EMMA and ENPA

Position paper on the Proposal for a regulation on contestable and fair markets in the digital sector

Digital Markets Act

23 March 2021

The European Newspaper Publishers Association (ENPA) and the European Magazine Media Association (EMMA) together represent the majority of European press publishers with a variety of press offerings in magazine and newspaper form, both digital and print.

The Digital Markets Act (hereafter "DMA") is a historic and potentially the only chance for the EU to address market imbalances caused by the gatekeeper platforms and to ensure fair and non-discriminatory distribution of the free press and media. As such, we very much welcome the initiative taken by the European Commission on the matter. However, the DMA regrettably falls short on some of the key provisions.

Should those shortcomings not be addressed in the legislative process, this important regulation risks becoming a toothless tiger which in some instances would even legitimize the unjustifiable behaviours of the gatekeeper.

As such, the following points must be addressed:

- The DMA limits the obligation to apply fair and non-discriminatory access conditions for business users to App Stores only. **This obligation must apply to all gatekeepers (Article 6(1) k) DMA).**
- The prohibition of self-preferencing in ranking is important but not sufficient. **The prohibition must be extended to the practice of offering arbitrary and preferential treatment to selected third parties (Article 6(1) d) DMA).**
- The DMA must include a prohibition for gatekeeper to **discriminate relevance-based intermediation (i.e., generic search results) in favour of paid intermediation (i.e., search-advertising).**
- The DMA must introduce an obligation for gatekeepers to participate in **binding procedures to set a fair price** for services such as the licensing of the publishers' right.
- While the web-browser market is dominated by one provider functioning as a gatekeeper, web-browsers are not included in the scope of the DMA. **The DMA must also apply to web-browsers (Article 2(2) DMA).**

- The DMA only prohibits combining data from different services of a gatekeeper or with data of third parties if the user has not given consent. **Combining data from different own services or with data from third parties must be prohibited as a rule (Article 5 a)).**

- Article 6(1) a) rightfully prohibits gatekeepers to use non-publicly available data from the business or end-user when in competition with this business user. **This prohibition must be expanded to also prohibit the use of such data in competition with other business users.**

- Gatekeepers must be obliged to participate in industry-wide and neutral audience measurement and other validation systems that are independently and transparently monitored by third parties. **Article 6(1) g) is not sufficient.**

- The application and enforcement of the DMA must be efficient. It is therefore indispensable that **national authorities** are also empowered to enforce the DMA provisions in national cases and that the legal prohibitions of the DMA are also **enforceable by the courts**.

- It must be ensured that proceedings initiated under (more stringent) national law before the entry into force of DMA are shielded by **a transitional provision against potential incompatibility with the DMA.**

I) Gatekeeper platforms and the digital era: the special case of press publishers

For over a decade, magazine and newspaper publishers have been exposed to a tightening and increasingly unfair competitive pressure from so-called gatekeeper platforms.

Using their position as gatekeepers, these platforms arbitrarily decide for example if and how press publishers have access to consumers and advertisers through their platforms, thereby determining the success or failure of not only journalistic and editorial publications, but also other commercial services and digital offerings of publishers. On numerous of their services, these platforms practice an arbitrary preselection, thereby excluding, barring access or otherwise discriminating against other legal publications and offerings, resulting in discrimination against media pluralism, diversity of opinion as well as competition in the digital single market. As a consequence of their size, dominance and gatekeeper role, they affect market mechanisms and thereby seriously undermine innovation and competition. Ultimately, they steer political and cultural opinion as well as economic prosperity in the EU.

At the same time, the gatekeeper platforms secure an increasing share of digital advertising budgets, while not bearing any productions or investment costs for the content they offer. This is further exacerbated by the fact that these gatekeeper platforms gained an unassailable place in the market with primary and direct access to users and monopoly access to user data.

It is also for the reasons above that press publishers already in 2009 were at the forefront of anti-trust complaints against the gatekeepers which led to seminal decisions by the European Commission, e.g., the Google Shopping case. Yet, the decisions have highlighted the limitations of the current legal regime. The DMA now provides a historic chance that the EU should not miss.

II) Addressing the shortcomings of the DMA

A successful and effective DMA should entail, **as a minimum**, the following key elements:

1. Necessary changes to Article 5 and 6

a) The DMA provisions on fair and non-discriminatory conditions of access, currently limited to app stores in Article 6(1) k), must be extended to all gatekeepers and their services.

Article 6(1) k) DMA limits the obligation to apply fair and non-discriminatory general conditions of access for business users to App Stores only. Such a restriction to App Stores is incomprehensible and unacceptable. It would *de facto* legitimize gatekeeper search engines, general social networks to restrict access on an unfair and discriminatory basis, including to legal publications and offerings. Fair and non-discriminatory access of business users to all gatekeeper platforms and in particular to the search engine and social network, must be ensured.

Only an obligation to provide fair and non-discriminatory access conditions to all gatekeeper platforms, which must include a prohibition of disproportionate or unreasonable demands and conditions such as the refusal to pay for the publisher's right or other forms of otherwise discriminatory and unacceptable access conditions of gatekeepers, can address core issues stemming from the gatekeeper role of these platforms.

Article **6(1) k) DMA** must therefore also prohibit for the gatekeeper search engine and for all other gatekeepers to demand advantages that are disproportionate to the requested intermediation service of the gatekeeper.

Article **6(1) k)** can thus easily be amended to extend the scope to online search engines and other gatekeepers.

The **accompanying recital 57** 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. These concretisations must be further elaborated to also cover, for example, the obligation to provide fair remuneration for the publishers' right, including the concretisation that making the access to the gatekeeper platform dependent on a free licence for rights such as the publishers' right or for the transfer of data is prohibited.

b) The scope of the proposed ban on self-preferencing in ranking in article 6(1) d) must also prohibit giving preferential treatment to selected third parties.

First and foremost, **Article 6(1) d)** only prohibits preferential treatment of own services in ranking. It does not prohibit giving preferential treatment to selected third parties. However, both with regard to the benefits of the gatekeeper as well as the damage done to the competition, self-preferencing is largely interchangeable with giving preferential treatment to a selected third-party. In practical terms it would mean, for example, that if favouring the gatekeeper's own media offering (be it in written, video or audio form) is prohibited, the gatekeeper could simply draw advantages by deciding to give preferential treatment to one

specific media outlet amongst the tens of thousands on the market and thus eliminate the journalistic and economic competition on the market.

The extension of the ban is possible by a simple change to Article **6(1) d).**

To ensure the effectiveness of the DMA, it is also important that **Article 6(1) d)** covers all forms of self-preferencing or preferencing of selected third parties. Ranking is defined broadly in **article 2(18)** in combination with **recital 48 and 49** and includes a reference to "relative prominence" also. As such it rightfully also covers the positioning, displaying and presentation etc. What is missing, however, is a clarification that a search result includes both generic and paid search results, which are shown as a consequence of the query. It would therefore be important to add a definition of "search results" in **Article 2**. As such, also the circumvention of this prohibition by moving the preferred own or third-party offering to the so-called "position 0" must be covered. It would be unacceptable if this important prohibition could be circumvented by simply arguing that although the content or offering which receives preferential treatment on "position 0" is shown as a result of a search query, it is not in itself a search result.

Finally, we wish to raise the question of whether or not the prohibition of discrimination in article **6(1) d)**, which is limited to ranking, is sufficient. Besides the necessary extension of the scope of Article **6(1) k)** to ensure fair and non-discriminatory access conditions to all core platform services (see section 1 a)), it remains questionable whether a prohibition of discrimination relating to ranking and access is enough, and whether there would be other behaviours of gatekeepers which as a result would not be bound by a prohibition of discrimination. A new and general prohibition of discrimination should therefore be considered in the DMA.

c) Prohibiting the discrimination of relevance-based intermediation (i.e. generic search results) in favour of paid intermediation (i.e. search-advertising).

A new provision should be included in **Article 6 DMA** to cover yet another form of indirect self-preferencing by gatekeepers: gatekeepers shall not be allowed to discriminate against relevance-based intermediation in favour of paid intermediation. This must be ensured at the very least for the gatekeeper online search engine. Such a provision would ensure, for example, that it would not be permissible to always allocate the best positions in the search results for advertising. If necessary, a rotation should be applied. Equally, it should not be permissible to reserve and allocate the most prominent and relevant intermediation space, e.g., the first page of search results, predominantly for paid results. Should the gatekeeper show and highlight paid search advertising with graphics or similar visual emphasis, the generic results must be offered and shown in the same manner.

It is again important to keep in mind that for example the search monopoly can easily circumvent a comprehensive ban on self-preferencing by simply allocating the most prominent intermediation space to paid intermediation. Such a circumvention would benefit the gatekeeper while negatively affecting fair competition.

Further, the paid intermediation should be limited to 25% of the initial result screen visible on the user's device ("above the scroll").

While such a provision would establish an appropriate balance between generic and paid search results, it would not actually affect the search advertising profits of the gatekeeper from the monopolistic search.

d) Introducing an obligation for gatekeepers to participate in binding procedures to set a fair price for services such as licensing of the publisher's right.

The DMA should include an obligation for gatekeepers, in the event of disputes, to participate in a binding procedure to determine the amount of the remuneration to be paid to all rightsholders. Such a procedure should apply for example in the case of a dispute on the fairness of an access condition or in the event of a dispute on remuneration for an intellectual property right such as the press publishers' right. In the case of the publishers' right, it would necessarily cover with all rightsholders, magazines as well as newspaper publishers alike. We therefore support similar initiatives voiced in the EU Parliament and believe that the Council should also support such a provision.

Such an obligation could be added to **Article 6 DMA**. Alternatively, it could also be envisaged in **Article 7 DMA**.

e) Several changes in relation to the data processing of gatekeepers are necessary.

First and foremost, the DMA must limit the gatekeepers' unique and overpowering data supremacy, which stifles competition. Secondly, the provisions on data processing should at least follow the principle that gatekeepers either share the data generated by the activity of the commercial user with said commercial user or not use the data themselves. The use of such data should only be admissible if the processing is technically indispensable for the business user's offer. Ideally, however, the gatekeeper should not be allowed to use such data for competitive purposes at all. Instead, such data should solely be provided to the business user in compliance with data protection rules.

- With fair and non-discriminatory access conditions to be extended to all gatekeeper platforms (see above section 1 a)), **discriminatory or unfair conditions imposed by gatekeepers for data processing on, via or in the context of their platform should and must also be prohibited**. For example, it must not be allowed for a gatekeeper to prohibit business users of the platform from processing data otherwise permissible under data protection law by imposing stricter conditions or by imposing conditions to which the gatekeeper does not adhere itself.

- **Article 5(a) DMA** prohibits platforms to combine personal data sourced from the different services of the gatekeeper or from other third parties, UNLESS the user has given his or her consent. The provision will most likely not have any effects. It must be ensured that the combining of data is prohibited as such and irrespective of the consent.

- **Article 6(1) a)** prohibits the gatekeeper from using non-publicly available data generated through the activities of the business users (or through the end-users of the business users) in competition with business users. We generally welcome this provision. However, further clarification is needed, especially to the effect that the gatekeeper shall also not be allowed to use in competition with the business users non-publicly available data it generated through the activities of other business users. For example, the gatekeeper marketplace shall also not be allowed to use in competition with the watch retailer "A" non-publicly available data that was generated by the watch retailers "B" to "Z" on the gatekeeper marketplace.

- **Article 6(1) i)** aims to provide business users free, effective, continuous and real-time access to the data they generate with their end users on the gatekeeper platform. In addition, **Art. 11(2)** provides that gatekeepers must, among other things, either enable business users to obtain consent from end users or otherwise ensure compliance with data protection law. In

such cases, obtaining consent must not be more difficult for the business user than it would be for the gatekeeper itself. The provisions are generally positive but could require specific clarifications.

f) Specific requirements for online advertising (reach and audience measurements, performance data, etc.).

- **Article 5 (g)** obliges gatekeepers to provide advertisers and publishers to whom they supply advertising services with information on the prices for specific advertisement etc. upon their request. This obligation is not clear and not sufficient. The DMA must for example address the issue of a conflict of interest. In particular, the DMA should prohibit gatekeepers from running advertising intermediation services while at the same time taking part in them through subsidiaries. This is because a gatekeeper's subsidiary will have privileged access to the information and data relevant for winning in the ad auctions. Such participation should therefore be treated in a similar manner to insider trading, i.e. prohibited due to an unjustified insider advantage. The provision should be complemented with more effective prohibitions that address gatekeeper's conflicts of interest in the ad tech industry. In particular, prohibiting any insider (ad) bidding through subsidiaries of a gatekeeper with a superior knowledge, understanding or access to data relevant for the outcome of the intermediation would be important.

- **Article 6(1) g)** obliges gatekeepers to give advertisers and publishers free access to the gatekeeper's "performance measuring tools" and provide the necessary information to carry out their own independent checks of the ad inventory. Again, we believe that this provision is not enough. It must be ensured that gatekeepers participate in industry-wide and neutral audience measurement and other validation systems that are independently and transparently monitored by third parties.

2. Scope, designation of gatekeepers and definitions

We welcome and deem it important that only very large platforms with a significant impact on the market and which operate services that serve as an important gateway for business users to reach end users are to be considered gatekeepers.

Nonetheless, it must be ensured that all core services of such gatekeeper undertakings are covered by the DMA. Two adjustments are therefore necessary:

a) Web-browsers must be included in the scope of the regulation.

Google's web browser "Chrome", as a typical gatekeeper, has a market share of over 60% in the EU. Yet, web-browsers would not be covered under the Commission proposal.

For this reason, we believe that the DMA prohibitions must also cover web-browsers and call on decision makers to add web-browsers under the core platform services in **Article 2(2).**

b) Clarifying that voice assistant platforms are online intermediation services

Although we assume that voice assistant platforms are covered by the definition of online intermediation services, we believe that a clarification would nonetheless be important in order to provide legal certainty. As such, it should be clarified in **Recital 13 DMA** that voice assistant platforms are online intermediation services.

3. Application and enforcement of the DMA: Judicial enforcement and the competence of national authorities to act on national cases is indispensable.

An effective DMA must set up a powerful enforcement framework to ensure that the required obligations are monitored effectively and enforced rigorously. We do not believe that the EU Commission should have a monopoly on whether and how to apply and enforce the DMA. This would in practice mean that for every case the Commission can and will discuss and find agreements with the gatekeepers directly. Courts, Member States as well as competitors would have no possibilities to file complaints, to have judicial protection or to even engage in the enforcement of the DMA. Experiences from the Google Shopping case for example - where the Commission initially wanted to green-light the self-preferencing practices of the monopoly and which 10 years and a prohibition decision has still not been effectively implemented - highlight why judicial protection, enforcement through courts as well as the competence of Member States authorities for national cases are of utmost importance.

Considering the above:

a) The legal prohibitions of Art. 5 and 6 DMA must also be enforceable by the courts to protect fair competition. This is a basic principle in any state based on the rule of law.

b) National regulatory authorities must be able to apply and enforce the DMA in national cases. It cannot be left at the discretion of the Commission if and how the DMA applies to national cases. Competent authorities in the Member States must be able to act in national cases if the Commission does take over the case because of a pan-European significance. Previous cases against gatekeepers have shown the shortcomings of focusing the power on a political institution. Should the monopolization of power as envisaged in the DMA be maintained, we believe that there is a serious risk of political inactivity on the part of the Commission in many important cases. In addition, it is questionable whether the Commission can and will continuously monitor the individual markets in the Member States with sufficient detailed knowledge.

c) More stringent national regulation must remain applicable. With the surge in national cases concerning the problematic behaviour of the gatekeeper platforms over the past decade, EU Member States have started to see the need to intervene to curb the dominance of the gatekeepers and their abusive or unfair commercial practices by initiating legal proceedings[1] and adopting dedicated rules.

In this regard, two things must therefore be ensured:

- First and foremost, proceedings initiated under national law before the entry into force of DMA must be shielded by a transitional provision against a potential incompatibility with the DMA.

- Secondly, even after the entering into force of the DMA, more stringent national regulation must remain applicable by the national authorities.

[1] From Damien Géradin's „Platform Law blog", see e.g. the antitrust investigations by DG COMP (on data-related practices), the French Competition Authority, the Italian Competition Authority and the UK Competition and Markets Authority ("CMA") (on ad tech).

For additional information please contact:

Ilias Konteas
EMMA-ENPA Executive Director
Ilias.Konteas@magazinemedia.eu or Ilias.Konteas@enpa.eu
Ariane Carré
EMMA-ENPA Head of Legal and Policy
Ariane.Carre@magazinemedia.eu or Ariane.Carre@enpa.eu

EMMA, the European Magazine Media Association*, is the unique and complete representation of Europe's magazine media, which is today enjoyed by millions of consumers on various platforms. EMMA represents 15,000 publishing houses, publishing 50,000 magazine titles across Europe in print and digital. See: http://www.magazinemedia.eu*

ENPA, the European Newspaper Publishers' Association (ENPA) *is the largest representative body of newspaper publishers across Europe. ENPA advocates for 16 national associations across 13 European countries, and is a principal interlocutor to the EU institutions and a key driver of media policy debates in the European Union. See: www.enpa.eu*