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# Developers Alliance's Position Paper On The Digital Markets Act (DMA)

**Founded in January 2012, the Developers Alliance is a global industry association that supports software developers as entrepreneurs, innovators, and creators.**

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**Our mission is to provide a collective voice for software developers and to represent their interests on matters affecting the software development ecosystem. From this perspective, we see the impact of the DMA as follows:**

- **The DMA could benefit the EU by increasing transparency and creating a harmonized business environment** within the digital market across the EU.
- **The DMA will put at risk European developer jobs** by disrupting the 3rd party software ecosystem.
- **The DMA will reduce investment in the EU** by eroding investor faith in the freedom and fairness of the EU market.
- **The DMA will trigger the divergence of EU digital markets from other western economies,** resulting in fewer and poorer choices for EU consumers.

### The stated objectives of the DMA would be better met by:

- **Shifting the focus from outright and arbitrary prohibition to a rebuttable assumption of harm** such that practices that are beneficial to consumers and other ecosystem stakeholders are taken into account.
- **Limiting the application of general remedies and prohibitions to specifically enumerated practices and services,** rather than building a framework of generic prohibitions which are questionable in many service contexts.
- **Specifically articulating the predicted long-term market outcomes of the individual remedies,** to ensure that cascading and overlapping actions and responses don't destroy the very markets the regulation is seeking to protect.

## On Objectives And Scope

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The proposed objectives of the regulation are harmonization (sole legal base art. 114 TFEU) and "fairness and contestability" of digital markets across the EU.

1. We welcome a **harmonized approach**, which should be strengthened by an appropriate mechanism of cooperation with the national authorities, in particular national competition authorities (sparsely addressed by art. 32 - The Digital Markets Advisory Committee).

   Furthermore, legal certainty is a prerequisite for situations of conflict between public and private enforcement at the national and EU level (the need for more clarity in art. 1 para 5 and 6). Otherwise, the objective of harmonization will not be achieved.

2. **The co-legislators should balance the trade-offs and find a proportionate regulatory solution.** This should be driven by a clear analysis on the intended and unintended effects of the regulation on the digital markets in the short, medium and long term. To date, this analysis has not been presented.

   The proposal is prescribing rebuttable presumptions for designating 'gatekeepers', and restrictions per se of certain economic behaviours, based on conclusive presumptions and thus excluding efficiency defences. The impact assessment does not provide adequate evidence for the presumptions put forward by the European Commission (as stated by the Regulatory Scrutiny Board) and therefore the co-legislators tasks to assess the trade-offs is quite difficult. Moreover, the notions of "fairness"and "contestability" are not clearly defined by the proposal. Further, there is no adequate assessment of the potential benefits and justifications for the current system, resulting in a one-sided analysis.

   We recommend caution in adopting a rigid approach which will artificially (re)design the digital market. Imposing arbitrary and disproportionate limitations on the freedom to conduct business and imposing government redistribution of value across established markets will chill investment and drive entrepreneurs out of the EU.

   > *The potential for startups to emerge and scale up in the EU will be hampered. It will be difficult to find investors, and foreign market access is likely to be drastically reduced. Private investors won't rush to support companies that won't be able to grow in a business environment where success is sanctioned and where exit strategies are limited.*

3. **The policy objectives should consider the interests of all stakeholders, including all business users and all consumers.** A major unintended consequence of rigid or poorly thought-out rules will be the reduction of the benefits of technology for European consumers. This can be avoided by:

   - ...considering the benefits derived from practices that will be banned, for both consumers and business users (e.g. bundled product and services).
   - ...preserving the stability of and safety of digital ecosystems, for the benefit of both consumers and business users.
   - ...resisting the temptation to "pick winners" (serving the short-term interest of some direct competitors of 'gatekeepers', artificial redistribution of market shares and rents).
   - ...assessing the likely response of for-profit businesses when their current business case is disrupted.

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Rather than focusing on markets in the abstract, the regulation should be user-centric. The outcomes should allow consumers to make their choices for the best products and services.

*Direct competitors of a 'gatekeeper' could benefit in the short term from the implementation of certain obligations (e.g those based on the alleged harms of complainants in ongoing competition cases/ investigations), while 3rd party software developers will likely lose market access as digital ecosystems are reconfigured in response to subsequent shareholder demands.*

## On 'Gatekeepers' Obligations

- **Art. 5**

1. **Some self-executing obligations would have predictable spillover effects on certain digital ecosystems**, therefore their implementation should be further specified in the regulatory dialogue with the European Commission. The following two obligations should be reworded and better placed in art. 6:

   - **art. 5 a)**

Inter-services data processing serves to promote interoperability and related efficiencies for different categories of users, including business users. Furthermore, it is very difficult to anticipate the effects of the rules when applying them across disparate business models.

*Software developers are making the most of business tools and services based on these inter-service practices (e.g. advertising services). A lack of/reduced access to such services would disrupt developers' ability to measure, monitor and optimize their marketing campaigns, reducing revenues and putting them at a disadvantage to their competitors in foreign markets.*

**Special note:** It is essential to maintain the legal standard for processing personal data set out by the Regulation 2016/679 (GDPR), with special reference to all legal bases for processing.

   - **art. 5 c)**

It is important that this obligation could be implemented in such a way that the economic viability of the core platform services is maintained. Proper guidance and a regulatory dialogue will prevent unintended negative consequences related to the durability of those ecosystems.

*Such obligations would force core service providers to re-design their current business model which could become unsustainable. This will have a direct impact on European developers' access to specific services, access to functionalities and business tools, and **raise the cost of doing business.***

2. **The other obligations listed in art. 5** address issues that could be relevant for all types of core platform services. Their implementation would bring benefits in the specific case of services utilized by software developers. These provisions could be seen as a reasonable follow-up to those of Regulation 2019/1150 (Platform-to-business Regulation). Nevertheless, the wording should be improved for more legal clarity (without affecting their substance), and we would encourage amendments in this sense.

> *These provisions could bring potential benefits through more access and transparency for the digital ecosystems where developers are doing business and a legal safeguard from retaliation when raising issues and seeking redress.*

- **Art. 6**

1. **Some obligations could negatively impact the ecosystems that developers rely on.** This is likely to happen when applying them as blanket versus targeted bans, or further specifying them without taking into account all the consequences.

   - **art. 6.1 d)**

The prohibition of self-preferencing is proposed in order to implement the principle of “platform neutrality”, in conjunction with art. 6.1.k). This principle is derived from the regulation of traditional infrastructure. The dynamics of digital markets and the specific organization of digital ecosystems make these platforms very different from static markets based on physical infrastructure (e.g. telecom).

The obligation related to self-preferencing should be applied only on the basis of an evidence-based assessment and regulatory dialogue (involving all those potentially affected by the remedy), in order to avoid significant unintended consequences, particularly **ripple effects on certain digital ecosystems.**

> *A blanket ban on differential treatment will degrade important software development ecosystems.*
>
> *Without the ability to influence how partners participate in an otherwise open ecosystem, individual parties can quickly revert to self-serving behaviours that result in a loss of ecosystem value and cohesion. In a “tragedy of the commons” scenario, open ecosystems have repeatedly failed - creating significant business and consumer losses - due to the otherwise loose alignment of individual partner incentives. Ecosystem stability is one of the primary values that developers derive from the current market models and one that is essential to their business survival.*

2. The **obligations on data portability and data access** (art. 6.1. i), h) and j)) could enhance multi-homing and interoperability. All the provisions of the regulation should be coherent with these objectives (e.g. avoid inconsistency with art. 5 a)).

   **The implementation of these articles is complex**, due to different possible constraints, some of a technical nature, others of a legal nature, notably related to

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data protection, privacy and intellectual property. The benefits of such remedies for developers could easily be overshadowed by such complications (e.g. legal responsibility for ensuring privacy and security in the case of mixed datasets). A case-by-case application should consider not only the specifics of each platform but also the use cases where interoperability would be viable.

> *The inappropriate implementation of such provisions could lead to an increased level of standardized services and products, and* ***a lack of differentiation*** *in certain markets. This outcome would not be an incentive for more innovation and would not offer added value to consumers.*

3. The obligations regarding device neutrality **(art. 6.1. b), c), e) and f))** could ensure more choice for both developers and users, but as structured they pose a significant risk to the third-party developer community. **Strong safeguards for the integrity and security of hardware and operating systems are essential** and we support the proposed provisions in these areas.

   In particular, these obligations should not hinder the ability of OS providers to ensure the **stability and prompt availability of key functionalities**. This is crucial for developers that rely on these to build their applications, as for meeting consumers expectations.

   Generally, however, obligations must not be such that device and OS ecosystems are forced to choose between being fully open (as the regulation seems to contemplate), or fully closed, leaving no room for inter-platform competition.

> *The critical "stewardship" role that platform owners play - in keeping the ecosystem safe, stable, trustworthy, and connecting it to brand value, should be acknowledged. Obligations that encourage healthy multi-party ecosystems must retain market incentives for the investment and risk associated with building, maintaining, and offering this service to platform partners who have not chosen to invest. Moreover, emerging OS ecosystems in IoT, transportation, voice interfaces, etc. will predictably adjust their strategies and not invite 3rd party participation in their EU-based efforts.*

## On Mergers And Acquisitions

**Few acquisitions are "killer acquisitions" in disguise.** In many cases, the potential of a start-up is not necessarily guaranteed. Many startups fail before they have the chance to scale. The investment required for internet success is directly related to the ability to grow rapidly, and only some can access private investment or an IPO to obtain the resources they need. Start-ups and their private investors rely on exit strategies or corporate investment as part of the startup lifecycle. Acqui-hiring, R&D via acquisition, and legitimate service growth are an important part of the digital ecosystem, and their restriction would drive away jobs and investment from the EU.

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*An a priori negative assumption related to mergers and acquisitions will inhibit innovation and the dynamics of tech entrepreneurship supported by private investments.*

## On Enforcement

1. Market investigations are an important form of **due process**, offering legal safeguards for those involved. Enforcement and oversight should also be a **participative process**, involving not only the 'gatekeepers but also other market players, especially when the obligations need focused refinement in order to be implemented.

2. **Implementation guidance** is essential in order to ensure the proper implementation and ultimately the efficiency of the regulation. The lists of "do's and don'ts" and "should and shouldn'ts" of art. 5 and 6 are targeting a wide range of business models and their implementation should be clear, particularly in cases where the results don't seem to make sense across the many domains the regulation targets. In the alternative, circumscribing the "general" rules to identify the specific business models and services where they apply would be a better approach.

3. **Strong coordination with the national competition authorities** is critical for a harmonized approach.