EMPOWER CONSUMERS AND LIFT CONTESTABILITY

Position paper of the Federation of German Consumer Organisations (vzbv) on the European Commission's proposal for a regulation on contestable and fair markets in the digital sector (Digital Markets Act)

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INHALT

I. SUMMARY: SUGGESTIONS FROM A CONSUMER PERSPECTIVE

This section clusters and summarises some of the main concerns and suggestions of the Federation of German Consumer Organisations (vzbv) which span across several sections of the European Commission's proposal for a "Regulation of the European Parliament and of the Council on contestable and fair Markets in the digital sector (Digital Markets Act (DMA))".[1]

Decisions on gatekeepers: Stronger focus on consumers is needed

The DMA's focus is on unfairness towards business users and not consumers. In multi-sided platform markets such as those in which the gatekeepers operate, however, consumers and business users each constitute an equivalently important market side. Therefore, consumers need to be as much in the focus of "fairness rules" as business users are. For example, consumer representatives must have the right to be heard and to access files in European Commission's DMA proceedings, similar to the rights they have in competition cases (Art. 30). Decisions on updating the obligations must also consider gatekeepers' unfair treatment of consumers, not only their misconduct vis-a-vis business users (Art.10).

Case specific remedies: More flexibility and timely intervention is needed

vzbv regrets that the European Commission removed the "New Competition Tool" (NCT) from its toolset. Nonetheless, the dynamics of digital markets require that the European Commission is able to impose case-specific behavioural and structural remedies in a timely and flexible manner. Unfortunately, the provisions in the DMA do not allow for this to the extend necessary. The DMA enables the European Commission to impose behavioural or structural remedies on a gatekeeper only if it has infringed the DMA's obligation three times in the last five years and "further strengthened or extended its gatekeeper position" (Art. 16). This timespan can be exploited by gatekeepers to reap the benefits from unfair treatment of consumers and business and decrease the contestability of their services. In vzbv's view, Art. 6, laying down obligations for gatekeepers susceptible of being further specified, neither provides the necessary flexibility, nor does it entail any structural remedies. The obligations in Art. 5 and 6 should be complemented by a more principle-based approach allowing competent authorities to react in a more flexible manner to gatekeepers' specific business models and newly arising developments and malpractices in digital markets.

Dark patterns and manipulation of consumers: Risk of circumvention of DMA obligations

The proposal does not refer to the gatekeepers' use of so-called "dark patterns" (surreptitiously influencing consumers' behaviour), manipulative choice architecture and exploitation of consumers' behavioural biases[2]. These techniques harm consumer welfare

[1] European Commission: Proposal for a Regulation of the European Parliament and of the Council on contestable and fair Markets in the digital sector (Digital Markets Act) (2020), URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020PC0842 [Access: 01.02.2021].

[2] See Forbrukerradet: Deceived by Design - How tech companies use dark patterns to discourage us from exercising our rights to privacy (2018), URL: https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf [Acess: 01.02.2021].

and limit the contestability of gatekeepers' services, as consumers are pushed to make decisions that do not reflect their actual preferences. Gatekeepers can exploit these recognised behavioural biases to channel and manipulate consumer choices in order to circumvent a number of obligations under Art. 5 and 6 DMA.[3] This is specifically the case for the ban for combining users' personal data in Art. 5 (a), the rule for allowing users to remove pre-installed software applications (Art. 6b) and the prohibition of technical lock-ins (Art. 6e).

The DMA should more clearly address the problem and explicitly provide that gatekeepers may not circumvent DMA obligations of gatekeepers by exploiting dark patterns and manipulative choice architectures. To this end, the DMA should impose a "fairness-by-design" duty on gatekeepers ensuring balanced choice architectures that make it as easy as possible for consumers to make genuine choices.

DMA must not override national competition laws

vzbv emphasizes that it must be ensured that DMA rules do not override national competition law, in particular, the recently revised German competition act[4]. It introduces the possibility for the German competition authority (Bundeskartellamt) to impose obligations on large gatekeepers in platform markets that go beyond some of those proposed in the DMA (e.g. prohibitions on tying and bundling of services or self-preferencing).

Manpower and Member States: Ensure effective enforcement

Considering the complexity of the investigations and cases, the number of full-time employees within the European Commission designated to enforce the DMA is too low, jeopardising the effective enforcement of the DMA rules. Lawmakers must significantly increase the number of full-time employees assigned to the enforcement of the DMA. In addition, lawmakers could amend provisions in the DMA enforcement regime to allow for more contributions from national authorities without sacrificing EU wide consistency in the enforcement.

II. INTRODUCTION

vzbv welcomes that the European Commission's proposal for the DMA[5] recognises problematic developments in digital markets that have aggravated over the past decade: The economic dependence of consumers and business users on large digital gatekeeper platforms has increased and the imbalance of bargaining power in these markets has risen. Large platform players often set their own rules to strategically exploit digital markets' driving forces, like network effects, economies of scale and scope, and information asymmetries. These rules often turn into unfair conditions for consumers and business. They further weaken competition in these markets and the contestability of their own services' or products' market position.

[3] In the following, when Articles from the DMA are cited, the explicit reference to the DMA will be omitted, to facilitate reading.

[4] Bundesregierung: Gesetz gegen Wettbewerbsbeschränkungen und für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 (GWB-Digitalisierungsgesetz) (2021), URL: https://www.bundesregierung.de/breg-de/aktuelles/wettbewerbsrecht-1783534 [Access: 01.02.2021].

[5] European Commission (see FN. 1).

Therefore, vzbv welcomes that the DMA addresses these market failures by bolstering contestability of gatekeepers' services and addressing the pervasive unfair conditions imposed upon consumers and business in these markets.

vzbv welcomes that the obligations for gatekeepers are directly applicable and self-executing. The DMA must meaningfully complement rather than replace the European competition law framework – although its effects will be partly similar and vitalise the digital economy: It will create competition, foster innovation and enhance consumers' choice – some core pillars of a successful market economy.

The following chapters reflect the structure of the proposal of the European Commission for the DMA. Here, vzbv will address selected articles of the DMA that are particularly relevant form a consumer perspective.

III. CHAPTER I - SUBJECT MATTER, SCOPE AND DEFINITIONS

1. ARTICLE 1 - SUBJECT-MATTER AND SCOPE

The recent reform of the German Competition act ("Gesetz gegen Wettbewerbsbeschränkungen" or GWB[6]) enables the German competition authority (Bundeskartellamt) to impose obligations on large gatekeepers in platform markets. These can go beyond some of the obligations laid out in the DMA (for example prohibitions on tying and bundling of service or self-preferencing, or the obligation to enable effective data portability and interoperability).

Art. 1 (5) of the DMA prohibits Member States to "impose on gatekeepers' further obligations by way of laws, regulations or administrative action for the purpose of ensuring contestable and fair markets. This is without prejudice to rules pursuing other legitimate public interests, in compliance with Union law." Recitals (5) and (19) state that the application of Articles 101 and 102 TFEU as well as the corresponding national competition rules will still be permitted by Member States. The newly amended German competition act allows the Bundeskartellamt to impose individual obligations on gatekeepers who do not meet the threshold of market dominance (and thus abuse of a dominant position). The dominance-based approach, however, is at the heart of enforcement of Article 101 and 102 TFEU and their corresponding national competition rules. There is the risk that the DMA would render the newly amended German competition act GWB (in parts) unlawful as it targets gatekeepers below the dominance-threshold.

> EU lawmakers must ensure that the DMA rules do not override national competition laws or even render them unlawful, in particular, the recently revised German competition act (GWB) that allows imposing obligations on gatekeepers below the "dominance-threshold".

2. ARTICLE 2 - DEFINITIONS

vzbv welcomes that the European Commission includes a broad range of core platform services (CPS) in the list in Art. 2 (2). It is appropriate to draw on such a broad range of services to identify gatekeepers, as gatekeepers emerge in the most diverse markets.

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[6] Bundesregierung (see FN. 2).

vzbv holds that the list of CPS should be supplemented by streaming services and smart virtual personal assistants (like Amazon's Alexa, Apple's Siri etc.).

The European market for smart virtual assistants is dominated by few players (Google, Apple, Amazon, Microsoft). The number of consumers relying on smart virtual assistants at home (via "smart speakers") or in mobile devices increases continuously[7]. Digital assistants are often used as recommender systems in various areas of life and markets where they increasingly influence consumer decisions[8]. Thereby, they can constitute critical bottlenecks between consumers and third-party providers of services or products.

Streaming services (for films, games or music, like Netflix or Disney+) are becoming increasingly important for consumers, not least because of the COVID 19 pandemic[9]. This is reflected in the growing number of users, subscriptions and the turnover generated by these platforms. vzbv sees no reason for not explicitly including these platforms in the list of CPS[10]. Even if many streaming services do not pass the thresholds of Art. 3 (2) yet, this may change soon. In addition, streaming services may become increasingly integrated with other services (e.g. with shopping platforms or advertisement services), forming gatekeeper-ecosystems.

> The list of core platform services in Art. 2 (2) should be supplemented by streaming services and smart virtual/digital assistants.

IV. CHAPTER II - GATEKEEPERS

1. ARTICLE 3 - DESIGNATION OF GATEKEEPERS

1.1 Uphold flexible approach to designate gatekeepers

vzbv supports the European Commission's approach to designate gatekeepers based on a mix of quantitative and qualitative thresholds.

> Art. 3 (6) must be upheld as it allows the European Commission to designate providers of CPSs as gatekeepers, even if they do not meet all thresholds in Art. 3 (2). This gives the European Commission the necessary flexibility to designate underta-

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[7] Bitkom: Digitale Sprachassistenten erreichen den Massenmarkt (2018), URL: https://www.bitkom.org/Presse/Presseinformation/Digitale-Sprachassistenten-erreichen-den-Massenmarkt.html [Access: 01.02.2021].

[8] Deutsche Welle: Voice assistants on the rise in Germany (2018), URL: https://www.dw.com/en/voice-assistants-on-the-rise-in-germany/a-45269599 [Access: 01.02.2021].

[9] Statista: Video Streaming (SVoD)- Europe, URL: https://www.statista.com/outlook/206/102/video-streaming--svod-/europe#market-globalRevenue [Access: 01.02.2021]; Insider Intelligence: The Streaming Wars Hit Western Europe (2020), URL: https://www.emarketer.com/content/streaming-wars-hit-western-europe [Access: 01.02.2021].

[10] Although online intermediation services are CPSs pursuant to Art. 2, streaming services do not count as an online intermediation services means services as defined in point 2 of Article 2 of Regulation (EU) 2019/1150; which holds that an online intermediation service must "allow business users to offer goods or services to consumers, with a view to *facilitating the initiating of direct transactions* between those business users and consumers" [accentuation in italics by vzbv]. Typically streaming services like Netflix or Disney+ do not facilitate direct transactions between content providers and consumers, but offer consumers a content catalogue for a flat monthly fee. Compare European Parliament & Council: Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (P2B Regulation) (2019), URL: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019R1150&from=EN#d1e563-57-1 [Access: 01.02.2021].

kings as gatekeepers if they develop new business models or if they do not meet the quantitative thresholds defined in Art. 3 (2).

1.2 Adjustment of threshold: 45 million end users across all core platforms services

The user-number threshold in Art. 3 (2) (b), indicating the importance of a CPS as a gateway for business users to consumers, should be amended. The threshold now holds that the monthly active end users in the EU surpasses 45 million and that the active business users surpass 10 000 of the CPS core platform service active in at least three Member States. Digital services and products become increasingly intertwined, particularly as gatekeepers try to create ecosystems of interconnected services and devices. The "classic" US-based gatekeepers' strategy used to be focussed on services/products in their core business. However, the current trend led by Chinese tech giants, e.g. in retailing, and emulated by western counterparts, is to integrate multiple services into an ecosystem[11]. Thus, user numbers across all CPS of a provider is a more suitable proxy for the bottleneck power of a gatekeeper.

The threshold in Art. 3 (2) (b) should be adjusted: The requirement of a core platform service being an important gateway for business users to reach end users (in Art 3 (1) (b)) should be satisfied when a provider has 45 million monthly active end users established or located in the Union across all of its core platforms services and more than 10,000 active business users per year established in the Union during the last financial year.

1.3 No efficiency defence for exception or suspension of gatekeeper status

Art 3 (4) allows a gatekeeper to become "exempted" from its "gatekeeper-status" if it presents sufficiently substantiated arguments, demonstrating that it does not satisfy the requirements for being a gatekeeper. In its decision, the European Commission must take into account the elements listed in Art 3 (6). These include size, number of users, barriers to entry, effects of scale and scope and lock-in. vzbv welcomes that the elements in Art 3 (6) do not foresee an efficiency defence. In competition cases (particular merger cases, recently also in dominance abuse cases) efficiency defences often lead to long procedures, that can be strategically employed by undertakings to delay decisions.

The DMA should focus on timely addressing unfair conditions. The efficiency arguments should not be taken into account when assessing core service platform providers' gatekeeper status. In particular, the efficiency defence should not be taken into account when deciding over exceptions from gatekeepers' obligations, as it can be used by companies in a strategical way to delay procedures.

[11] For e-commerce compare The Economist: Why retailers everywhere should look to China (2021), URL: https://www.economist.com/leaders/2021/01/02/why-retailers-everywhere-should-look-to-china [Access: 01.02.2021] Amazon was focused on Shopping, Apple on Phones/Computers, Microsoft on OS and Office software, Facebook on social media. Google was an exception with its search, email and other services feeding data into its advertisement cash-generating branch.

V. CHAPTER III - PRACTICES OF GATEKEEPERS THAT LIMIT CONTESTABILITY OR ARE UNFAIR

vzbv welcomes the obligations for gatekeepers laid down in Art. 5 and 6. As the obligations are directly applicable and self-executing, they protect consumers immediately six month after an undertaking has been designated as a gatekeeper from unfairly imposed unfair conditions. The obligations in Art. 5 and 6 are vital building blocks for addressing unfair conditions imposed on consumers and businesses by different gatekeepers. They are also suited to address gatekeepers' attempts to undermine the contestability of their own services.

> vzbv strongly urges European lawmakers not to weaken the obligations laid down in Art. 5 and Art. 6.

Due to time constraints, for the time being, vzbv will only comment on some specific obligations in more detail below. These are obligations that – in the view of vzbv – should receive particular attention or be amended, in order to address the respective malpractices of gatekeepers more accurately.

1. GENERAL RECOMMENDATION: COMPLEMENT FIXED OBLIGATIONS WITH A MORE FLEXIBLE PRINCIPLE-BASED APPROACH

The obligations in Art. 5 and Art. 6 seem to be inspired by abuses of misconduct of large technology firms that were the subject of specific past or current antitrust cases. vzbv welcomes that the self-executing obligations in Art. 5 and Art. 6 protect consumers directly, but sees the value of a discussion about how these could be complemented by a more principle-based approach.[12]

> The obligations in Art. 5 and Art. 6 should be complemented by a more principle-based approach allowing competent authorities to react more flexibly to gatekeepers' specific business models and newly arising developments and malpractices in digital markets.

vzbv recognises that Art. 6 lists obligations and allows the European Commission to further specify these in a dialogue with gatekeepers. However, the obligations in Art. 6 still seem to be relatively specific. As all obligations in Art. 5 and 6 will apply to all gatekeepers, independently of their business models, the European Commission will regularly grant an exemption from obligations via Art. 8. This is a difference to the recently revised German competition act that includes a principle-based approach. It introduces the possibility for the Bundeskartellamt to impose remedies on large gatekeepers in platform markets. In §19a GWB, it formulates relatively broad practices/principles that the Bundeskartellamt may take action against. These principles are complemented with a non-exhaustive list of specific examples of practises that the Bundeskartellamt may prohibit (for example prohibitions on tying and bundling, forcing consumers to consent to data collection and data processing across services or self-preferencing).

[12] Compare Cristina Caffarra; Fiona Scott Morton: The European Commission Digital Markets Act: A translation (2021), URL: https://voxeu.org/article/european-commission-digital-markets-act-translation [Access: 01.02.2021].

2. ARTICLE 5 - OBLIGATIONS FOR GATEKEEPERS

2.1 Article 5a - Ban of combining users' personal data

vzbv welcomes that the DMA bans the practice of gatekeepers of combining users' personal data collected through one of their services with personal data collected through any of their other services, or with personal data obtained from third parties (like data-brokers). This form of data accumulation is a widespread practice today. It can harm consumers, as enterprises build and exploit extensive user profiles across platforms and services, in particular with respect to privacy and consumer autonomy. For example, companies like Facebook and Google commercially link data they extract from their end users across services.

Art. 5 (a) also bans the practice of gatekeepers of automatically signing users into additional services for the purpose of combining user data. For example, under Art. 5 (a), logging into Gmail would no longer automatically log a user into YouTube.

Both practices banned by Art. 5 (a) also harm competing businesses as gatekeepers' pooling of user data across different services and markets can lead to significant economies of scope[13], which undermines the contestability of their CPS. Also, automatically signing users into adjacent services practically amounts to a bundling strategy that can put business rivals at a competitive disadvantage.

The weakness of this obligation is that the ban on combining users' personal data or on signing them into multiple services would not apply in case the user explicitly consented to these practices. It is common practice among gatekeepers to extensively use manipulative choice architectures to get user consent. For example, consumers' behavioural biases are exploited to push them to consent to data collection and processing[14] or deliberately stop them from unsubscribing from services.[15] Often, users would have made other decisions had the choice architecture been more balanced.

> Law makers must ensure that gatekeepers do not circumvent the ban on combining user data or on signing them into multiple services by obtaining user consent via unfair means. To ensure this, the anti-circumvention rule laid down in Art. 11 must be supplemented with provisions preventing gatekeepers from obtaining end user consent by exploiting consumer's behavioural biases via manipulative choice architectures (see vzbv comment on Art. 11 below).

2.2 Article 5 (f) - Ban on tying and bundling

vzbv welcomes the ban on cross-tying/bundling of different services. It bans gatekeepers' practices of forcing business customers or end users to sign up for a CPS (identified pursuant to Art. 3) or services which serve as an important gateway for business

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[13] Duch-Brown, Nestor; Martens, Bertin; Mueller-Langer, Frank: The economics of ownership, access and trade in digital data. in: European Commission (2017), URL: https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/economics-ownership-access-and-trade-digital-data [Access: 01.02.2021].

[14] Forbrukerradet: New analysis shows how Facebook and Google push users into sharing personal data (2018), URL: https://www.forbrukerradet.no/side/facebook-and-google-manipulate-users-into-sharing-personal-data/ [Access: 01.02.2021].

[15] Compare report of the Norwegian Consumer Counsel on "dark patterns" (See FN. 3).

users[16] (the so-called “tied service”) in order to access another CPS that the users actually want to use (the so-called “tying service”). For example, Facebook could no longer force consumers to sign-up for a Facebook account (tied service) if they only want to use Instagram (tying service).

However, Art. 5 leaves loopholes that allow gatekeepers to still engage in tying and bundling of services, as both the tied and the tying service must either be a CPS or a service which is an important gateway for business users to access consumers (with more than 45m end users and over 10.000 business users). For example, under the current proposal of Art. 5 (f), Google could force users who would like to use only Fitbit (not a CPS)[17] to subscribe to another CPS of Google, like Gmail.

Tying and bundling to CPS allows gatekeepers to leverage their market position in a CPS to other markets. This harms competitors and reduces consumer welfare as users are forced to subscribe to services they do not want[18]. Thus, the DMA provisions against tying and bundling should be broader than currently laid out in Art. 5 (f).

> Art. 5 (f) should prohibit gatekeepers’ practices of tying and bundling of services if either one of the two services (the tying service or the tied service) is a core platform service pursuant to Art. 3.

3. ARTICLE 6 - OBLIGATIONS FOR GATEKEEPERS SUSCEPTIBLE OF BEING FURTHER SPECIFIED

3.1 Article 6 (b) - De-installation of pre-installed apps

vzbv welcomes that Art 6 (b) will force gatekeepers to allow consumers to remove any pre-installed software application unless they are related to an essential function of the product, like the phone app on a smartphone.

vzbv is however concerned that gatekeepers will attempt to circumvent this obligation by purposely increasing the technical integration of the pre-installed software applications in question with other system components, for example the operating system. Also, current industry practice suggests that gatekeepers will try to use so-called dark patterns or manipulative choice architectures in order to obstruct or dissuade end users from removing pre-installed software applications.

> The DMA must prevent gatekeepers from exploiting dark patterns or manipulative choice architectures for obstructing or dissuading end users from removing pre-installed software applications (compare vzbv comments on Art. 11 below).
>
> Art. 11 on anti-circumvention must contain an explicit provision banning gatekeepers’ practices of trying to prevent de-installation of pre-installed apps by purposely increasing their technical integration with other system components.

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[16] As defined by the DMA’s user-threshold to designate gatekeepers in Art. 3 (2) (b).

[17] A back-of-the-envelope calculation suggests that Fitbit would probably not pass the user threshold in Europe, therefore not necessarily qualify as a CPS. Compare: Business of Apps: Fitbit Revenue and Usage Statistics (2020), URL: https://www.businessofapps.com/data/fitbit-statistics/ [Access: 01.02.2021].

[18] „[…] digital markets are particularly vulnerable to tying and bundling practices. This led to a broadening of the scope of the doctrine of tying and bundling: It may be applied to all cases where consumers are nudged to demand a supplementary product, thereby foreclosing the market for this supplementary product.“ Stefan Holzweber: Tying and bundling in the digital era 14 (2018), in: European Competition Journal, 2-3, S. 342–366.

3.2 Article 6 (c) - Competing app stores

Art. 6 (c) requires gatekeepers to permit users installing and/or using third party app stores that compete with their own. It also prevents gatekeepers from hindering users from installing third party software applications. Art. 6 (c) holds that both must be possible outside the gatekeepers CPS (e.g. a gatekeeper's app store). But Art. 6 (c) would allow gatekeepers to "take appropriate measures" to prevent that these apps "endanger the integrity of the hardware or operating system". vzbv sees a risk of gatekeepers circumventing the obligation to allow use or installation of third-party software application stores and software applications. This could for instance be done by artificially highly integrating their own services with the alleged purpose of security that could allegedly not be matched by external software.

> The anti-circumvention clause (Art. 11) must prevent gatekeepers from circumventing the obligation to allow users to use or install third-party software application stores and software applications by purposefully abusing "the integrity of the hardware or operating system" as a justification.

3.3 Article 6 (e) - Ban of technical lock-in

The DMA proposal would prohibit gatekeepers from "technically restricting" users from switching away from default apps and services. For example, Apple could not prevent users from switching from the default email or calendar apps to a rival email app and set it up as the new default on the users' smartphone.

Even if the gatekeepers lifted the restrictions that technically prevent end users from installing alternative default applications, this is no guarantee that they will not use other means to obstruct or dissuade end users from switching to alternative applications by exploiting manipulative choice architectures or "dark patterns"[19].

> The DMA provision on anti-circumvention (Art. 11) must prevent gatekeepers from using manipulative choice architectures in order to obstruct or dissuade end users from switching to software applications and services.

3.4 Article 6 (f) - Limited interoperability requirements

The DMA proposal requires gatekeepers to grant "ancillary services" of other providers (like payment processors, cloud hosts, digital identity providers) access to and interoperability with the gatekeepers "operating systems hardware or software features". This obligation applies if the gatekeepers' own ancillary services are interoperable with these systems/system components.

However, it is not plausible why the obligation for interoperability should be limited to "ancillary services" and not extend to core platform services. The proposed rule, in its current form, would mean, for example, that Facebook would be obliged to let a competitor offer its own payment processing (ancillary service) for Oculus apps, but not oblige Facebook to allow them to offer a competing social media network or an alternative to the WhatsApp messaging service app (both being CPSs).

> Gatekeepers should be obliged to allow access to and interoperability with their "operating systems hardware or software features" not merely for "ancillary services" of third-party providers but also for rival core platform services (as listed in Art. 2 (2)) of third providers.

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[19] Forbrukerradet (FN. 3).

4. ARTICLE 8 - SUSPENSION AND ARTICLE 9 - EXEMPTION FOR OVERRIDING REASONS OF PUBLIC INTEREST

The deadlines in Art. 8 and Art. 9 favour gatekeepers as compared to other market participants. A gatekeeper can ask for the suspension of obligations where compliance would a) endanger its economic viability (Art. 8) or b) for overriding reasons of public interest (Art. 9). In both cases, the European Commission must respond within three month. In contrast, all European Commission decisions in relation to imposing obligations on gatekeepers would take significantly longer (six months). This is strongly geared towards gatekeepers' interests as the discrepancy constitutes an imbalance to the detriment of third parties (business and end users). The economic viability of third parties may be threatened by a gatekeeper's non-compliance with the obligations of the DMA and by unfair conduct, but they will not get any decision for six months (in some cases, they may not get any effective decision for over 5 years).

> In Art. 8 and Art. 9, the deadlines requiring the European Commission to decide over suspensions of obligations for gatekeepers should not favour gatekeepers but be extended from three to six months.

5. ARTICLE 10 - UPDATING OBLIGATIONS FOR GATEKEEPERS

Art. 10 foresees updates of the obligations for gatekeepers. Unfortunately, Art. 10 justifies updates of obligations merely if gatekeepers treat business users unfairly. Accordingly, obligations can be updated if gatekeepers' conduct is (a) unfair towards business users or (b) the contestability of markets is weakened by gatekeepers' practices.

This approach neglects end users/consumers and demand-side problems such as exploitation of consumers' behavioural biases in relation to contestability, deception and lock-in effects. End users need to be as much in the focus of "fairness rules" as business users. Gatekeepers typically operate in multi-sided platform markets, with consumers constituting one side of the market. Therefore, it would harm the well-functioning of markets and reduce welfare if the consumer side were ignored or considered second tier.

> When updating the obligations for gatekeepers, the European Commission must not only consider gatekeepers' unfair treatment of business users and risks to contestability. Decisions on updating the obligations must also consider consumer harm resulting from gatekeepers' conduct.

6. ARTICLE 11 - ANTI-CIRCUMVENTION

The anti-circumvention provisions in Art. 11 are a central building block of the DMA. It is supposed to act as a safeguard against gatekeepers circumventing the new rules. It provides that gatekeepers shall not undermine the obligations of Art. 5 and 6 "by any behaviour […], regardless of whether this behaviour is of a contractual, commercial, technical or any other nature".

vzbv welcomes that Art. 11 prohibits the degradation of the conditions or quality of service by gatekeepers when business or end users avail themselves of their rights or choices laid out in Art. 5 and 6. As an example, Google Maps must not degrade its functionality for users who would not consent to Google using its data collected in Google maps for other Google services.

Unfortunately, the entire DMA proposal refers nowhere to the use of so-called dark patterns used to surreptitiously influence consumers' behaviour, manipulative choice architecture and the exploitation of consumers' behavioural biases.[20] These tactics are well-documented and used, for example, to push users to consent to data collection and processing[21], to deliberately keep them from to unsubscribing from services[22], or to push them to buy additional services[23]. Such tactics distort consumers' choices, pushing them to take decisions that do not reflect their preferences. As a result, these practices reduce consumer welfare. Also, they distort competition, as users would have made other decisions had the choice architecture been more balanced.

Although Art. 11 prohibits gatekeepers circumventing the DMA's obligations by "contractual, commercial, technical or any other" means and forbids to "make the exercise of those rights or choices unduly difficult", there is a danger that the exploitations of dark patterns and the choice architecture will serve gatekeepers as a loophole. Unfortunately, manipulative tactics have become too deeply embedded in many undertakings' practices, exploiting "legal grey zones" and loopholes. The anti-circumvention clause should impose a "fairness-by-design" duty on gatekeepers, ensuring that they make it as easy as possible for consumers to make genuine choices via a balanced choice architecture.

> The DMA should explicitly provide that gatekeepers may not circumvent the obligations laid down in Art. 5 and 6 by exploiting so-called dark patterns and manipulative choice architectures. The design of the choice architecture for consumer decisions with relevance for the obligations in Art. 5 and 6 must be designed in a balanced way, not unduly favouring gatekeepers' commercial interests to the detriment of business or end users.

7. ARTICLE 13 - OBLIGATION OF AN AUDIT

According to Art. 13, gatekeepers must submit an independently audited description of any techniques used for profiling of consumers that the gatekeeper applies to or across its core platform services. Recital 61 specifies the information gatekeepers shall provide to the independent auditors. However, these prescriptions are so broad that the information that the gatekeeper must provide the auditors with could end up being very general. There is a real risk that this information will hardly be more conclusive than the information that is publicly available anyway, for example through the gatekeeper's terms and conditions. However, a detailed, independent audit digging into depth of a gatekeeper's profiling techniques and its uses thereof in consumer facing services is in the interest of consumers, the public and competitors.

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[20] See the report of the Norwegian Consumer Counsel on "dark patterns" (FN 3).

[21] Peter Hense: The end of dark patterns in "cookie walls": German court bans deceptive designs (2021), URL: https://www.jdsupra.com/legalnews/the-end-of-dark-patterns-in-cookie-5786302/ [Access: 01.02.2021].

[22] For example, the recent Norwegian Consumer Counsel recent report shows how Amazon seems to deliberately obstruct consumers who wish to unsubscribe from its Amazon Prime service. "In the process of unsubscribing from Amazon Prime, the company manipulates consumers to continue using the service in what seems like a deliberate attempt to confuse and frustrate customers." See Forbrukerradet: Amazon manipulates customers to stay subscribed, URL: https://www.forbrukerradet.no/news-in-english/amazon-manipulates-customers-to-stay-subscribed/ [Access: 01.02.2021].

[23] E.g. "A […] federal lawsuit asserts that Electronic Arts unlawfully increases its sports games' difficulty in order to induce gamers into paying the video game publisher additional money." See Sportico: Federal Law Suit: This Video Game is too Damn Hard (2020), URL: https://www.sportico.com/law/analysis/2020/ea-sports-its-in-the-game-1234617287/ [Access: 01.02.2021].

> The DMA should increase the transparency obligations for gatekeepers vis-à-vis independent auditors with regard to a gatekeeper's profiling techniques pursuant to Art. 13. It must be ensured that independent auditors are granted in depth transparency on a gatekeeper's profiling techniques, including information on the kind of data that is used for profiling, its origins, purposes and exploitation of profiling (like personalised pricing and offerings, and rankings), sharing of data and profiling information (including by third parties). Also, the main findings of the independent audit must be published in order to enable consumers to make more conscious decisions about which services they want to use.

VI. CHAPTER IV - MARKET INVESTIGATION

1. ARTICLE 16 - MARKET INVESTIGATION INTO SYSTEMATIC NON-COMPLIANCE

The DMA proposal does not entail a provision to impose behavioural or structural remedies on a gatekeeper until it infringed the DMA's obligations at least three times within a period of over five years AND has "further strengthened or extended its gatekeeper position" (Art 16 (1) and (3), Recital 64). This overly favourable privilege for misconducting gatekeepers is a major flaw in the proposal and substantially threatens the effectiveness of DMA's rules.

One of the purposes of the DMA is to enable the European Commission to act fast and to avoid the lengthy procedures of competition law cases which all too often, in the past, allowed malpractice to continue over many years. Unfortunately, under the DMA proposal, a gatekeeper could violate the DMA rules for 5 years, imposing unfair conditions on competitors and consumers, before fearing the imposition of behavioural or structural remedies. vzbv recognises that the DMA allows the European Commission to enforce gatekeepers' adherence to the obligation of Art. 5 and 6 after a market investigation. However, this involves lengthy investigations. Also, this "standard"-enforcement could be undermined by systematic and strategic non-compliance over a period of five years, at least. A strong incentive for compliance would be the possibility for the European Commission to impose behavioural or structural remedies more easily and faster.

Also, systematic infringement of the obligations imposed by the DMA can harm consumers without necessarily strengthening or extending its gatekeeper position. Therefore, the cumulative condition of extension and strengthening of the gatekeeper's position as a precondition for imposing behavioural and structural remedies seems unjustified when the consumer welfare perspective is taken into account. If a gatekeeper systematically infringes the obligations of the DMA, this should suffice to impose behavioural or structural remedies, also as a disincentive to tactically infringe the DMA rules.

> The European Commission should be empowered to impose behavioural or structural remedies on a gatekeeper if it was found to infringe the obligations laid down in Art. 5 and 6, regardless of whether it extended its gatekeeper position as a result of the infringement.

VII. CHAPTER V - INVESTIGATIVE, ENFORCEMENT AND MONITORING POWERS

1. FINES, INTERIM MEASURES, INVESTIAGTIONS

vzbv welcomes that the DMA proposal provides the European Commission with investigatory and monitoring powers similar to the ones it has under EU competition law. Also, it is adequate to "lend teeth" to the enforcement with the possibility to impose fines of up to 10% of the worldwide turnover of the undertaking, periodic penalty payments as well as interim measures.

Nonetheless, vzbv holds that the procedures for imposing behavioural and structural remedies are too slow (see comment to Art. 16 above).

1.1 Article 28 - Limitation periods for the imposition of penalties

vzbv also regrets that the limitation periods for the imposition of penalties is 3 years, with the absolute limitation period of 6 years when interruptions are considered (Art. 28). This is significantly shorter than the 5 (10) years limitation period for competition law fines. Nonetheless, the subject matter of individual cases will be equally complex and difficult to grasp. Therefore, the shorter limitation period for the imposition of penalties does not seem to be justified.

> The limitation period for the imposition of penalties (Art. 28) should be extended from three to five years.

1.2 Article 30 - Right to be heard and access to the file

Art. 30 lays down the gatekeepers' rights to be heard and get access to the file during DMA proceedings by the European Commission: "The Commission shall base its decisions only on objections on which gatekeepers, undertakings and associations of undertakings concerned have been able to comment." Given the power of gatekeepers and their influence over consumers' daily lives, it is essential that not only the gatekeepers but all third parties that are affected by gatekeepers' conduct should be consulted in the European Commission's decision-making procedures. This must include consumer associations representing consumer interests. The practise of involving consumer representatives in competition cases has proved valuable and can serve as a blueprint for the DMA. vzbv as well as BEUC have contributed the consumer's perspective in a number of landmark competition cases of the Bundeskartellamt and the European Commission.[24]

> Third parties, affected by gatekeepers' conduct, including consumer associations representing consumers' interests, must be grated the same rights to be heard and to access the files in European Commission's DMA proceedings as gatekeepers have pursuant to Art. 30. This must include all relevant procedures on decisions that affect consumers, including market investigations for designating a gatekeeper status, compliance with, suspensions of and exemption from obligations, interim measures, fines, etc.

[24] For example, vzbv was an involved third party in the Facebook case of the Bundeskartellamt. Compare Verbraucherzentrale Bundesverband: Mit dem Kartellrecht gegen die Datensammelwut von Facebook (2019), URL: https://www.vzbv.de/pressemitteilung/mit-dem-kartellrecht-gegen-die-datensammelwut-von-facebook [Access: 01.02.2021] as well as Bundeskartellamt: Bundeskartellamt prohibits Facebook from combining user data from different sources (2019), URL: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html;jsessionid=4966A1987A0DDCF7801D38F20E1F0F5D.2_cid362?nn=3591568 [Access: 01.02.2021]. BEUC was an interested third party in the European Commission's cross-border pay-tv competition case (AT.40023), see BEUC: Court of Justice judgement pulls plug on audiovisual geo-blocking (2020), URL: https://www.beuc.eu/publications/court-justice-judgement-pulls-plug-audiovisual-geo-blocking/html [Access: 01.02.2021].

1.3 Article 32 - Digital Markets Advisory Committee

According to the DMA proposal, enforcement of the DMA rules and monitoring of the compliance solely rests with the European Commission. The Member States' function would be limited to an advisory role within the Digital Markets Advisory Committee (Art. 32). On the one hand, this centralised approach ensures consistency in enforcement of the DMA and avoids the risks of regulatory capture and underenforcement at the Member State level. However, this approach deprives Member States' authorities that are willing and capable to pursue a progressive enforcement policy of the possibility from enforcing DMA rules. The Bundeskartellamt might be a positive example for an ambitious enforcer. More worryingly, the proposal suggests that enforcement of the DMA would be handled by 80 European Commission full time employees (FTEs) from 2025 on.[25] Considering the complexity of the investigations and cases, this low number of designated FTEs bear the risk of underenforcement at EU-level.

> Lawmakers must significantly increase the number of full-time employees assigned to the enforcement of the DMA within European Commission. Complementary to the increase in FTEs within the European Commission, vzbv suggests assessing how the DMA-enforcement regime could be amended to allow for more contributions from national authorities' without sacrificing EU-wide consistency in the enforcement.

[25] The DMA proposal suggests to increase the number of FTEs gradually until 80 in 2025. Compare: DMA, Legislative Financial Statement, Section 3.2.3.2. Estimated requirements of human resources, p.71 ff.