

## News Media Europe position paper on the European Commission proposal for a Digital Markets Act (DMA)

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*News Media Europe (NME) represents the progressive news media industry in Europe – over 2,500 media companies including newspapers, radio, television and internet. News Media Europe is committed to maintaining and promoting the freedom of the press, to upholding and enhancing the freedom to publish, and to championing the news brands, which are one of the most vital parts of Europe’s creative industries.*

### **Recommendations**

- **Expand the obligation in Art. 6(1)k for gatekeepers to provide “fair and non-discriminatory general conditions of access” to all core platform services and not just app stores to ensure the fair treatment of business users.**
- **Build on the market investigation instrument under Art. 17 to allow the Commission to impose binding and tailored codes of conduct to tackle problems related to the bargaining power of gatekeepers.**
- **Introduce an obligation to stop quasi-tying in online advertising and independent oversight over certain gatekeepers decisions that raise concerns about privacy washing.**
- **Consider whether a new obligation is needed to tackle questions related to the oversight of standards created and managed by gatekeepers.**
- **Include web browsers and digital voice assistants in the definition of core platform service under Art. 2 to tackle problematic gatekeepers conduct in these areas.**
- **Ensure early access to structural remedies without a requirement of last resort by removing Art. 16(2) to avoid excessively onerous conditions.**
- **Shorten the length of investigations from 6-12 to 4-8 months to ensure swift means of intervention which are important in the absence of a “new competition tool”.**
- **Revise Arts. 5 & 6 to clarify the universal scope of application of the obligations.**
- **Maintain the clarification in Art. 1(5) that full harmonisation under the DMA is “without prejudice to rules pursuing other legitimate public interests” such as media pluralism.**
- **Ensure a stronger Art. 3 definition of “users” in the gatekeeper designation process, including for “active users” and “business users”.**

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## Introduction

The European media sector is prime example of a sector with problems arising from the control that gatekeepers exercise over access to online users and audiences. We therefore very much welcome the proposal which seeks to address the clear limitations of anti-trust enforcement under TFEU 101 and 102, which is often slow, inefficient and difficult to implement in the context of digital markets.

The serious difficulties facing the news media business must be heeded as a serious warning by EU policy makers. Our sector is probably the first to fully experience the unequal competition in relation to the raw power of gatekeepers. It is also the first where we see the effects in terms of significant revenue loss, with serious consequences for media pluralism.

Freedom of speech, freedom of the press and freedom of information are central and necessary values in a democratic society. Together with trust and openness, both between people and between people and social institutions, these values are under threat. The media sector is vital to uphold these values. Therefore, measures that help strengthen the media sector also strengthen these values.

The DMA is a unique opportunity for the news media sector to emerge stronger and more resilient from the current crisis, with self-reliant business models that are capable of supporting quality journalism and innovating in the digital age.

## Scope and designation

It is important for the media that the proposal for full harmonisation of rules on gatekeepers should not foreclose the possibility of further regulation of gatekeepers on other public interest grounds such as media pluralism. This clarification in Art. 1(5) should thus be maintained and strengthened.

In so far as concerns the designation of gatekeepers in Art. 3, we agree with the proposed approach to establish a combination of clear qualitative and quantitative criteria to identify gatekeepers which provides the basis for a consistent designation mechanism.

However, the definitions of “users” and “turnover” should be clarified to avoid abuse, while the designation process should also account for core platform services supplied beyond the EU but still in the EEA and the United Kingdom to better reflect economic reality.

As concerns the notion of core platform services, we note with concern the exclusion of web browsers and digital voice assistants which appears arbitrary. Browsers and digital voice assistants play an immensely important role in shaping the digital landscape and can be exploited by gatekeepers to lock in users and to unilaterally impose standards.

This is also recognised in the impact assessment accompanying the DMA proposal<sup>1</sup>, and we therefore recommend including web browsers and digital voice assistants as a core platform service. Considering the amount of problematic conduct that is being shifted to browsers, such as Google’s Federated Learning of Cohorts (“FLoCs”), it becomes evident that this is necessary.

## Obligations and prohibitions

The DMA addresses major and long-standing competition concerns shared by the European media sector in relation to access to data, advertising, self-preferencing and app stores. Out of the 18

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<sup>1</sup> European Commission (2020) SWD Impact Assessment accompanying the DMA proposal ([link](#))

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obligations proposed under Arts. 5 & 6, we especially identify 13 with a direct practical application addressing distinct and concrete antitrust concerns that we share.

We therefore support the introduction of the suggested obligations to allow for efficient remedies and greater transparency. We recommend that it is clarified so that both obligations under articles 5 and 6 have direct application for the purpose of legal and administrative certainty.

We must emphasise that access to and control of data about our own audiences is critical for the development of our ecosystem and the ability of our services to innovate and deliver high quality content. Similarly, measures regarding online advertising markets are much needed given the high levels of concentration and opacity present in these markets, in addition to conflicts of interest.

As news publishers increasingly invest in developing their own technologies, they also become technology companies and accordingly compete with the products and services of gatekeepers. As a result, it becomes essential that rules on rankings and self-preferencing as well as on non-discriminatory access to app stores are introduced to ensure contestable and fair markets.

However, the requirement for gatekeepers to apply “fair and non-discriminatory general conditions of access” as per Art. 6(1)k should not be limited to app stores, instead we propose to extend this obligation to all core platform services. This should serve as a basic universal requirement for all companies with a gatekeeper status to ensure the fair treatment of business users. This would address concerns about the exclusionary effects that the conduct gatekeeper of gatekeepers can have.

In relation to online advertising we propose, as suggested by an independent DMA study prepared for the Commission<sup>2</sup>, further intervention to stop quasi-tying behaviour in advertising technology services and to introduce independent oversight to address privacy washing concerns, which appear when platforms use privacy as a justification for practices that further cement their walled gardens.

The need for stronger intervention against anti-competitive tying and bundling practices by gatekeepers, however, extends beyond online advertising. In particular, there is a need to ensure that unfair tying and bundling is prohibited in the context of licensing agreements that seek to ensure a fair transfer of value for content protected by intellectual property rights.

This must be complemented by a precautionary approach towards the creation of standards by gatekeepers, which the DMA unfortunately overlooks even if gatekeepers play a key role in this context. Standards can rapidly become problematic and arbitrary because gatekeepers are in a position to unilaterally determine and impose them, as illustrated by Google’s latest FLoCs advertising project. The DMA should therefore allow for the review and prohibition of gatekeeper standards.

Similarly, it is essential that a level playing field regarding access to personal data is established between gatekeepers and business users. It is highly regrettable but needed that Art. 5(a) of the DMA should enforce the General Data Protection Regulation’s purpose limitation on gatekeepers, as data protection authorities have so far failed to do so, distorting competition in the process. This prohibition should apply irrespective of whether gatekeepers obtain the consent of users.

In our view, the proposed structure of obligations under Arts. 5 & 6 can be improved by new wording affirming the universal scope of the said obligations. It is essential that the Commission should in no case bear a burden of proof, aside from the gatekeeper designation process, to demonstrate the anti-competitive nature of gatekeeper practices.

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<sup>2</sup> Cabral et al. (2021) The EU Digital Markets Act: a report from a panel of economic experts ([link](#))

The DMA should maintain obligations that are sufficiently flexible to cover different situations and enforceable with the limited administrative resources at the disposal of the European Commission. The impact assessment raises concerns that the Commission may be underestimating the resources required to ensure good enforcement<sup>3</sup>.

In this sense, it is important to retain obligations that are relatively simple and universal in scope to ensure a lean and enforceable framework. The argument that “obligations should be more tailored to business models” while appealing in theory also implies an increased drain on limited public administration resources that is difficult to justify in present circumstances. It also risks creating excessive discussions related to the various decisions issued by the Commission.

## **Tackling the bargaining power of gatekeepers**

The ongoing negotiations between news media publishers and platforms show that there is a huge imbalance in negotiating power that the DMA proposal fails to address. In anticipation of the entry into force of the neighbouring right for press publishers in June 2021, Google is using its uniquely strong bargaining position to conclude agreements with European publishers that raise major concerns about their standard of fairness and compliance with EU competition law.

As part of the agreements concluded under the News Showcase product, Google is able to tie and condition remuneration under the EU publishers’ right to participation in its news product. In addition, Google is able to further tie and bundle different products and services that publishers must use as part of these agreements (e.g. advertising, analytics, subscriptions, etc.) and to introduce unfair clauses, such as clauses prohibiting publishers from taking legal action against Google on grounds of usage of the content covered by the agreements.

To illustrate this problem, it is relevant to consider the case of France, where a group of 121 publishers concluded a deal worth USD 22 million per year with Google<sup>4</sup>, whereas in Australia, where the government threatened to introduce a binding arbitration mechanism in law, Google subsequently offered publishers a figure worth at least USD 100 million<sup>5</sup>. As a result, Australian publishers are set to receive five times the amount offered to French publishers, for a market less than half of the size of France, making the difference even more aggravating.

The French case in particular demonstrates that, even in the presence of support from the government and anti-trust authorities to conduct collective negotiations, Google is still able to impose poor terms and conditions, especially when compared with the Australian case, because of the superior bargaining power that it derives from its gatekeeper position. We wish to highlight that this type of problematic situation where business users are unable to genuinely bring gatekeepers to the negotiating table is not unique to either Google nor to intellectual property licensing agreements.

The value of the agreements concluded in France, their terms and conditions and the negotiation process that lead to their conclusion all raise question about fairness, one which requires a firm response as part of the DMA discussion. As a gatekeeper, Google is able to put take-it-or-leave-it agreements on the table, and more critically to tie and bundle remuneration under the EU publishers’ right to participation in Google’s own news product “Google News Showcase”.

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<sup>3</sup> European Commission (2020) SWD Impact Assessment accompanying the DMA proposal ([link](#))

<sup>4</sup> Reuters (2021) Exclusive: Google's \$76 million deal with French publishers leaves many outlets infuriated ([link](#))

<sup>5</sup> Australian Financial Review (2021) Facebook signs deals with independent publishers ([link](#))

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This fundamentally undermines the Copyright Directive, which is meant to secure the ability of publishers to control how their content is distributed. Google's News Showcase product appears to many publishers as a cynical attempt at expropriating the monetisation of content, the distribution of content, and at disintermediating publishers further from their audiences and advertisers, rather than ensuring that publishers are remunerated for the use of their content, as required by the Directive.

These agreements essentially amount to a new standard that Google is able to impose by leveraging its gatekeeper position. Google successfully invented a new product and de facto standard where all present and future rights are bundled and licensed across all Google news products, undermining established licensing procedures where rightsholders are remunerated for the use of their content.

It is in this sense necessary to consider whether the problematic conduct of Google are mere anti-trust concerns, or more fundamentally related to problems of fairness inherent in dealings and negotiations with gatekeepers, where huge imbalances in bargaining power can be found - a problem exacerbated by the lack of regulatory oversight over these agreements. By taking decisive action in this area of gatekeeper regulation, serious media pluralism concerns could simultaneously be tackled.

We believe that many of the issues raised above deserve special attention in the discussion on the DMA proposal. While it is clear that the DMA cannot solve all the competition problems faced by news publishers, it is also evident that some of these problems manifest dimensions that are relevant to the regulation of gatekeepers. In Australia, the competition authority concluded that a tailored code of conduct was necessary to ensure pro-competitive outcomes.

While it is not so clear how an arbitration mechanism could fit in the DMA, it seems imperative to ensure some regulatory oversight in relation to these agreements which are currently being used to circumvent regulatory scrutiny. One option could be to empower the Commission to impose codes of conduct on gatekeepers (e.g. bargaining code) following a market investigation and findings that would support this course of action.

A recent study of the European Parliament<sup>6</sup> also argues for the need to complement the ex-ante rules in the Commission proposal with tailored codes of conduct to ensure that public policy objectives are effectively met. Enhancing and expanding the market investigation tool under Art. 17 could be one way of achieving this within the boundaries of the Commission's proposal.

## **Market investigations**

Concerns about whether the DMA enables rapid intervention are particularly important since the Commission abandoned the idea of introducing a "new competition tool" to complement the ex-ante rules. The procedural delays foreseen in the proposal, such as the 6-12 months period to conduct market investigations under Arts. 15, 16 and 17 are excessive and could hamper meaningful action.

We suggest a 4-8 months period instead to ensure the kind of timely market intervention necessary to prevent material harm or tipping markets, in line with the ex-ante rationale. This will also facilitate the use of interim measures which now play a key role in enforcement.

It is equally important that structural remedies do not become a tool of last resort as suggested in Art. 16(2) as this creates excessively onerous conditions to be met. This also undermines the disciplining effect that the proposed instrument should have on the behaviour of gatekeepers. Ideally, the Regulation should dissuade effect gatekeepers from engaging in anti-competitive conduct.

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<sup>6</sup> European Parliament Research Service (2021) Online platforms: Economic and societal effect ([link](#))

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## Enforcement

In relation to enforcement, it is important that the European Commission is empowered to make independent enforcement decisions as currently envisaged. The experience of our sector with enforcement shows that it can be problematic to rely on the often-limited resources and expertise of individual national authorities to investigate the practices and sectors concerned.

So while it is tempting for Member States with greater resources at their disposal to seek greater autonomy in enforcement matters, this should not come at the expense of the ability of the European Commission to intervene when and where needed. It is also desirable from the perspective of consistent enforcement for the Commission to be able to issue binding decisions.

Last but not least, it cannot be stressed enough how important it is to ensure that DG COMP has adequate resources at its disposal to ensure good enforcement, both in terms of human resources and funding. We are concerned that the European Commission underestimates this point, judging by the contents of the impact assessment that accompanied the proposal.

Ultimately, ensuring good enforcement may prove to be the most difficult question. The DMA proposal is by and large already much welcome on the basis of substance. Therefore, it is important to draw on recent experience of regulation affecting gatekeepers. The GDPR is a case in point and highlights important lessons regarding asymmetric enforcement.

*For further background on this position paper, please consult our full [submission](#) to the Digital Services Act package and the New Competition Tool public consultations 2020.*

## Contacts

Wout van Wijk, Executive Director, [wout.vanwijk@newsmediaeurope.eu](mailto:wout.vanwijk@newsmediaeurope.eu)  
Jacob Gammeltoft, Policy Manager, [jacob.gammeltoft@newsmediaeurope.eu](mailto:jacob.gammeltoft@newsmediaeurope.eu)