A TELECOMS INDUSTRY VIEW ON THE DIGITAL MARKETS ACT
JOINT POSITION PAPER BY ETNO AND GSMA

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ETNO and GSMA welcome the Commission's initiative to create a harmonised *ex-ante* instrument targeted at the providers of core platforms services designated as gatekeepers via the Digital Markets Act (DMA). Current legislative instruments are not sufficient to ensure contestable and fair markets in the digital economy. This would also support the DMA's objective to strengthen the internal market by setting out harmonised rules across the EU.

We share the Commission's concerns about unfair and anticompetitive conducts by a few large digital platforms, which stifle opportunities for competitors and ultimately have a chilling effect on innovation and diminish consumer choice.

Telecommunications operators are both business partners and customers of online platforms. Furthermore, we strive to compete with gatekeepers in our core business and other activities, such as in cloud computing. Our relationship with online platforms is manifold and includes *inter alia* the use of online advertising, operating systems incorporating aspects of the device hardware and software, or app stores. Additionally, devices connected through our networks often provide access to the platforms in question.

Beyond these direct links to telecoms' business activities, telecoms have a vital general interest in Europe's digital prosperity and sovereignty, which require a healthy and competitive digital platforms sector. An ambitious and balanced DMA has the potential to lead the way, globally, in improving market dynamics in the field of digital services. It can create competitive and innovative markets that deliver superior results for citizens in Europe and worldwide.

Executive Summary:

- **Welcome a new *ex-ante* regulation to promote fair competition in digital markets**: where competition law is insufficient to tackle problems arising from entrenched and durable dominance in digital markets, level-playing field needs to be restored through new *ex-ante* regulation targeted at gatekeepers that are not already subject to asymmetric regulation;
- **Support the sets of prohibitions and obligations for designated gatekeepers**. The lists of do's and don'ts could be further strengthened to address all the relevant problems and to benefit contestability more broadly. It is crucial that obligations be accompanied by a detailed remedy-setting process, with clear timing stages, and involving interested stakeholders in the dialogue between the Commission and regulated gatekeepers to ensure the correct implementation of these measures.
- **Ensure legal certainty in gatekeepers' designation**: the mechanism to designate gatekeepers below the thresholds defined in Article 3 should be reviewed in order to keep the focus on providers of core platform services acting as gatekeepers, prevent legal uncertainty, and avoid arbitrary application of Article 15;
- **Advocate for a flexible and proportionate framework based on clear criteria**: the market investigation into new services and practices is a key element of the DMA. In order to safeguard the DMA's future-proof and proportionate nature, the processes set out in Article 17 should be shortened and the extension in scope to new core platform services should be supplemented with a mechanism based on sound criteria;
- **Promote harmonisation through supervision and enforcement of the new rules at the EU level**: gatekeepers operate in global ecosystems and competition concerns arising in digital markets have an important cross-border dimension. In parallel, enhanced coordination and involvement of national competent authorities remains crucial for an effective oversight.

Subject-matter & Scope (Article 1)

ETNO and GSMA strongly support the scope of the Regulation focusing on digital markets where online platforms are present and operate as, or may turn into, gatekeepers. Here, market competition is distorted and a level-playing field needs to be restored through new *ex-ante* regulation.

Telecom operators are already subject to an *ex-ante* regulatory framework designed to promote competition, which is enshrined in the EU Electronic Communications Code (EECC). The application of additional, overlapping *ex-ante* rules would be unjustified for services already subject to general authorisation under that regime. For this reason, regulated electronic communications networks and services have been explicitly exempted from this Regulation as indicated in Article 1(3).

However, we are concerned that this exemption lacks sufficient clarity in its application to Interpersonal Communication Services (ICS). It is then critical to define precisely the services that should fall under the scope of the DMA. Number-based ICS (voice, text) use phone numbers and already fall under a broad range of sector-specific competition rules required by the general authorisation regime (e.g., ensuring interoperability and removing switching barriers, complemented by additional regulation at national level). Therefore, it should be clarified that these services should fall outside of the scope of the DMA, to avoid redundancy with applicable sector-specific regulation. Article 1(3)(b) of the DMA should though clarify that only those ICS that do not use phone numbers – as defined in Article 2(7) of the EECC – fall within the scope of the DMA.

Contrary to number-based ICS, number-independent ICS (e.g. messaging apps available online) are exempted from most EECC provisions; importantly, they are not subject to the general authorisation regime. Article 1(4) excludes communication services that do not use phone numbers from interoperability obligations in the DMA. Consequently, gatekeepers would continue to fall only under Article 61 of the EECC, which does not address situations of dominance and would only apply in the unlikely event that telecoms did not offer their communication services any longer. This EECC provision is not a reasonable alternative to the DMA.

Definitions (Article 2)

Providers of core platform services have some key characteristics in common that contribute to cementing their market power. They all typically enjoy a very large user base and have cross-market activity over a wide geographic footprint, which allows them to realise significant economies of scale and scope. They also play a gatekeeping role by controlling the access to markets and users; enjoy strong network effects; raise barriers to entry in their markets; and are readily able to leverage their market power to enter adjacent markets thanks to their considerable tangible and intangible assets.

The DMA accurately includes in the scope the relevant core platform services for which regulatory intervention is needed to ensure fairness and contestability in digital markets when certain gatekeeping criteria are met. In addition, the Commission should continuously monitor markets, which may result in proposals to adjust the list of core platform services through a legislative review based on Article 17(a).

However, the justification that substantiates the extension in scope seems arbitrary to the extent that the Commission does not establish economic and objective criteria to justify the inclusion of the

proposed core platforms services via amendment to the Regulation. This lack of objective criteria carries considerable legal uncertainty, particularly for new services which could potentially be subject to the DMA Regulation by means of market investigation. We do appreciate that the new regulatory regime introduced by the DMA will require time for the Commission and all parties involved to learn and adapt, and that the Regulation could be reviewed in the future based on the acquired experience. Nonetheless, in order to avoid undesired and unwarranted spill-over effects from the onset, Article 17(a) should be supplemented with a mechanism based on sound criteria.

Designation of Gatekeepers (Article 3)

ETNO and GSMA believe that the mechanism to designate a gatekeeper is an essential element of the proposed Regulation and should be carefully calibrated, taking into account the considerable impact on the businesses concerned and the broader implications for the digital economy. To achieve this objective, we deem it necessary that designation is based on a sound cumulative three-criteria test that evaluates size, gateway and enduring position of the given core platform service. This approach is also favoured by the Panel of Economic Experts in their recent report on the DMA[1], where the authors argue that a straightforward mechanism to designate gatekeepers can cope with the complexities of defining relevant markets in the platform economy and with regulators' information asymmetries.

Thresholds in Article 3(2)(a) should be sufficiently high to exclusively cover very large platforms where most of the structural competition problems are identified and thus reducing type 1 errors, i.e., over-regulation. We see the risk for undertakings which do not pose the same type of issues as the actual gatekeepers being captured by the provisions.

Obligations for Gatekeepers (Articles 5 & 6)

ETNO and GSMA support the sets of prohibitions and obligations for gatekeepers put forth in Articles 5 and 6. We believe that the two lists of remedies are suitably designed to address fairness and contestability in digital ecosystems and capture most relevant issues experienced by stakeholders in the digital ecosystem.

Article 5

Regarding Article 5, we support measures tackling, among others, data hoarding (a), user mobility and lock-in (c, e, and f), and transparency of online advertising intermediation (g). Nevertheless, there is room for improvement to ensure that these obligations are fully equipped to deal with the breadth and complexity of the ecosystems leveraged by gatekeepers, and that there are no gaps left to undermine the effectiveness of remedies.

The combination of personal data from various services offered by the gatekeeper could be permitted in certain circumstances where the end user had freely consented to such use of their data according to the GDPR, and the gatekeeper committed to making the data available to other providers on fair and non-discriminatory grounds.

[1] The EU Digital Markets Act - A Report from a Panel of Economic Experts

The prohibition of tying in Art. 5(f) addresses situations where one core platform service (the tying service) is provided conditional on the use of another core platform service (the tied service). Strategic tying of services to lock users into a gatekeeper's ecosystem could be pursued through any combination of the offerings in the gatekeeper's portfolio. Competition law (Article 102(d) TFEU) indeed identifies that abuse of dominance may result from tying of any unconnected service and the same approach should be followed. Hence, the prohibition at Art. 5(f) should be extended to any other unconnected service or product, not only limited to other core platform services. This will have the effect of removing the ability of gatekeepers to leverage market power from their core platform service, and so will prevent them from tipping adjacent markets in their favour.

We note that the DMA proposal currently does not address some problematic behaviour related to standardisation and intellectual property. We propose adding an obligation tackling these critical behaviours.

Article 6

We very much welcome the obligations set forth in Article 6, such as requirements for gatekeepers to allow third party apps to interoperate with their operating systems (c) and to allow other service providers to utilise underlying technical facilities of the core platform service on the same terms as the gatekeepers' own services (f). These measures would greatly improve contestability in mobile ecosystems.

For instance, they could support the launch of interoperable, secure and open solutions based on mobile hardware for a European e-Identity, thereby answering to the European Council's call for a EU-wide framework for secure public electronic identification (eID)[2] and meeting the ambitions of the 2030 Digital Compass to ensure that 80% of the EU population is equipped with an eID solution. It is essential for European developers of eID solutions that the market is not foreclosed in this regard.

To truly stimulate fair competition in digital markets, the DMA should strive to address a gatekeeper's unfair practices against its competitors, even if said competitors are not necessarily its business users. Leveraging the crucial assets of gatekeepers, such as their data monopolies, would be particularly effective to redress the balance for gatekeepers and their competitors. To this end, Art. 6(1)(a) should benefit contestability more broadly.

Furthermore, due to reasons already mentioned, interoperability obligations should not be limited to ancillary services only.

Data portability obligations as reflected in Art. 6(1)(h) are essential to facilitate switching, e.g. between cloud services. In line with recital 54, we suggest to clarify that a gatekeeper's users should be able to port also the data they actively provided to the gatekeeper, along with the data they have generated by using the core platform service.

We also recommend amending both Articles 6(1)(c) and 6(1)(k) in order to bolster assurances of equal treatment between the gatekeeper's own services and third party services.

[2] European Council conclusions, 1-2 October 2020

As explained in more detail in the next section, more clarity is required on how all these obligations are to be further specified to take effect, and on what opportunities there will be for interested parties to participate in the dialogue between the Commission and regulated gatekeepers.

Compliance with obligations for gatekeepers (Article 7)

It is essential that a strong list of obligations in Articles 5 and 6 is supported by an equally sound and practical remedy-setting process guaranteeing that gatekeepers correctly implement the measures to comply with the obligations set out in this Regulation within a clear timeframe. A detailed implementation and compliance process, with clear timing stages, and an opportunity for stakeholders to comment of draft implementing measures would be key to greater legal certainty for all parties concerned.

We appreciate that, according to Article 3(8), once gatekeepers are designated they are afforded a reasonable yet definite timeframe of six months to implement the measures required by Articles 5 and 6. It is crucial for gatekeepers, their users and competitors, as well as competent authorities to know exactly by when gatekeepers are required to meet their obligations, when they are deemed to have failed to comply, and when a non-compliance decision can be administered.

However, we regret that the overall implementation process for the obligations susceptible of being further specified as per Article 6 lends itself to delays and long periods of uncertainty regarding a gatekeeper's effective compliance with its obligations.

In the current proposal, the process resembles the 'commitment decision' system used in competition law, which allows companies to offer commitments that are intended to address the competition concerns identified by the Commission. The Commission can undertake *ex-post* proceedings to specify the measures that a gatekeeper should take, only after the initial implementation of said measures has been completed. A Commission decision that definitely specifies a given measure might be issued no sooner than a full year after a gatekeeper's designation.

True to the DMA's objective of introducing an *ex-ante* regulatory instrument, the Commission should have the possibility to specify the remedies laid down in Art. 6 on its own initiative as it designates a provider of core platform services as gatekeeper. This prerogative would give more legal certainty to gatekeepers, which would receive from the onset guidance to swiftly implement measures that are compliant with their regulatory requirements.

In addition, relevant stakeholders such as the gatekeeper's competitors and its affected business users should be involved in the remedy development process to ensure that the specific obligations are effective in addressing the market problems they target. The DMA proposal does not contemplate this step, as according to Art. 7(4) the dialogue is exclusively between the Commission and the gatekeeper platform concerned. In our view, the Commission's preliminary findings or proposed draft obligations should be subject to input by stakeholders, either through a targeted or a public consultation, before they are finalised. The well-established market testing mechanism that is used for remedies in competition law could inform this process, and could also be used in the context of market investigations for systematic non-compliance (Art. 16) and commitments offered by the gatekeeper (Art. 23). Any possible delay in implementation of the measures would be offset by advantages in terms of greater robustness and effectiveness of the remedies.

Concerning the obligations set forth in Art. 5, the Commission should have a right to issue non-binding guidance for gatekeepers that specify their obligations. While not affecting the self-executing nature of these remedies, guidelines that clarify and harmonise the interpretation of Art. 5 obligations would greatly benefit all the parties involved.

Obligation to inform about concentrations (Article 12)

We agree that there is a need to address in a more efficient way anticompetitive concentrations in the digital economy and the obligation for a gatekeeper to inform the Commission of any concentration involving another core platform service or other digital services is a positive first step. However, this duty of notification as currently drafted raises several questions in terms of process and, most importantly, does not empower the Commission to act upon critical digital mergers. We therefore would recommend that the Commission added clarification in this respect.

Market investigation for designating gatekeepers (Article 15)

The market investigation for designating gatekeepers in Article 15(1) and (4) allows the Commission to supplement the quantitative thresholds under Article 3(6) and to prevent markets from tipping by empowering the Commission to designate firms as gatekeepers based on a number of qualitative criteria.

While this objective is understandable, we highlight that the current architecture of the DMA with its obligations is built on the perspective of redressing imbalances caused by those gatekeepers that enjoy an entrenched and durable dominant position in a given tipped market. Moreover, the considerable discretion granted to the Commission through the market investigation of Article 15(1) and (4), as well as the lack of reasonable safeguards, create a high level of legal uncertainty and unpredictability for those services falling in the list of core service platforms.

The current structure of the proposal could result in regulation of core platform service providers that actually strive to compete with gatekeepers, before they reach the quantitative thresholds in Article 3(2) and the full application of Articles 5 and 6. In our view, this not only goes against the ultimate objectives of the DMA to ensure and stimulate fair, contestable and innovative digital markets and the principle of legal certainty, but also jeopardises the aspirations to create solid and accountable European Digital Champions. Furthermore, providers of core platform services that do not qualify as gatekeepers based on Article 3(2) are nevertheless covered by competition law.

In light of the above, we recommend that the Commission be empowered to conduct a market investigation under Article 15 only when a provider of core platform services does not fulfil the 3-year threshold set in Article 3(2)(c). The provider subject to investigation would still have to meet the other two quantitative thresholds related to turnover and user base. This approach would be more targeted at providers that have reached a certain scale in the European market, in line with the key objectives of the DMA, and would avert a potentially arbitrary application of Article 15.

Market investigation tool for non-compliance (Article 16)

ETNO and GSMA believe that compliance with the obligations and prohibitions provided in Articles 5 and 6 is the key for a successful DMA. However, the processes provided in Article 16 in case of non-compliance are too lengthy and would not ensure a timely and efficient intervention. A shorter

timeframe and more efficient procedures would ensure that necessary measures are rapidly taken to stop any non-compliance and to remedy the breach.

Market Investigation Tool for extension for new services and practices (Article 17)

ETNO and GSMA believe that the future-proof character of the DMA is safeguarded by the market investigation set forth in Article 17 which allows the Commission to expand the scope of the DMA to new gatekeeping services and harmful practices that emerge over time. Nevertheless, we consider that the processes provided in Article 17 could be lengthy and inefficient for digital activities that are fast-moving by nature.

More specifically, a shorter timeframe to include additional obligations and core platform services (i.e., conclusions of a market investigation to be issued within 12 months instead of 24 as proposed by the Commission) might be necessary to make sure that the Regulation remains flexible and adaptable.

Regulatory Oversight

We believe that the imposition, supervision and enforcement of this new framework will be best undertaken at EU level, since gatekeepers operate in global ecosystems and competition concerns arising in digital markets have an important cross-border dimension. The Commission should be adequately resourced, and vested with investigative powers to collect relevant information from digital firms and fully appreciate the competitive dynamics of digital ecosystems. Nevertheless, as the effects of platforms' abusive conducts may differ across Member States, or emerge only in single Member States, an effective coordination with national competent authorities remains crucial for an effective oversight.

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