ASSOCIATION OF COMMERCIAL TELEVISION IN EUROPE

POSITION PAPER ON THE DIGITAL MARKETS ACT

EXECUTIVE SUMMARY

EC PROPOSAL FOR A REGULATION ON A SINGLE MARKET FOR DIGITAL SERVICES

MEMBERS & PURPOSE - ASSOCIATION OF COMMERCIAL TELEVISION IN EUROPE (ACT)

ACT member companies finance, produce, promote and distribute content and services benefiting millions of Europeans across all platforms. At ACT we believe that the healthy and sustainable commercial broadcasting sector has an important role to play in Europe's economy, society and cultures. Commercial broadcasters are at the heart of Europe's media landscape as producers and distributors of European original content and news. We embrace the digital environment providing new services, formats and content to meet the growing European demand for quality content on various distribution models.

FACTS & FIGURES – TV IN EUROPE (ACT)

INITIAL REMARKS

ADDRESSING THE GROWING DEPENDENCY ON DIGITAL GATEKEEPERS

As producers and distributors of original European content and news, commercial broadcasters form a central pillar of Europe's diverse media landscape. From the very beginning, ACT's members have embraced the increasing use of digital platforms to access content and supported such increasing demand with new services, formats and content tailored to the needs of a growing European online audience. In this process, it has become increasingly clear that some online markets suffer from fundamental structural imbalances, primarily created by a small number of digital platforms that are determining how most Europeans obtain and consume news, information and audio-visual content online.

We share the concerns identified in the Commission's Impact Assessment and outlined in the Explanatory Memorandum of the DMA regarding the unfair trading practices of digital Gatekeepers. In particular, we agree that, due to structural problems, competition law is not sufficient in addressing the challenges posed by the largest online platforms acting as Gatekeepers, and that therefore additional obligations are required. Considering the entrenched market positions of such Gatekeepers, the DMA is a long overdue, and possibly the last opportunity to gain back some control over the digital infrastructure and to ensure fair and contestable markets.

By controlling walled-off ecosystems, Gatekeeper services have become largely incontestable while controlling access to large user groups. Such control provides a strong commercial incentive and ability to unfairly extract rents from content providers and other business users that have become dependent on Gatekeepers in their effort to reach online audiences. This is particularly striking for Gatekeepers that, like content providers, are funded by advertising and therefore have a strong conflict of interest when intermediating competitors in this area. As a result, today even the largest European broadcasters are faced with a situation where digital Gatekeepers with conflicting business interests in effect unilaterally determine the commercial conditions for user access to audio-visual content, and thereby both hinder and exploit broadcasters in their endeavours to fund and provide innovative high-quality services.

WELCOMING THE DMA & CENTRAL RECOMMENDATIONS

ACT welcomes the proposal for a Digital Markets Act (DMA), as it addresses some of the most fundamental shortcomings in the current regulatory framework. For innovation to thrive in the digital economy, including in the media sector, there must be open and fair access to online audiences and corresponding revenue streams. Combined with the equally relevant liability regime for very large platforms proposed under the Digital Services Act (DSA), the DMA envisages practical solutions for genuine and urgent business restraints faced by various industries and companies in the digital sphere.

In order to further enhance the effectiveness of the DMA, ACT's recommendations focus on three key points: (i) a narrow set of designated Gatekeepers; (ii) more extensive obligations, and; (iii) less time-consuming and more effective enforcement mechanisms. The basic requirement for an effective asymmetric regulation is a targeted but all the more effective and speedy prohibition of the harmful practices of incontestable Gatekeepers, while simultaneously preventing negative spill-over effects for contestable competitors and intermediaries that do not threaten the competitive process.

In summary, we would suggest focusing the application of the DMA to a very narrow set of Gatekeepers along with tightening the requirements for such players by introducing more effective obligations and enforcement tools.

EXECUTIVE SUMMARY - KEY AREAS OF FOCUS FOR BROADCASTERS

CHAPTER I – SUBJECT MATTER, SCOPE, DEFINITIONS

ARTICLES 1 & 2 – SUBJECT MATTER, SCOPE, DEFINITIONS

- ACT members are concerned that, in the medium-term to long-term, the effectiveness of the DMA will significantly suffer, its purpose will be diluted and its merits will be reduced if the group of addressed "Gatekeepers" is defined too broadly.
- Providers of broadcasting services are not in the position of constituting Gatekeepers, we see the risk, however, that digital Gatekeepers would seek to expand their dominance into broadcasting markets. We have already witnessed digital Gatekeepers moving into linear broadcasting as well as first attempts to use their platforms to unfairly 'squeeze' themselves in between main-TV audiences and broadcasters with a view to becoming new intermediaries for broadcast channels, Voice-on-Demand services or other TV content. To ensure that such practices are covered, the DMA should not encompass any of the broadcasting services, unless they are provided by a Gatekeeper identified pursuant to Article 3(7). This would be comparable to the approach taken to advertising services, which, according to Article 2(2)(g), constitute a core platform service only if they are "provided by a provider of any of the core platform services listed in points (a) to (g)".
- Web browsers should be included in the list of core platforms services and the concept of "search results" should be further defined also covers operating systems for any "smart TVs" (i.e. internet connected).
- ACT would suggest that the co-legislators add a clarification that the term "operating system" as defined in Article 2(10) applies to all intermediation services owned by designated Gatekeepers whereby they control access to audiences, including "smart TVs", voice assistants and "smart speakers".

CHAPTER II – DESIGNATION OF GATEKEEPERS

ARTICLE 3 (AND ASSOCIATED) – DESIGNATION PROCESS, PROCEDURES AND CRITERIA

- ACT believes that if the DMA targets a group of platform services that is too broad - or that could be quickly broadened over time - the material obligations may be diluted and the enforcement may be slowed down, without additional benefits.

Material criteria

- The central qualitative criteria in Article 3(1) would benefit from clarification, especially given the that the additional criteria in Article 3(6) do not provide guidance on material thresholds.
- The central quantitative criteria such as market capitalisation and number of monthly active users are sufficiently precise to provide for a speedier designation process rather than taking the much lengthier route of conducting a complex analysis of multi-sided markets.

Delegated acts to specify criteria

- Given the potential implication of the designation process, the criteria used should be more clear and transparent.
- Instead of a delegated act that directly broadens the scope of Gatekeepers, the Commission should limit itself to a legislative proposal to amend the Regulation in order to include the identified additional criteria in the list of Article 2(6) DMA-A, only after the need for review is signalled by EU jurisprudence.

Procedure for designating Gatekeepers

- Keeping the scope of the Gatekeepers narrow, instead of relying on delegated acts, will speed the designation process to the benefit of affected stakeholders.
- It is essential that the obligations laid down in Articles 5 and 6 are implemented as soon as possible, therefore the obligations foreseen in Articles 5 and 6 need to be applicable immediately after the designation.
- If a designated Gatekeeper believes that it does not fulfil the thresholds, it should be entitled to request a market investigation in accordance with the relevant provisions of the Regulation. Such request - and any following market investigation - shall not affect the obligation pursuant to Article 3(8) for a Gatekeeper to comply with the obligations laid down in Articles 5 and 6 within a certain number of months (currently six, more appropriately three) after its core platform service has been included in the list pursuant to Article 3(7). The Gatekeeper may, however, turn to the General Court to apply for a suspension of the Commission's designation decision. In such summary proceeding, the Gatekeeper shall bear the burden of proof and, if unsuccessful, all costs incurred. This would reflect the statutory presumption in Article 3(2) and reduce the risk that companies only challenge designation decisions with a view to delaying the due process.
- While due process remains essential, the co-legislators need to ensure that the process does not lead to significant delays, similar to what has happened in the competition realm.

CHAPTER III - PROHIBITTED PRACTICES

ARTICLE 5 - OBLIGATIONS FOR GATEKEEPERS *IN*SUSCEPTIBLE OF BEING FURTHER SPECIFIED

Article 5 (a) – opt-in for personal data combination

- Article 5 (a) prohibits the bundling of data from various sources only if the user does not consent to such combination in the sense of an opt-in. When dealing with Gatekeepers, a solution which relies on consent would empty the obligation of substance.
- Combining personal data should be based upon an end user's explicit request to combine data in order to obtain a significantly improved service.
- However there must be a high hurdle for combining such data. This could be based upon an end user's explicit request to combine data in order to obtain a significantly improved service. In such a case, the provider should bear the burden of proof that the combination of data indeed (i) improves the service; (ii) allows the end user a fair share of the resulting benefits; (iii) is

indispensable for such improvement, and; (iv) does not eliminate competition[1]. Moreover, in order to ensure that the Gatekeeper remains contestable, the end user's consent should only justify the Gatekeeper's combination of data if the consent is equally given to the business users involved in the intermediation pursuant to Article 6 (1) (i).

Article 5 (b) prohibition of parity clauses

- Article 5 (b) contains an important prohibition for broadcasters, for instance where a Gatekeeper does not allow a broadcaster to offer end users better conditions on different content platforms. The current version is limited to the offering of better conditions on other intermediation services (a broad most-favoured nation clause).
- The prohibition should be expanded to disallowing better conditions through the business users directly (a narrow most-favoured nation clause).

Article 5(d) prohibition of contact with enforcement institutions

- Article 5 (d) should be expanded to also cover conduct that would serve to penalise business users for enforcing the DMA before national courts. This is necessary because the DMA and the DSA distinguish between "authorities" and "courts".

Article 5 (e) – requiring business users to use ID service (and other ancillary services)

- Economists have recommended that tying and bundling practices be presumed anti-competitive and that a general ban be included in the list of Article 6 DMA-A[2]. ACT would support such an approach.
- There is no apparent reason as to why a Gatekeeper should be prohibited from bundling its core platform service with an identification service, but allowed to bundle it with another ancillary services. In line with the uniform treatment elsewhere in the DMA, Article 5 (e) should pursue a uniform approach to all types of ancillary services.

Article 5 (f) – prohibition of making access to CPS conditional on use of other service

- To prevent leveraging, only prohibiting the tying of one Gatekeeper service with another Gatekeeper service is insufficient, especially while permitting the making of the use of a Gatekeeper service dependent on the use of another service for which the undertaking does not yet enjoy a Gatekeeper position.
- Should the tying prohibition be limited to bundling two Gatekeeper services together, the prohibition would come too late, because the markets would have already likely tipped and the users would have become dependent on both services in any event.
- The prohibition foreseen should also cover cases of a mixed bundling, often referred to as multi-product rebates. While in the case of a 'pure' bundling the products are only sold jointly in fixed

[1] This method of justification is based upon the well-established principles and case law developed under Article 101 para. 3 TFEU, which ensures legal certainty.

[2] *Cabral/Haucap/Parker/Petropoulus/Valletti,Van Alstyne*, The EU Digital Markets Act: A Report from a Panel of Economic Experts, 2021, p. 13.

proportions, in the case of mixed bundling, the products are also made available separately, but the sum of the prices when sold separately is higher than the bundled price.

- The Commission's "Guidance on the [..] enforcement priorities in applying Article [102] TFEU to abusive exclusionary conduct" treats pure and mixed bundling equally . Accordingly, a multi-product rebate is seen as abuse of dominance, "if it is so large that equally efficient competitors offering only some of the components cannot compete against the discounted bundled" . The DMA should follow the same holistic approach.

Article 5 (g) – price transparency in advertising intermediation

- ACT members are frequently faced with restraints caused by the highly concentrated online advertising markets. Even for the largest media companies, the advertising environment is highly opaque, given the discretionary activities/opaqueness of Gatekeepers. The latter can use their entrenched position to impose their Terms & Conditions to limit the disclosure of information on costs, effectiveness and profits of ad placements.
- Regulation must neutralise the competitive advantages resulting from the unhindered vertical integration and bundling of relevant bidding data.
- One way to achieve this objective is to prohibit a Gatekeeper from using data that is relevant for advertising purposes and that was collected via one advertising service (e.g., an SSP) in another advertising service, with the objective of gaining a competitive advantage vis-à-vis competing bidders. Such use of data that the intermediary could only obtain from another intermediation service of the same undertaking should be considered to be unlawful "insider bidding" and prohibited - akin to insider trading in the financial sector.
- To be able to assess whether a Gatekeeper with an entrenched position has calculated a price fairly and reasonably, a business user needs to know which criteria and which calculation methodology the Gatekeeper used, in particular as regards any biddings in algorithmic auction processes.

ARTICLE 6 - OBLIGATIONS FOR GATEKEEPERS SUSCEPTIBLE OF BEING FURTHER SPECIFIED

Article 6 (1) (a) – prohibition of using non-public data generated by competing business users

- To enhance the effectiveness of the prohibition, the wording in Article 6.1.a. should be aligned with that of Article 6 (1) (i) as regards the type of data that may not be used. It is also to be read in connection with Article 6 (1) (e) which refers to the provision of broadcasters' data by Gatekeepers.
- It should also be clarified that the prohibition also applies where the Gatekeeper uses the data of one business user ("A") to compete not against such particular user, but with another business user ("B") as in both cases competition is unfairly distorted.

Article 6 (1) (b) – app un-installing

- Article 6 (1) (b) amounts to legalising one of the most extreme forms of self-preferencing.
- Currently, Article 6 (1) (b) only obliges Gatekeepers to allow end users to un-install any pre-installed apps. It does not prohibit such pre-installations in the first place. Gatekeeper are not obliged to actively provide a choice to end users. Due to the strong "status quo bias", it is very unlikely that end users will switch and make well-informed choices if such choices are not

presented and explained to them in the first place. This was a key learning from the Commission's Android case.

- The unjustified pre-installation of other core platform services such as a video-sharing platforms, social networks or web browsers by the provider of an operating system can have equivalent effects and should be addressed in the DMA proposal.
- End users should be able to un-install any functionality on a device, irrespective of its technical labelling, as long as this does not jeopardise the security or other functionalities. The Gatekeeper should bear the burden of proof that such risks exist.

Article 6 (1) (c) – enabling of side-loading

- In order to align the obligation with Article 6 (1) (d), this Article should also be expanded to the installation of any competing service, such as video-streaming services and not only with app stores and apps.

Article 6 (1) (d) - prohibition of self-favouring in ranking

- The intermediation power of Gatekeepers 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 an indispensable precondition for a well-functioning internal market.
- Self-preferencing by any other core platform service such as operating systems, cloud computing services, advertising systems or ancillary services should be equally addressed.
- In addition, the current wording of the proposal does not address other equally damaging self-preferencing practices such as a preferential crawling, indexing or other "access" of offerings/content to the intermediation service, preferential sharing of data regarding the ranking criteria and how to influence them.
- The complex algorithmic and data-driven ranking of the various types of results in search engines, app stores or marketplaces can only be effectively monitored by a highly specialised and sufficiently equipped enforcement unit, ideally on a day-to-day basis. This is a standard that should be achieved.

Article 6(1)(e) – prohibition of restricting user switching

- To maintain contestability, every provider of a Gatekeeper service should be prohibited from technically restricting the ability of end users to switch between services and subscribe to any other service. For example, search engines and social networks should not make it technically more difficult for advertisers to switch to alternative advertising networks in order to serve ads on their platforms or elsewhere.

Article 6 (1) (f) – access to operating system and other features

- Such leveraging practices should be prohibited, however, not just if any "ancillary service" is favoured, as (narrowly) defined in Article 2(14). The favouring of any of the Gatekeeper's separate services should be equally addressed.

Article 6(1)(g) – transparency in advertising intermediation (performance)

- Article 6 (1) (g) can be seen as a special application of the general obligation under Article 6 (1) (i) (to share data relating to business users) for the advertising industry.
- Access to the relevant ad performance raw data must be provided in an "effective, high-quality, continuous and real-time" manner.
- While it is important that publishers and advertisers may verify the service of the Gatekeeper, it is equally important that they are enabled to measure, on an individual basis, the performance of their own campaigns and to use independent Joint Industry Committees.

Article 6(1)(h) – provision of data portability

- The wording of this obligation should be aligned with that of Article 6 (1) (i), and it should be ensured that the obligation may not be relied upon by one Gatekeeper to gain access to the data of another Gatekeeper.

Article 6 (1) (i) – access to data generated by intermediating between end users and business users

- Data provides broadcasters and other providers of digital services with important insights on how audiences consume and engage with content. Such insights allow to better cater to the interests of all user groups and thereby improve the quality of digital services.
- At present, when distributing content through Gatekeeper platforms, broadcasters often fail to enhance the positive network effects of their services, as Gatekeepers decline to share with them the data allowing them to better fine-tune the offerings to the needs of all users. In particular, Gatekeepers typically refuse to share any data regarding the number of views or any interactions of end users with relevant content.
- In order to use the Gatekeeper services to reach their respective (single-homing) audiences, broadcasters need to make their data available to the Gatekeeper and to accept its conditions as regards the free combination and use of such data.
- To make matters worse, in order to enhance their superior access to data, Gatekeepers increasingly use privacy laws as an excuse to further deprive business users and competing operators of relevant data. While, given end users' dependency on Gatekeeper services, the providers of such service find it easy to collect and bundle data in a GDPR-compliant manner, they reject sharing such data with business users on the basis of alleged GDPR-non-compliance.
- Gatekeepers are in a unique position to facilitate the obtaining of consent. Where a user accesses a third-party service through a Gatekeeper platform, the platform is used to facilitate obtaining consent for both the use of data by itself and the third-party service. The Gatekeeper cannot restrict obtaining consent for its purposes alone.
- The DMA could provide for a balance of interests by adopting a principle based approach - wherever the Gatekeeper fails to obtain consent from end users to share personal data that has been generated in the context of the use of the core platform service with the intermediated business user pursuant to Article 6 (1) (i)), the Gatekeeper should be prohibited from using such data for any purpose other than the original intermediation.
- In particular, a Gatekeeper must not be allowed to combine the data with any data gathered from other sources or use it for the provision of another service. In other words, if the Gatekeeper does not obtain consent from end users to share their data with its business users, the Gatekeeper must also not use this data itself.

Article 6 (1) (j) – access to search data

- The obligation for Gatekeeper online search engines to grant FRAND-access to relevant search data eliminates the central barrier to entry for online search services and thereby renders the market for general search services contestable.

Article 6 (1) (k) – prohibition of unfair access conditions

- ACT believes that the most coherent and consistent solution would be to expand the prohibition of unfair (unreasonable) and discriminatory conditions to all designated Gatekeepers.
- There is no justification to allow any Gatekeeper to impose unfair and/or discriminatory T&Cs.

ARTICLE 7 - COMPLIANCE WITH OBLIGATIONS LAID DOWN IN ARTICLE 5 AND 6

- ACT would recommend that the co-legislators clarify that all obligations are immediately applicable without any room for delay which may be triggered by the Gatekeeper by means of an *a priori* dialogue between the Commission and the designated Gatekeepers.

CHAPTER IV - MONITORING AND ENFORCEMENT

- Previous competition cases involving digital Gatekeepers demonstrate the high degree of information asymmetry between Gatekeepers and enforcement authorities. To reduce such asymmetry authorities must be equipped with powerful tools to create the transparency and technical know-how necessary to detect and effectively condemn acts of non-compliance.
- The DMA needs to include a clear commitment to the private enforceability of the obligations laid down in Articles 5 and 6 before national courts.
- Currently, the DMA conveys no rights to affected business users, end users or competitors to request any investigation into any observed non-compliance, which is regrettable.
- It should be clarified that business users affected by any conduct of a Gatekeeper have the right to submit formal complaints about Gatekeepers' non-compliance with the obligations laid down in Article 5 and 6 of the DMA proposal. They should also be heard in the decision-making process of the enforcement authorities.
- We also remain cautious with regards to the potential implication of association of undertakings representing Gatekeepers in this process, given the targeted nature of the Regulation.

CONCLUDING REMARKS

ACT supports the European endeavours to effectively address the serious harms caused by the largely uncontrolled intermediation power of digital Gatekeepers over end users and business users. Despite some shortcomings, in particular as regards advertising markets and the enforcement mechanism, the DMA is overall a helpful piece of legislation that can be improved to meet its stated goals, and could thus serve as an example for the international community.