



EPC | European Publishers Council

Summary of the Position Paper of the European Publishers Council on the Commission's Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)

*The European Publishers Council ("EPC"), a high-level group of Chairmen and CEOs of Europe's leading media and publishing groups representing companies with newspapers, magazines, online publishing, journals, databases, books, eLearning, online marketplaces and radio and TV broadcasting, warmly **welcomes the Commission's Proposal for a Digital Markets Act** which represents a significant step towards preventing digital gatekeeping platforms from engaging in practices that are detrimental to the millions of business users relying on them to provide their services to end users.*

*We consider that the DMA proposal is clearly targeted and sound, acknowledging the need to control the conduct of digital gatekeepers in order for digital markets to remain fair and contestable which are **necessary pre-conditions for vibrant, independent press publishers and media companies to thrive in their digital transformation, and to ensure that the democratic system remains healthy, diverse, uncorrupted and functional.***

*We are recommending **certain targeted amendments** designed to underpin the future sustainability of journalism, a wide availability of news and magazine content and to improve the relationship between press publishers and the digital gatekeepers. Our views and recommendations below are extracted from our [Full Position Paper](#) which includes an [annex of our proposed amendments](#).*

I. The EPC members' reliance on gatekeepers' platforms

The media and publishing groups represented by EPC use a variety of gatekeeper platforms and services in order to provide their publications and digital services to European citizens, meaning that they are **dependent on various "core platform services", including those related to advertising and subscription revenues which contribute to the funding of a free and independent press in Europe.**

Below we demonstrate how media and publishing groups are dependent on Google, Apple, Facebook and Amazon, to provide their content to end users. As these platforms are important gateways, **holding access to media and publishers' user base**, they are in the position to impose rules



and policies and to engage in practices that harm media and publishing groups and competition in the markets in which they are active as follows:

- When it comes to **ad intermediation services** (i.e., ad tech tools), publishers use tools provided by Google and other ad intermediaries to sell their ad inventory to advertisers. For EPC's members, digital advertising is a significant (and in some cases the only) source of revenue.
- EPC's members are, moreover, reliant on the **Apple App Store and the Google Play Store**. There is no alternative method of app distribution.
- Because of App Store's rules, publishers that offer in-app purchases **have to use Apple's own in-app payment solution** ("In-App Purchase") to accept in-app payments on iOS.
- In the **Android environment**, there are a few alternative app stores, but they have very small market shares. If publishers want to reach Android users, therefore, they have to be present on Play Store, and be bound by any rules and policies imposed on them by Google.
- Some members also use **online marketplaces**, such as the Amazon marketplace, to distribute audiobooks and physical books to end users. Amazon is a gatekeeper for e-commerce. Without access to the Amazon marketplace, it is not clear how a publisher could survive.
- Publishers are also heavily reliant on **online search engines** that allow them to be discoverable by end-users around Europe. Google is a gatekeeper when it comes to general search. **The ranking of a publisher's product or service in the Google search engine results page ("SERP") is crucial for its success and has a profound impact on the publishers' business.**
- The EPC's members, moreover, use online **social networking services** to reach end users. Facebook, the dominant online social network service, comprising also Instagram, WhatsApp, and Facebook Messenger.
- When it comes to **operating systems**, members are dependent on Apple and Google, as iOS and Android are the operating systems used by more than 99% of smartphone users. **Apple's iOS 14 policy change**, which requires user consent to an Apple-designed pop-up in order for app developers to obtain access to the Identifier for Advertisers, has devastating consequences for news publishers.
- Some members use **video-sharing platform services** to make their content available to end users. YouTube, owned by Google, is the dominant video-sharing platform.
- EPC members are increasingly reliant on **platforms incorporating voice assistant technologies** to make available their radio stations and audio products, including podcasts. There is a high risk of undue interference considering the incentives these platforms have to re-direct audio listeners to their own (unlicensed) "radio-like" services.
- **Browser providers**, e.g., Google (Chrome) and Apple (Safari), are in the position to take unilateral decisions and initiatives that challenge the *status quo* and the way the open internet works – and, therefore, how media and publishing groups operate their businesses.

EPC's KEY RECOMMENDATIONS:

II. Definition of core platform services

The EPC is generally content with the core platform services identified by the Commission as services that should fall within the scope of the DMA. However, we would like to make two observations with regards to the core platform services that will be regulated. The EPC recommends that:

- **Web browsers should also be included in the list of core platform services** that fall within the scope of the DMA, meaning that **providers of browsers could then be designated** as gatekeepers and thus be required to comply with the DMA obligations.
- The DMA should state explicitly that online platforms incorporating **voice assistant technologies fall within its scope and clarify that the term “operating system”, as defined in Article 2(10), includes operating systems for any “smart” (internet connected) TVs, speakers and voice assistants.**

III. The designation of gatekeepers

The EPC strongly believes that **the DMA should be targeted at regulating a small number of large digital platforms** that are unavoidable gateways between digital service providers and their large user base. It is the conduct of a few large digital platforms that threatens the contestability and fairness of digital markets and **the future viability of independent media and publishing companies**. Thus, it is **imperative that the DMA, in its final form, remains focused on such platforms and the scope of the Proposal is not unduly broadened**. In this context the EPC supports the Commission’s Proposal as to the method of designation of gatekeepers with the **following recommendations**:

- **The quantitative thresholds must not be lowered while the Proposal goes through the Parliament and the Council.** A **broadening of the definition of gatekeepers** would not only be unnecessary, as smaller platforms are not in the position to affect the contestability and fairness of digital markets, but it **would also significantly weaken the ability of the Commission to properly implement, monitor and enforce the DMA obligations.**
- The EPC is **concerned that large online platforms which exceed the quantitative thresholds may seek to abuse Article 3(4)** in order to delay their compliance with the DMA obligations. **Article 3(4) exception should therefore be clarified in order to minimise the likelihood of abuses**, and to ensure that this provision can **only be used to capture exceptional circumstances** whereby a company that meets the quantitative thresholds is not a gatekeeper. Furthermore, the Commission should ensure that companies whose gatekeeping role has already been established (e.g., in previous decisional practice) do not seek to contest their (already proven) gatekeeping role merely to delay their compliance with the DMA to the detriment of their users.
- **Multi-homing is an important factor in this qualitative assessment.** Moreover, the fact that **business users are compelled to accept the terms and conditions set by the platform** even if they are anticompetitive or unfair also constitutes, in our view, evidence that the platform enjoys significant market power and that there is little multi-homing. We emphasise however

that it is imperative that the qualitative assessment is as objective as possible and transparent, in order to not unduly widen the definition of gatekeepers that are to be regulated under the DMA.

IV. The obligations and prohibitions imposed by the Proposal

The EPC is generally satisfied with the obligations imposed on **designated gatekeepers on the basis of Articles 5 and 6** of the Proposal and constitute a **positive step towards the development of fair and contestable digital markets including for publishers** in the EU.

On the procedural side, the Proposal envisages that the measures to comply with the obligations listed in Article 6 may be further specified by the Commission following a regulatory dialogue with the gatekeeper. However, **there is little – if any – room for third parties to intervene. The regulatory dialogue should be more transparent, and explicit provision should be made for business users to be able to, at the very least, comment on the effectiveness of the proposed measures for compliance with the Article 6 obligations.**

On substance, the obligations laid down in the Proposal constitute a **positive step towards the development of fair and contestable digital markets including for publishers** in the EU:

- **Article 5(a) of the Proposal** prohibits gatekeepers from combining personal data sourced from the gatekeeping platform with personal data from any other services. After all, gatekeepers could, in practice, circumvent this prohibition by including clauses in their Terms of Service and Privacy Notices. It is, therefore, **imperative that the consent exception is removed in order for the prohibition of Article 5(a) to be effective.**
- Furthermore, **Article 5(a) should be amended to prohibit gatekeepers from combining and using, for their own purposes, data sourced from their core platform services with personal data collected from sources or services where they are present as third parties.** By amending Article 5(a) to include such prohibition, the DMA will put an end to gatekeepers' practices that oblige end and business users to agree to such practices as a precondition for the use of the gatekeepers' core platform services.
- **Article 5(c):** this provision should be **amended explicitly to oblige gatekeeping app stores** to allow app developers to engage in any type of in-app or out-of-app communication with their end users (and not only to "promote offers" to them).
- **Article 5(e):** this provision should not be limited to "core platform" services, but **extended to all "ancillary" services that gatekeepers may wish to tie to their core platform service, including payment services.**
- **Article 6(1)(a):** EPC **welcomes the explicit reference in paragraph 44 of the Preamble** that this prohibition also applies "with respect to the data that a core platform service has received from businesses for the purpose of providing advertising services related to that core platform service."



- **Article 6(1)(c):** This provision, which we strongly support, is instrumental in permitting competition among various alternative app distribution channels.
- **Article 6(1)(d):** we welcome the clarification in the Preamble of the Proposal that this obligation also covers “the situation whereby a gatekeeper offers its own online intermediation services through an online search engine” and
- EPC fully supports the more **general obligation imposed on gatekeepers under this provision to “apply fair and non-discriminatory conditions” to ranking**. For the EPC, **it is of utmost importance that the obligation to “apply fair and non-discriminatory conditions” to ranking is maintained in the legislative process**.
- It is also paramount that, in the absence of visual electronic programme guides, Article 6(1)(d) of the Proposal ensures that radio and publishers’ audio content can easily be discovered by users of online platforms incorporating voice assistant technologies.
- **This obligation should be complemented by an obligation to perform regularly an algorithmic audit** to ensure that gatekeepers indeed comply with the Article 6(1)(d) obligation. To this effect, **Article 13 of the Proposal should be amended to impose on gatekeepers engaging in ranking of products and services the obligation of a regular independent audit of their algorithms**.
- **Article 6(1)(g): gatekeepers should be required to provide access to granular, user-level and high-quality information**, in order for them to be able to indeed carry out their own verification of the ad inventory. Moreover, an obligation should be imposed on the gatekeeper to provide such granular information to independent third parties authorised by advertisers and publishers, which are part of the measurement system.
- **Article 6(1)(i)** would oblige gatekeepers to grant effective, high-quality, continuous and real-time access to data. The EPC believes that **this obligation should not be restricted to data provided for or generated in the context of the use of core platform services** provided by gatekeepers, but also **extended to data provided for or generated in the context of the use of ancillary services** offered by gatekeepers (e.g., payment services). The EPC, furthermore, believes that the **user’s consent requirement included in Article 6(1)(i) is a hurdle and should therefore be removed** and it should be possible for such data sharing to take place on the basis of any of the grounds envisaged in Article 6(1) of the GDPR.
- **Article 6(1)(k)** requires gatekeepers to “apply fair and non-discriminatory general conditions of access for business users”. The obligation to provide fair and non-discriminatory conditions of access **should also apply to gatekeeping online platforms incorporating voice assistant technologies**, preventing them from limiting or restricting access to third-party services (including licensed radio stations) or charge for carriage.
- **Article 6(1)(k)** should also **include an obligation for gatekeepers to negotiate, on fair and non-discriminatory terms, for the use of content on their core platform services**.
- Finally, the EPC considers that Article 6(1)(k) should also require gatekeepers to refrain from making it more difficult for business users to advertise or provide their offers.

It is **important that Article 6 of the Proposal is amended** to include the following obligations and prohibitions, which are necessary for the DMA objective – i.e., ensuring the fairness and contestability of digital markets – to be achieved:

- a) **A broader prohibition of self-preferencing** should be added to the list of Article 6.
- b) An **obligation should be imposed on online platforms incorporating voice assistant technologies to refrain from inserting sponsorship or advertising around third-party content**, including radio content, without the express consent of the provider of such content.

The EPC strongly believes that it is **important that the DMA obligations are not restricted to the conduct of a particular gatekeeper**, but are sufficiently flexible to be applicable to existing, and most importantly, similar future conducts of existing and emerging gatekeepers.

V. The enforcement and implementation system of the Proposal

The EPC emphasises the need for:

- i. **swift processes** that allow the Commission to intervene promptly when needed and
- ii. the **allocation of sufficient resources** to the Commission to exercise its tasks under the DMA.

In this regard, the EPC is seriously concerned **that 80 FTE officials may be insufficient to monitor and enforce compliance with the DMA**, especially since the DMA provides for a centralised enforcement system.

While it is imperative for the Commission to have regard to due process, this **should not act as a way for gatekeepers to escape the obligations applying to them or to delay their application by employing dilatory tactics**, such as invoking Article 3(4) of the Proposal or abusing the possibility for a regulatory dialogue as to the appropriate measures to ensure compliance with Article 6 obligations.

A. The timeframes for investigations and proceedings

The timeframes for market investigations are satisfactory. It is thus **imperative that they are not further relaxed by amendments** to the Proposal during the legislative process. However we suggest that:

- The **timeframe for market investigations** into systematic non-compliance, which is currently set at 12 months on the basis of Article 16 of the Proposal, **should be reduced to 6 months**.
- The **timeframe of 24 months for Article 17 market investigations** with the view of adding new services to the list of core platform services or adding new practices to the list of Article 5 or 6 **should be reduced to 12 months**.



- The **timeframe of 6 months for a regulatory dialogue** between the Commission and the gatekeeper with a view of specifying the measures for compliance with Article 6 obligations **should be reduced to 4 months**.
- The EPC considers that **the final non-compliance decision should be taken, at the latest, 12 months after the Commission opens proceedings** on the basis of Article 18 of the Proposal.

For the EPC, **it is imperative that the availability of interim measures in the toolbox of the Commission is upheld as the Proposal goes through the European Parliament and the Council.**

B. The relationship between the EU and national levels

The **EPC agrees with the Proposal's reliance on the European level for the enforcement** of the DMA and emphasises once again the need for the **allocation of sufficient resources** to the Commission to effectively monitor and enforce the DMA, a task that would require the appointment of considerably more than 80 FTE officials. However, in addition the EPC believes:

- There is **further room for Member States to be involved** in the monitoring, enforcement and implementation of the DMA, without substituting the Commission's primary role. There is merit in allowing Member States to **not only request the Commission to open a market investigation for the designation of a gatekeeper, but also to open market investigations** for non-compliance and / or systematic non-compliance. Instead, each Member State should be allowed to request the Commission to initiate such proceedings
- Moreover, we are **concerned about the way the Proposal addresses the interplay between the DMA and existing national laws concerning large online platforms**.

VI. What is missing from the Proposal: the need for a formal complaint system

- a) **The EPC considers that a significant gap in the Proposal is the lack of a formal complaint system, which would be instrumental in the effective implementation and enforcement of the DMA.**
- b) Such a system would **enable business users that continuously use the gatekeepers' services** and thus are in the best position to witness whether the gatekeepers comply with the DMA to bring, in a timely manner, to the attention of the Commission instances of non-compliance, allowing for a more effective and efficient monitoring of the gatekeepers' conduct.
- c) **A complaint system would furthermore increase transparency, allowing third parties who are directly affected by the gatekeepers' conduct to be involved** in the enforcement of the DMA, an instrument that aims to make digital markets fair and contestable for the millions of third-party business users.

VII. Conclusions



- **The EPC warmly welcomes and supports the Proposal, which with some careful amendments will be a powerful tool** to prevent designated gatekeepers from taking advantage of their size, their strong market position and the dependency of the business users that rely on their platforms to provide their products or services to end users.

- **It will ensure that media and publishing companies will be treated fairly by gatekeeper online intermediation services** including ad intermediation services, app stores, platforms incorporating voice assistant technologies and online marketplaces, online search engines, operating systems, web browsers, online social networking services and video-sharing platform services, and that the relevant markets will remain contestable to the benefit of competition, innovation and ultimately consumers.

- We would, however, like to **add a word of caution**. The list of DMA obligations is inspired by problematic conducts *that have already been brought forward* with regards to certain gatekeepers in competition law complaints and investigations making it possible to a great extent to assign each of the obligations of Articles 5 and 6 to a particular gatekeeper. **The EPC strongly believes that it is important that the DMA obligations are not restricted to the conduct of a particular gatekeeper**, but are sufficiently flexible to be applicable to existing, and most importantly, similar future conducts of existing and emerging gatekeepers.

- **We invite the European Parliament and the Council to act decisively and swiftly** to ensure expeditious adoption of the DMA to put an end to the detrimental conduct of gatekeeping online platforms (or preventing such conduct from occurring) to the benefit of their business and end users, **ensuring that digital markets in Europe remain fair and contestable allowing sustainable journalism and a vibrant publishing and media market to thrive.**



On our [website is our Full Position Paper](#) which includes an [annex of our proposed amendments](#).