EUROPEAN MEDIA SUGGESTED AMENDMENTS ON THE DMA PROPOSAL

REFERENCE DOCUMENT

- **EUROPEAN MEDIA ENCOURAGES SWIFT ADOPTION OF DIGITAL MARKETS ACT WITH TARGETED IMPROVEMENTS & A CLEAR FOCUS ON GATEKEEPERS, 25 May 2021.**

30 June 2021, Brussels

ON SCOPE & DEFINITIONS

Recital 13 a (new)	***Digital Voice Assistants are becoming access points to services. However, there is a difference between, on the one hand, voice assistant technology providing an alternative interface for certain other services (e.g., a search engine which allows users to carry out voice searches instead of typing a search term, or remote controls that allow to be used by voice control rather than using the buttons), and on the other hand, Digital Voice Assistants, which provide software that is not directly connected to / ancillary to another service and which allows conversational interactions between users and a variety of services and products. Such voice assistants have a more independent role, allowing users to use them for a whole range of tasks and being able to have an influence on how products and services are provided or presented to users, intermediating between them and (voice-enabled) app developers. Therefore, there is a difference between voice control / voice commands in the context of a specific product or service (i.e., voice control as an interface), and a Digital Voice Assistant acting as an intermediary between end users and business users as part of the wider core services of gatekeepers.***
Article 2 Definitions	Proposed Regulation, suggested deletion (~~strike through~~) and ***new insertions***
For the purposes of this Regulation, the following definitions apply: (1)….. (2) 'Core platform service' means any of the following: (10) 'Operating system' means a system software which controls the basic functions of the hardware or software and enables software applications to run on it;	For the purpose of this Regulation, the following definitions apply: (1)… (2) 'Core platform service' means any of the following: (a) online intermediation services; ***(h) web browsers;*** ***(x) digital voice assistants;*** (10) 'Operating system' means a system software which controls the basic functions of ***any*** ~~***the***~~ hardware ***that is capable of being connected to the Internet*** or software

	that enables software applications to run on it, ***including for static and mobile devices, televisions or wearables***. ***(18xnew) 'Search result' means any information presented in any format, including texts, graphics, videos, voice or other output, returned in response and related to any written, oral or equivalent search query, irrespective of whether the information constitutes an organic result, a paid result, a direct answer or any product, service or information offered in connection with, or displayed along with, or partly or entirely embedded in the results interface.*** ***(x) 'web browser' means a software used by users of client PCs, smart mobile devices or other connected devices to access and interact with web content hosted on servers that are connected to networks such as the Internet, including standalone web browsers as well as web browsers integrated or embedded in other services*** ***(xx) "Digital voice assistant means a software application that provides capabilities for oral dialogue – beyond simple voice control – with a user in natural language and which intermediates between end users and business users offering voice-based apps."***

Justification

It is essential that the scope remains tightly focused, as proposed by the European Commission, to the gatekeeper platforms whose size, reach and exercise of monopoly power justify the prohibitions and obligations enshrined in the DMA proposal. In our view, the Commission's proposal strikes the right balance in restricting the scope to the entities it seeks to capture. We are concerned that, if the DMA targets a group of platform services that is too broad - or that could be quickly broadened over time - the material obligations may be diluted and the enforcement may be slowed down, without additional benefits. There is an important correlation between the threshold for regulating a service and the intensity of such regulation. An effective control of the immense powers of genuine Gatekeepers to structure today's digital economy requires intensive oversight, as such we would suggest that the co-legislators abstain from attempts to widen the scope of the proposal. However, we believe that the list of core platforms services should include web browsers, as defined by the European Commission in its Android decision1, and digital voice assistants, as their role and importance will increase even more in the future. It should also be clarified that the term "operating system" includes operating systems for any "smart" (internet connected) TVs and other connected devices. This will ensure that rules in Articles 5 and 6 apply to all activities where gatekeepers control access to online audiences - including content intermediation.

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ON TIMING & DESIGNATION

Article 3 Designation of gatekeepers	Proposed Regulation, suggested deletion (~~strike through~~) and ***new insertions***
2. A provider of core platform services shall be presumed to satisfy: (a)[..]; (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; for the purpose of the first subparagraph, monthly active end users shall refer to the average number of monthly active end users throughout the largest part of the last financial year; (c)[..].	2. A provider of core platform services shall be presumed to satisfy: (a) [..] (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; for the purpose of the first subparagraph, monthly active end users shall refer to the average number of monthly active end users throughout ***at least six, not necessarily consecutive, months*** ~~the largest part~~ of the financial year; (c) [..]
3. Where a provider of core platform services meets all the thresholds in paragraph 2, it shall notify the Commission thereof within three months after those thresholds are satisfied and provide it with the relevant information identified in paragraph 2.. That notification shall include the relevant information identified in paragraph 2 for each of the core platform services of the provider that meets the thresholds in paragraph 2 point (b). The notification shall be updated whenever other core platform services individually meet the thresholds in paragraph 2 point (b). A failure by a relevant provider of core platform services to notify the required information pursuant to this paragraph shall not prevent the Commission from designating these providers as gatekeepers pursuant to paragraph 4 at any time.	3. Where a provider of core platform services meets all the thresholds in paragraph 2, it shall notify the Commission ***without undue delay and at the latest 30 days*** ~~thereof within three months~~ after those thresholds are satisfied and provide it with the relevant information identified in paragraph 2. That notification shall include the relevant information identified in paragraph 2 for each of the core platform services of the provider that meets the thresholds in paragraph 2 point (b). The notification shall be updated whenever other core platform services individually meet the thresholds in paragraph 2 point (b). A failure by a relevant provider of core platform services to notify the required information pursuant to this paragraph shall not prevent the Commission from designating these providers as gatekeepers pursuant to paragraph 4 at any time.
7. For each gatekeeper identified pursuant to paragraph 4 or paragraph 6, the Commission shall identify the relevant undertaking to which it	7. For each gatekeeper identified pursuant to paragraph 4 or paragraph 6, the Commission shall ***within 3 months*** identify the relevant

belongs and list the relevant core platform services that are provided within that same undertaking and which individually serve as an important gateway for business users to reach end users as referred to in paragraph 1(b). 8. The gatekeeper shall comply with the obligations laid down in Articles 5 and 6 within six months after a core platform service has been included in the list pursuant to paragraph 7 of this Article.	undertaking to which it belongs and list the relevant core platform services that are provided within that same undertaking and which individually serve as an important gateway for business users to reach end users as referred to in paragraph 1(b). 8. The gatekeeper shall comply with the obligations laid down in Articles 5 and 6 ***without undue delay but no later than three*** ~~**six**~~ months after a core platform service has been included in the list pursuant to paragraph 7 of this Article.

Justification

Recent profit announcements by the biggest gatekeeper platforms demonstrate how rapidly they are using their monopoly positions to extract revenues from markets in which they operate. The scale of these profits is abnormal, prompting an urgent need for the harmful market practices identified to be banned before any remaining competition to these platforms is eliminated. It is crucial that the obligations foreseen in Articles 5 and 6 apply as soon as possible after adoption of the Regulation. We caution against any attempt by gatekeepers or other entities, to delay the application of the obligations. As such, we call for the obligations to be directly applicable to Gatekeepers after designation and to ensure that the regulatory dialogue does not have a suspensive effect on the obligations foreseen in Articles 5 and 6.

OPT-IN FOR PERSONAL DATA COMBINATION

Article 5 (a) – opt-in for personal data combination	Proposed Regulation, suggested deletion (~~strike through~~) and ***new insertions***
(a) refrain 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. ;	(a) refrain 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. ;~~

Justification

The DMA should include a prohibition on Gatekeepers from combining and using data for their own purposes. Currently Article 5(a) prohibits the bundling of data from various sources only if the user does

not consent to such combination in the sense of an opt-in. When dealing with Gatekeepers, such a solution could instead render the provision empty of any substance. By nature, the gatekeepers' position gives them critical leverage to offer incentives or force users into consenting to certain data processing operations. Therefore, the ban on combining personal data sourced from a gatekeeper's core service with personal data from other services should be strengthened and apply irrespective of the end user's consent to effectively address gatekeeper's data power.

ACCESS TO DATA GENERATED BY INTERMEDIATING BETWEEN END USERS AND BUSSINESS USERS

Article 6 (i) – prohibition of making access to CPS conditional on use of another service	Proposed Regulation, suggested deletion (~~strike through~~) and ***new insertions***
(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; **;**	(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 services***,*** and wherein the end user opts in to such sharing with a consent ***provided to the gatekeeper or directly to the business user as prescribed in Article 11 (2) or where the business user may rely on Article 6(1)c or Article 6(1)e*** in the sense of the Regulation (EU) 2016/679
Article 11(2)	
2. Where consent for collecting and processing of personal data is required to ensure compliance with this Regulation, a gatekeeper shall take the necessary steps to either enable business users to directly obtain the required consent to their processing, where required under Regulation (EU) 2016/679 and Directive 2002/58/EC, or to comply with Union data protection and privacy rules and	2. Where consent for collecting~~***, or***~~ processing ***or sharing*** of personal data is required to ensure compliance with this Regulation, a Gatekeeper shall take the necessary steps to either enable business users to directly obtain the required consent to their processing ***and retrieval***, where required under Regulation (EU) 2016/679 and Directive 2002/58/EC, or, ***if such consent is not***

principles in other ways including by providing business users with duly anonymised data where appropriate.	***obtained***, to comply with Union data protection and privacy rules and principles in other ways including by providing business users with duly anonymised data ~~where appropriate~~. ***In case consent is directly expressed by the end-user at the level of the services offered by the business user through the relevant core platform service, it shall prevail over any consent provided at the gatekeeper level.***
Article 11(2)(a)	
The gatekeeper shall not make the obtaining of this consent by the business user more burdensome than for its own services.	The gatekeeper shall not make the obtaining of this consent by the business user more burdensome than for its own services. ***In particular, the obtaining of this consent should be as user-friendly as possible and under the same conditions, such as the duration and renewal of consent, as those applied to the consent provided by the end user to the gatekeeper for the use of such data for its own services. Neither shall the gatekeeper make it less burdensome or create more barriers to obtain any such consent) for the business user than for its own services. Where an end user has not granted or has withdrawn consent for the collection and processing of personal data required to ensure compliance with this Regulation, a gatekeeper may not itself process such data for any other purpose than the provision of the core platform service for which the data was provided by the end user.***

Justification

Article 6(1)i has the potential to resolve many competitive issues that currently exist in the digital market. Access to data generated by media content is an essential requirement for all industries which have a digital presence. However, currently, the obligation to share personal data is connected to the gatekeeper's capacity to obtain consent for data sharing. Given the experiences that our industries have with consent management, relying on the gatekeepers to manage consent would empty the obligation of any meaning. Gatekeepers should be incentivized to facilitate the obtention of end-users' consent for sharing data with business users, for instance by limiting Gatekeepers' capacity to re-use the data collected if business users cannot equally access it.

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AUDIENCE MEASUREMENT

Article 6 (g) – *transparency in advertising intermediation (performance)*	Proposed Regulation, suggested deletion (~~strike through~~) and ***new insertions***
(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;	g) provide advertisers and publishers, upon their request and free of charge access to the performance measuring tools of the Gatekeeper and ***via a suitable interface high-quality, continuous and real-time access and use of all the information and data*** necessary for advertisers, publishers, ***mandated independent third parties***, to ***effectively*** carry out their own independent ***measurement of the performance of their services and the intermediation services provided by the Gatekeeper, including the verification of the provision of the relevant advertising services, the*** ad inventory ***and the attribution***.

Justification

We welcome the provision on audience measurement in Article 6(1)g, however, in order for it to ensure meaningful access to information for the media sector we would insist on the need for granular, reliable and transparent information; independently verified by trusted, approved and neutral third parties.

UNFAIR BUNDLING AND TYING PRACTICES

Article 5 (f) – prohibition of making access to CPS conditional on use of another service	Proposed Regulation, suggested deletion (~~strike through~~) and ***new insertions***
(f) refrain from requiring business users or end users to subscribe to or register with any other core platform services identified pursuant to Article 3 or which meets the thresholds in Article 3(2)(b) as a condition to access, sign up or register to any of their core platform services identified pursuant to that Article;	(f) refrain from requiring from business users or end users to subscribe to**,** ~~or~~ register ***or use*** any other ***[digital] service*** ~~core platform services identified pursuant to Article 3 or which meets the thresholds in Article 3(2)(b)~~ as a condition to access, sign up, ~~or~~ register to, ***use*** any of their core platform services identified pursuant to ***that*** Article ***3 or meeting the thresholds of Article 3 (2) (b) or as a condition for obtaining a better price for the use of such core platform services or any product or services offered through such core platform.***

Article 5 (x) new	***refrain from making the indexing, ranking or display of a business user in a core platform service dependent on this business user's subscription to, registration to or use of any core platform service identified pursuant to Article 3 or meeting the thresholds in Article 3 (2) (b)***
New Article 5(fa):	***A platform must refrain from requiring the acceptance of supplementary conditions or services that, by their nature or according to commercial usage, have no connection with and are not necessary for the provision of the platform or services to its business users.***

Justification

The proposed DMA prohibits bundling practices that require a user to subscribe to or register with one service in order to use another service (Article 5(f)). Such approach falls short of addressing equally unfair bundling practices which do not focus on subscription/registration such as: i) forcing business users to offer content on a subscription-based core platform service as a condition to make that content equally available on the free version of that core service, or ii) proposing aggressive multi-product rebates (or mixed bundling which hamper competition even from the most efficient companies in their field. To effectively address leveraging before markets have 'tipped', this provision should cover the tying of one gatekeeper service with another core service for which the undertaking does not yet enjoy a gatekeeper position.

SELF-PREFERENCING AND THIRD PARTY FAVORITISM

Article 6 (d) – Article 6 (1) (d) - prohibition of self-favouring in ranking	Proposed Regulation, suggested deletion (~~strike through~~) and ***new insertions***
refrain from treating more favourably in ranking services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third party and apply fair and non-discriminatory conditions to such ranking;	refrain from ***embedding or*** treating more favourably in ***crawling, indexing,*** ranking *and settings as well as in access to and conditions for the use of services, functionalities or technical interfaces* services and products offered by the gatekeeper itself or by any ~~third~~ party, ***with which it has entered into an agreement,*** ~~belonging to the same undertaking~~ compared to similar services or products of ***third***–part~~y~~***ies*** and apply

	fair, ***reasonable*** and non-discriminatory conditions to such ***crawling, indexing,*** ranking ***and settings***
Article 2(18)	'Ranking' means the relative prominence given to goods or services ~~**offered through online intermediation services, or online social networking services,**~~ or the relevance given to search results by online search engines, as presented, organised or communicated by the providers of ~~**online intermediation services or of online social networking services or by providers of online search engines**~~ ***core platform services***, respectively, whatever the technological means used for such presentation, organisation or communication.

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Justification

A ban on self-preferencing in ranking as foreseen in Article 6.1.d is a necessary precondition for the well-functioning of the digital single market. The DMA proposal however only prohibits giving preferential treatment to own services in ranking but does not prohibit giving preferential treatment to selected third parties. We indeed 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. Additionally, this provision must apply beyond search engines to all core platform services operated by designated gatekeepers; it should also be extended to cover other self-preferencing practices that go beyond ranking. This includes ensuring that users are accurately and impartially directed to the content they have requested via the gatekeeper platform's electronic programme guide or voice activated ranking services, instead of being directed to the platforms' own competing services. Moreover, the algorithms which underpin the discoverability of content must be transparent.

FAIR AND NON-DISCRIMINATORY CONDITIONS OF ACCESS

Article 6 (1) (k)	
(k) apply fair and non-discriminatory general conditions of access for business users to its	(k) apply fair***, reasonable*** and non-discriminatory general conditions of access, ***treatment*** and use

software application store designated pursuant to Article 3 of this Regulation.	for business users to its ***core platform service*** ~~software application store~~ designated pursuant to Article 3 of this Regulation.
6 (1) (ka)	***refrain from applying unfair and discriminatory conditions to the business users of its core platform service, including its digital voice assistant. Such unfair and discriminatory conditions may include, but are not limited to, mandating the use of its own ad tech solutions, inserting sponsorship or advertising around third-party content provided through its core platform service without the express consent of the provider of such consent;***
Recital 57	
In particular gatekeepers which provide access to software application stores serve as an important gateway for business users that seek to reach end users. In view of the imbalance in bargaining power between those gatekeepers and business users of their software application stores, those gatekeepers should not be allowed to impose general conditions, including pricing conditions, that would be unfair or lead to unjustified differentiation. Pricing or other general access conditions should be considered unfair if they lead to an imbalance of rights and obligations imposed on business users or confer an advantage on the gatekeeper which is disproportionate to the service provided by the gatekeeper to business users or lead to a disadvantage for business users in providing the same or similar services as the gatekeeper. The following benchmarks can serve as a yardstick to determine the fairness of general access conditions: prices charged or conditions imposed for the same or similar services by other providers of software application stores; prices charged or conditions imposed by the provider of the software application store for different related or similar services or to different types of end users; prices charged or conditions imposed by the provider of the software application store for the same service in different geographic regions; prices charged or conditions imposed by the provider of the software application store for the	***(57)*** In particular gatekeepers which provide access to ~~software application stores~~ ***core platforms services which*** serve as an important gateway for business users that seek to reach end users. In view of the imbalance in bargaining power between those gatekeepers and business users of their software application stores, those gatekeepers should not be allowed to impose general conditions, including pricing conditions, ***data usage conditions or conditions related to the licensing of rights held by the business user,*** that would be unfair or lead to unjustified differentiation***. Imposing conditions encompasses both explicit and implicit demands, by means of contract or fact, including, for example, an online search engine making the raking results dependent on the transfer of certain rights or data.*** Pricing or other general access conditions should be considered unfair if they lead to an imbalance of rights and obligations imposed on business users or confer an advantage on the gatekeeper which is disproportionate to the service provided by the gatekeeper to business users or lead to a disadvantage for business users in providing the same or similar services as the gatekeeper**.** The following benchmarks can serve as a yardstick to determine the fairness of general access conditions: prices charged or conditions imposed for the same or similar services by other

same service the gatekeeper offers to itself. This obligation should not establish an access right and it should be without prejudice to the ability of providers of software application stores to take the required responsibility in the fight against illegal and unwanted content as set out in Regulation [Digital Services Act].	providers of software application stores; prices charged or conditions imposed by the provider of the software application store for different related or similar services or to different types of end users; prices charged or conditions imposed by the provider of the software application store for the same service in different geographic regions; prices charged or conditions imposed by the provider of the software application store for the same service the gatekeeper offers to itself. ***It should also be considered unfair if access to the service or the quality and other conditions of the service are made dependent on the transfer of data or the granting of rights by the business user which are unrelated to or not necessary for providing the core platform service.*** This obligation should not establish an access right and it should be without prejudice to the ability of providers of software application stores to take the required responsibility in the fight against illegal and unwanted content as set out in Regulation [Digital Services Act].

Justification

The DMA therefore must prohibit gatekeepers from imposing unfair conditions, such as the granting of a royalty-free license, demanding data that is not necessary to provide the intermediation service, or tying the ability of users to exercise statutory remuneration rights to their participation in platform services. The accompanying Recital 57 which already provides – although only for App Stores - that pricing or other general access conditions are unfair, in particular if they provide an advantage for the gatekeeper that is disproportionate to the intermediary service, must also cover the scenario whereby a Gatekeeper would make the access to the gatekeeper platform dependent on a free license for rights or for the transfer of data. This is vital to ensure Europe can maintain its core objectives of cultural diversity, media pluralism and competitiveness which benefits European citizens. Therefore, article 6.1k should be expanded to include an obligation refraining Gatekeepers from inserting sponsorship and advertising around third party content, without the express consent of the content provider.

Signatories: