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Statement of the German Startup Association

on the Draft European Parliament Legislative Resolution (A9-0332/2021) and the Council's General Approach (ST 13801 2021 INIT)

on 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) (COM(2020)0842 - C9-0419/2020 - 2020/0374(COD))

1. Introduction

Large online platforms in the digital sector increasingly control access between commercial users and end users and thus set the rules of the game in digital markets. Through unfair practices, they entrench their market power, create dependencies and thus have a negative impact on the contestability in the digital sector. The Digital Markets Act (DMA) proposed by the European Commission on Dec. 15, 2020, aims to ensure fair and contestable digital markets within the EU and to contribute to a functioning single market for digital services. The DMA focuses on the largest online platforms, so-called "gatekeepers", whose "central platform services" have a particularly negative impact on the contestability of digital markets.

As the German Startup Association, we expressly welcome the DMA and its objective. Startups in particular, but also scaleups in an advanced stage of development, have been unable to develop their full potential in recent years due to high market entry barriers and unfair practices by gatekeepers. We therefore consider the prohibitions of such practices as well as conduct obligations for gatekeepers contained in the DMA to be a major step forward for the European digital and technology sector. This could create the conditions for Europe to develop its own digital champions.

Against this backdrop and considering that EU decision-makers are entering the last phase of discussions on the text (the so-called “trilogues”), we support the fundamental approach of limiting the DMA to only the largest gatekeepers and imposing the sharpest possible obligations on them. Not every practice of large online platforms limits the contestability of a digital market; on the contrary, it can also generate innovations and benefits for customers and users. In this respect, we agree with the objective of addressing at EU level only *"the most salient incidences of unfair practices and weak contestability”* (Explanatory Memorandum, DMA-EC). This currently applies to very few non-European platforms, which are still far superior to European platforms in terms of size and market power. In our view, it is therefore essential to maintain the approach of the DMA (namely, obligations as stringent as possible for only very few market-dominant platforms), as this creates an appropriate regulation.

Deviating from this approach would lead to collateral damage for the European digital and technology sector. On the one hand, too lax prohibitions and obligations would not break the market dominance of gatekeepers and would not limit their unfair practices. The DMA would have no effect and thus fail to achieve its intent. On the other hand, strong bans and obligations on an expanded gatekeeper scope, which would include not only the largest non-European platforms, would weaken European digital companies and hinder Europe's ability to innovate. The DMA must have an appropriate and proportionate scope, otherwise Europe will not have the digital champions it needs to compete in the digital and technology sector on a global level.

Against this background, the Commission proposal (hereinafter DMA-EC) still has some shortcomings, especially with regard to the scope and prohibitions of unfair practices. The drafts submitted by the Council of the EU (DMA-CEU) and the European Parliament (DMA-EP) offer some improvements in this respect. However, there is still room for further

enhancement. In particular, the DMA-CEU is too close to the Commission draft in our view and does not go far enough in some points or goes too far in some places. By comparison, we consider the DMA-EP to be more ambitious and therefore welcome many of the proposed tightenings.

To make the DMA a real contribution to a fair single market and a level playing field for European startups and scaleups, we believe it is urgent to make improvements in two crucial areas: the prohibition on self-preferencing and the scope.

2. Executive Summary

- ➔ **Prohibition on self-preferencing**: Article 6 para. 1 lit. d) DMA-EC prohibits gatekeepers from giving preference to their own products and services over third-party providers in the ranking, which we support. We also welcome the corresponding recitals 48 and 49, which establish a very broad interpretation of the term ranking and thus includes not only ranking but also other abusive and competition-distorting practices. However, we express the concern that the article as well as the two recitals leave too much room for interpretation and that a more legally secure and practicable wording is therefore urgently required in order to avoid loopholes. We therefore strongly support the amendments in Article 6 para. 1 lit. d) and the corresponding recital 48 in the parliament's draft. In addition, we suggest expanding the ban in recital 48 on links and referrals to separate proprietary services that the gatekeeper presets as "filters" on its homepage or search results pages to direct users directly to that specialized service.

- ➔ **Scope**: With regard to the thresholds in Art. 3 para. 2 lit. a), we support the proposal of the European Parliament (DMA-EP). Here, the annual turnover is raised from EUR 6.5 billion to EUR 8 billion and the average market capitalization from EUR 65 billion to EUR 80 billion. This increase is essential, as otherwise there is a risk that European digital companies will fall within the scope unnecessarily early.

  Furthermore, the definition of an "active end user" of online intermediation services proposed by the European Parliament and the Council for the annex of the DMA will significantly expand the scope of the DMA. The definition does not take into account the different business models within online intermediation services (especially online marketplaces and e-commerce companies) and will lead to multiple European tech companies being regulated as gatekeepers, even though they are not really gatekeepers. The definition contradicts the DMA's objective to regulate only the largest global digital platforms and to ensure a fair and contestable EU single market. As a consequence, it would become more difficult for Europe to develop its own digital champions and would thus significantly weaken Europe's geostrategic role in the digital and technology sector. We therefore strongly suggest accounting for multiple businesses in the definition of an active end user of online intermediation services and importantly, distinguish between transaction-based intermediaries and non-transaction-based intermediaries.

3. In Detail

3.1 Establish comprehensive and enforceable prohibition on self-preferencing

Background

The DMA focuses on gatekeepers and seeks to prohibit specific business practices. Gatekeepers usually create an ecosystem that enables them to secure their own economic position and leverage it from a central platform service into further market areas, for example by technically linking various services and data. They are exceptionally large and unavoidable gateways between businesses and consumers, thereby being in a position to exploit control over access to consumers or data.

As a result, both consumers and business customers become increasingly tied to the gatekeeper's offerings, so that the cost of parallel use of alternative services increases (lock-in effect) and multihoming becomes more difficult. This situation leads to higher market entry barriers for potential competitors and to crowding out competitors already active in a given market who are unable to tap a similar data breadth or data depth from their users due to a lack of comparable intermediation power. This dominant market situation endangers the contestability of digital markets. Especially startups as new market participants, but also scaleups in advanced development phases, depend on fair and contestable markets in the digital sector.

DMA: prohibition of self-preferencing

Above all, the DMA aims at ensuring fair and open competition in digital markets by prohibiting certain specific practices of gatekeepers. Among others, this includes prohibitions on strategies to secure and expand one's own position in the ecosystem that have a negative impact on competition. One such strategy is, above all, giving preference to one's own services or products, among others in the ranking of search results on search engines, for example Google. The risk of distortion of competition is particularly high in this case, because customers usually expect “neutral” search results from third-party providers when using search engines. This is especially problematic because gatekeepers can set the rules for access to their core platform, while at the same time providing their own services in competition with other providers. Preferential treatment of a gatekeeper's own services or products over third-party providers must consequently be regarded as competition-distorting behavior.

This assessment is also supported by the judgment of the European Court of First Instance of 10.11.2021 (T-612/17) in the *Google Shopping* case, which upheld the European Commission's decision of the same name of 27.06.2017. The court found that Google had favored its own Google Shopping service on its general results page by displaying and positioning it more favorably than competing comparison services and, as a result, had restricted competition. In its reasoning, the court stated, among other things, that *"the fact that Google favors its own specialized results over third-party results, which seems to be the converse of the economic model underpinning the initial success of its search engine, cannot but involve a certain form of abnormality"* (recital 179) and thus does not constitute

competition on the merits. The court also pointed out that *"a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators"* (recital 180). The court clarified that *"gateways to the Internet"* are subject to a stricter obligation in the case of high barriers to market entry and that their conduct must not impair competition (recital 183). On the basis of this assessment, it appears justified and necessary to introduce a comprehensive prohibition of self-preferencing for corresponding "gatekeepers" in the DMA.

Article 6 para. 1 lit. d) DMA-EC therefore logically prohibits gatekeepers from giving preference to their own products and services over third-party providers in the ranking. According to recital 48, such preferential treatment can refer to cases *"which are ranked in the results communicated by online search engines, or which are partly or entirely embedded in online search engine results, groups of results specialized in a certain topic, displayed along with the results of an online search engine"*. Ranking is understood to mean any form of *"relative prominence, including display, rating, linking or voice results"* (recital 49). Recital 49 also prohibits all other measures *"that may have an equivalent effect to the differentiated or preferential treatment in ranking"*. This specification establishes a very broad interpretation of the term ranking and thus introduces a prohibition of circumvention, which prohibits conduct that restricts competition in a manner similar to self-preferencing in the ranking of search results.

As the German Startup Association, we welcome a comprehensive prohibition of self-preferencing that includes not only ranking but also other abusive and competition-distorting practices. We therefore support the objective of Article 6 para. 1 lit. d) as well as the corresponding recitals 48 and 49. However, we express the concern that the article as well as the two recitals leave too much room for interpretation and that a more legally secure and practicable wording is therefore urgently required in order to avoid loopholes.

Evaluation of the DMA drafts of the European Parliament and the Council

In this context, we support the version submitted by the European Parliament (DMA-EP), as it specifies more concretely than the Commission's proposal (DMA-EC) and the Council's general approach (DMA-CEU), that not only the preferential display of own services in search results is prohibited, but also any other preferential display of own services. This ensures a higher degree of legal certainty and better meets the objective of prohibiting measures that distort competition.

Our assessment of the article and the recitals:

Article 6 para. 1 lit. d) DMA-EP (changes compared to DMA-EC[1])

*"(d) ~~refrain from treating~~ **not treat** more favourably in ranking **or other settings**, services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third party and apply **transparent**, fair and non-discriminatory conditions to such **third party service or products** ~~ranking~~;"*

[1] Changes compared to the Commission Proposal (DMA-EC) are marked in **bold** for additions and in ~~strikethrough~~ for deletions.

Since recital 49 in particular allows a broad interpretation of the term "ranking" and can thus also include other conduct that may restrict competition in a similar way to self-preferencing in ranking, it is necessary to specify this in the article as well. We therefore advocate that "ranking" be supplemented by "**or other settings**".

The terms of the service should be fair, non-discriminatory and **transparent**, referring to "**third party service or products**" rather than ranking. Merely referring to ranking would limit the scope. The wording proposed here, on the other hand, includes all measures besides ranking by which a gatekeeper can engage in self-preferencing with respect to third party service providers.

In the version of the Council of the EU (DMA-CEU), the addition "*or by any third party belonging to the same undertaking*" is to be deleted. We take a critical view of this, as it lacks the necessary concretization with regard to the various structural corporate levels of a gatekeeper that may subsequently lead to legal uncertainty.

We advocate using the version of Article 6 para. 1 lit. d) proposed by the EU Parliament (DMA-EP) in the final DMA draft.

Recital 48 DMA-EP (changes compared to DMA-EC)
"[...] to the online search engine. ***Such preferential or embedded display of a separate online intermediation service shall constitute a favouring irrespective of whether the information or results within the favoured groups of specialised results may also be provided by competing services and are as such ranked in a non-discriminatory way.*** *[...]"*

We expressly welcome the proposed addition. It is in line with a central finding of the European Court in the *Google Shopping* ruling. The court had found that the boxes with product results (so-called shopping units) that Google displays on its general results pages constitute a separate (specialized) Google service and that the display of such boxes favors this service because no competitor can compile similar boxes and place them on Google's pages (recital 329-340). According to the court, such boxes constitute an abuse even if competitors are given the option to place their own results in these boxes and are treated equally "*within*" the box in this respect. Because, according to the court, this would turn the competitors into mere "*customers*" of the comparison service displayed by Google on its results pages and "*stop being its direct competitor*" (recital 347-353). By concretizing this, recital 48 now also includes such separate services, in particular specialized search services, which are offered directly within the general search results. As a result, Google is prohibited from exploiting its "*undisputed ultra-dominant position*" (recital 180) on the market for general search services to offer users its own specialized search services or its own content directly on the results pages, thus eliminating competition for such search services or content. This prohibition is very significant for startups, as Google has been developing more and more new services in recent years and has thus established itself as a competitor, for example for brokering flights, jobs or vacation rentals. The first negative market developments are already evident in the mediation of hotels and travel experiences. By

preferentially displaying these own special search services on the general search results pages, Google has been able to gain a competitive advantage in recent years and extend its market power to ever new markets. In this respect, it is important to explicitly extend the prohibition of self-preferencing to boxes that compare products or prices outside the general search. The ban should even apply if competing comparison services can also formally post their results in Google's boxes, as this would force them to change their business model because they no longer provide the comparison service themselves.

Despite the broad interpretation of the concept of ranking in Recital 49 and the prohibition of circumvention derived from it, we believe that there is legal uncertainty as to which specific measures of self-preferencing will be prohibited in practice. This legal uncertainty could be exploited by gatekeepers to circumvent the prohibition. The current wording of the self-preferencing ban does not yet clearly include a ban on links and referrals to separate proprietary services that the gatekeeper presets as "filters" on its homepage or search results pages to direct users directly to that specialized service (e.g., "shopping", "flights", "finance" tabs below Google's search bars). Such presets on the central mediation page redirect users to the gatekeeper's specialty services without first providing them with a choice. Thus, in Google Shopping, the court found that Google's separate price comparison service, Google Shopping, received most clicks not from (favored) search results, but from the "Shopping" navigation link that Google displays on the search page and search results pages (recital 514). Google could additionally reinforce this effect by displaying such links even more prominently, thus undermining the prohibition of self-preferencing within the search page. Since this leads to a disadvantage for competing services, these types of display could be interpreted with recital 49 as "*forms of relative prominence*" and thus described as self-preferencing. In order to create more legal certainty, we therefore propose a more concrete definition, for example by adding the following to recital 48 (our addition in **bold**):

“[...] and are as such ranked in a non-discriminatory way. ***Also the exclusive or preferential display of interfaces such as tabs or links that lead the user to a separate online intermediation service offered by the gatekeeper itself or by any third party belonging to the same undertaking prior or in response to the entry of a search query may constitute such search-related favouring.*** *[...]”*

3.2 Scope: Suggestion for an applicable definition of “active end users” of online intermediations services in the annex of the DMA

DMA: designation of gatekeepers

According to Art. 1 para. 2 DMA-EC, the scope of the DMA is limited to gatekeepers offering "core platform services" in the European Union. Core platform services include, among others, online intermediation services, online search engines and online social networking services (Art. 2 para. 2 DMA-EC). For the classification of a provider of core platform services as a gatekeeper, quantitative thresholds are defined in Art. 3 para. 2 DMA-EC.

In order to measure the impact on the internal market, the undertaking to which the provider of a core platform service belongs must achieves “*an annual EEA turnover equal to or above EUR 6.5 billion in the last three financial years, or where the average market capitalisation or equivalent fair market value of the undertaking to which it belongs amounted to at least EUR 65 billion in the last financial year, and it provides a core platform service in at least three Member States”* (Art. 3 para. 2 lit. a) DMA-EC).

To measure the extent to which a core platform service serves as an important gateway to end users for commercial users, an undertaking must provide a core platform service that has “*more than 45 million monthly active end users established or located in the Union and more than 10 000 yearly active business users established in the Union in the last financial year”* (Art. 3 para. 2 lit. b) DMA-EC).

As the German Startup Association, we generally support the approach of using quantitative thresholds, as they are a simple and suitable metric for identifying providers of core platform services as gatekeepers. However, we point out that reaching these thresholds does not necessarily mean that the undertaking is a gatekeeper in the sense mentioned by the DMA. Some European companies are almost reaching the thresholds, yet they are still far from being gatekeepers or having market power comparable to that of non-European digital companies. In our view, it is therefore crucial to set the thresholds as high as possible so that European digital companies do not fall within the scope of the DMA. The Commission's draft therefore sets the thresholds too low.

In addition, the Commission draft has failed to define the term "active end users", so this will have to be made up for in the Annex to the DMA. Initially, this technical issue does not seem to have any major implications for the scope. However, the concrete definition as proposed in the DMA-EP and DMA-CEU, has significant implications and would lead to the extension of the scope.

As a consequence, it would become more difficult for Europe to develop its own digital champions and would thus significantly weaken Europe's geostrategic role in the digital and technology sector. The DMA itself is a good and widely supported approach to foster European business and enable them to eventually compete on a global level – leaving the thresholds as it is, would deny them this chance.

Annual turnover and market capitalization

With regard to the thresholds in Art. 3 para. 2 lit. a), we support the proposal of the European Parliament (DMA-EP). Here, the annual turnover is raised from EUR 6.5 billion to EUR 8 billion and the average market capitalization from EUR 65 billion to EUR 80 billion. This increase is essential, as otherwise there is a risk that European digital companies will fall within the scope. In our view, it would even be advisable to raise the thresholds even further, as the level of the thresholds proposed in the DMA-EP is already insufficient to determine actual gatekeepers. In any case, the DMA-EP should be preferred over the DMA-CEU.

Definition of “active end users”

The definition of an “active end user” of online intermediation services proposed by DMA-EP as well as by DMA-CEU will also significantly expand the scope of the DMA. The definition does not take into account the different business models within online intermediation services (especially online marketplaces and e-commerce companies) and will lead to multiple European tech companies being regulated as gatekeepers, even though they are not really gatekeepers. The definition contradicts the DMA’s objective to regulate only the largest global digital platforms and to ensure a fair and contestable EU single market.

Both drafts define an "active end user" of online intermediation services as a "unique end user". This definition also covers “unique visitors”:

"Number of unique end users who engaged with the online intermediation service at least once in the month for example through actively logging-in, making a visit, making a query, clicking or scrolling or concluded a transaction through the online intermediation service at least once in the month."

The number of “unique visitors” is relevant for advertising-based business models (e.g. social media platforms or businesses based on clicks or impressions), because they generate revenue when users "visit" a website. However, this definition is not applicable to other business models whose revenue is not based on advertising but rather on transactions (whether goods, services or content).

In transaction-based business models (e.g. e-commerce companies), there is a high discrepancy between high visitor numbers and actual lower purchases. An “active end user” contributes to the company's revenue through the purchase of goods, services or content. The decisive factor here is the "active customer". The number of “unique visitors” – based upon the definition above – who contribute to the revenue of e-commerce companies, on the other hand, is very low. Thus, this proposed definition is not appropriate for transaction-based business models, such as marketplaces, platforms to book services or transport, food delivery platforms, etc. Furthermore, the definition does not apply to all advertising-based business models. In order to collect advertising-relevant data and to generate revenue, clearly identifiable "visitors" (logged-in) are needed.

With its "one-size-fits-all" approach, the European Parliament and the Council do not sufficiently differentiate between the extremely different business models of the platforms. Implementing this proposal would result in a significant extension of the scope of the DMA, a

contradiction of the DMA's original principles and lead to an even less competitive European tech ecosystem.

Suggestion of amendment for the Annex

The concept of an "active end user" should be refined in order to increase legal certainty for market participants. To this end, it is necessary to account for multiple businesses in the definition of core platform services and importantly, distinguish between transaction-based intermediaries and non-transaction-based intermediaries. In the case of advertising-based platforms, only those users should be included in the definition of an "active end user" that generated meaningful revenue for the company.

We therefore propose to define "active end users" for online intermediation as follows:

i) Number of unique end users who engaged with the online intermediation service at least once in the month by concluding a transaction, through paying or undertaking to pay a price, or by enabling the initiating of direct transactions between the business users and the end users, or

ii) If the online intermediation service does not meet the circumstances at paragraph i), number of unique end users who engaged with the online intermediation service at least once in the month in a way that it generates revenue for the online intermediation service or leads to a contractual relationship between the end user and a business user, for example through actively logging-in, downloading an app, making a visit, making a query, clicking or scrolling through the online intermediation service.