ITI Promoting Innovation Worldwide

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ITI Comments to
The Digital Markets Act Proposal

As the global voice of the tech industry, ITI - The Information Technology Industry Council - welcomes the possibility to provide comments on the recently published Digital Markets Act proposal. Our goal is providing a critical but constructive perspective, aiming for rules that are proportionate and reasonable to the goals they plan to achieve and that take into account longstanding legal principles.

ITI is the premier advocate for the global technology industry, representing over 75 global companies active across the whole spectrum of technology. ITI and its members stand ready to support the Commission in its endeavor to find proportionate policy tools to guarantee a consistent approach and fair competition in Europe. We fully support the goal of ensuring market access for innovative challengers, safeguarding consumer welfare and economic efficiency.

ITI strongly supports free and undistorted competition as key to promoting innovation and consumer welfare. We are committed to addressing challenges potentially arising from digitalisation in the EU and globally. Because of our very diverse membership we recognize the many equities at stake in this debate, and the need for action to preserve competitive markets for all. Proportionate instruments that ensure a consistent policy approach and fair competition should be considered wherever necessary. Grasping differences in business models and user interaction across digital platforms is key to gauging potential non-competitive conduct and properly addressing any challenges. As the notion of platform refers to very different business models, policymakers should consider the role that specific companies play in the markets they operate in, the value they create, their relationship to customers and competitors, and possible alternative approaches.

Consequently, the legislative proposal would benefit from further focus on a company's conduct, its business models and its interaction with users. While we share the purpose of **streamlining rules and proceedings to address emerging challenges in an increasingly digitalised economy**, this should not be achieved at the expense of accuracy and balance of the rules. Proportionality is key in order to avoid unintended consequences linked to over-enforcement, in terms of choice, reach, trust and innovation.

Any remedies should be tailored more specifically to the type of core platform service, and be relevant and effective within the specific market and context of application. The initiative should primarily focus on ensuring that market participants, smaller ones in particular, find an ecosystem that enables them to succeed, while focusing on promoting consumer welfare and addressing identified harms.

Especially because the new rules would only target a narrowly defined set of companies, it is essential that they are based on objective criteria, with proportionate, well-justified obligations accompanied by appropriate due process guarantees to ensure the system is credible, well-functioning and effective. Relatedly, the proposal should **preserve key procedural and substantive protections** drawn from long-standing European and international legal principles. Clear procedural guarantees should apply to the process for the designation of "gatekeepers", including a right for companies to challenge the interpretation and application of the proposal's obligations, and opportunities to justify business practices as beneficial to competition or other public goals.

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Policy goals, scope and level of harmonisation

The proposed regulation covers a wide range of services such as operating systems, cloud computing, messaging, user generated video streaming and advertising services, underpinned by various business models. These services have brought economic benefits, consumer choice and innovation. It is therefore crucial that regulatory intervention takes into consideration all sides of the services targeted - intervention on one side should be weighed against the benefits provided on all other sides.

The proposal only takes account two **policy goals**, as outlined in Article 1(1), contestability and fairness. Such an approach runs the risk of unintended consequences, particularly in multi-sided markets, as actions to protect user safety on the one side can be perceived as unfair by a user on the other. On top of ensuring market access for innovative challengers, the DMA's enforcement process should also take into consideration the short and long-term effects on consumer welfare. When discussing and developing the European Commission proposals, policymakers should also consider the consequences of limiting the size advantages for consumers stemming from network economies and economies of scale with a balance to be found between these consequences and the goals of the proposal.

When it comes to the scope, we recommend the Commission better explains the reasoning and justification behind the **selection of "core platform services"** covered. While some of these core platform services clearly have an intermediation function, others only provide technical services that do not raise the same gatekeeper-related concerns.

Finally, article 1(5) references a limitation for Member States to apply national rules that are specific to the types of undertakings in scope of this regulation. We agree with the Commission that the objective of **avoiding a patchwork of different rules and obligations within the Single Market** is fundamental, and brings considerable benefits to companies, regardless of their size. Precisely for this reason, it is of utmost importance that the public interest exception also included in the article is more narrowly tailored in order to minimize potential divergences between different national frameworks across the Single Market.

Designation of "gatekeepers"

The designation of "gatekeeper" is the prerequisite to attach more stringent obligations to platforms that play a systemic role in a market. A gatekeeper designation is not an indication of illegal conduct or infringement of existing legislation, rather an acknowledgement that a firm meets the designation criteria set out in article 3 and, as such, has a responsibility to meet additional obligations as a result of its status.

The **process of designation of the companies in scope** needs to be rigorous and objective. It is crucial that the criteria are not designed to lead to define or exclude certain companies by default. At the same time, any overly broad definition would lead to uncertainty about the services in scope and risk unintentionally affecting activities that are less or not problematic.

First, among the thresholds spelled out in article 3.2, it is not clear how turnover and market capitalisation may be an indicator of significant impact. When it comes to assessing a company's influence on the market, other more significant indicators than turnover are not taken into account, like for example the number of alternative providers of similar platform services, as way to assess dependency. In addition, a safe harbour should be envisaged with criteria to identify services that should by default fall outside the scope of the regulation. Moreover, while it is crucial that the rules are objective and non-discriminatory, since the gatekeeper presumption is established simply through

reliance on pure-size criteria, it could only work if accompanied by consideration of other, qualitative elements that can precisely assess dependency.

Secondly, a clarification on how the **number of users** would serve as a significant indicator of a company's dominance is needed. A large user base is not necessarily a compelling measure of significant market power if those users are also using other services in the same market. Among others, the way the user thresholds and definitions would concretely apply to cloud services remains unclear. The current broad definition of cloud services in Article 2, combined with the definition of end-users and the approach outlined in Article 3 for the designation of gatekeepers, could inadvertently lead to the designation of providers active in highly fragmented downstream sectors without competitive concerns. For example, many businesses rely on cloud infrastructure or IT providers to build applications, platforms or websites, yet the cloud provider is not necessarily intermediating between the business and its customers, particularly when the service in question is of technical nature. The reference in article 3.1(b) and 3.2(b) to a "gateway for business users to reach end users" should exclude services not acting as a *necessary* intermediary enabling business users to propose products to end users. Also, it should be clarified that the number of users refers solely to the *direct* users of a provider, rather than the potential sum of indirect users of business customers. There are also vast differences between business models that a wide range of users may use on infrequently basis (e.g. booking sites) vs. sites that users, however identified, may use regularly.

Finally, having a straightforward definition of what constitutes a user is key, and the criteria to determine the active users should be defined in law, rather than be deferred to delegated acts by the European Commission as mentioned in article 3.5.

The same observations can be made for the **qualitative criteria laid down in article 3(6)** for the designation as a "gatekeeper" of a provider of core platform services that does not meet the quantitative threshold of article 3.2.

Most important in relation to article 3.6 is the consideration that this provision essentially affords the Commission an **extremely wide margin of appreciation in the gatekeeper designation process** and makes it possible to ignore the thresholds based on elements like turnover and number of users (the same elements constituting the thresholds), as well as scale and network effects, data and user lock-in. As ITI noted in previous submissions, while potentially resulting in user lock-in or limiting new entrants on the market, network effects may be observed even when no significant market influence exists. Users may even benefit from concentration, as it enables them to rely on one (or few) platform(s) for each specific service or activity, be it shopping, social interaction, transportation or accommodation among others. We have witnessed clear examples of this in the context of the COVID pandemic where new online services have emerged very quickly in conjunction with the enormous surge in demand. On the other hand, network effects can disincentivise switching between platforms, thereby possibly diminishing choice and effective competition. In this context, better understanding how certain company practices impact a specific market and correcting potential imbalances and failures may be useful, as long as such tools and rules are carefully assessed in order not to negatively impact consumer choice, innovation, and rapidly evolving markets and business models.

In light of the above, other, more significant aspects to evaluate dependency should be used instead or in addition to the thresholds in article 3.2. While we recognise the challenge with these elements being of less immediate recognition, they would prove much more relevant to the purposes of targeting the obligations to companies having significant impact in a given market or service, and would remove legal uncertainties caused by the wide interpretation margins of the Article 3 criteria.

ITI appreciates the provisions in article 4 that allow companies to contest a designation as a "gatekeeper" either on the merits or for example if relevant market circumstances have changed. The presumptions proposed to enable the designation of a company as a gatekeeper need to be rebuttable. In order to exclude obvious cases of services that are not gatekeepers, certain safe harbour rules could support the designation process, by referring to those features that indicate how a platform will not be able to act as a gatekeeper. The **review process of the "gatekeepers" status** as defined in article 4 needs to be efficient and capture the evolution of the market circumstances as soon as possible. Hence, we support that after the designation has taken place, a "gatekeeper" can request a review of their designation if relevant market circumstances have changed even ahead of the regular 2-year review, or at least when they are requested to comply with a specific obligation in the framework.

Due process is crucial to ensure legal certainty and fairness. It is important that the whole procedure is smooth and effective. There should be clear notice for any company designated as gatekeeper, and a proportionate deadline for them to comply with the additional requirements. The proposal currently provides the Commission with ample margins of discretion when establishing which companies should or should not be subject to further obligations. It is essential that the significant regulatory intervention into companies' activities comes with strongly articulated procedural safeguards.

While the Commission will retain the power to regulate and make modifications, that authority is currently very broad, and should be subject to appropriate scrutiny, to ensure an appropriate level of accountability and avoid hampering the credibility of the framework. Among others, **Article 17** gives the Commission disproportionate discretion to add new obligations under articles 5 and 6 through delegated acts, modifying substantive provisions without the intervention of the legislator.

Substantive obligations

Some of the obligations spelled out in Chapter III address valid concerns, such as preventing a user from raising issues with relevant public authorities. On the other hand, given the diversity of core services and business model targeted, the rationale for others is unclear and concepts that have been developed in the context of very specific situations require clarification on the respective context, with the obligations to be limited to the core platform service where they are relevant, to avoid risking stifling otherwise pro-competitive behaviours. Overall, the obligations on core platform service providers should be proportionate, reasonable and as clearly defined as possible.

Article 5 should only contain a narrow set of "per se" prohibitions which is specific and targets practices that have been clearly demonstrated as being particularly harmful to competition. For instance, article 5(a) prohibits combining users' data from different services without consent. However, not only the GDPR already contains horizontal provisions around consent, but it also provides additional legal bases alongside consent. Article 5(a) should reflect this and allow for data processing based on all the legal bases provided for in the GDPR.

As it stands, Article 5(c) would allow business users of a gatekeeper service to do business directly with a platform's end users, regardless of its terms and conditions. This would make it impossible for the platform to apply its business model, particularly when commission-based. It is difficult to discern whether these prescriptions are proportionate and appropriate in abstract and without a case-by-case assessment, and applying them in a generalized manner to very complex and diversified situations does not seem appropriate. Furthermore in case the end users acquire a business user's product outside of the gatekeeper's core platform, Article 5(c) would also allow end users to also access the product through the gatekeeper's core platform, while using the business user's application. In these

circumstances, a gatekeeper should not be held responsible for risks the consumers may be exposed to in their direct interactions with independent applications.

Clarifying the **difference in the application of the obligations respectively in article 5 and those in article 6** that are "subject to further specification" is also crucial. Recital 58 of the proposal mentions that the process of further specification of the obligation is at the Commission's discretion following a dialogue with the company concerned. While we certainly welcome the regulatory dialogue between the Commission and the companies in scope of this Regulation, **a detailed process for "further specification" of the obligations should be established** in the operative provisions of the DMA, with clear principles and criteria. We appreciate the possibility for gatekeepers to discuss with the Commission an implementation plan for the obligations in article 6, that are by their nature more open to interpretation.

In the context of this **regulatory dialogue** and in order to ensure proportionality, companies concerned should have the possibility to provide objective justifications for the business practices targeted in articles 5 and 6, on the basis of clear principles as well as compliance with separate legal obligations (e.g. data protection). The removal of an obligation should be possible if, based on these objective justifications, the obligation does not serve the goals of the regulation.

The procedures of article 8 suspending a specific obligation and of article 9 granting exceptions for overriding reasons of public interest should be as streamlined as possible. Consideration should be given to other, equally valid, reasons that may justify exceptions. The application of the exceptions should be subject to the regulatory dialogue we previously referred to.

Further, we believe that other obligations may be too far-reaching for any company. This is the case for instance for the requirement in **article 6(i) and 6(j)** to grant continuous, real-time access to data of users to third parties authorized by a business user of the gatekeeper.

The obligation in **article 6(g)** should also be carefully considered. At present, advertisers utilise data from independent measurement companies to verify performance. The proprietary information of platforms, independent measurement companies, or advertisers should not be subject to public view but instead should be transparent within the business relationship (as it is today). Such provision could otherwise undercut the present ad delivery ecosystem and risk revealing sensitive information.

The obligation in **article 6(k)** to apply "fair" access conditions presents a challenge since what is fair for one set of users may be seen as unfair for others. In the pursuit of ensuring a fair business environment, the DMA should rather seek to address and define what is unfair and prohibited. This is the approach taken by the Unfair Commercial Practices Directive or the Unfair Trading Practices Directive in the agri-food sector.

Finally, some obligations stand to redesign business models altogether, or present very complex technical challenges which are disproportionate to the goals of the DMA. This includes Article 6(c) on side-loading and alternative app stores. These obligations should only be imposed in case of identified and demonstrated antitrust violations, following well established enforcement proceedings.

Market Investigations

In line with the comments made above, the Commission powers in the context of market investigations as laid out in **articles 14 to 17** should be complemented by strong due process guarantees, providing appropriate opportunities for companies (either potential gatekeepers or their competitors if they have a legitimate interest) to challenge the Commission's decisions.

It is important to maintain the limitations for the Commission in **article 16.1**, where it can only impose **behavioural or structural remedies** if a firm has both a) infringed the substantive obligations of articles 5 and 6, and b) has concurrently strengthened its gatekeeper position. In principle, the limitations in **article 16.1 and 16.2** setting out strict conditions for the imposition of structural remedies appear also appropriate, structural remedies should only be applied as a last resort, and provided the suggestions related to the substantive articles 5 and 6 obligations are taken into account. A decision imposing structural remedies should also be subject to strict due process standards and to judicial review before its application, given the remedy's seriousness and likely irreversibility of a structural remedy. In both instances the market investigations into systematic non-compliance referred to in the first paragraph should be accompanied by appropriate due process safeguards in paragraphs 5 and 6 and should afford the gatekeeper with a right to be heard and to contest the allegations, before the imposition of any remedy or fine.

If the above conditions are met, in case of systematic, intentional non-compliance, i.e. an apparent unwillingness of the gatekeeper to comply with EU rules, we believe it appropriate, for a gatekeeper to face as a last resort the imposition of remedies. However, in order to follow the logic that a finding a systematic non-compliance be connected with repeated infringements over time, the 3 non-compliance decisions on any of the gatekeeper platform's services within 5 years described in **Article 16.3** should also be non- contextual and taken following three separate proceedings.

Any proposal to amend the regulation following an investigation as per **article 17** which concluded there is a need to add new core platform services, or new unfair practices to the scope of the regulation, should be accompanied by appropriate, open stakeholders' consultations and should follow the ordinary legislative procedure rather than – as proposed – be implemented through delegated acts, which would exclude Parliament and Council from the decision-making process.

Enforcement provisions

As mentioned above, the Digital Markets Act proposal affords the Commission broad investigative and enforcement powers, accompanied by wide discretion in the interpretation and application of the substantive criteria and obligations. This needs to be accompanied by **unambiguous due process safeguards**, to increase accountability on all sides, including the right to be heard and to effectively challenge any decision without having to embark in lengthy proceedings in front of the Court of Justice of the EU.

This is essential because while many powers in the DMA context are as strong and impactful as those the Commission enjoys in the antitrust context, they are not currently designed to be taken through the same strictly regulated procedural steps – which have also been subject to the EUCJ's scrutiny over the course of the past 60 years.

As regards the procedure for the request of information or decision to require information laid out in **article 19**, the draft should specify the request for information should always be proportionate, appropriately motivated, clear and specific. We suggest that the time-limit established by the Commission to provide information as laid out in **articles 19(3) and 19(4)** should be reasonable and open to extension requests for companies, should it be necessary to comply with the request. Appropriate additional guarantees should be included in case confidential business information is concerned.

Some of the investigative powers in chapter V are extremely broad and far-reaching. The power to conduct on-site inspections as described in **article 21** is particularly invasive, while the proportionality

and necessity of on-site inspections in this context are not obvious. This is particularly true since the main stated purpose is asking questions and explanations to personnel (not only this would not require on-site presence, but also seems to be covered by **article 20** on interviews) and providing access to the organisation and IT systems among others – here, it would be important to clarify the specific purpose for the access. Finally, it is unclear if the Commission decision to conduct an on-site inspection must be communicated to the company concerned in advance and with which notice period.

We recognise the need for the power by **article 22** to mandate interim measures in the interest of business users or end users in case of urgency due to the risk of serious and irreparable damage. This possibility requires careful consideration and should, again, be complemented with clear procedural guarantees, including in particular a clear a short time limit – as currently drafted, **article 22.2**. would allow the Commission to renew indefinitely measures that are instead supposed to be taken in exceptional circumstances and "in the interim" of an ongoing investigation.

International aspects

As today's economy is highly digitalised and globalised, the international impact of the Digital Markets Act proposal needs to be carefully considered as the discussion progresses.

ITI strongly supports free and undistorted competition as a key factor to promote innovation and consumer welfare globally. Maintaining an open and business friendly environment in Europe is not only important for European consumers, but also for the development of an innovative and successful business ecosystem in the European digital economy.

Any criteria not based on objective principles risks unduly diminishing access to goods and services offered by firms falling within the DMA that - regardless of their foreign or European credentials – enable SMEs and startups in Europe, allowing them to compete across the single market and catalyzing their growth potential. For this reason, in addition to those already addressed in this submission, it is of the outmost importance that the rules are targeted to proven and clear market failures and remain non-discriminatory in nature, are fair and open to rebuttal.

In addition, if throughout the legislative process the Digital Markets Act is developed in a way that disproportionately affects certain companies without clear and objective market-based concerns, it may risk creating tensions in the global trading environment and discourage further investment in Europe and – given the EU's international normative influence – it could also constitute a precedent triggering the adoption of similar measures by other governments globally, not all of which share the EU's commitment to due process and consumer welfare.

The EU has an imperative to think globally when creating domestic rules – particularly those, like the DMA, which are inherently international in their proposed scope – by talking to its international partners and developing market rules that help foster a **convergence** that is important to all companies regardless of their place of establishment. As we have recommended in other contexts, we strongly encourage the EU to engage in meaningful dialogue with like-minded international partners as a means of ensuring that any final legislation is fair, proportionate, and in line with the EU's international commitments and diplomatic priorities.

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