



European media sector calls for further improvements of the DMA for a forward-looking media sector

Brussels, 9 March 2022

The media sector has been at the forefront of supporting the DMA regulation since the beginning of the negotiating process. We have welcomed the commitment of the EU political leadership for a swift adoption and enforcement of this regulation, a purpose that we wholeheartedly support.

In light of the ongoing trilogue negotiations, the media sector would like to draw your attention to several elements which are crucial for the undersigned associations.

Scope

It is essential that the scope of the regulation is restricted to the very gatekeeper platforms whose size, reach and overall lack of regulatory scrutiny justify the prohibitions enshrined in the DMA proposal. In our view, the European Parliament's proposal strikes the fine balance on restricting the scope to the entities it seeks to capture. We believe that an extension of the scope for example by lowering the quantitative thresholds would consequently lead to an unwarranted dilution of the obligations foreseen in Articles 5 and 6.

We also take note of the fact that both co-legislators have been looking in the same direction when it comes to enlarging the scope of the core platform services, by including **virtual assistants**. While the Council has only made a reference to this type of platform in Recital 13 of its General Approach, the European Parliament has chosen to include them as separate core platform service. We support the approach taken by the latter, which is also supported by the findings of the European Commission's own [sector inquiry on the Internet of Things](#), which provides an accurate account of the risks that arise from the growing dominance of voice assistant platforms. We equally welcome the European Parliament's proposal to include **web browsers** and **connected TVs** in the scope of the core platform services, in order to make the DMA future proof.

Obligations

Self-preferencing. We support the European Parliament's approach of extending the scope of Article 2(18) as the intermediation power that certain gatekeepers possess could allow them to determine the "winners and losers" on any interface they control and in any market that they intermediate. Accordingly, a strict ban on the unjustified preferencing of own services or those of partners is critical to guarantee a well-functioning internal market. Self-preferencing by other core platform services such as operating

systems, cloud computing services, advertising systems (as well as by virtual assistants, web browsers and connected TVs) should be equally addressed.

We welcome that the European Parliament's position also extends article 6(1)(d) to "other settings", hence encompassing a broader range of unfair practices such as the use of default settings to keep users in a closed environment¹, or preferential crawling/indexing. Likewise, the European Parliament introduces in recitals 48 and 49 important clarifications that prevent possibilities to circumvent the prohibition such as the embedded display of a separate intermediation service. The Parliament also introduces in art. 2(18a) a definition of "search results", which further clarifies that any information in any format, paid for or organic, that appears as a result of a search query, is considered a search result, thus ensuring that the various gatekeepers' services appearing along or within search results cannot escape the obligation.

Suggested wording: European Parliament's position

Article 2(18)

*(18) 'Ranking' means the relative prominence given to goods or services offered through ~~online intermediation services or online social networking core platform~~ 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 core platform service~~ providers of online search engines, respectively, whatever, **irrespectively of** the technological means used for such presentation, organisation or communication;*

Article 2(19a)

(18a)(new) 'Search results' means any information in any format, including texts, graphics, voice or other output, returned in response and related to a written or oral search query, irrespective of whether the information is 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 organic results;

Article 6(1)(d)

*~~Refrain from treating~~ **Not treat** more favourably in ranking **or other settings**, 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 **transparent**, fair and non-discriminatory conditions to such ranking **third party services or products.***

Access to data. It is important that gatekeepers provide access to aggregated "and" non-aggregated data (instead of "or"), as highlighted in the European Parliament's position on article 6(1)(i).

On access to personal data specifically, article 11(2) as proposed by the European Commission and the co-legislators would contradict article 6(1)(i), therefore creating a loophole that would circumvent the DMA. This provision would allow gatekeeper platforms to fulfill the obligation to share personal data by simply

¹ As an example, when using Apple's virtual assistant Siri, end users can only access podcasts through Apple's own podcast service ("Apple podcast"), instead of being offered the possibility to use the content provider's own service.

sharing anonymized data (which is non-personal by nature). This is insufficient and would not work in practice.

In our view:

- article 11(2) should be amended to avoid such a loophole - gatekeepers should de minimis provide business users with the capacity to ask consent directly to end users;
- the obligation for gatekeepers not to make the obtaining of consent more burdensome for business users than for their own services should be maintained.

Suggested wording: new amendment

Article 11(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 principles in other ways including by providing business users with duly anonymised data where appropriate.~~*

The gatekeeper shall not make the obtaining of this consent by the business user more burdensome than for its own services.

Audience measurement. We welcome the European Parliament's approach to the audience measurement provision in Article 6(1)(g). For such an obligation to produce the warranted results, the information that the gatekeepers share should be granular, reliable and real-time, as well as independently verified by trusted, approved and neutral third parties. If these conditions are not upheld, the obligations would remain unenforceable.

We would therefore encourage the co-legislators to maintain the wording adopted by the European Parliament:

Suggested wording: European Parliament's position

Article 6(1)(g)

*Provide advertisers and publishers, **and 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 the information necessary for advertisers and publishers to carry out their own independent verification of the ad inventory **including aggregated and non-aggregated data and performance data in a manner that would allow advertisers and publishers to run their own verification and measurement tools to assess performance of the core services provided for by the gatekeepers***

Fair and non-discriminatory general conditions of access. We recommend that, to ensure the effectiveness of the DMA, the obligation must be applied beyond App stores to all core platform services, in particular to search engines and social networks. 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 European Parliament also adds that in

addition (“and”) to fair and non-discriminatory conditions of access, conditions for business users shall not be less favourable than the conditions applied to its own services. It is thus crucial that the “and” is not changed into an “or”, as it would empty the obligation of its substance, allowing gatekeepers to apply unfair conditions as long as they are equivalent to those applied to own services. The Council also introduced a revised Recital 57 which gives important clarifications with regard to unfair access conditions relating to data and licences held by the business users. This wording should be considered, along with the extension of Recital 57 to all core platform services as proposed by the European Parliament.

Suggested wording: European Parliament’s position

Article 6(1)(k)

Apply **transparent, fair, reasonable** ~~fair~~ and non-discriminatory general conditions of access **and conditions that are not less favourable than the conditions applied to its own service** for business users to its ~~software application store~~ **core platform services** designated pursuant to Article 3 of this Regulation.

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