



# Privacy International's preliminary comments on the Digital Markets Act

March 2021

## 1. Introduction

Privacy International (PI) welcomes the aim of the Digital Markets Act (DMA) to address some of the challenges posed by the way the current digital markets operate. However, we believe that the proposal put forward by the European Commission in December 2020<sup>1</sup> contains some shortcomings that need to be addressed, if the DMA were to be effective in tackling these challenges.

PI is an international charity, based in London, which campaigns against companies and governments who exploit individuals' data and technologies. PI employs specialists in their fields, including technologists and lawyers, to understand the impact of existing and emerging technology upon data exploitation and our right to privacy, including in relation to online platforms and the advertising technology ("ad tech") industry. PI has an established track record of engaging with competition regulators around the world on issues that concern the intersection of data/privacy and competition laws.<sup>2</sup>

PI has submitted evidence to the European Commission,<sup>3</sup> the UK Competition and Markets Authority,<sup>4</sup> and the U.S. Federal Trade Commission regarding data and competition issues.<sup>5</sup> In 2020, PI intervened and made submissions before

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<sup>1</sup> Available at: [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en)

<sup>2</sup> PI, Competition and Data, <https://privacyinternational.org/learn/competition-and-data>.

<sup>3</sup> PI, Privacy International's submission to the European Commission consultation on 'shaping competition policy in the era of digitisation', 2 October 2018, <https://privacyinternational.org/advocacy/2312/privacy-internationals-submission-european-commission-consultation-shaping>.

<sup>4</sup> PI, Submission to the Competition and Markets Authority's call for information on digital mergers, 23 July 2019, <https://privacyinternational.org/node/3097>; Response to the CMA's online platforms and digital advertising market study, 29 July 2019, <https://privacyinternational.org/advocacy/3101/response-cmas-online-platforms-and-digital-advertising-market-study>.

<sup>5</sup> PI, Submission to the US Federal Trade Commission on the intersection between privacy, big data, and competition, 1 August 2018, <https://privacyinternational.org/report/2262/submission-us-federal-trade-commission-intersection-between-privacy-big-data-and>.

both the European Commission's<sup>6</sup> and the Australian Competition and Consumer Commission's<sup>7</sup> review of Google LLC's acquisition of Fitbit, Inc., highlighting the series of competition concerns that the transaction raised with regard to the markets of digital advertising, wearables and health-related markets.

While the DMA contains important positive elements, PI's preliminary comments aim to address the current shortcomings of the proposal, notably:

- The lack of focus on the rights and interests of end users (throughout the text);
- The weak interoperability provision (Article 6(1)(f));
- Expand scope on updating obligations for gatekeepers (Article 10(2)(a));
- The lack of measures to address the negative effects of mergers (Article 12);
- The need for transparency in profiling (Article 13);
- The failure to include civil society in the implementation and monitoring of the DMA (Articles 15-17, 25-29 and others);
- The need to assess DMA's full conformity with the General Data Protection Regulation (Articles 1 and 6).

## 2. Lack of focus on the rights and interests of end users

PI welcomes the DMA's objective "to allow **end users** and business users alike to reap the full benefits of the platform economy and the digital economy at large, in a contestable and fair environment."<sup>8</sup>

The proposal contains provisions that could benefit individuals as they engage with services provided by gatekeepers. However, we believe that the proposal falls short of its stated aim by not adequately addressing the negative effects of gatekeepers' practices on end users; and by not supporting the emergence of new platforms and competition among existing and new platforms, for the benefit of users.

PI is concerned that gatekeepers abuse their dominant position by exploiting individuals' personal data. Companies act as gatekeepers, for example by regulating how individuals access information on the web as well as which applications they can install on their devices and on which conditions. They can track and profile users across devices to predict and influence their behaviour. Through network effects, a vicious cycle is at play: because of their market power, these companies collect and analyse vast amounts of data. The more data they collect, the better they become at profiling individuals and offering

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<sup>6</sup> PI, European Commission's review of the Google/Fitbit merger, <https://privacyinternational.org/legal-action/european-commissions-review-googlefitbit-merger>.

<sup>7</sup> PI, Submission to the Australian Competition and Consumer Commission on the proposed acquisition of Fitbit, Inc. by Google LLC, 24 March 2020, [https://privacyinternational.org/sites/default/files/2020-07/WEB\\_20.03.25\\_PI\\_Submission\\_Google\\_Fitbit\\_ACCC\\_FINAL.pdf](https://privacyinternational.org/sites/default/files/2020-07/WEB_20.03.25_PI_Submission_Google_Fitbit_ACCC_FINAL.pdf); Response to the Australian Competition and Consumer Commission's Statement of Issues: Proposed acquisition of Fitbit, Inc. by Google LLC, 10 July 2020, [https://privacyinternational.org/sites/default/files/2020-07/WEB\\_20.07.09\\_PI\\_Google\\_Fitbit\\_Response\\_ACCC\\_SOI\\_FINAL.pdf](https://privacyinternational.org/sites/default/files/2020-07/WEB_20.07.09_PI_Google_Fitbit_Response_ACCC_SOI_FINAL.pdf).

<sup>8</sup> Explanatory memorandum, Digital Markets Act, emphasis added.

these profiles to businesses (such as advertisers), as well as using those profiles to improve the attractiveness of their own services. More businesses and users are therefore drawn to these services, reducing any individual user's choice or power to opt out of using these services and being subject to their associated data exploitation.

The proposal rightly identifies how core platform services are characterised by the "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, and data driven-advantages" (Recital 2). It also notes how "the combination of those features of gatekeepers is likely to lead in many cases to serious imbalances in bargaining power and, consequently, to unfair practices and conditions for business users as well as end users of core platform services provided by gatekeepers, to the detriment of prices, quality, choice and innovation therein" (Recital 4).

Despite these references to the negative effects on end users, the proposal fails to build a set of comprehensive substantive provisions to address these issues.

According to the executive summary of the Impact Assessment Report, the DMA proposal should "foster the emergence of alternative platforms, which could deliver quality innovative products and services at affordable prices" (p. 2).<sup>9</sup> However, the proposal itself falls short on this promise. It seems to focus disproportionately on creating conditions for more competition at the business users' level, rather than on creating conditions for more platforms to enter these markets or giving end users more choice between platforms.

This failure reflects the traditional, narrow approach of the European Commission that when assessing market power have tended to focus on economic parameters.<sup>10</sup> This narrow approach gives little to no consideration to other factors, such as consumer welfare, quality, innovation, and privacy; and the interaction between the different relevant markets at play. However, competition in digital markets can take place along various price and non-price parameters, with examples of the latter being quality, innovation and privacy. The importance of non-price parameters to be expected as the 'price' for service usage which consumers must pay is more often than not that of their data. Service quality reductions in the form of lower standards of privacy protection can cause objective detriment to consumers in the form of discriminatory behaviour, profiling, targeting and attempts at manipulating behaviour. Privacy parameters ought to, therefore, be part of any digital markets' assessment because in a competitive market, it should be expected that the level of data protection offered to individuals would be subject to genuine competition, i.e. companies would compete to offer privacy-friendly services.<sup>11</sup>

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<sup>9</sup> Available here: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers>

<sup>10</sup> <https://privacyinternational.org/explainer/2293/competition-and-data>

<sup>11</sup> In its 2014 assessment of the proposed merger of Facebook and WhatsApp, the Commission acknowledged that "competition on privacy" exists. The Commission stated that "apps compete for customers by attempting to offer the best communication experience," including with respect to "privacy and security, the importance of which varies from

This is a significant shortcoming of the proposal.

Consumers in Europe and elsewhere demand both confidentiality and security of their digital communications and the protection of their personal data.<sup>12</sup> In a competitive market, it should be expected that the level of privacy and data protection offered to individuals would be subject to genuine competition, i.e. companies would compete to offer privacy friendly services. Instead, in the current digital markets companies in a dominant position have no incentive to adopt businesses models and practices that enhance people's privacy. Rather, they may seek to exclude any privacy enhancing players from any of the markets where they can exert market power. Considering fundamental rights and societal implications of corporate powers within the competition framework should not be seen as a new or revolutionary proposition in the European context. For example, it is already recognised in EU competition law that the protection of media pluralism can and should trump merely economic consideration in order to avoid excessive media concentration with negative effects on democracy as a whole.

Given the above considerations, PI is concerned that the DMA proposal fails to support the emergence of competitors to the existing gatekeepers, and to facilitate the conditions for companies to compete on providing users with privacy friendly services. The suggestions in the following sections of our submission aim at strengthening the rights and interests of users.

### 3. Weak interoperability provision

PI believes that interoperability between core services could help addressing the negative implications of users' lock-in and network effects. Interoperability can operate at different levels. PI supports those interoperability measures that give end users more effective control of their data and that contribute to address the power imbalance between individuals and gatekeepers.<sup>13</sup> We also stress the importance to ensure interoperability measures are fully compliant with data protection law. We note that the support for interoperability in social media and platform-based digital markets is growing and benefits have been highlighted in recent reports, such as CMA Online platforms and digital advertising market study,<sup>14</sup> as well as legislative initiatives in EU member states, such as France and Germany.<sup>15</sup>

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*user to user but which are becoming increasingly valued, as shown by the introduction of consumer communications apps specifically addressing privacy and security issues".* In addition, the U.K. Competition and Markets Authority's (CMA) Online Platforms and Digital Advertising Market Study Final Report, published on 1 July 2020, explicitly refers to privacy as a parameter of competition, see (for example) paragraph 3.12 in relation to search and paragraph 3.158 in relation to social media, [https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final\\_report\\_1\\_July\\_2020\\_.pdf](https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf).

<sup>12</sup> See EU Agency for Fundamental Rights, Your rights matter: Data protection and privacy - Fundamental Rights Survey, 18 June 2020, <https://fra.europa.eu/en/news/2020/how-concerned-are-europeans-about-their-personal-data-online>. See also Eurobarometer, Europeans' attitudes towards cyber security, January 2020, <https://ec.europa.eu/comfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/SPECIAL/surveyKy/2249>

<sup>13</sup> For an analysis of interoperability and its potential effect on data, see <https://privacyinternational.org/explainer/4130/explainer-competition-data-and-interoperability-digital-markets>

<sup>14</sup> Available at: <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study>

<sup>15</sup> See <https://www.euractiv.com/section/digital/news/new-german-amendment-aims-to-tackle-the-market-power-of-digital-giants/> and <https://www.ianbrown.tech/2020/08/07/140/>

The importance of interoperability for an effective digital market has been noted by the European Commission in the past.<sup>16</sup> A strong interoperability requirement would empower competing platforms to interoperate with dominant ones and increase genuine choice for European users including for services that better protect their rights.

Regretfully the current proposal falls significantly short of a strong interoperability requirement. **Article 6(1)(f)** requires gatekeepers to provide access and interoperability only with regard to business users or providers of ancillary services. As worded, this provision does not extend interoperability requirements to core services provided by gatekeepers. End users would not therefore benefit from increased competition in social media networks or other core platform services, which will remain firmly within the control of existing platforms. In fact, as noted in the open letter to the European Parliament by civil society organisations, which PI supported, "rather than fostering the emergence of new platforms, this provision has the potential to increase the systemic dependence of business users and ancillary services' providers on the core platform, whose position remains uncontested and secured in its primary market(s)".<sup>17</sup>

The shortcomings of the current interoperability provision are highlighted in the Opinion of the European Data Protection Supervisor (EDPS) who recommends the DMA to introduce "minimum interoperability requirements for gatekeepers, with explicit obligations on gatekeepers to support interoperability, as well as obligations not to take measures that impede such interoperability".<sup>18</sup>

PI supports the EDPS view and recommends that the DMA includes a strong interoperability requirement applicable to core services provided by digital platforms.

#### 4. Updating obligations for gatekeepers

Article 10 of the DMA proposal allows the European Commission to update the obligations applicable to gatekeepers when, based on a market investigation, it has identified the need for new obligations addressing practices that limit the contestability and fairness. However, in defining which practices limit contestability, **Article 10(2)(a)** refers to "an imbalance of rights and obligations on business users and the gatekeeper is obtaining an advantage from business

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<sup>16</sup> Commission Communication on "ICT Standardisation Priorities for the Digital Single Market", <https://ec.europa.eu/digital-single-market/en/news/communication-ict-standardisation-priorities-digital-single-market>, where it states "common standards ensure the interoperability of digital technologies and are the foundation of an effective Digital Single Market. They guarantee that technologies work smoothly and reliably together, provide economies of scale, foster research and innovation and keep markets open. Effective interoperability guarantees that connected devices such as cars, phones, appliances and industrial equipment can communicate seamlessly with each other, regardless of manufacturer, operating system, or other technical components. Open standards ensure such interoperability, and foster innovation and low market entry barriers in the Digital Single Market, including for access to media, cultural and educational content. Differing national standards may significantly slow down innovation and put European businesses at a disadvantage vis-à-vis the rest of the world."

<sup>17</sup> <https://privacyinternational.org/advocacy/4348/interoperability-digital-markets-act-joint-letter-european-commission>.

<sup>18</sup> Opinion by the EDPS on the Digital Markets Act, para 38.

users that is disproportionate to the service provided by the gatekeeper to business users".

PI is concerned that the proposal fails to include 'end users'. There seems to be no rationale for such exclusion, given the aim of addressing limits to contestability and fairness. PI recommends the addition of 'end users' in Article 10(2)(a).

## 5. Lack of measures to address the negative effects of mergers

The 2020 report of the EU Court of Auditors identifies the trends of acquisitions in digital markets among the key challenges to effective enforcement of merger regulation.<sup>19</sup> Better implementation of existing regulations can address some of these challenges, for example by changing traditional assumptions about markets and effective competition to include a better analysis of the role that data plays into some mergers.

Timely enforcement action at European level is often prevented, firstly, because some mergers fall below the threshold of notification under Regulation No. 139/2004; secondly, because of the lengthy procedures of the Commission, as noted in the Court of Auditors' report.

**Article 12** of the DMA proposal (Obligation to inform about concentrations) fails to address these limitations. Article 12(1) provides an obligation for the gatekeeper to inform the Commission of the intention to acquire "any other services provided in the digital sector irrespective of whether it is notifiable to a Union competition authority under Regulation (EC) No 139/2004". However, this notification does not trigger a merger investigation, nor does it impose any obligation on the gatekeeper to prove the acquisition will not have negative effects.

Similarly, Article 12(3) only imposes on gatekeepers an obligation to inform the Commission, within 3 months from the acquisition, if additional core platform services have been acquired.

By the time the Commission is notified, it is likely to be already too late to address many of the concerns that the acquisition might raise. This is particularly so given the practice of gatekeepers to buy up start-ups within their existing digital market to preclude them from growing into competitors; and/or to acquire strategically to establish a presence in a new market and then leverage their power, notably based on users' data, to achieve dominance in those markets. The importance of prior anti-trust review as well as of prior commitments imposed on companies was recently highlighted by the European Commission in the case of Fitbit's acquisition by Google.<sup>20</sup>

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<sup>19</sup> Available at: <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=56835>

<sup>20</sup> <https://privacyinternational.org/news-analysis/4116/googlefitbit-merger-more-scrutiny-eu-commission>.

PI recommends that the DMA a) introduces an obligation on gatekeepers to prove that the intended acquisition of any services provided in the digital sector will not have negative effects on end users' rights and interests; and b) enables the European Commission to commence an investigation prior to the intended acquisition of any services provided in the digital sector with the view to assess, inter alia, potential negative effects on end users' rights and interests.

## 6. Transparency in profiling

**Article 13** of the current proposal requires gatekeepers to annually submit "to the Commission an independently audited description of any techniques for profiling of consumers that the gatekeeper applies to or across its core platform services".

Because of the risks involved in these practices, GDPR regulates and limits profiling.<sup>21</sup> However, the practices remain often secretive and require significant efforts to be unmasked.<sup>22</sup>

Profiling is about recognizing patterns, revealing correlations and making inferences. Through profiling, highly sensitive information can be inferred, derived or predicted from other non-sensitive data. As a result, data about an individual's behaviour can be used to generate previously unknown information about someone's *likely* identity, attributes, behaviour, interests, or personality.<sup>23</sup> This includes information revealing or predicting an individual's likely racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, health, sexual behaviour or sexual orientation. Because of the inherently probabilistic nature of profiling, individuals are frequently misidentified, misclassified or misjudged as having certain attributes or characteristics.<sup>24</sup> Based on profiling, decisions (including fully automated decisions) are made that affect individual's human rights, as noted by the UN General Assembly and the UN Human Rights Council.<sup>25</sup>

For these reasons PI believes that Article 13 of the DMA should specify that:

- standards of auditing need to be developed in consultation with the EU Data Protection Supervisor, the European Data Protection Board, civil society and experts; and
- the results of auditing are made public (or at very least made available to Member-State data protection and competition authorities.)

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<sup>21</sup> <https://privacyinternational.org/sites/default/files/2018-04/Data%20Is%20Power-Profiling%20and%20Automated%20Decision-Making%20in%20GDPR.pdf>.

<sup>22</sup> See, for example, PI's research and complaints related to data brokers, available here:

<https://privacyinternational.org/long-read/4398/companies-control-our-secret-identities>

<sup>23</sup> <https://privacyinternational.org/campaigns/advertisers-facebook-who-heck-are-you-and-how-did-you-get-my-data>.

<sup>24</sup> <https://privacyinternational.org/news-analysis/3735/why-were-concerned-about-profiling-and-micro-targeting-elections>.

<sup>25</sup> See UN General Assembly resolution 75/176 and UN Human Rights Council resolution 42/15, <https://www.ohchr.org/EN/Issues/DigitalAge/Pages/InternationalStandardsDigitalPrivacy.aspx>

## 7. Failure to include civil society in the implementation and monitoring of the DMA

Under the proposal, the European Commission would play a fundamental role in the implementation, monitoring and enforcement of the DMA.

Notably the Commission would be responsible for:

- opening market investigations to designate gatekeepers (Article 15) and reviewing the status of gatekeepers (Article 4);
- specifying the measures gatekeepers should implement (Article 7), suspending or exempting gatekeepers from the obligations (Articles 8 and 9);
- opening market investigation into new services and new practices (Article 17)
- opening market investigation into systematic non-compliance (Article 16);
- deciding on non-compliance (Article 25) and imposing fines (Articles 26-29)

The only exception to the concentration of powers in the hands of the Commission is contained in Article 33, which stipulates that three or more Member States can request the Commission to open a market investigation because they consider that there are reasonable grounds to suspect that a provider of core platform services should be designated as a gatekeeper.

Nowhere in the proposal is a role expressly envisaged for civil society, such as consumer organisations, digital rights, human rights organisations, etc., despite the fact that these organisations play a necessary role in protecting the rights and interests of users of digital services provided by gatekeepers. For example, in 2020 PI intervened and made several submissions before the European Commission's<sup>26</sup> review of Google LLC's acquisition of Fitbit, Inc., highlighting the series of competition concerns that the transaction raised with regard to the markets of digital advertising, wearables and health-related markets.<sup>27</sup>

This is a notable omission given that civil society and consumer rights organisations conduct many investigations exposing the abusive practices of companies in the digital markets; these organisations often represent individuals or groups of individuals negatively affected by companies' actions; and these organisations have developed technical and legal expertise to support users in protecting their rights and interests. The technical complexities and novelty of challenges that characterise digital markets warrant specialist organisations to have a seat at the table.<sup>28</sup>

There is growing recognition by competition authorities of the need to reach to consumer organisations and other civil society organisations in order to better address the challenges of regulating digital markets. As articulated by the head

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<sup>26</sup> PI, European Commission's review of the Google/Fitbit merger, <https://privacyinternational.org/legal-action/european-commissions-review-googlefitbit-merger>.

<sup>27</sup> <https://privacyinternational.org/campaigns/googlefitbit-merger-not-our-watch>.

<sup>28</sup> <https://digitalfreedomfund.org/challenging-the-google-fitbit-merger-through-competition-law/>.



of the UK Competition and Market Authority, "we need to think about how that consumer voice can be amplified. First, amplifying the consumer voice would help to entrench the legitimacy of the competition regime, and to address reasonable concerns that it is systematically biased against the consumers whose interests it purports to represent. Second, at a more practical level, it can enrich our evidence base and improve our analysis."<sup>29</sup>

PI believes that the DMA cannot effectively provide end users of core platform services with "appropriate regulatory safeguards [...] against the unfair behaviour of gatekeepers" (Recital 7), without the meaningful involvement of the organisations that represent the views and interests of the end users.

PI recommends that the DMA include provisions to ensure that civil society organisations, such as digital rights and consumer organisations, are enabled to:

- make a request to the Commission for the opening of a market investigation when there are reasonable grounds to suspect that a provider of core platform services should be designated as a gatekeeper;
- notify the Commission of suspected infringements covered by the DMA and share with the Commission any evidence in the context of their investigation;
- provide the Commission with information to open market investigations into new services and new practices.

## 8. Assessment of full conformity with the General Data Protection Regulation

PI welcomes that the recital states the complementarity of this proposal to the General Data Protection Regulation (GDPR).<sup>30</sup> However, we are concerned that **Article 1(6)** does not include the GDPR in the national and European rules to which the DMA shall be without prejudice.

Further, PI believes that, given the scope of application of this proposal, the e-privacy directive (and the likely forthcoming e-privacy regulation) should also be expressly listed in article 1(6) among those EU laws that complement the DMA.

We recommend including in Article 1(6) reference to the GDPR and ePrivacy directive/regulation.

In light of the stated complementarity of the GDPR with the DMA, and of the need to ensure the full application of the GDPR to the practices of gatekeepers, PI suggests the following adjustments to some of the provisions in the current proposal.

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<sup>29</sup> See <https://www.gov.uk/government/speeches/andrea-coscelli-ahead-of-the-curve-bannerman-competition-lecture>

<sup>30</sup> Recital, para 11: "This Regulation should also complement, without prejudice to their application, the rules resulting from other acts of Union law regulating certain aspects of the provision of services covered by this Regulation, in particular [...] Regulation (EU) 2016/679".

- **Article 6(1)(a)**<sup>31</sup>

PI is concerned that limiting the obligation in this provision to “in competition with business users” risks being interpreted as allowing such data, including personal data of end users, to be used by the gatekeeper in other contexts where they do not compete with those business users. This could accordingly allow the gatekeeper to consolidate their power by exploiting data of users or abusing their position to expand their dominance. PI notes that para 43 of the recitals clarifies that “this obligation should apply to the gatekeeper as a whole, including but not limited to its business unit that competes with the business users of a core platform service”. However, we believe it would be clearer to remove reference to “in competition with business users” in Article 6(1)(a).

- **Article 6(1)(i)**<sup>32</sup>

PI is concerned that this provision may allow for data sharing in ways that are not compatible with the GDPR, and may be interpreted to support the advancing of competition by relying on sharing of users' personal data which could be detrimental for data protection rights.<sup>33</sup> For these reasons, we recommend that Article 6(1)(j) is amended to (a) delete reference to “aggregated or non-aggregated data” and limit the first sentence to “non personal data”; (b) clarify that any access and use of personal data must be compliant with the GDPR.

- **Article 6(1)(j)**<sup>34</sup>

PI shares the concerns expressed by the EDPS that “query, click and view data” is personal data “likely to be of a highly sensitive nature” and that sharing this information can lead to “a high risk of re-identification” whose impact could be very negative on users' privacy.<sup>35</sup>

PI recommends that Article 6(1)(j) provision is amended to prohibit the sharing of the query, click and view data unless it is subject to demonstrably effective anonymisation that addresses the risks of re-identification.

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<sup>31</sup> Article 6(1)(a) provides that the gatekeeper shall “refrain from using, in competition with business users, any data not publicly available, which is generated through activities by those business users, including by the end-users of these business users, of its core platform services or provided by those business users of its core platform services or by the end-users of these business users;”

<sup>32</sup> Article 6(1)(i) requires gatekeepers to “provide business users, or third parties authorised by a business user, free of charge, with effective, high-quality, continuous and real-time access and use of aggregated or non-aggregated data, that is provided for or generated in the context of the use of the relevant core platform services by those business users and the end users engaging with the products or services provided by those business users; for personal data, provide access and use only where directly connected with the use effectuated by the end user in respect of the products or services offered by the relevant business user through the relevant core platform service, and when the end user opts in to such sharing with a consent in the sense of the Regulation (EU) 2016/679.

<sup>33</sup> See Opinion of the EU Data Protection Supervisor, paragraph 31.

<sup>34</sup> Article 6(1)(j) of the Proposal requires gatekeepers to “provide to any third party providers of online search engines, upon their request, with access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data in relation to free and paid search generated by end users on online search engines of the gatekeeper, subject to anonymisation for the query, click and view data that constitutes personal data;

<sup>35</sup> See Opinion of the EU Data Protection Supervisor, paragraph 32.

## 9. Conclusion

PI believes that the DMA could play a significant role in addressing the data exploitative practices so common in the digital markets. While the current proposal contains some useful provisions, it still fails to focus adequately on the effects on end users, to challenge the status quo of dominance by few large companies, and to give civil society and consumer rights organisations a role to support the European Commission in monitoring and implementation of the DMA.

Specifically, in these preliminary comments, PI recommends that the DMA is amended to:

- Include a strong interoperability requirement applicable to core services provided by digital platforms;
- Add 'end users' in Article 10(2)(a);
- Modify Article 12 to address negative effects of mergers by:
  - a) introducing an obligation on gatekeepers to prove that the intended acquisition of any services provided in the digital sector will not have negative effects on end users' rights and interests; and
  - b) enabling the European Commission to commence an investigation prior to the intended acquisition of any services provided in the digital sector;
- Specify in Article 13 that:
  - a) standards of auditing need to be developed in consultation with the EU Data Protection Supervisor, the European Data Protection Board, civil society and experts;
  - b) the results of auditing should be made public (or at very least made available to Member-State independent data protection supervisory and competition authorities);
- Include provisions to ensure that civil society organisations are enabled to
  - a) make a request to the Commission for the opening of a market investigation;
  - b) notify the Commission of suspected infringements covered by the DMA and share with the Commission any evidence in the context of their investigation; and
  - c) provide the Commission with information to open market investigations into new services and new practices.

- Ensure full compliance with the General Data Protection Regulation, including by:
  - a) adding reference to the GDPR and ePrivacy directive/regulation in Article 1(6);
  - b) removing reference to "in competition with business users" in Article 6(1)(a);
  - c) amending Article 6(1)(j) to delete reference to "aggregated or non-aggregated data" and limit the first sentence to "non personal data"; and to clarify that any access and use of personal data must be compliant with the GPDR;
  - d) amending Article 6(1)(j) to prohibit the sharing of the query, click and view data unless it is subject to demonstrably effective anonymisation that addresses the risks of re-identification.