should show the need for FRAND terms to apply to such intermediation services.

Personal data combination (article 5(a))

Article 5 (a) prohibits the combination of personal data from various services of the gatekeeper only if the user does not consent to such combination (opt-in).

By definition, given the lack of alternatives, end users are dependent on a gatekeeper as described in Article 3. Thus, Gatekeepers will find it easier than any other platform to obtain end user consent for data usage as a pre-condition for the use of their platforms.

Consequently, for the DMA to reduce barriers to entry vis-à-vis digital gatekeepers, Article 5 (a) shall not allow gatekeepers to circumvent systematically this obligation by nudging end users into declining consent thereby depriving this provision of its "*effet utile*". This is why we believe that the obligation should not be attached to end users' consent. Besides, the co-legislators should underline that by default, gatekeepers shall separate their data pools into separate data silos.

There must be a high standard for combining such data. This could be based upon an end user's explicit request to combine data in order to obtain a significantly improved service. In such a case, the provider should bear the burden of proof that the combination of data indeed (i) **improves or offers an additional service**, (ii) allows the end user a **fair share of the resulting benefits**, (iii) is **indispensable** for such improvement and (iv) **does not eliminate competition**.

It is also important to maintain the prohibition on gatekeepers to combine, for their own purposes, data sourced from their core platform services with personal data collected from sources and/or services **where they are present as third parties**, like a publisher's or broadcaster's site. This is to ensure that the DMA will put an end to gatekeepers' practices that oblige not only end-users, but also business users to agree to any practices as a precondition for the use of the gatekeepers' core platform services.

Access to data (article 6(1)i and article 11(2))

At present, when distributing content through Gatekeeper platforms, broadcasters and publishers find that Gatekeepers refuse to share with them end-user data to better understand the use of their services. Gatekeepers typically refuse to share any data regarding the number of views or any interactions of end users with relevant content.

As a result, while Gatekeepers can use such data to further improve their services and enter new markets (often in competition with their business users), business users cannot benefit from the same datasets to improve their own services (and to compete with the Gatekeeper). Given that the Gatekeeper is unavoidable in reaching audiences, broadcasters and publishers have no other choice but to accept this one-sided and unfair situation and to make their data available to the Gatekeeper while accepting its conditions as regards the free combination and use of such data.

To make matters worse, to enhance their superior access to data, Gatekeepers increasingly use privacy laws as an excuse to further deprive business users and competing operators of relevant data. Meanwhile, given end users' dependency on Gatekeeper services, the providers of such service find it easy to collect and bundle data in a GDPR-compliant manner. They reject sharing such data with business users based on alleged GDPR-non-compliance. Since business users cannot equally leverage market power to acquire data, the data supremacy of Gatekeepers vis-à-vis their competitors and business customers will only increase.

Gatekeepers are in a **unique position to facilitate the obtaining of consent**. Where a user accesses a third-party service through a Gatekeeper platform, the platform is used to facilitate the obtention of consent for both the use of data by itself and the third-party service. The Gatekeeper should not restrict the obtention of consent to its own uses alone.

Against this background, parallel to the concerns expressed against the current version of Article 5 (a) (see above), we fear that the "consent-requirement" in Article 6 (1)(i) creates the opposite incentive for Gatekeepers to **nudge their end users into denying consent for the sharing of data with business users**. This will lead to imbalance. In order to reduce barriers to entry by creating a level playing field for the collection of data, the commercial interests of the Gatekeeper in obtaining consent for the use of data should be aligned with the equivalent interests of its business users.

More importantly, the wording of the anti-circumvention clause (article 11(2)) is unlikely to prevent the above-mentioned loophole. Indeed, "*where consent for collecting and processing of personal data is required to ensure compliance with this Regulation*" gatekeepers have the option to comply with GDPR by other ways including providing anonymised data to business users (in lieu of requesting end user consent).To address the above and align Gatekeepers and business users interests we suggest introducing the following principle:

> *wherever the **Gatekeeper fails to obtain consent from end users to share personal data** that has been generated in the context of the use of the core platform service with the intermediated business user pursuant to Article 6 (1) (i)), the **Gatekeeper should be prohibited from using such data for any purpose other than the original intermediation**.*

Scope of the self-preferencing obligation and enforcement

Article 6 (1) (d) exclusively addresses favourable "ranking". Article 2 (18) of the Commission's proposal for a DMA defines "ranking" as the "*relative prominence given to goods or services offered through online intermediation services or online networking services, or the relevance given to search results by online search engines*". Yet, this narrow approach fails to sufficiently address self-preferencing:

(i) **by any other core platform service** such as video-sharing platforms, voice assistants, operating systems, cloud computing services, advertising systems or ancillary services, even though such practices will be equally harmful;

(ii) **practices that go beyond ranking**, such as a preferential crawling, indexing or other access of content to the intermediation service (e.g. through settings);

(iii) by **search engines** that provide their services directly within general search results pages or exchange unbiased intermediation (via organic results) for biased intermediation (via paid results or the display of own content).

The DMA proposal likewise should prohibit giving preferential treatment to selected third parties. We believe that gatekeeper platforms are able to circumvent the prohibition of self-preferencing by favouring selected services and partners, thus creating the same anticompetitive effects for competitors and undermining the free choice of the user. We therefore recommend that the ban on self-preferencing is extended to selected third parties. As such, "belonging to the same provider" should be deleted.

In addition to the required adjustments of the ban on self-preferencing, the DMA should also pay more attention to the instruments available for the enforcement authorities to detect, evaluate and

monitor such conduct. The complex algorithmic and data-driven ranking of the various types of results in search engines, app stores or marketplaces can only be effectively monitored by a highly specialised and sufficiently equipped enforcement unit, ideally on a day-to-day basis.

Such units must be able to audit and test any mechanisms underlying an intermediation process so that discrimination becomes detectable and alternative solutions can be evaluated. Against this background, we are highly skeptical of presuming that "[t]*he burden on the Commission for implementing this [DMA] initiative is low (mainly redeployment of existing job positions)"*.[5] Despite a high-profile investigation of now over eleven years into Google's favouring of various own services in general search results, we still have not seen any end to this process. We do not see how the current institutional set-up for the DMA would allow a significantly more effective approach to this.

Bundling and tying

In addition to any need to "subscribe" or "register" with any core platform service, **the need to "use" such a service as a pre-condition to access, sign-up, register or use another service must equally be prohibited in article 5(f)**. This would help cover situations where media services are forced to provide their content through the gatekeeper's subscription service in order to be able to use the gatekeeper's platform free service (e.g. YouTube premium vs YouTube).

Additionally, under the current wording, a gatekeeper could make the use of its identified core platform service dependent on the subscription to its own video on demand platform - but not to its own video sharing platform. There is no plausible reason for such differentiation. Put differently: the reasons for limiting the scope of core platform services to multi-sided intermediation services do not apply when it comes to identifying the markets/services that should be protected from unfair leveraging or trading practices. To cover such practices, the scope of unfairly tied services should be extended to any core platform service (not just those with a gatekeeper status). Since there is no justification for making the use of a gatekeeper service dependent on the use of any other service the provision should be extended to the tying to any digital service.

Furthermore, such prohibition should also cover cases of a mixed bundling, often referred to as multi-product rebates. While in the case of a 'pure' bundling the products are only sold jointly in fixed proportions, in the case of mixed bundling, the products are also made available separately, but the sum of the prices when sold separately is higher than the bundled price. The Commission's "*Guidance on the [..] enforcement priorities in applying Article [102] TFEU to abusive exclusionary conduct*" treats pure and mixed bundling equally. Accordingly, a multi-product rebate is seen as abuse of dominance, "*if it is so large that equally efficient competitors offering only some of the components cannot compete against the discounted bundle*". The DMA should follow the same holistic approach. This would prevent circumventions, such as the current practice of Amazon to grant significant discounts if an end user purchases goods on the Amazon Marketplace and agrees to also subscribe to Amazon's video-on-demand service Amazon Prime.

Audience measurement (article 6(1)g)

Measuring audiences across media is increasingly important to grasp the extent of multi-platform reach of both content and advertising for the entire media and advertising industry. Key elements, namely (1) independently verified information by trusted governance structures and (2) industry-wide

[5] Commission proposal for a Digital Markets Act, explanatory memorandum, p.11.

agreed measurement standards, have long been essential prerequisites for the measurement of 'traditional' media, such as TV, radio, print, etc. However, global online platforms have generally never adhered to the same measurement practices of data transparency and independent data verification.

A significant recent development has been a high-profile push by the advertising industry to create a cross-media measurement system to allow advertisers to track and optimise cross-media campaigns. Part of this process has been to gather the industry around a transparent and globally applicable measurement solution, with the support of Google, Facebook and other global digital platforms. This is a positive step towards greater platform data transparency and sharing, but there are concerns that these platforms are playing too dominant a role in the design and development of the measurement solution being built – especially as the blueprint was designed by Google and Facebook. Their ad-based business models prompt questions about whether the measurement standards they have conceived are ultimately designed primarily to serve their interests and further entrench their dominant market positions.

We therefore welcome the provision outlined in **article 6 (1)(g)** that imposes a new European obligation for audience measurement to ensure a minimum European-wide access to performance measuring tools and information so that relevant actors can carry out their own independent verification of the ad inventory. To strengthen this provision, we strongly recommend that it is amended to explicitly empower publishers and advertisers to receive **granular, reliable and transparent data on a continuous and real time basis that has been independently verified by trusted, approved and neutral third parties.**

Contact details

[redacted]

European Broadcasting Union (EBU)

[redacted]@ebu.ch

+[redacted]

www.ebu.ch

[redacted]

EMMA/ENPA

[redacted]@enpa.eu

[redacted]

www.enpa.eu

www.magazinemedia.eu

[redacted]

European Publishers Council (EPC)

[redacted]@epceurope.eu

+[redacted] www.epceurope.eu

[redacted]

Association of European Radios (AER)

[redacted]@aereurope.org

+[redacted] | www.aereurope.org

[redacted]

EGTA

[redacted]@egta.com

+[redacted]

http://www.egta.com/

[redacted]

Association of Commercial Television in Europe (ACT)

[redacted]@acte.be

+[redacted]

www.acte.be

[redacted]

News Media Europe

[redacted]@newsmediaeurope.eu

+[redacted]

www.newsmediaeurope.eu