



Privacy International's recommendations for the trilogue on the Digital Markets Act

January 2022

1. Introduction

Privacy International (PI)¹ welcomes the aim of the Digital Markets Act (DMA) to address some of the challenges posed by the way the current digital markets operate. As we noted in our preliminary assessment, the proposal put forward by the European Commission in December 2020² contains some shortcomings that need to be addressed, if the DMA were to be effective in tackling these challenges. Some of these shortcomings have been addressed, particularly by the European Parliament in its resolution adopted on 15 December 2021.

To support the current negotiations in the trilogue, PI is making recommendations on the following topics and provisions:

- Focusing on the rights and interests of end users;
- Strengthening Interoperability provision;
- Address the negative effects of mergers;
- Strengthening transparency in profiling;
- Including civil society organisations in the implementation and monitoring of the DMA;
- Ensuring DMA's full conformity with the General Data Protection Regulation.

¹ PI is an international charity, based in London, which campaigns against companies and governments who exploit individuals' data and technologies. PI employs specialists in their fields, including technologists and lawyers, to understand the impact of existing and emerging technology upon data exploitation and our right to privacy, including in relation to online platforms and the advertising technology ("ad tech") industry. PI has an established track record of engaging with competition regulators around the world on issues that concern the intersection of data/privacy and competition laws. PI, Competition and Data, <https://privacyinternational.org/learn/competition-and-data>.

² Available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en

2. Focussing on the rights and interests of end users

PI welcomes the DMA's objective "to allow **end users** and business users alike to reap the full benefits of the platform economy and the digital economy at large, in a contestable and fair environment."³

The Commission's proposal however falls short of its stated aim by not adequately addressing the negative effects of gatekeepers' practices on end users; and by not supporting the emergence of new platforms and competition among existing and new platforms, for the benefit of end users.

Consumers in Europe and elsewhere demand both confidentiality and security of their digital communications and the protection of their personal data.⁴ In a competitive market, it should be expected that the level of privacy and data protection offered to individuals would be subject to genuine competition, i.e. companies would compete to offer privacy friendly services. Instead, in the current digital markets companies in a dominant position have no incentive to adopt businesses models and practices that enhance people's privacy. Rather, they may seek to exclude any privacy enhancing players from any of the markets where they can exert market power. Considering fundamental rights and societal implications of corporate powers within the competition framework should not be seen as a new or revolutionary proposition in the European context. For example, it is already recognised in EU competition law that the protection of media pluralism can and should trump merely economic consideration in order to avoid excessive media concentration with negative effects on democracy as a whole.

For these reasons, PI welcomes the amendments proposed by the European Parliament and the Council that introduce references to end users and to consumers, thereby bringing the DMA provisions into line with its objective.

In particular, PI supports:

- AM No. 59 of the EP: Article 1(1)

The purpose of this Regulation is to contribute to the proper functioning of the internal market by laying down harmonised rules ensuring contestable and fair markets for all businesses to the benefit of both business users and end users in the digital sector across the Union where gatekeepers are present so as to foster innovation and increase consumer welfare.

- AM No. 231 of the EP: Article 1(2)

³ Explanatory memorandum, Digital Markets Act, emphasis added.

⁴ See EU Agency for Fundamental Rights, Your rights matter: Data protection and privacy – Fundamental Rights Survey, 18 June 2020, <https://fra.europa.eu/en/news/2020/how-concerned-are-europeans-about-their-personal-data-online>. See also Eurobarometer, Europeans' attitudes towards cyber security, January 2020, <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/SPECIAL/surveyKy/2249>

This Regulation shall apply to core platform services provided or offered by gatekeepers to end users established or located in the Union **and business users**, irrespective of the place of establishment or residence of the gatekeepers **or business users** and irrespective of the law otherwise applicable to the provision of service. ***This Regulation shall apply and be interpreted in full respect of fundamental rights and the principles recognised by the Charter of Fundamental Rights of the European Union, in particular Articles 11, 16, 47 and 50 thereof.***

- AM No. 78 of the EP: Article 3(1)(b)

(b) it operates a core platform service which serves as an important gateway for business users **and end users** to reach **other** end users; and

- Article 5

PI further supports AMs of the EP (No. 108) and the Council to Article 5(1)(d) to include prohibition to limit end users' capacity to bring complaints against gatekeepers

AM No. 108 of the EP: Article 5(1)(d)

(d) refrain from ***directly or indirectly*** preventing or restricting business ***users or end users*** from raising issues with any relevant public authority, ***including national courts***, relating to any practice of gatekeepers;

- Article 10

Article 10 of the DMA proposal allows the European Commission to update the obligations applicable to gatekeepers when, based on a market investigation, it has identified the need for new obligations addressing practices that limit the contestability and fairness. However, in defining which practices limit contestability, Article 10(2)(a) does not refer to the effects on end users.

AM No 150 of the EP: Article 10(2)(a)

(a) there is an imbalance of rights and obligations on business users and the gatekeeper is obtaining an advantage from business users that is disproportionate to the service provided by the gatekeeper to business users **or end users**; or

3. Strengthening interoperability obligations

PI believes that interoperability between core services could help addressing the negative implications of users' lock-in and network effects. PI supports those interoperability measures that give end users more effective control of their data

and that contribute to address the power imbalance between individuals and gatekeepers.⁵ We also stress the importance to ensure interoperability measures are fully compliant with data protection law.

A strong interoperability requirement would empower competing platforms to interoperate with dominant ones and increase genuine choice for European users including for services that better protect their rights.

The Commission proposal falls significantly short of a strong interoperability requirement. **Article 6(1)(f)** requires gatekeepers to provide access and interoperability only with regard to business users or providers of ancillary services. The shortcomings of the proposal were highlighted in the Opinion of the European Data Protection Supervisor (EDPS) who recommends the DMA to introduce "minimum interoperability requirements for gatekeepers, with explicit obligations on gatekeepers to support interoperability, as well as obligations not to take measures that impede such interoperability".⁶

Some AMs proposed by the EP address the above concerns.

In particular PI supports:

- AM No. 76 of the EP: Article 2(1) point 23 a (new)

(23a) 'Interoperability' means the ability to exchange information and mutually use the information which has been exchanged so that all elements of hardware or software relevant for a given service and used by its provider effectively work with hardware or software relevant for a given services provided by third party providers different from the elements through which the information concerned is originally provided. This shall include the ability to access such information without having to use an application software or other technologies for conversion.

- AM No. 126 of the EP: Article 6(1)(f)

(f) allow business users, providers of services and providers of hardware free of charge access to and interoperability with the same hardware and software features accessed or controlled via an operating system, provided that the operating system is identified pursuant to Article 3(7), that are available to services or hardware provided by the gatekeeper. Providers of ancillary services shall further be allowed access to and interoperability with the same operating system, hardware or software features, regardless of whether those software features are part of an operating system, that are available to ancillary services provided by a gatekeeper. The gatekeeper shall not be prevented from taking indispensable measures to ensure that interoperability does not compromise the integrity of the operating system, hardware or software features provided by the gatekeeper or undermine end-user data protection or cyber security provided that such indispensable measures are duly justified by the gatekeeper.

⁵ For an analysis of interoperability and its potential effect on data, see <https://privacyinternational.org/explainer/4130/explainer-competition-data-and-interoperability-digital-markets>

⁶ Opinion by the EDPS on the Digital Markets Act, para 38.

- AM No. 127 of the EP: Article 6(1) f a (new)

(fa) allow any providers of number independent interpersonal communication services upon their request and free of charge to interconnect with the gatekeepers number independent interpersonal communication services identified pursuant to Article 3(7). Interconnection shall be provided under objectively the same conditions and quality that are available or used by the gatekeeper, its subsidiaries or its partners, thus allowing for a functional interaction with these services, while guaranteeing a high level of security and personal data protection;

- AM No. 151 of the EP: Article 10 – paragraph 2 a (new)

2a. In relation to the obligation laid down in article 6(1) fb, the Commission shall adopt by ... [18 months after the entry into force of this Regulation] a delegated act in accordance with Article 37 supplementing this Regulation by defining the appropriate scope and features for the interconnection of the gatekeepers online social networking services as well as standards or technical specifications of such interconnection. Such standards or technical specifications shall ensure high level of security and protection of personal data. When developing standards or technical specifications the Commission may consult standardisation bodies or other relevant stakeholders as foreseen in the in Regulation (EU) No 1025/2012.

4. Strengthening provisions to address the negative effects of mergers

The 2020 report of the EU Court of Auditors identifies the trends of acquisitions in digital markets among the key challenges to effective enforcement of merger regulation.⁷

Article 12 of the DMA proposal fails to address these limitations. Article 12(1) provides an obligation for the gatekeeper to inform the Commission of the intention to acquire other companies. However, this notification does not trigger a merger investigation, nor does it impose any obligation on the gatekeeper to prove the acquisition will not have negative effects. Article 12(3) only imposes on gatekeepers an obligation to inform the Commission, within 3 months from the acquisition, if additional core platform services have been acquired. By the time the Commission is notified, it is likely to be already too late to address many of the concerns that the acquisition might raise. This is particularly so given the practice of gatekeepers to buy up start-ups within their existing digital market to preclude them from growing into competitors; and/or to acquire strategically to establish a presence in a new market and then leverage their power, notably based on users' data, to achieve dominance in those markets.

PI welcomes some of the AMs by the EP and the Council which if adopted would strengthen the capacity of the Commission to assess the effects of acquisitions

⁷ Available at: <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=56835>

by gatekeepers. However, PI believes that the above AMs do not go far enough. PI recommends that the DMA a) introduces an obligation on gatekeepers to prove that the intended acquisition of any services provided in the digital sector will not have negative effects on end users' rights and interests; and b) enables the European Commission to commence an investigation prior to the intended acquisition of any services provided in the digital sector with the view to assess, inter alia, potential negative effects on end users' rights and interests.

PI supports:

- AM No. 95 of the EP: Article 3(6)(2) point e b (new)

(eb) the ability of the undertaking to implement conglomerate strategies, in particular through its vertical integration or its significant leverage in related markets;

- AM No. 96 of the EP: Article 3(6)(3)

In conducting its assessment, the Commission shall take into account foreseeable developments of these elements ***including any planned concentrations involving another provider of core platform services or of any other services provided in the digital sector.***

- AM No. 153 of the EP: Article 12(1)(1)

This AM seeks to expand the scope of this provision by deleting the part of the EC proposal which limits the obligation to provide information "another provider of core platform services or of any other services provided in the digital sector".

A gatekeeper shall inform the Commission of any intended concentration within the meaning of Article 3 of Regulation (EC) No 139/2004 ***involving another provider of core platform services or of any other services provided in the digital sector*** irrespective of whether it is notifiable to a Union competition authority under Regulation (EC) No 139/2004 or to a competent national competition authority under national merger rules.

5. Transparency in profiling

Article 13 of the DMA proposal requires gatekeepers to annually submit "to the Commission an independently audited description of any techniques for profiling of consumers that the gatekeeper applies to or across its core platform services". Because of the risks involved in these practices, GDPR regulates and

limits profiling.⁸ However, the practices remain often secretive and require significant efforts to be unmasked.⁹

For these reasons PI support the AMs by the European Parliament and the Council that strengthen Article 13. In particular, PI support the European Parliament AM requiring the Commission to develop, in consultation with the EU Data Protection Supervisor, the European Data Protection Board, civil society and experts, the standards and procedure of the audit. PI also supports the Council and the EP AMs to require gatekeepers to publish an overview of the audits.

- AM No. 158 of the EP: Article 13(1):

Within six months after its designation pursuant to Article 3, a gatekeeper shall submit to the Commission **and the High Level Group of Digital Regulators** an independently audited description of any techniques for profiling of consumers that the gatekeeper applies to or across its core platform services identified pursuant to Article 3. This description shall be updated at least annually. **The Commission shall develop, in consultation with the EU Data Protection Supervisor, the European Data Protection Board, civil society and experts, the standards and procedure of the audit.**

- AM No. 159 of the EP: Article 13(1) a (new)

The gatekeeper shall make publicly available an overview of the audited description referred to in the first paragraph, taking into account the need to respect business secrecy.

6. Including civil society organisations in the implementation and monitoring of the DMA

PI expressed significant concerns that the Commission proposal did not envisage a role for civil society organisations, such as consumer organisations, digital rights, human rights organisations, etc., despite the fact that these organisations play a necessary role in protecting the rights and interests of users of digital services provided by gatekeepers.

This is a notable omission given that civil society and consumer rights organisations conduct many investigations exposing the abusive practices of companies in the digital markets; these organisations often represent individuals or groups of individuals negatively affected by companies' actions; and these organisations have developed technical and legal expertise to support users in protecting their rights and interests. The technical complexities and novelty of

⁸ <https://privacyinternational.org/sites/default/files/2018-04/Data%20Is%20Power-Profiling%20and%20Automated%20Decision-Making%20in%20GDPR.pdf>.

⁹ See, for example, PI's research and complaints related to data brokers, available here: <https://privacyinternational.org/long-read/4398/companies-control-our-secret-identities>

challenges that characterise digital markets warrant specialist organisations to have a seat at the table.¹⁰

PI believes that the DMA cannot effectively provide end users of core platform services with "appropriate regulatory safeguards [...] against the unfair behaviour of gatekeepers" (Recital 7), without the meaningful involvement of the organisations that represent the views and interests of the end users.

For these reasons we support some of the AMs proposed by the European Parliament.

In particular PI supports:

AMs of the EP to include third parties in the Article 30 on right to be heard.

- AM No. 201 of the EP: Article 30(1):

Before adopting a decision pursuant to Article 7, Article 8(1), Article 9(1), Articles 15, 16, 22, 23, 25 and 26 and Article 27(2), the Commission shall give the gatekeeper or undertaking or association of undertakings concerned ***including third parties with a legitimate interest***, the opportunity of being heard on:

- AM No. 202 of the EP: Article 30(2):

Gatekeepers, undertakings and associations of undertakings concerned ***including third parties with a legitimate interest*** may submit their observations to the Commission's preliminary findings within a time limit which shall be fixed by the Commission in its preliminary findings and which may not be less than 14 days.

- AM No.203 of the EP: Article 30(3):

The Commission shall base its decisions only on objections on which gatekeepers, undertakings, associations of undertakings concerned ***and third parties with a legitimate interest*** have been able to comment.

AM by the EP to include a complaint mechanism before national authorities

- AM No. 187 of the EP: Article 24 a (new)

Article 24a Complaint mechanism

1. Business users, competitors, end- users of the core platform services as well as their representatives or other person with a legitimate interest may complain to the

¹⁰ <https://digitalfreedomfund.org/challenging-the-google-fitbit-merger-through-competition-law/>.

competent national authorities about any practice or behaviour by gatekeepers that falls into the scope of this Regulation, including non-compliance.

The competent national authorities shall assess such complaints and shall report them to the Commission.

The Commission shall examine whether there are reasonable grounds to open proceedings pursuant to Article 18 or a market investigation pursuant to Article 14.

2. Directive (EU) 2019/1937 shall apply to the complaints and the reporting of breaches of this Regulation and the protection of persons reporting such breaches.

PI also support the AM by the EP to include the DMA in the scope of Representative Action Directive (2020/1828) to allow class actions on reported DMA infringements.

- **AM No. 226 of the EP: Article 37 b (new)**

Amendments to Directive (EU) 2020/1828 on Representative Actions for the Protection of the Collective Interests of Consumers

The following is added to Annex I:

“(X) Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)”

7. Conformity with the General Data Protection Regulation

PI welcomes that the recital of the DMA proposal states the complementarity of this proposal to the General Data Protection Regulation (GDPR).¹¹ However, In light of the stated complementarity of the GDPR with the DMA, and of the need to ensure the full application of the GDPR to the practices of gatekeepers, PI welcomes some of the AMs by the European Parliament and the Council which clarify this aspect.

In particular, PI supports the Council's AM to Article 7(1) putting the onus on gatekeeper to demonstrate compliance with the obligations under the DMA and with the GDPR.

- **Council AM to Article 7(1)**

¹¹ Recital, para 11: "This Regulation should also complement, without prejudice to their application, the rules resulting from other acts of Union law regulating certain aspects of the provision of services covered by this Regulation, in particular [...] Regulation (EU) 2016/679".

The gatekeeper shall ensure and demonstrate compliance with the obligations laid down in Articles 5 and 6. The measures implemented by the gatekeeper to ensure compliance with the obligations laid down in Articles 5 and 6 shall be effective in achieving the objective of the relevant obligation. The gatekeeper shall ensure that these measures are implemented in compliance with *applicable law, in particular* Regulation (EU) 2016/679 and Directive 2002/58/EC, and with legislation on cyber security, consumer protection and product safety.

PI also supports the European Parliament AM to Article 5(a)

- AM No. 104 of the EP: Article 5(1)(a)

(a) refrain from combining ***and cross- using*** 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 ***in a explicit and clear manner, and has*** provided consent in the sense of Regulation (EU) 2016/679;