

The Consumer Voice in Europe

## DIGITAL MARKETS ACT PROPOSAL

Position Paper



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## Why it matters to consumers

Digital Markets play an ever more significant role in consumers' lives. Digital players, including the big platforms, have brought consumers many benefits. However, with the increase of power, the risk of its misuse with detrimental effects for consumers also increases, as seen in multiple enforcement cases against big tech. Monopolisation of services such as social networks and search tools can lead to locked-in consumers being deprived of meaningful choice. Existing EU tools are insufficient to deal with the risks that powerful platforms pose for consumers to stop this harmful trend. National measures would lead to fragmentation of the EU Single Market and are insufficient to deal with these global players. The proposed Digital Markets Act (DMA), together with the proposed Digital Services Act (DSA), are therefore important instruments to ensure that in future the online world better serves the interests of Europe's consumers.

## Summary

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BEUC strongly welcomes the proposed Digital Markets Act. It is a good starting point to adopt an essential new law to tackle problems in digital markets.

In particular, BEUC welcomes the fact that this proposal:

- is a Regulation (rather than a Directive) with a swift entry into application
- contains self-executing obligations and prohibitions, and
- will be enforced at EU level.

To ensure that the final DMA optimally serves consumers the proposal must however be strengthened by the co-legislators in a number of key areas during the process of adopting the legislation. These areas include:

- greater emphasis on consumer interests
- closing gaps in the scope of gatekeepers' obligations, most importantly:
  - adding an interoperability obligation for social networks and instant messaging services to enable contestability of these core platform services and consumer choice
  - prohibiting not only technical barriers which affect consumer choice but also behavioural barriers, and
- a more effective system of enforcement:
  - appropriate procedures
  - appropriate sanctions
  - appropriate resources

As this Regulation would preclude national regulation of gatekeeper obligations for the purpose of ensuring contestable and fair markets<sup>1</sup>, it is essential that the DMA's provisions fully address all gatekeeper issues.

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<sup>1</sup> Article 1(5) DMA.

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## General remarks and key BEUC demands

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BEUC welcomes the Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)<sup>2</sup>.

The DMA, together with the Digital Services Act (DSA), are essential to ensure that the digital world works to the benefit of consumers, and to prevent conduct by powerful platforms that harms European consumers and citizens. The DMA should lead to more contestable markets with new players leading to more choice of service providers for consumers.

The DMA and DSA, whilst sharing common objectives, each have a different but complementary role to play. Their adoption must be coordinated to ensure consistency and to avoid legislative gaps. There must not, however, be trade-offs between these two instruments, as they target different behaviours by digital service providers, notably online platforms, and each is essential to protect consumers in its own right.

This paper deals only with the DMA. For BEUC's views on the DSA, please see [here](#).

### Key BEUC demands:

- Consumer interests must be taken into account equally with business users to ensure contestability and fairness in the obligations and procedures under the DMA.
- In particular, the DMA must ensure consumer choice of social network and instant messaging services through interoperability obligations.
- Where consumers are given rights and/or choices under the DMA, gatekeepers must present them neutrally.
- Consumers and other third parties must have the right to (1) submit formal complaints about gatekeepers violating their obligations under the DMA; and (2) be heard in decision-making processes under the DMA to ensure due process and transparency of process.
- The DMA must foresee effective enforcement measures from the first infringement by a gatekeeper to ensure swift compliance by gatekeepers with their obligations.
- Deadlines under the DMA must be equitable between all affected parties and legally binding for all types of Commission decisions under the DMA to ensure that their effect is not delayed.
- The future-proofing provisions in the DMA must be tightened to protect end users and to close loopholes. They must also be sufficiently flexible to deal with future harmful practices.
- The standard of proof for Commission decisions must be set out in the DMA.
- The Commission must be fully resourced to carry out its enforcement functions under the DMA, as regards both the number of staff and the types of expertise required.
- The DMA must also be enforceable by business and end users in Member States' courts, including through representative actions by consumers to obtain redress.
- The balance between timely legal certainty and flexibility in the current proposal as regards gatekeepers and their obligations must be maintained.

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<sup>2</sup> Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final of 15.12.2020.

## 1. The need for a self-executing DMA

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Experience in recent years has shown that EU competition law alone is not able to deal effectively with many of the challenges thrown up by digital markets, in particular due to the characteristics of these markets and the time required to investigate them.<sup>3</sup> Therefore, regulation which can prevent problems arising before they cause consumer harm is essential to complement competition and consumer law enforcement.

The need for regulation to be self-executing and for this to proceed without delay is recognised in the DMA. The balance in the proposal between legal certainty on the one hand, and sufficient flexibility to deal with specific circumstances and future developments on the other, is appropriate. This applies both to the designation of gatekeepers (through qualitative and quantitative criteria and the Commission's decision-making powers<sup>4</sup>) and to the mechanism of immediately applicable obligations and obligations susceptible of being further specified.<sup>5</sup>

Gatekeepers are pushing for more flexibility in a bid to reduce the scope of their obligations and to delay the moment from which they need to comply.<sup>6</sup> This must be resisted, however, as it would necessarily cause delay and encourage legal disputes and thereby undermine one of the key advantages of the DMA over competition law, namely swift and effective enforcement. The structure and review provisions in the DMA are sufficient to correct any "teething troubles" and should not be materially changed.

***The balance between timely legal certainty and flexibility in the current DMA proposal as regards gatekeepers and their obligations must not be materially altered. Changes would enable stalling by gatekeepers to the detriment of consumers.***

## 2. The need for greater emphasis on consumer interests

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The DMA is built on the twin objectives of contestability and fairness. However, the current proposal is heavily focussed on contestability and fairness for business users rather than end users.<sup>7</sup>

This imbalance manifests itself both in terms of substance and procedure. End users must receive the same focus as business users in order to ensure a high level of consumer protection as required by the TFEU<sup>8</sup>, since end users also include consumers. Where gatekeeper platforms operate in two-sided markets, the interests of consumers must be appropriately taken into account, equally with business users.

The rights afforded to business users could also lead to benefits to end users, for example if the DMA leads to the development of new or better services by business users, this should give end users more choice. Nevertheless, there are several areas where end user – consumer – interests should be taken into account directly.

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<sup>3</sup> An example of this is the *Google Shopping* case which involved ranking conduct which infringed competition law (Article 102 TFEU). Ten years on, there still appears to be no effective remedy for Google's conduct.

<sup>4</sup> Article 3 and 4 DMA.

<sup>5</sup> Article 5-9 DMA.

<sup>6</sup> For example, several gatekeepers are suggesting that the DMA should be more like the UK digital markets proposals.

<sup>7</sup> End user is defined in Article 2 as "any natural or legal person using core platform services other than as a business user". This therefore includes consumers.

<sup>8</sup> Article 169 Treaty on the Functioning of the European Union (TFEU).

It should also be made clear in Article 1(6) that the DMA is, in addition to the other EU law mentioned, also without prejudice to EU consumer protection law, notably the Unfair Commercial Practices Directive (“UCPD”)<sup>9</sup> and Unfair Contract Terms Directive.<sup>10</sup>

## **2.1. The need for greater focus on consumers in the substance of the DMA**

### **2.1.1. Consumer choice in core platform services - social networks and instant messaging services**

The DMA is intended to “foster the emergence of alternative platforms, which could deliver quality innovative products and services at affordable prices.”<sup>11</sup> However, consumers would not get a choice of core platform service providers under the current proposals.<sup>12</sup> The majority of the obligations and prohibitions imposed on gatekeepers in Article 5 and 6 are aimed at enabling business users to offer services in vertical or ancillary markets, rather than fostering the emergence of new platforms to enable consumers to choose alternative core platform service providers and therefore genuinely creating competition in such services and not only in ancillary ones.

A key example of this is the proposed Article 6(1)(f) on interoperability. This Article only provides for interoperability between core platform services and ancillary services such as payment services. It would allow business users to develop ancillary services (also to the benefit of consumers) but would not enable competing core platform services to develop. This Article would therefore do nothing for genuine consumer choice in core platform online communication services, i.e. social networks or instant messaging services such as Facebook or WhatsApp. The current DMA proposal ignores consumer choice, contestability and fairness in these important digital services.

Core platform services take advantage of common open standards that have allowed the Internet to flourish. These standards have created fast and widespread economic and cultural progress<sup>13</sup> and are the bedrock of innovation on the open Internet. This open interoperable approach must be replicated for social networks and instant messaging services.

To ensure that the DMA fulfils its objectives for consumers, a further Article must be added to ensure interoperability for these online core platform communication services.<sup>14</sup> Further details are set out in section 3.2.1 below.

### **2.1.2. End users need to receive the same focus as business users throughout the DMA**

Other parts of the DMA also lack an end user focus. Giving consumers rights is likely to lead to both greater contestability and fairness. End users are named as beneficiaries of the gatekeeper obligations in only 7 of the 18 obligations/prohibitions in Articles 5 and 6. The interests of end users must be reflected in further articles.

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<sup>9</sup> Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328, 18.12.2019, p. 7–28.

<sup>10</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29–34.

<sup>11</sup> DMA proposal of 15.12.2020, p.10. See also Recitals 12 and 13.

<sup>12</sup> See also <https://www.article19.org/resources/eu-joint-letter-on-protecting-rights-in-the-digital-markets-act/>

<sup>13</sup> The EU Digital Markets Act A Report from a Panel of Economic Experts, Joint Research Centre, 2021, page 22, at: <https://ec.europa.eu/jrc/en/publication/eu-digital-markets-act>

<sup>14</sup> See also EDPS Opinion 2/2021, paras 37-38 at: [https://edps.europa.eu/sites/edp/files/publication/21-02-10-opinion\\_on\\_digital\\_markets\\_act\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/21-02-10-opinion_on_digital_markets_act_en.pdf)

- Article 5(a) would require gatekeepers to refrain from combining personal data from different sources unless the end user has been presented with the specific choice and provided consent in the sense of Regulation (EU) 2016/679.<sup>15</sup> The linked Recital 36 notes that gatekeepers should offer end users “a less personalised alternative” if they do not consent to personal data combination. However, to avoid any ambiguity, it must be made clear in Article 5(a) itself, that gatekeepers must offer end users who do not consent to data combination an alternative service which is only different in the level of personalisation resulting from the non-cumulation of data. This alternative service must otherwise be of identical quality.<sup>16</sup> Without such an obligation on the gatekeeper, the alternative service could be sufficiently inferior that the consumer in reality has no choice but to consent to data combination.
- Article 5(d) provides that gatekeepers must “refrain from preventing or restricting business users from raising issues with any relevant public authority relating to any practice of gatekeepers” but does not prohibit similar restrictions being placed on end users. End users must also be free to raise issues with any relevant public authority relating to any practice of gatekeepers.
- Article 6(1)(i) provides a right for business users, “or third parties authorised by a business user” to access and use data. It is unclear why this option to authorise third parties to exercise business users’ rights would apply only to Article 6(1)(i) and not to other relevant obligations/prohibitions. Moreover, end users must also be able to authorise third parties to exercise their rights in relation to relevant obligations/prohibitions.
- Article 10 would empower the Commission to update obligations on gatekeepers where there is an imbalance of rights and obligations between gatekeepers and business users that limit contestability or amounting to unfair practices. There is no reference to end users in this article. This must be corrected.

## 2.2. The need for greater focus on consumers in the procedures in the DMA

Article 30 would provide gatekeepers, or undertakings, or associations of undertakings concerned, with the right to be heard before the Commission adopts a decision in multiple types of proceedings. These decisions include the designation of gatekeepers, the specification of Article 6 obligations, suspensions/exemptions from obligations, market investigations, interim measures, non-compliance, commitments, etc.

Consumers or their representatives (and other interested third parties) must also have the right to be heard before such decisions are taken when their interests can be affected by such decisions. This is foreseen in the equivalent provisions under competition law for the hearing of parties where the Commission adopts similar decisions.<sup>17</sup> There is no justification to deny consumers the right to be heard under the DMA, particularly as many gatekeepers operate in directly consumer-facing markets.

Denying other third parties the right to be heard would also be counter-productive from the consumer perspective. If the dialogue on compliance with a particular obligation only

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<sup>15</sup> Whether the specific choice and consent are two different matters is unclear.

<sup>16</sup> Article 11(3) as currently drafted is not sufficient to ensure this. While it provides that gatekeepers must not degrade the conditions or quality of any of the core platform services provided to business users or end users who avail themselves of the rights or choices laid down in Articles 5 and 6, this does not specifically provide for the level of personalisation being the only difference under Article 5(a).

<sup>17</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 04.01.2003, p.1-25 (Chapter VIII) and its implementing regulation, Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, p. 18-24 (Chapter V).



takes the views of the gatekeeper into account, and not the intended third party beneficiaries of the obligations, the chances of effectively achieving the objectives of the relevant obligation in practice are likely to be materially reduced. The incentives of the gatekeeper will likely be to preserve its existing practices, and not promote contestability. Without the ability to check, using the expertise of third parties in the sector, that what the gatekeeper proposes will actually work for those it is intended to benefit, the DMA may miss its aims and that would not be in consumers' interests. Furthermore, guidance on the compliance dialogue process should be envisaged.

***Consumer interests must be taken into account equally with business users to ensure contestability and fairness in the obligations and procedures under the DMA.***

***In particular the DMA must:***

- ***provide consumers with a choice of social network and instant messaging services through interoperability obligations.***
- ***ensure less personalised but otherwise equivalent quality alternative services where consumers do not consent to data combination.***
- ***give consumers the right to be heard before the Commission takes enforcement decisions.***

### **3. The need to close gaps in the scope of gatekeeper obligations**

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#### **3.1. Prohibiting the use of technical barriers is not enough**

The DMA proposes to prohibit the use of technical barriers to prevent end user switching in Article 6(1)(e). However, this provision alone is insufficient to ensure effective switching as intended by this prohibition. The exploitation by gatekeepers of consumer behaviour must also be prohibited.

Consumers can be manipulated into taking (or not taking) actions they do not actually intend or are not in their interest, simply by the way choices are presented to them. This can be done through non-neutral choice architecture such as dark patterns<sup>18</sup> which can exploit consumers' naturally occurring behavioural biases<sup>19</sup>. We have seen, for example, how companies "comply" with their obligations under EU law on cookies, and we know how easy it is to agree to cookies, and how hard it is to reject them. Similarly, privacy settings are designed to make consumers share data and dissuade them from exercising their data protection rights instead of empowering them to freely decide about the level of data disclosure they want when using a service.

Gatekeepers frequently use choice architecture techniques to influence how consumers behave.<sup>20</sup> Even where it is technically feasible for a consumer to switch a service, she/he

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<sup>18</sup> Dark patterns can be described as "...features of interface design crafted to trick users into doing things that they might not want to do, but which benefit the business in question", or in short, nudges that may be against the user's own interest." - How Dark Patterns Trick You Online at <https://www.youtube.com/watch?v=kxkrdLI6e6M>. Dark Patterns are built on the concept of "nudging", identified in behavioural economics and psychology, which describes how users can be steered toward making certain choices by appealing to psychological biases. Rather than making decisions based on rationality, individuals have a tendency to be influenced by a variety of cognitive biases, often without being aware of it - Deceived by Design - Forbrukerradet, 27.06.2018 at <https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf>

<sup>19</sup> Behavioural biases have been identified in the field of behavioural economics and psychology by two recent Nobel prize winners (Richard Thaler and Daniel Kahneman).

<sup>20</sup> Case AT.39740 *Google Search (Shopping)*, Commission Decision of 27.6.2017; Case AT.40099 *Google Android*, Commission Decision of 18.7.2018; Amazon Prime - Forbrukerrådet, 'Complaint against Amazon



may, for example, be bombarded with repeated and “intimidating” messages about the purported disadvantages or dangers of switching, or this may be made so time-consuming or complex that the consumer gives up. Such tactics can be just as effective as technical barriers.

Article 11(1) (on anti-circumvention) would require undertakings to which gatekeepers belong not to undermine the obligations in Article 5 and 6 by any behaviour, regardless of whether this behaviour is of a contractual, commercial, technical “or any other nature”. It should be made clear that this applies both to gatekeepers themselves and to the undertakings which they belong. Article 11(3) further requires gatekeepers not to “make the exercise of those rights or choices [in Articles 5 and 6] unduly difficult.”<sup>21</sup> However, the use of dark patterns must be explicitly included in this anti-circumvention Article to avoid any ambiguity and to draw gatekeepers’ attention to the prohibition on their use.<sup>22</sup>

The prohibition on the use of dark patterns must apply beyond Article 6(1)(e) to prevent other DMA obligations from being undermined, notably in relation to end user consent to personal data combination (Article 5(a))<sup>23</sup>; tying practices (Article 5 (f)) the ability to uninstall apps (Article 6(b)); installing other apps/app stores (Article 6(c)); ranking (Article 6(d)); and data portability (Article 6(h)). The same would apply to relevant provisions in the DSA.

In terms of the Commission’s investigative, enforcement and monitoring powers in relation to, but not exclusively, dark patterns, it would also be advisable for Article 19 (1) on Requests for Information to refer not only specifically to “access to data bases and algorithms of undertakings” as is currently the case but also to undertakings so-called “A/B testing”.

Many practices aimed at distorting the consumer’s decision-making process have for example been qualified as unfair practices in the context of the Unfair Commercial Practices Directive (e.g. misleading and aggressive practices). In relation to online manipulation, that Directive needs to be urgently updated to address new unfair forms of influencing consumers relevant for all business practices, not only those of gatekeepers. However, the DMA should nevertheless include in its anti-circumvention provision a prohibition on the use of behavioural techniques and interface design that would undermine the effectiveness of Articles 5 and 6. This would be without prejudice to such techniques constituting an infringement of other EU and national laws, such as the UCPD.

## 3.2. Individual obligations and prohibitions

### 3.2.1. Interoperability

Article 6 must include a new provision, in addition to Article 6(1)(f), to ensure interoperability in relation to online communications (social networks and instant messaging) so as to provide for genuine consumer choice. At present, consumers are locked-in to core platform services such as Facebook’s social network and WhatsApp. Due

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Prime’ at <https://fil.forbrukerradet.no/wp-content/uploads/2021/01/complaint-against-amazon-prime.pdf>. See also Forbrukerrådet study “Deceived by Design” at: <https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf>

<sup>21</sup> See also Recitals 29 and 32.

<sup>22</sup> This may be particularly significant for voice-activated assistants. It should also be made unambiguous (for example in a Recital) that core services accessed through virtual assistants are covered by the DMA in so far virtual assistant software is considered as an Operating System or an Online Intermediation Service in the sense of Articles 2(5) and 2(10), respectively.

<sup>23</sup> Recital 36 states that consent choices should be presented “in an explicit, clear and straightforward manner”. While this goes slightly further than the current Article 11, the obligation not to use dark patterns should be explicitly included. Consent management should also be user-friendly. See EDPS Opinion 2/2021, para 25 at: [https://edps.europa.eu/sites/edp/files/publication/21-02-10-opinion\\_on\\_digital\\_markets\\_act\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/21-02-10-opinion_on_digital_markets_act_en.pdf)

in particular to strong network effects, consumers cannot choose more privacy-friendly alternatives without sacrificing the networks of friends and other groups they have built up on a specific platform. Unless interoperability is mandated for these core services, it will be practically impossible for other service providers to gain a foothold and online communications services will remain neither contestable nor fair to consumers. Interoperability would enable new market entrants to offer users a real choice, and allow users to choose their providers on the basis of their needs and preferences.

Whilst instant messaging services are also covered by the European Electronic Communications Code<sup>24</sup>, including in the DMA an interoperability obligation only on gatekeepers has the advantage, from the contestability perspective, that it would enable rival start-ups to decide if this is favourable to them in terms of innovation (given that once requested it would be reciprocal between the start-up and the gatekeeper).

The Article 6 obligations are due to be specified in more detail by the Commission once the DMA is passed. This process should be used to impose technical interoperability requirements by means of defined Application Programming Interfaces (APIs) and/or standardised communication protocols and a set of core interoperable features.<sup>25</sup>

The DMA must define a process to agree a set of core interoperable features for a given service, to avoid obstacles to innovation by ossifying functionalities, to counter incentives for gatekeeper companies to minimise the functionality standardised, and to avoid the risk of capture of the process by vested interests.

The European Commission's Multi Stakeholder Platform on ICT Standardisation, an expert advisory group where Member State and Commission representatives meet technical standards bodies four times each year, would be the right venue to plan standardisation support for interoperability requirements in digital markets. Or alternatively internationally agreed standards may be appropriate.

To ensure that end users are not locked-in to cloud storage services, the Commission should explore whether interoperability could also be required for these services.

### **3.2.2. Parity Clauses - Article 5(b)**

Article 5(b) currently requires gatekeepers to allow business users to offer the same products or services to end users through third party online intermediation services at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper. In other words, this Article prohibits some types of parity or so-called most favoured nation (MFN) clauses. It does not appear to require gatekeepers to allow business users to offer different prices or conditions when the business user itself directly sells the product or service online. This can reduce consumer choice or increase prices and should therefore also be covered by Article 5 (b).

### **3.2.3. Tying/bundling - Articles 5(e) and 5(f)**

Article 5(f) prohibits only the tying of different core platform services, but not the tying of core platform and ancillary services which can also impede contestability. Specific ancillary services, notably payment services and technical services which support the provision of

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<sup>24</sup> Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) (OJ L 321, 17.12.2018, p. 36).

<sup>25</sup> An API is a computing interface allowing access to a technical system and defining the conditions under which the system can be used. APIs typically intermediate in a standardised manner a series of data flows between computing systems. A communication protocol similarly defines a set of messages that can be sent between two or more systems to share information and invoke features – via the Internet or other networks (or even on the same computing system). This is compatible with end-to-end encryption.

payment services, should therefore be added to the prohibition on tying of identification services in Article 5(e).

Article 5(f) must be drafted to ensure that it cannot be circumvented through integrated product design.

Without these changes, gatekeepers would more easily be able to leverage their power into other markets, thereby harming their contestability and consumer choice. Simply ensuring interoperability for ancillary services is not enough, as tying of ancillary services will still enable gatekeepers to leverage into these services.

#### **3.2.4. Un-installing - Article 6(1)(b)**

The un-installation obligation must apply to all functionalities on devices so long as the security or the core functionality of the device or operating system is not compromised. For example, this should apply to the health app on iPhones even if this is not considered as an app as such by the gatekeeper. Furthermore, this Article must state that the burden of proof that any restriction on un-installation is essential must be on the gatekeeper.

Device manufacturers/suppliers as well as end users should be allowed to un-install apps.

#### **3.2.5. Installing apps and app stores - Article 6(1)(c)**

Article 6(1)(c) obliges gatekeepers to allow the installation of third party software applications or software application stores, subject to the gatekeeper not being prevented from taking proportionate measures to ensure that such installation does not endanger the integrity of the hardware or operating system. As for Article 6(1)(b), this Article must state that the burden of proof is on the gatekeeper to demonstrate that such measures are necessary and justified and that there are no less restrictive means to safeguard the integrity of the hardware or operating system.<sup>26</sup>

As for uninstalling, the right to install apps and app stores should pertain to both end users and device manufacturers/suppliers. Furthermore, this article should make explicit that the end user must have the unimpaired right to set the newly installed app or app store as the default. This right must be accompanied by the obligation on the gatekeeper to prompt the end user to decide whether the downloaded application or app store should become the default.

***A clear prohibition on the use of dark patterns by gatekeepers must be explicitly included in the DMA's anti-circumvention provision (Article 11) i.e. a prohibition on the use of behavioural techniques and interface design that undermine the effectiveness of Articles 5 and 6. Interoperability, tying, uninstallation and installation obligations must be enhanced to ensure fairness to consumers.***

## **4. The need for a more effective system of enforcement**

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### **4.1. Sanctions for violations of the DMA must be effective**

The sanctions for violation of the DMA currently proposed (Articles 25 on non-compliance decisions and Article 26 on fines) would be insufficient to ensure gatekeepers' compliance with their obligations under the DMA. Experience in other areas of law has shown that "cease and desist orders" and fines have not always been effective to stop some

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<sup>26</sup> This should be made explicit in Article 6(1)(c) rather than relying on Recital 47.

gatekeepers breaking the law<sup>27</sup>, nor to correct their behaviour within a meaningful timeframe.<sup>28</sup>

The most effective way to prevent (deter) and remedy breaches of the DMA would be to require offenders to change their conduct immediately, not merely to stop what they are doing wrong and, where necessary, to undo the harm they have done.

There are thus two problems with Article 25 as currently drafted that must be corrected. First, it must be clear that a "cease and desist order" enables the Commission to specify what measures the gatekeeper concerned shall implement to comply with Article 5 and 6 obligations<sup>29</sup>. Second, Article 25 must enable the Commission to specify the measures necessary to undo the harm caused by non-compliance. However, under the DMA as currently proposed, taking action to remedy harm caused by infringements could typically only take place after three infringements of the DMA within a period of five years and after a market investigation which could mean that behavioural or structural measures may not be possible for *at least six years* after a first finding that the law has been breached, under Article 16 (systematic non-compliance).<sup>30</sup> Six years is a very long time in which to further entrench a gatekeeper position and damage the contestability and fairness of digital markets. By this time, the damage could effectively be irreparable. This lack of immediately effective redress for violation of the DMA risks undermining its effectiveness.

Article 25 must therefore clearly state that the Commission can specify what is necessary to ensure compliance with the relevant obligations of the DMA, and also foresee the possibility of imposing at least behavioural remedies directly in any non-compliance decision to undo the harm done by failure to comply.<sup>31</sup> This would be the most effective way to both deter gatekeepers from breaching their obligations and, should this nevertheless occur, to bring them swiftly into compliance. As a matter of principle, it is not

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<sup>27</sup> For example, Google has been fined three times in the EU for breach of competition law and is currently under investigation for further breaches. Google has also been found in breach of competition and data protection law at Member State level. Amazon and Facebook have been found to have infringed competition law at Member State level, and Facebook also for data protection. The three are currently under investigation for further competition law breaches at EU level and/or Member State level, as is Apple.

<sup>28</sup> Google has arguably still not remedied its breach of competition law in the Google Shopping case more than 10 years on. Similarly, in Google Android, the remedy imposed has had no effect in terms of making the search market contestable 6 years after the case was started. Google still has a more than 90% market share in search.

<sup>29</sup> In a similar way to decisions under Article 7(2) DMA on specific implementing measures for obligations in order to ensure their effectiveness and proportionality (Article 7(5) DMA. See also Recital 33.) The provision in Article 25(3) that in the event of a non-compliance decision, the gatekeeper must "provide explanations on how it plans to comply with the decision" and in Article 25 (4) requiring the gatekeeper to provide a description of the measures it took to ensure compliance with the decision does not achieve this.

<sup>30</sup> Article 16 specifies that behavioural or structural remedies can only be imposed on gatekeepers who are found to be in systematic non-compliance with the DMA and have further strengthened or extended their gatekeeper position. Systematic non-compliance will be deemed to arise where the Commission has issued at least three non-compliance or fining decisions against a gatekeeper in relation to any of its core platform services within a period of five years. The Commission must carry out a market investigation into the systematic non-compliance which can take 12-18 months from the opening of the investigation (Article 16(1) and (6)). The time taken from the identification of a first potential breach of the DMA to an effective behavioural/structural remedy could thus be:

- 6 months for a finding of first violation (note there is currently no deadline for a non-compliance finding in Article 25), plus
- five years, plus
- 12-18 months of market investigation, plus
- 3-6 months implementation time for the behavioural/structural remedy.

Therefore, although systemic non-compliance could potentially be identified in other ways – and if so, these should be made more explicit in Article 16 - the means of establishing this that is specifically cited in Article 16 could require a time period from violation detection to correction of realistically more than 7 years and at least 6 years from a finding of violation to correction.

<sup>31</sup> Sanctions and remedies for non-compliance under Article 25 and 26 should not be confused with the Commission's decision-making powers under Article 7(2). The purpose of Article 7(2) decisions is to ensure immediate correct implementation of obligations under Article 6 in order to ensure their effectiveness and proportionality (Article 7(5)). See also 4.2.2.2 below.

clear why a behavioural remedy to undo harm caused by non-compliance could only be imposed in cases of systematic non-compliance.

Finally, where compliance with an obligation is dependent on how end users react to what the gatekeeper does (including behavioural biases), it may be advisable to foresee in the DMA that the Commission can require remedies to be A/B tested to optimise their effectiveness.

The DMA must also explicitly include a right to review and amend remedies under Article 16 and 25 and commitments under Article 23 if, following investigation by the Commission<sup>32</sup>, they are demonstrated to be ineffective.

***The DMA must foresee effective enforcement measures from the first infringement by a gatekeeper.***

## **4.2. Decision-making processes must be transparent and balanced**

The procedures foreseen in the current proposal for the adoption of decisions and the execution of market investigations must be improved to optimise their outcomes. This concerns the transparency of the process, legal deadlines and the standard of proof.

### **4.2.1. Efficacy and transparency: Complaints and consultation**

The procedural rights of gatekeepers are set out clearly in the DMA. However, there are no equivalent procedural rights provided for parties affected by gatekeepers' conduct, in particular consumers (see section 2.2 above). No formal complaints procedure to the Commission is foreseen<sup>33</sup>, nor the right to request a market investigation (with the exception of the right for Member States under Article 33 with respect to the designation of new gatekeepers). This omission will promote neither the efficacy nor the transparency of process, nor accountability. Furthermore, the DMA does not foresee the formal hearing or consultation of third parties who can contribute their expertise<sup>34</sup> in the course of the important decision-making processes as set out under 2.2 above. The inclusion of provisions to remedy these omissions is essential to ensure balanced enforcement and good governance.

Transparency of decision-making, and the involvement of all parties who are affected by such decisions, including consumers, would improve the outcomes of decisions and mitigate the risks of regulatory capture. The DMA must include clear timeframes for consultation, however, so that this process does not unduly delay decision-making.

***Consumers or their representatives and other third parties must have the right to (1) submit formal complaints about gatekeepers violating their obligations under the DMA; and (2) be heard in decision-making processes under the DMA to ensure effectiveness and transparency of process.***

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<sup>32</sup> This investigation should be considered an extension of the previous non-compliance proceeding under Article 16 or 25 as applicable and not require the opening of a new proceeding.

<sup>33</sup> Including a formal Commission decision rejecting a complaint which could then be appealed to the Court of Justice of the European Union. A complaint should also be possible on an anonymous basis where there is a risk of retaliation by the gatekeeper on whom the complainant is dependent.

<sup>34</sup> Other than under the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (OJ L 123, 12.5.2016, p.1), Article 37(4) and Recital 77 DMA.

#### 4.2.2. Deadlines, loopholes, gaming risks and limitation periods

The deadlines currently foreseen in the DMA appear to be unduly favourable to gatekeepers. There are also potential loopholes and ambiguities which could delay enforcement against gatekeepers and allow gatekeepers to game the system. The issues set out below must be corrected to ensure effective implementation and enforcement of the DMA so that consumers can benefit from this law without undue delay.

##### 4.2.2.1. Deadlines

The length of deadlines in the current proposal favours gatekeepers rather than business or end users. The deadlines for the Commission to take decisions against gatekeepers/complete market investigations range from 12 to 24 months<sup>35</sup>, or there is no deadline at all. By contrast, decisions on suspending Article 5 and 6 gatekeeper obligations where they would endanger the economic viability of the gatekeeper, or for exempting gatekeepers from such obligations for overriding reasons of public interest, must be taken within 3 months.<sup>36</sup> It seems likely that where gatekeepers fail to comply with their obligations, business users' economic viability could be equally (or perhaps even more) endangered and yet there is no deadline for a non-compliance finding (Article 25). If potential rivals to gatekeepers are driven out of business, consumers will have no choice but to use the gatekeeper's service, leaving them vulnerable to exploitation. Decisions under Article 25 must be made subject to a binding 6-month deadline.

##### 4.2.2.2. Loopholes and gaming risks

As regards potential ambiguities or loopholes, there is apparently no time limit in the current proposal within which the Commission should open a market investigation under Article 15 for designating new gatekeepers or to identify core platform services following the 60-day gatekeeper designation decision deadline in Article 3. The DMA must be revised to make clear that any decision to open such a market investigation must be taken within the 60 days so as not to lead to indefinite delays. Furthermore, the deadlines in Article 15 must be made legally binding as is the case for all other deadlines in the DMA.

In addition, it is unclear in the current proposal when the Commission would use a market investigation to designate a gatekeeper pursuant to Article 3(6)<sup>37</sup>, or to identify core platform services for a gatekeeper pursuant to Article 3(7). The meaning of the word "may" in Article 15(1) is too vague. This must be clarified to avoid ambiguity and legal uncertainty.

It is further unclear whether the Commission would normally decide on the list of relevant core platform services for each gatekeeper within the 60-day deadline for designation of gatekeepers under Article 3(4). It must be made clear that this would be the default position.

Article 7(2) states that where the Commission finds that the measures that the gatekeeper intends to implement, or has implemented, are not in compliance with the relevant obligations in Article 6, it may by decision specify the measures to be taken. Whilst Article 7(3) states that Article 7(2) is without prejudice to Article 25<sup>38</sup>, the relationship between Article 7(2) and Article 25 decisions is somewhat ambiguous. This could lead to gatekeepers gaming the system as set out below.

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<sup>35</sup> See Articles 15, 16, 17 DMA, (with the exception of a decision under Article 7(2) on effective compliance with Article 6 obligations for which the deadline is 6 months).

<sup>36</sup> Provisional suspension can even occur earlier than 3 months (Article 8(3) and 9(3) DMA).

<sup>37</sup> Other than where the gatekeeper does not satisfy all of the quantitative thresholds in Article 3(2) where a market investigation is to be used, see Recital 25.

<sup>38</sup> And Articles 26 and 27 on fines and periodic penalty payments respectively.



Presumably, where there was no attempt by the gatekeeper to comply with applicable Article 6 obligations, the Commission would proceed immediately to an Article 25 non-compliance decision (similarly for non-compliance with Article 5 obligations). Where the Commission believed that the obligations were not being correctly complied with, the Commission would take a decision under the Article 7(2) procedure specifying the measures that the gatekeeper must implement. If compliance with this decision took the gatekeeper beyond the binding 6-month implementation deadline in Article 3(8), it must be made clear that the Commission has the ability to fine the gatekeeper under Article 25 and 26. This is essential to avoid gatekeepers gaming the system. The level of any fine must take into account how much the Commission has legitimately had to discuss with the gatekeeper. Where the gatekeeper has clearly acted in bad faith to delay compliance with its obligations, it must be fined for the full period for which it was not in compliance after the 6-month deadline.

If the gatekeeper fails to comply with an Article 7(2) decision, the DMA must specify a short time period within which the Commission must open a non-compliance proceeding under Article 25. The Commission must then come to a decision under Article 25 within 6 months as set out above. Again, to deter gatekeepers from gaming the system, any fine imposed under Articles 25 and 26 must be based on an infringement duration from when compliance with the Article 6 obligation first arose under Article 3(8) and not from the date of the Article 7(2) decision.

Finally, as regards a gatekeeper's right to request a Commission decision under Article 7(7) on whether the measures that it intends to implement, or has implemented, under Article 6 are effective in achieving the objective of the relevant obligation, two clarifications are required to avoid gatekeepers gaming the system. First, it must be made clear that an Article 7(7) request can only be made within the Article 3(8) implementation deadline. Second, a binding deadline must be introduced within which the Commission must take a decision on compliance. Otherwise, gatekeepers could introduce an Article 7(7) request the day before the expiry of the Article 3(8) deadline and the entry into effect of the relevant Article 6 obligation could be indefinitely delayed. Swift compliance with Article 6 obligations must be the overriding objective. Where the gatekeeper has in good faith sought necessary further specification, proportionality would require that no fine be imposed for the period of the good faith discussions beyond the Article 3(8) deadline. However, as under Article 7(2), where the gatekeeper has clearly acted in bad faith to delay compliance with its obligations, it must be fined for the full period for which it was not in compliance after the 6-month deadline.

The gaming risks under Article 7 underline the importance of including the ability to impose behavioural remedies under Article 25 decisions as set out above in section 4.1.

#### **4.2.2.3. Limitation periods**

There is no obvious reason why gatekeepers should benefit from a 3-year limitation period for the imposition of fines or periodic penalty payments (and a 6-year absolute limitation period<sup>39</sup>, subject to suspensions) when the standard limitation period under EU and national competition law, for example, is 5 (and 10) years or where such a limit does not exist in other instruments adopted under Article 114 TFEU e.g. sanctions imposed for consumer law infringements pursuant Article 24 of Directive (EU) 2019/2161 as regards the better enforcement and modernisation of EU consumer protection rules. The limitation periods should be extended to at least 5 (and 10) years respectively.

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<sup>39</sup> Article 28 DMA.



***Deadlines under the DMA must be equitable between all affected parties and legally binding for all types of Commission decision under the DMA to ensure that its effect is not delayed.***

#### **4.2.3. Standard of proof**

To avoid any ambiguity in the applicable standard of proof in the Commission's decision-making, and thus any unnecessary litigation delay to the effectiveness of the DMA, particularly in the light of some recent case law<sup>40</sup>, the DMA must clearly specify the legal standard of proof required in Commission decisions under the DMA.

***The standard of proof for Commission decisions must be set out in the DMA.***

### **4.3. Effective resourcing for enforcement**

#### **4.3.1. Properly resourced enforcement at EU level**

BEUC welcomes that the DMA will be enforced at EU level by the European Commission, with the assistance of the Member States through a Digital Markets Advisory Committee. However, effective enforcement would require the Commission to be endowed with appropriate resources, particularly as enforcement will involve the most powerful companies on the planet resisting changes to their business model through any means possible.

It would seem highly questionable whether the financial and human resources currently foreseen by the Commission (80 FTE<sup>41</sup>) would be sufficient for this task, in particular when they would be required to work in parallel on the designation of multiple gatekeepers in the early stages of the entry into force of the DMA.<sup>42</sup> Lack of resources at this stage could lead to delays in the provisions of the DMA coming into effect and potentially to sub-optimal decisions. In the light of the urgent need to ensure contestability and fairness in digital markets, such delays would be inadvisable and harmful to consumers.

After this initial stage, the Commission would be required to carry out multiple decision-making tasks, in particular on compliance with Articles 5 and 6 (whether on the Commission's own initiative<sup>43</sup> or at the request of gatekeepers<sup>44</sup>) and designation of potential further gatekeepers<sup>45</sup>. The Commission would also need to perform the tasks of monitoring<sup>46</sup>, reviewing<sup>47</sup>, suspension<sup>48</sup> and exemption decisions<sup>49</sup>, updating the list of obligations for gatekeepers<sup>50</sup>, market investigations<sup>51</sup> and sanctioning tasks<sup>52</sup>. In the interests of all concerned, the decisions of the Commission must be sound at every stage and be capable of withstanding review by the EU Courts which will inevitably follow. This

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<sup>40</sup> Notably in Case T-399/16 CK Telecoms UK Investments v Commission, where the General Court overturned a Commission merger decision introducing a novel and stricter interpretation of the Commission's standard of proof.

<sup>41</sup> DMA proposal of 15.12.2020, p. 11.

<sup>42</sup> Assuming that there are likely to be some 10-15 gatekeepers initially, verifying this and the relevant core services in parallel within 60 days, together with setting up other elements of the DMA procedures will be challenging to say the least for 80 FTE.

<sup>43</sup> Under Article 7(2) DMA.

<sup>44</sup> Under Article 7(7) DMA.

<sup>45</sup> Under Article 3(6) DMA.

<sup>46</sup> Under Article 24 DMA.

<sup>47</sup> Under Article 4, 12, 13 DMA.

<sup>48</sup> Under Article 8 DMA.

<sup>49</sup> Under Article 9 DMA.

<sup>50</sup> Under Article 10 DMA.

<sup>51</sup> Under Articles 15, 16, 17 DMA.

<sup>52</sup> Using the tools in Articles 19, 20, 21, 22, 23, 25, 26, 27 DMA.

requires not only sufficient resources but also the right resources in terms of all relevant types of expertise.

One solution to enhance enforcement resources and expertise could be to allow the Commission to involve Member State enforcers in the Commission's enforcement actions. While the Commission would make the decision as currently proposed in the DMA, monitoring and the investigation of compliance could be supported by the inclusion of Member State authorities with particular expertise/experience with the issue at stake in the investigation team. Such monitoring could involve being the first point of contact for local consumers and business users to raise concerns or complaints on non-compliance by gatekeepers and information/data gathering at the national level where relevant.

Member States could also be given greater powers to oblige the Commission to open non-compliance proceedings. Under Article 33, three or more Member States would be entitled to request the Commission to open a market investigation into the designation of gatekeepers (under Article 15). This could be supplemented to give three or more Member States the right to call for the opening of a market investigation into new core platform services and practices to potentially be added to the DMA (under Article 17), a market investigation to establish systematic non-compliance (under Article 16) as well as an investigation into non-compliance by gatekeepers with the obligations under Articles 5 and 6.

The importance of effective enforcement is all the greater as the DMA would preclude national enforcement against gatekeepers for the purpose of ensuring contestable and fair markets in the internal market.<sup>53</sup>

The size and composition of the DMA enforcement body must be benchmarked internationally to the closest equivalent to ensure that it is appropriately resourced to carry out its enforcement tasks. Any legislation can only be as effective as its enforcement.

***The Commission must be fully resourced to carry out its enforcement functions under the DMA, in terms of both the number of staff and the types of expertise required.***

#### **4.3.2. Integrated enforcement under consumer profiling audit**

Enforcement could be enhanced by greater sharing of information among enforcers on gatekeeper practices. In addition, the audit obligation should not be limited to core services of the gatekeeper but to all services of the gatekeeper that involve profiling of consumers since these services can fall within the scope of the DMA (e.g. Article 5(a)).

In this regard, Article 13 should specify that the audits of techniques applied by gatekeepers for profiling of consumers required by this Article should cover all services provided by the gatekeeper. In addition, the audit reports could be shared with other relevant enforcement authorities, in particular Data Protection Authorities.

#### **4.4. Effective future-proofing**

The future-proofing provisions in the DMA are particularly important given the fast-moving nature of the digital sector. The current proposals must be improved to address the following shortcomings:

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<sup>53</sup> Article 1(5) DMA.

- there would appear to be no means to amend the obligations and prohibitions in Article 5 and 6, only to add new ones under the update mechanism in Articles 10 and 17<sup>54</sup>
- there does not seem to be a mechanism to switch the obligations and prohibitions in Articles 5 and 6 between these two articles based on experience of their operation after implementation of the DMA, nor to remove them if they no longer serve their purpose due to changed market circumstances
- as set out above<sup>55</sup>, the update mechanism in Article 10 relates only to business users and not end users.

***The future-proofing provisions in the DMA must be tightened to close loopholes.***

#### **4.5. Role for national courts**

The provisions of the DMA must be enforceable in the national courts of the Member States by business users and consumers, including through collective redress. For the latter, the Regulation must indicate that the DMA is added to the annex of the Representative Actions Directive.<sup>56</sup>

***The DMA must explicitly provide that its enforcement by the European Commission is without prejudice to (private) enforcement before national courts. In addition, the DMA must be added to the annex of the Representative Actions Directive to be enforceable in Member States courts.***

#### **5. Merger control**

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The reporting obligation on gatekeepers under Article 12 in relation to any intended mergers and acquisitions by gatekeepers is insufficient to deal with the serious issues that can be raised by such acquisitions. This obligation should in any event be revised to cover not only concentrations involving another provider of core platform services or of any other services provided in the digital sector. It should cover concentrations in any sector. Otherwise there is a risk that this obligation may miss mergers and acquisitions of companies which may be highly relevant for contestable markets but which may not fall within the definition of digital sector<sup>57</sup> - for example the recent takeover by Google of Fitbit (wrist-worn fitness trackers).

To the extent that merger control provisions as such cannot fall within the scope of the DMA, it will be essential to strengthen EU merger control both in jurisdictional and substantive terms to catch and evaluate such mergers. This should, at a minimum, be done through the use of Article 22 of the EU Merger Regulation<sup>58</sup> to ensure EU review of gatekeeper mergers falling below the EU Merger Regulation jurisdictional thresholds, and through the upcoming review of guidance on the substantive analysis of mergers, in particular for vertical and conglomerate mergers. Current enforcement practice is

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<sup>54</sup> Article 17 enables the Commission to carry out market investigations to add new core platform services into the list in Article 2 (Article 17(a)) and to add new practices into Articles 5 and 6 (Article 17(b)) DMA.

<sup>55</sup> See 2.1.2 above.

<sup>56</sup> Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4.12.2020, p. 1–27.

<sup>57</sup> Article 2(4): “‘Digital sector’ means the sector of products and services provided by means of or through information society services”.

<sup>58</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation), Official Journal L 24, 29.01.2004, p. 1-22.

inadequate to deal with the challenges raised by digital sector mergers, and in particular gatekeeper mergers.<sup>59</sup>

We would recommend that the Commission is required to regularly publish (e.g. on an annual basis) the list of acquisitions by gatekeepers which have fallen below the thresholds of EU merger control.

Finally, with regard to competition law, BEUC would encourage further consideration of the introduction of a New Competition Tool separately from the DMA.<sup>60</sup>

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<sup>59</sup> The EU Digital Markets Act A Report from a Panel of Economic Experts, Joint Research Centre, 2021, page 24-27, at: <https://ec.europa.eu/jrc/en/publication/eu-digital-markets-act>. See also <https://www.beuc.eu/publications/google-s-fitbit-takeover-eu-merger-control-proves-unable-protect-consumers-digital/html>

<sup>60</sup> As proposed in the Commission's 2020 consultation on a New Competition Tool: [https://ec.europa.eu/competition/consultations/2020\\_new\\_comp\\_tool/index\\_en.html](https://ec.europa.eu/competition/consultations/2020_new_comp_tool/index_en.html)



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