

DIGITAL MARKETS ACT

AFEP POSITION ON THE COMMISSION'S PROPOSAL

The French Association of Large Companies (AFEP) welcomes the Digital Markets Act (DMA) proposed by the European Commission. The very large platforms now represent structuring economic actors in the digital single market, with business particularly dependent on the intermediary services that they offer. European competition law should be adjusted to tackle these systemic digital challenges.

The traditional methods of antitrust remain relevant for other actors but do not address efficiently structural competition issues proper to these platforms. French large companies therefore support an ex-ante Regulation targeting the largest online platforms acting as gatekeepers. With this ex-ante tool, the Commission intends to control the behaviour of these actors and mainly their contractual clauses.

This proposal therefore has the double advantage of:

- offering the Commission a **tool applicable to the most structuring platforms**, provided that this concept is clearly defined,
- **maintaining the legal framework** known to companies operating in other economic sectors.

The parallel work on the DSA and DMA also calls for consistency of definitions and obligations to operators, as with the interaction with existing tools such as the Platform to Business Regulation, which is related to the commercial relationship between digital platforms and business users. Coherency with the recently adopted Regulation on terrorist content and its definitions (for example on ancillary services) should also be kept in mind.

French large companies focus their comments on the main following issues.

■ **Scope and designation of gatekeepers**

The definition of core platforms services and criteria designating gatekeepers are central for companies. Some clarification can however be made **to ensure that its scope is strictly circumscribed to gatekeepers**. Digital actors, including those that do not pose gatekeeping issues, should have **legal clarity** on who qualifies and who could potentially fall within the scope of Article 3. Clarification should therefore be made by co-legislators on the definitions, characteristics of core services and appropriate criteria of designation:

- the distinction between a **business user and end-user** (article 2) and of active users, key notions for the quantitative thresholds, should be defined more precisely.

- AFEP also proposes for **browsers to be added to the list of core services**, as they show a large concentration of user data, potentially locked in the platform ecosystem, and lead to risks of bundling with the operating systems.
- a **new definition for algorithms main parameters** is suggested, linked to AFEP's proposal of new obligation of transparency (see paragraph on new obligations).

Additional clarification could also be reached on:

- the link between qualitative criteria laid out in Article 3(6) and the ones laid out in Article 3(1). Although AFEP supports the use of such qualitative criteria by the European Commission to designate a gatekeeper even when it does not fulfil the quantitative thresholds, these criteria remain very broad, while legal certainty should remain and decisions be evidence-based. Additional guidelines could be produced to clarify the use of Article 3(6) by the Commission.
- for an appropriate self-assessment by companies and better legal clarity, AFEP finally proposed to move the set of concordant items of evidences from the Recitals to Article 3.

■ Obligations

AFEP supports the overall list of obligations set out in Article 5 and 6 which improves the predictability for companies, notably the ones aiming for:

- a fair, transparent and non-discriminatory right of access to markets for other economic operators
- the guarantee of interoperability of services with the providers of complementary and alternatives services, ensuring multi-homing and mobility for businesses and consumers
- the ban of self-preferencing and discriminatory access.

Both articles could however still be **improved to better reflect identified unfair practices**:

- article 5(e) should be extended so the **bundling of gatekeeper's services be prohibited** not only for core services but for non-core services, as practice has shown that it might lead to lock-in of users within a broader ecosystem,
- article 5(b) should be modified so it should be more explicit in banning clauses forbidding business users to offer different prices and conditions on their own website and not only through third-party online intermediation services (**most favoured nation clauses**),
- article 6(1) obligation of **interoperability** should be extended to unconnected services and not limited to ancillary services,
- an additional obligation of **transparency of algorithm main parameters** should be introduced to prevent self-preferencing in ranking, jointly with the addition of new definition in article 2.

- Exemptions and suspensions of obligations

Regarding Articles 8 and 9 and the possibility for gatekeepers to get exceptions where an overriding public interest exists, companies believe that a **clear description of said public interest** is needed so to prevent any abuse. Similar clarification could be brought over the **notion of economic viability** introduced in Article 8, as it is quite broad and could lead gatekeepers to suspend their obligations when thinking they might be endangering their business model.

- Enforcement and investigation tools

AFEP welcomes the enforcement of these rules at the European level by the Commission and supports effective provisions on market investigation, supported by effective sanctions. The Commission services should be vested with **clear competencies and powers** such as information gathering powers to ensure efficient oversight, necessary tools and resources to process data and investigate market practices, power to impose behavioural and structural remedies, power to impose interim measures and a dispute settlement competence.

The coordination with and supporting **role of national competitions authorities should however be clarified**, in particular in light of the ECN+ directive currently being implemented in Member States and of the Digital Advisory Committee introduced by Article 32.

At last, the DMA is marking a major step in the project to regulate the most structuring global digital platforms. It is essential that the work of the Commission and co-legislators be part of a broader approach, allowing for the convergence of rules at the international level.

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ABOUT AFEP

Since 1982, AFEP brings together large companies operating in France. The Association, based in Paris and Brussels, aims to foster a business-friendly environment and to present the company members' vision to French public authorities, European institutions and international organisations. Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is AFEP's core priority. AFEP has 113 members. More than 8 million people are employed by AFEP companies and their annual combined turnover amounts to €2,600 billion.

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ANNEX: DIGITAL MARKETS ACT
AFEP'S PROPOSALS

■ Chapter I: Subject matter, scope and definitions

Commission's proposal	AFEP's proposal
<p style="text-align: center;">Article 2 Definitions</p> <p>For the purposes of this Regulation, the following definitions apply: (1) 'Gatekeeper' means a provider of core platform services designated pursuant to Article 3;</p> <p>(2) 'Core platform service' means any of the following:</p> <p>(a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communication services; (f) operating systems; (g) cloud computing services;</p>	<p style="text-align: center;">Article 2 Definitions</p> <p>For the purposes of this Regulation, the following definitions apply: (1) 'Gatekeeper' means a provider of core platform services designated pursuant to Article 3;</p> <p>(2) 'Core platform service' means any of the following:</p> <p>(a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communication services; (f) operating systems; (g) cloud computing services; <i>(i) browsers</i></p>

Justification

To ensure that one of the most structural actors with risks of anti-competitive practices falls within the scope, browsers should be added to the core platform system to take into account:

- their concentration of user data, potentially locked in the platform ecosystem
- the risks of bundling with the operating systems

Commission’s proposal	AFEP’s proposal
<p style="text-align: center;">Article 2 Definitions</p> <p>(14) ‘Ancillary service’ means services provided in the context of or together with core platform services, including payment services as defined in point 3 of Article 4 and technical services which support the provision of payment services as defined in Article 3(j) of Directive (EU) 2015/2366, fulfilment, identification or advertising services ;</p>	<p style="text-align: center;">Article 2 Definitions</p> <p>(14) ‘Ancillary service’ means services provided in the context of or together with core platform services, including payment services as defined in point 3 of Article 4 and all payment services and technical services which support the provision of payment services as defined in Article 3(j) of Directive (EU) 2015/2366, fulfilment, identification or advertising services ;</p>

Justification

For clarity. To improve coherence of the European legislative framework, “payment services” in Article 2 should also be defined by reference to Article 4 (5) of Directive (EU) 2015/2366 of 25 November 2015 on payment services in the internal market.

Commission’s proposal	AFEP’s proposal
<p style="text-align: center;">Article 2 Definitions</p> <p>16) ‘End user’ means any natural or legal person using core platform services other than as a business user</p>	<p style="text-align: center;">Article 2 Definitions</p> <p>16) ‘End user’ means any natural or legal person using core platform services other than as a business user, for another purpose than providing goods or services to other end users;</p>

Justification

To clarify who are “end user”, it is proposed to refer to the last sentence of Recital 13 to confirm that this definition also includes companies, but outside of a commercial relationship.

(See Recital 13 : « the notion of end users should encompass users that are traditionally considered business users but in a given situation do not use the core platform services to provide goods or services to other end user ».)

Commission’s proposal	AFEP’s proposal
	<p style="text-align: center;">Article 2 Definitions</p> <p><i>(2'4) (new) ‘algorithm main parameter’ means any general criteria, processes, specific signals incorporated into algorithms or other adjustment or demotion mechanisms used in connection with the ranking;</i></p>

Justification

To ensure transparency on ranking by algorithms, this definition is proposed and linked to the proposed new obligation (article 6) of transparency on the main algorithmic parameters, which are a major element of the functioning of core platform services (CPS). This addition also contributes to the general coherence with the DSA which requires an obligation of transparency on content moderation on the part of all providers of intermediary services and on recommender systems for very large online platforms.

■ Chapter II: Gatekeepers

Commission’s proposal	AFEP’s proposal
<p style="text-align: center;">Article 3 Designation of gatekeepers</p> <p>2. A provider of core platform services shall be presumed to satisfy:</p>	<p style="text-align: center;">Article 3 Designation of gatekeepers</p> <p>2. A provider of core platform services shall be presumed to satisfy:</p> <p><i>(d) (new) the requirement of featuring a number of non-cumulative characteristics that can be exploited by their providers and that include among others: extreme scale economies, very strong network effects, multi-sidedness of these services, a significant degree of dependence of both business users and end users, lock-in effects, a lack of multi-homing for the same purpose by end users, vertical integration, or data driven-advantages.</i></p>

Justification

To ensure better designation of a gatekeeper, these clarifications aim to limit the scope of the regulation to the gatekeepers and allow an appropriate self-assessment by companies with this set of concordant items of evidences taken from the recitals of the proposal.

Commission’s proposal	AFEP’s proposal
<p style="text-align: center;">Article 5 Obligations for gatekeepers</p> <p>(b) allow business users to offer the same products or services to end users through third party online intermediation services at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper;</p>	<p style="text-align: center;">Article 5 Obligations for gatekeepers</p> <p>(b) allow business users to offer the same products or services to end users through third party online intermediation services <i>or their own websites</i> at prices or conditions that are different <i>or more favourable</i> from those offered through the online intermediation services of the gatekeeper</p>

Justification

Most-favoured nation (MFN) clauses limit the price at which a supplier can offer a product through alternative sales channels. Under narrow MFN clauses, suppliers agree not to set lower prices through their own websites compared to prices offered on the comparison website imposing the MFN, without specifying conditions for the sales through other rival channels. Wide MFNs, on the other hand, restrict a supplier from charging lower prices on their website, as well as through any other sales channel, including other digital comparison tools (DCT). **The prohibition of wide MFN clauses in Article 5(b) should be extended to narrow MFN clauses.** Wide MFNs have been prohibited or abandoned in most jurisdictions in Europe already and they have not spurred competition. Various recent studies commissioned by the Commission support a prohibition of narrow MFNs.

Commission’s proposal	AFEP’s proposal
<p style="text-align: center;">Article 5 Obligations for gatekeepers</p> <p>(f) refrain 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;</p>	<p style="text-align: center;">Article 5 Obligations for gatekeepers</p> <p>(f) refrain from requiring business users or end users to subscribe to or register with <i>any products and services</i> or 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;</p>

Justification

To ensure that gatekeepers refrain from any bundling requirement, the obligation for gatekeepers not to require business users or end users to subscribe to or register with any other platform services as a condition of access to the platform services should not be limited to core services only but should instead include supplementary/ancillary services. Bundling could be used to lock users in the platform ecosystem or facilitate the leveraging of data.

Commission’s proposal	AFEP’s proposal
<p style="text-align: center;">Article 6</p> <p>Obligations for gatekeepers susceptible of being further specified</p> <p>1. In respect of each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall:</p>	<p style="text-align: center;">Article 6</p> <p>Obligations for gatekeepers susceptible of being further specified</p> <p>1. In respect of each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall:</p> <p><i>(dbis) (new): Provide business users the algorithm main parameters of aggregation, selection and presentation of services and products offered by the gatekeeper and/or third party and gatekeeper’s recommendation system, including information on the functioning of the algorithm used.</i></p>

Justification

To ensure the ban on self-preferencing, which means that platforms will no longer be able to rank their own services or products better than similar services or products offered by businesses on their platform, this new obligation is proposed (see also addition to the definition).