ECIS European Committee for Interoperable Systems

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5 *May 2021*

FEEDBACK ON THE EUROPEAN COMMISSION'S PROPOSAL FOR THE DIGITAL MARKETS ACT

1. BACKGROUND ON ECIS

1. The European Committee for Interoperable Systems ("**ECIS**") is an international, non-profit association of information technology companies founded in 1989 which endeavours to promote a favourable environment for interoperable ICT solutions. For three decades ECIS has actively represented its members on issues relating to interoperability and competition before European, international and national fora, including the EU institutions and WIPO, and has emphasised the importance of open source and open standards throughout. ECIS' members include both large and small information and communications technology hardware and software providers. For further information, please see ECIS' website at www.ecis.eu.

2. FEEDBACK ON THE PROPOSAL FOR THE DIGITAL MARKETS ACT

2. Digital markets should be fair and contestable. It is, therefore, crucial that the European Commission ("**Commission**") has the right tools at its disposal to address inappropriate conduct by digital gatekeepers through *ex ante* regulation and proportionate enforcement powers.

3. ECIS welcomes the Commission's Digital Markets Act ("**DMA**") proposal, particularly in so far as it promotes fair competition in digital markets, openness and interoperability. ECIS wholeheartedly supports in particular the Commission's efforts to mandate gatekeepers to provide access to and interoperability with the same operating system, hardware and software features as provided for in Article 6(1)(f) DMA. We consider, however, that the scope of this provision can be expanded to improve its effectiveness further, as explained below.

Scope

4. ECIS welcomes the Commission's efforts to provide certainty in relation to "*core platform services provided or offered by gatekeepers to business users"* and supports the Commission's aim to regulate "gatekeepers" (as defined by the DMA) whether or not their business users are *"established in the Union or end users established or located in the Union,*" and "*irrespective of the place of establishment or residence of the gatekeepers* […or] *the law otherwise applicable to the provision of service*." (Article 1(2) DMA). However, we encourage the Commission to make additional clarifications, as outlined below.

a) Article 2 DMA: Definitions

5. The proposed definition of "business user" in Article 2(17) DMA is fundamental to understanding the gatekeeper notion in Article 3 DMA. The current proposal defines "business user" as "*any natural or legal person acting in a commercial or professional capacity using core platform services for the purpose of or in the course of providing goods or services to end users.*" We are concerned this definition is unclear and ambiguous, as a result of which it could be interpreted in a way that is inconsistent with the spirit of the DMA.

6. First, "business user" is defined with reference to "end users", and "end user" is in turn defined as "*any natural or legal person using core platform services other than as a business user*" (Article 2(16) DMA)). The circular nature of these definitions gives rise to uncertainty, and hence we encourage the Commission to revisit these definitions.

7. Second, the DMA aims to address the conduct of companies that are in essence unavoidable middlemen between business users and end users. However, under a broad interpretation of the current definition of "business user," the DMA would not only cover situations in which companies rely on core platform services to reach end users, but also situations in which companies rely on core platform services for internal or related business operations. For example, a company's HR management services might rely on cloud computing services, and even though this cloud service is most definitely not a channel for that company to reach end users, the company in question could qualify as a "business user" because it relies in part on this cloud service "*in the course of providing goods or services to end users.*" ECIS considers that the Commission should clarify the definition of "business user" to exclude the use of core platform services for such internal or related business operations in order to preserve the legislative intent behind the DMA and avoid spillover effects. In the same vein, the Commission should clarify that the notion of "business user" does not encompass (i) prime contractors using subcontractors to provide services to their customers; (ii) resellers; or (iii) managed service providers.

8. Third, further refining of the definition of operating system (Article 2(2)(10) DMA) is required in the DMA so as to avoid negatively impacting those digital companies which are not intended to be targeted by the DMA. The term "operating system" should be re-scoped to *only* capture operating systems for consumer devices such as mobile phones, tablets, personal computers

and wearables, etc which – based on the DMA's recitals – is the DMA's target rather than the broader universe of operating systems, including enterprise server-side platforms.

b) Article 3 DMA: Designation of gatekeepers

9. The main purpose of the DMA is to prevent unfair conduct by large, powerful, digital companies vis-à-vis business users that depend on these large companies to reach their customers. Hence, the DMA should be targeted to those specific situations and should not become a blanket tool to regulate all digital players alike. It is therefore critical that the "gatekeeper" concept that is at the centre of the DMA is fit for purpose.

10. Article 3(1) DMA puts forward three criteria which, if met, will lead the Commission to designate a company as a gatekeeper. The DMA further provides that the Commission will presume these criteria are satisfied when a set of quantitative criteria are met (Article 3(2) DMA), that a company can seek to rebut that presumption by presenting sufficiently substantiated arguments (Article 3(4) DMA), and that the Commission can designate a company as a gatekeeper even if the quantitative criteria in Article 3(2) DMA are not met, following the market investigation described in Article 15 DMA and taking into account the various elements set out in Article 3(6) DMA.

11. ECIS understands that the Commission has sought to strike a balance between, on the one hand, having sufficient flexibility to designate companies as gatekeepers taking into account all relevant circumstances and, on the other hand, providing sufficient legal certainty to companies regarding their potential gatekeeper status and their ability to argue against such gatekeeper designation. However, ECIS is concerned that the gatekeeper criteria are currently not sufficiently clear, and allow for too much flexibility in favour of designating a wide range of companies as gatekeepers. ECIS therefore considers that the Commission should give further consideration to Article 3 DMA to increase legal certainty. For example, the "*important gateway*" criterion in Article 3(1) DMA is intended to ensure that only those large digital companies that are (quasi-)unavoidable channels for business users to reach end users are designated as gatekeepers. But the "*important gateway*" notion is in itself uninformative. While Article 3(2) DMA clarifies when the Commission will presume this criterion to be met and Article 3(6) DMA provides some general guidance on the elements the Commission will "*take into account*" in its assessment, it remains unclear *what* exactly the Commission would need to show to reach the conclusion that a company acts as an "*important gateway*" or that a gatekeeper designation is appropriate, *what* exactly a company would need to demonstrate to escape such gatekeeper designation, or *how* the various elements listed in Article 3(6) DMA will inform the Commission's assessment. This absence of a sufficiently clear legal standard leads to legal uncertainty. Hence, we look forward to engaging with the Commission to clarify further how to interpret the gatekeeper criteria in Article 3(1) DMA and which elements will be determinative in its assessment of a company's potential gatekeeper status.

Obligations for gatekeepers

12. ECIS believes that powerful digital players should not be able to misuse their gatekeeper power by engaging in unfair conduct vis-à-vis business users or by leveraging their power into neighbouring markets. Given ECIS' central focus on interoperability and cloud computing, it has a particular concern that gatekeepers can leverage data collected in one market into adjacent ones. Therefore, it is important that the DMA adequately prevents gatekeepers from unfairly leveraging their power and sets out obligations which are clear and unambiguous.

13. ECIS considers that the following obligations included in Article 5 DMA would benefit from further clarification, as outlined below.

    i. ***Combination of personal data***. Article 5(a) DMA aims to prevent gatekeepers from combining personal data sourced from core platform services with personal data from any other services without end user consent. This provision should be expanded so that the end user must provide *express and unambiguous opt-in* consent, which the gatekeeper should obtain anew on a regular basis, and such consent should not be a condition for accessing the gatekeeper's core platform service. Gatekeepers should also be required to refrain from incorporating the terms governing the collection of personal data from their core platform services in their terms of service, giving users the possibility to consent to the terms of service without such agreement automatically entailing consent to a gatekeeper's data collection and combination practices. In addition, it should be clarified that metadata and location data also fall within the scope of this provision to the extent they qualify as personal data.

    ii. ***Registration or subscription as a condition for access***. Article 5(f) DMA prevents gatekeepers "*from requiring business users or end users to subscribe to or register with any other core platform services identified pursuant to Article 3 or which meets the thresholds in Article 3(2)(b) as a condition to access, sign up or register to any of their core platform services identified pursuant to that Article*." ECIS believes that the scope of this provision should be broadened such that end users or business users are not required to subscribe or register with *any* other services offered (*i.e.*, owned or controlled) by the gatekeeper as a condition for accessing its core platform services. This would ensure that gatekeepers cannot bundle core platform services with their other services (and the data therein) to improve their position in adjacent markets.

14. ECIS supports the provisions within Article 6 DMA which aim to increase contestability, access to data and access of third-party software applications. We look forward to discussing in more detail possible amendments which could help realise the DMA's objectives and thus share, in the interim, some core observations:

    i. ***Switching.*** ECIS, over the past 30 years, has contributed and advocated for open standards to ensure switching and portability of software and data – many of the reasons remain the same since our last paper on this topic written in 2016. Hence, ECIS welcomes Article 6(1)(e) DMA requiring gatekeepers to "*refrain from technically restricting the ability of*

end users to switch between and subscribe to different software applications and services to be accessed using the operating system of the gatekeeper." However, this provision should be broadened to not only require gatekeepers to refrain from "*technically*" restricting end users to switch, but also *contractually or otherwise*, in order to avoid circumvention. In addition, we suggest that the wording of the provision should be amended to prohibit not only restricting the ability to "*switch between*" or "*subscribe to*", but also to *otherwise use* different software applications and services to be accessed using the operating system of the gatekeeper, again in order to avoid circumvention.

ii. ***Data portability.*** The data portability provision in Article 6(1)(h) DMA requires gatekeepers to "*provide effective portability of data generated through the activity of a business user or end user and shall, in particular, provide tools for end users to facilitate the exercise of data portability*". ECIS believes that the scope of this provision should be expanded such that it also includes third parties authorised by end users.

iii. ***Interoperability.*** ECIS maintains that openness and interoperability between IT systems architectures – based on a strong model of collaboration between partners – is at the heart of best-in-class, pro-competitive cloud products and services. Article 6(1)(f) DMA requires gatekeepers to "*allow business users and providers of ancillary services access to and interoperability with the same operating system, hardware or software features that are available or used in the provision by the gatekeeper of any ancillary services*". First, ECIS considers that this provision should not provide for "*access to*" but only "*interoperability with*" operating system, hardware or software features, as providing "*access to*" these features might cause security concerns. Second, the provision should ensure that interoperability information is conveyed in complete and accurate technical documentation for transparency. Third, the current provision only provides for interoperability with the operating system, hardware or software features that are available or used in the provision by the gatekeeper of *any ancillary services*. It should, instead, provide for interoperability with these features that are available or used in *any other services* (not just ancillary services) offered by the gatekeeper. The inclusion of an interoperability requirement is essential to ensure a pro-competitive outcome, for example, in SAAS markets which may be reliant on interoperability with the underlying IAAS provider. Similarly, it is also important that the gatekeeper provides access to data available or used by the gatekeeper, and not only to the operating system, hardware or software, to ensure that interoperability and data portability are guaranteed.

Commission's powers of review

15. ECIS believes that the DMA must remain focused and targeted to prevent inappropriate conduct by digital gatekeepers. It is therefore important that the Commission has the appropriate flexibility to conduct a review of the DMA periodically. We understand that Article 3(5) DMA empowers the Commission "*to adopt delegated acts in accordance with Article 37 to specify the methodology for determining whether the quantitative thresholds laid down in paragraph 2 are met, and to regularly adjust it to market and technological*

developments where necessary, in particular as regards the threshold in paragraph 2, point (a)". However, while this provision enables the Commission to revise the quantitative criteria, it is important that its methodology remains clear, transparent, and relevant over time.

16. Similarly, ECIS also recognises that under Article 38 DMA, the Commission will have the power to evaluate the DMA and establish whether "*additional rules, including regarding the list of core platform services laid down in point 2 of Article 2, the obligations laid down in Articles 5 and 6 and their enforcement, may be required to ensure that digital markets across the Union are contestable and fair*." It is crucial that this review process, and any additional obligations, remain transparent, focused, and do not place a significant compliance burden on digital companies for which a gatekeeper status is not warranted.