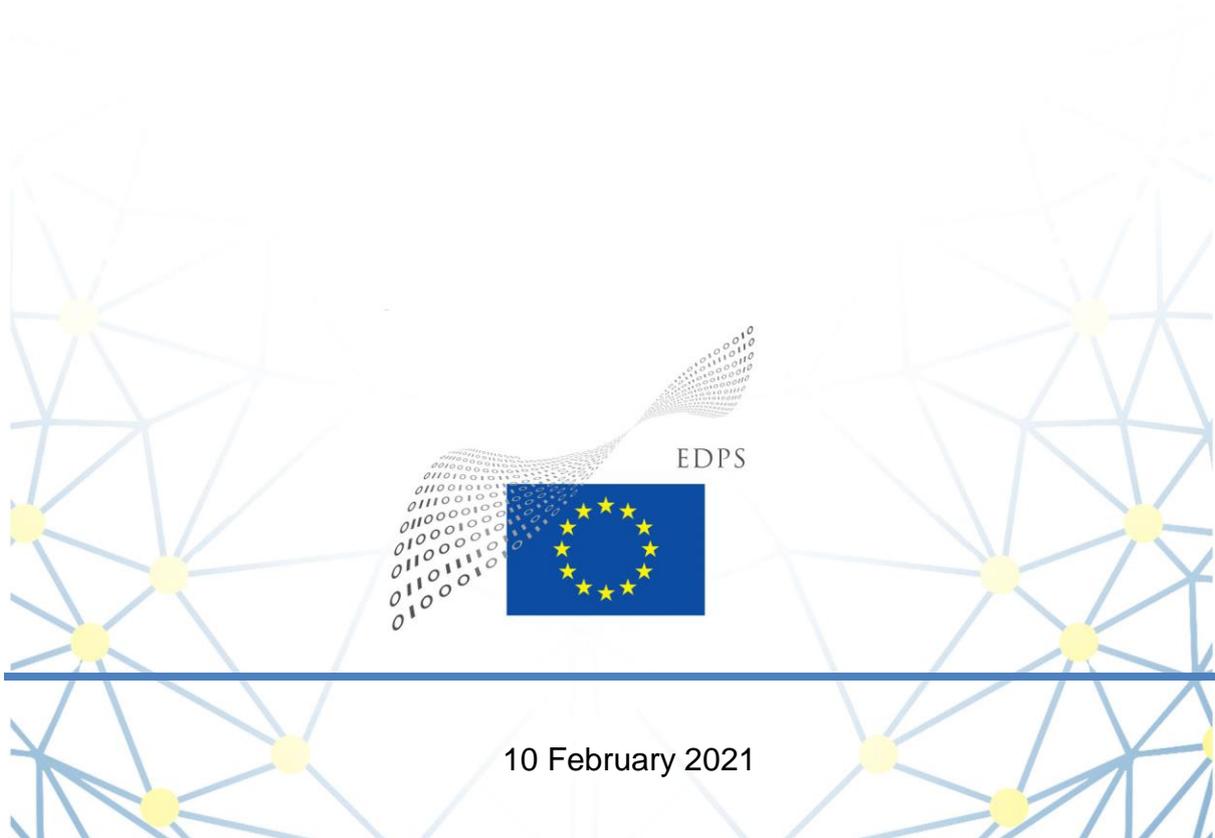


EUROPEAN DATA PROTECTION SUPERVISOR

## Opinion 2/2021

# on the Proposal for a Digital Markets Act



10 February 2021

*The European Data Protection Supervisor (EDPS) is an independent institution of the EU, responsible under Article 52(2) of Regulation 2018/1725 ‘With respect to the processing of personal data... for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to data protection, are respected by Union institutions and bodies’, and under Article 52(3) ‘...for advising Union institutions and bodies and data subjects on all matters concerning the processing of personal data’.*

*Wojciech Wiewiorowski was appointed as Supervisor on 5 December 2019 for a term of five years.*

*Under Article 42(1) of Regulation 2018/1725, the Commission shall ‘following the adoption of proposals for a legislative act, of recommendations or of proposals to the Council pursuant to Article 218 TFEU or when preparing delegated acts or implementing acts, consult the EDPS where there is an impact on the protection of individuals’ rights and freedoms with regard to the processing of personal data’ and under article 57(1)(g), the EDPS shall ‘advise on his or her own initiative or on request, all Union institutions and bodies on legislative and administrative measures relating to the protection of natural persons’ rights and freedoms with regard to the processing of personal data’.*

*This Opinion is issued by the EDPS, within the period of eight weeks from the receipt of the request for consultation laid down under Article 42(3) of Regulation (EU) 2018/1725, having regard to the impact on the protection of individuals’ rights and freedoms with regard to the processing of personal data of the 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).*

## Executive Summary

On 15 December 2020, the Commission published a Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (**Digital Markets Act**). The Proposal follows the **Communication *Shaping Europe's Digital Future***, which indicated that additional rules may be needed to ensure **contestability, fairness and innovation and the possibility of market entry**, as well as public interests that go beyond competition or economic considerations. The Proposal establishes *ex ante* rules to ensure that markets characterised by large platforms with significant network effects (“gatekeepers”), remain fair and contestable.

In doing so, the Proposal sets out provisions concerning **the designation of gatekeepers** which takes into account the data driven advantage related among others to the provider’s access to and collection of personal data; **obligations and prohibitions** to which the gatekeepers are subject; rules for carrying out **market investigations**; provisions concerning **the implementation and enforcement** of the Proposal.

In this Opinion the EDPS **welcomes the Proposal**, as it seeks to promote **fair and open markets and the fair processing of personal data**. Already in 2014, the EDPS pointed out how **competition, consumer protection and data protection law are three inextricably linked policy areas** in the context of the **online platform economy**. The EDPS considers that the relationship between these three areas should be a relationship of **complementarity**, not a relationship where one area replaces or enters into friction with another.

The EDPS highlights in this Opinion those provisions of the Proposal which produce the effect of **mutually reinforcing** contestability of the market and ultimately also control by the person concerned on her or his personal data. This is the case for instance of **Article 5(f)**, prohibiting the mandatory subscription by the end-users to other core platform services offered by the gatekeeper; **Article 6(1)(b)**, allowing the end-user to un-install pre-installed software applications on the core platform service; **Article 6(1)(e)**, prohibiting the gatekeeper from restricting the ability of end-users to switch between different software applications and services; and **Article 13**, laying down the obligation for the gatekeeper to 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.

At the same time, the EDPS provides **specific recommendations** to help ensure that the Proposal **complements the GDPR effectively**, increasing protection for the fundamental rights and freedoms of the persons concerned, and **avoiding frictions** with current data protection rules. In this regard, the EDPS recommends in particular specifying in **Article 5(a)** of the Proposal that the gatekeeper shall provide end-users with a solution of easy and prompt accessibility for consent management; clarifying the scope of the data portability envisaged in **Article 6(1)(h)** of the Proposal; and rewording **Article 6(1)(i)** of the Proposal to ensure full consistency with the GDPR; and raising the attention on the need for **effective anonymisation** and re-identification tests when sharing query, click and view data in relation to free and paid search generated by end users on online search engines of the gatekeeper.

Moreover, the EDPS invites the co-legislators to consider introducing minimum **interoperability requirements** for gatekeepers and to promote the development of technical standards at European level, in accordance with the applicable Union legislation on European standardisation.

Finally, building among others on the experience of the Digital Clearinghouse, the EDPS recommends specifying under **Article 32(1)** that the **Digital Markets Advisory Committee** shall include representatives of the EDPB, and calls, more broadly, for an **institutionalised and structured cooperation** between the relevant competent oversight authorities, including data protection authorities. This cooperation should ensure in particular that all relevant information can be exchanged with the relevant authorities so they can fulfil their complementary role, while acting in accordance with their respective institutional mandates.

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## THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16 thereof,

Having regard to the Charter of Fundamental Rights of the European Union, and in particular Articles 7 and 8 thereof,

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)<sup>1</sup>,

Having regard to Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)<sup>2</sup>,

Having regard to Regulation (EU) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data<sup>3</sup>, and in particular Article 42(1) thereof,

### HAS ADOPTED THE FOLLOWING OPINION:

#### 1. INTRODUCTION AND BACKGROUND

1. On 15 December 2020, the European Commission adopted the Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (hereafter, “the Proposal”)<sup>4</sup>.
2. The Proposal follows the **Communication *Shaping Europe’s Digital Future***, which indicated that additional rules may be needed to ensure contestability, fairness and innovation and the possibility of market entry, as well as public interests that go beyond competition or economic considerations. The Communication also announced that the Commission would explore *ex ante* rules to ensure that markets characterised by large platforms with significant network effects acting as gatekeepers, remain fair and contestable for innovators, businesses, and new market entrants.<sup>5</sup>
3. According to the **Explanatory Memorandum** to the Proposal, a few large platforms in the digital sector increasingly act as gateways or “gatekeepers” between business users and end users. Such gatekeepers are said to be entrenched in digital markets, leading to significant dependencies of many business users and negative effects on the contestability of the core platform services concerned. In certain cases, the dependencies lead to unfair behaviour *vis-à-vis* these business users<sup>6</sup>.
4. The **objective of the Proposal** is to address at EU level the most salient incidences of unfair practices and weak contestability in relation to so-called “core platform services”.<sup>7</sup> To this end, the Proposal:

- establishes the conditions under which providers of core platform services should be designated as “gatekeepers” (Chapter II);
  - sets out the practices of gatekeepers that limit contestability and that are unfair, laying down obligations that the designated gatekeepers should comply with, some of which are susceptible to further specification (Chapter III);
  - provides rules for carrying out market investigations (Chapter IV); and
  - contains provisions concerning the implementation and enforcement of this Regulation (Chapter V).
5. The EDPS was consulted informally on the draft Proposal for a Digital Markets Act on 8 December 2020. The EDPS welcomes the fact that he has been consulted at this early stage of the procedure.
  6. In addition to the Proposal, the Commission has also adopted a Proposal for a Regulation of the European Parliament and of the Council on Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC. In accordance with Article 42(1) of Regulation 2018/1725, the EDPS has also been consulted on the Proposal for a Digital Services Act, which is the subject matter of a separate Opinion.

## 2. GENERAL COMMENTS

7. The EDPS recalls that the digital future of Europe is at the heart of the EDPS Strategy for 2020-2024, which aims to shape a safer, fairer and more sustainable digital Europe, particularly for the most vulnerable in our societies<sup>8</sup>.
8. The EDPS supports the Commission’s intention to ensure **fairness and contestability** of markets in the digital sector, in particular as regards core platform services. The EDPS also welcomes the recognition that additional rules may be necessary to ensure public interests that go beyond competition or economic considerations, in addition to the need to ensure innovation and market entry<sup>9</sup>.
9. The EDPS especially welcomes the explicit recognition that “[t]he data protection and privacy interests of end users are relevant to any assessment of potential negative effects of the observed practice of gatekeepers to collect and accumulate large amounts of data from end users”<sup>10</sup>.
10. The EDPS is also aware that the need for a ‘digital update’ of competition law has been the object of in-depth debates not only in the EU, but also globally, including in the United Kingdom<sup>11</sup> and in the United States<sup>12</sup>.
11. Given the business model of certain platforms (further identified as “gatekeepers”), the Proposal necessarily includes rules (*ex ante* regulation) that at the same time seek to promote **fair and open markets and the fair processing of personal data**.
12. Already in 2014, the EDPS pointed out how competition, consumer protection and data protection law are three **inextricably linked** policy areas in the context of the online platform economy<sup>13</sup>. The EDPS considers that the relationship between these three areas should be a relationship of complementarity, convergence and coherent application, not a relationship where one area replaces or enters into friction with another.

13. Services in the digital ecosystem rely on covert tracking of individuals, who are generally unaware of the nature and extent of that tracking<sup>14</sup>. This predominant business model is often paired with trends in the digital economy sitting at the crossroad of those different fields of laws. Those include: information and power asymmetry between large platforms and individuals; insufficient transparency and accountability; growing inequality in the distribution of value; manipulative and addictive patterns; platforms as gatekeepers for solutions, choice, and innovation, online manipulation and disinformation<sup>15</sup>.
14. The EDPS therefore welcomes the statement that the Proposal aims to **complement** data protection laws, in particular by *supplementing* the existing level of protection and *helping to inform enforcement* under the General Data Protection Regulation ('GDPR').<sup>16</sup> Given the complementarity of aims pursued, the EDPS fully supports the objectives of the Proposal.
15. The remainder of this Opinion contains specific recommendation to help ensure that the Proposal **complements the GDPR effectively** and **increases protection** for the fundamental rights and freedoms of the persons concerned and avoids **frictions** with current data protection rules.

### 3. SPECIFIC RECOMMENDATIONS

#### 3.1. Subject matter and scope

16. Recital (11) of the Proposal confirms that the Regulation should “complement” and is “without prejudice” to the application of Regulation (EU) 2016/679.<sup>17</sup> For the sake of clarity, the EDPS recommends further specifying that the Proposal complements both Regulation 2016/679 **and Directive 2002/58/EC**. It should also be specified in the recital that the Proposal **does not particularise or replace** any of the obligations of core platform services under Regulation 2016/679 and Directive 2002/58/EC.
17. The EDPS recommends supplementing **Article 1** of the Proposal to reflect the wording of Recital (11), by explicitly stating that the Proposal **complements and is without prejudice to** Regulation 2016/679 and Directive 2002/58/EC.<sup>18</sup>

#### 3.2. Definitions

18. The EDPS notes that Article 2 of the Proposal correctly refers to several definitions provided by the GDPR (“personal data”<sup>19</sup>; “non-personal data”<sup>20</sup>), rather than introducing other definitions that might generate ambiguities or difficulty of interpretation.
19. The EDPS notes however that the Proposal contains requirements referring to concepts which are already defined and employed by Regulation 2016/679 and/or Directive 2002/58, such as “profiling”<sup>21</sup>, “consent”<sup>22</sup>, and “data portability”<sup>23</sup>. As a result, further clarification is necessary to avoid confusion (beyond stating that this Regulation is “without prejudice” to the GDPR).
20. In particular, the EDPS submits that for the sake of clarity, the term “profiling” referred to Article 13 of the Proposal should have the same meaning as ‘profiling’ defined in Article 4(4) of the GDPR, and suggests adding in Article 2 of the Proposal (‘Definitions’) a specific

reference to the definition of “profiling” as defined in Article 4(4) of the GDPR insofar as the profiling of end users or consumers is concerned.

As regards the reference to “consent” in Articles 5(a); 6(1)(i); and 11(2), the Proposal makes clear that this refers to consent “in line with Regulation 2016/679”. The EDPS suggests adding in Article 2 of the Proposal (‘Definitions’) a specific reference to the definition of “consent” as defined in Article 4(11) of the GDPR insofar as the consent of end users is concerned.

The EDPS also suggests introducing further clarifications in relation to “data portability” referred to in Article 6(1)(h) of the Proposal, which are explained later on in this Opinion (see below para. 29).

### 3.3. Designation of gatekeepers

21. Among the elements relevant for the designation of “gatekeepers”, the EDPS welcomes the reference to the “*data driven advantages, in particular in relation to the provider’s access to and collection of personal and non-personal data or analytics capabilities*” (Article 3(6)(c)<sup>24</sup>); as well as to “*user’s lock-in*” (Article 3(6)(e))<sup>25</sup>. Indeed, the EDPS considers that online platforms who, as a key component of their business model, engage in profiling of individuals, can derive considerable competitive advantages because of their unique abilities to collect vast amounts and types of personal data. User lock-in in turn may also enable gatekeepers to raise the prices for consumers, including non-monetary prices, which may lead to possible degradation of the level of protection of personal data for end users.

### 3.4. Practices of gatekeepers that limit contestability and are unfair

22. In light of the entry barriers that result from the data driven advantage, but also (indirectly) from user’s lock-in, **Article 5(a)** of the Proposal provides that the gatekeeper shall:

*“refrain from combining personal data sources from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services, and from signing in end users to other services of the gatekeeper in order to combine personal data, unless the end user has been presented with the specific choice and provided consent in the sense of Regulation (EU) 2016/679.”*

Recital (36) clarifies that “*The conduct of combining end user data from different sources or signing in users to different services of gatekeepers gives them potential advantages in terms of accumulation of data, thereby raising barriers to entry. To ensure that gatekeepers do not unfairly undermine the contestability of core platform services, they should enable their end users to **freely choose to opt-in** to such business practices by offering a less personalised alternative. The possibility should cover all possible sources of personal data, including own services of the gatekeeper as well as third party websites, and should be proactively presented to the end user in an explicit, clear and straightforward manner.*”

23. The EDPS **welcomes** this provision, as it both helps to address competition concerns and further strengthens the protection of the fundamental rights to privacy and to the protection of personal data in relation to gatekeepers.
24. For the sake of clarity, however, the EDPS recalls that online platforms who are not designated as “gatekeepers” may still need to obtain the consent of the persons concerned before combining data across their services or with data from third-party services pursuant to the GDPR and/or the ePrivacy Directive. Article 5(a) should therefore not be understood as

suggesting that platforms that are **not designated as gatekeepers** may freely combine personal data across services without the individual's consent.<sup>26</sup> The EDPS recommends adding wording in a recital to that effect.

25. The EDPS recommends specifying that the gatekeeper shall provide end-users with a **user-friendly solution** (of easy and prompt accessibility) for consent management in line with Regulation 2016/679, and, in particular, the requirement of data protection by design and data protection by default laid down in Article 25 of Regulation 2016/679. For example, the Proposal could specify that the functionalities for giving information and offering the opportunity to grant, modify or revoke consent should be as user-friendly as possible.

26. The EDPS also welcomes **Article 5(f)** of the Proposal, laying down a **prohibition** for the gatekeeper to require the business user or the end users **to subscribe or register with any other core platform services offered by the gatekeeper**. This provision may mitigate competition concerns (on compulsory '**bundling of services**'), as well as reduce excessive collection and combination of personal data.

The EDPS considers that while Article 5(f) of the Proposal indirectly **enhances the safeguards** to data protection and privacy, it does so without encroaching upon the GDPR, given that the requirement is also justified by the peculiar position of the gatekeeper and by the functioning of the platform economy.

27. The EDPS observes that rationale of Article 5(f) would also apply to **Article 5(e)**, which establishes the prohibition for the gatekeeper to require the business user (but not the end user) to **use, offer or interoperate with an identification service of the gatekeeper** in the context of services offered by the business users using the core platform services of that gatekeeper. Therefore, the EDPS recommends inserting the wording "**or end users**" after "business users" in Article 5(e).

28. The EDPS observes that the following provisions similarly demonstrate that competition law and data protection law can usefully complement and enhance each other:

- **Article 6(1)(a)**, providing 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*";

- **Article 6(1)(b)**, providing that the gatekeeper shall "*allow end-users to **un-install** any pre-installed software application on its core platform service (..)*";

- **Article 6(1)(e)**, providing that the gatekeeper shall "*refrain from technically restricting the ability of end-users to **switch** between and subscribe to different software applications and services to be accessed using the operating system of the gatekeeper, including as regards the choice of the internet service provider for end-users*".

29. **Article 6(1)(h)** of the Proposal provides that a gatekeeper shall: "*provide **effective portability** of data generated through the activity of a business user or end-user and shall, in particular, provide tools for end users to facilitate the exercise of data portability, in line with Regulation EU 2016/679, including by the provision of continuous and real-time access*".

The EDPS recalls that under Article 20 GDPR, the right to data portability includes the right of the data subject to receive the personal data concerning him or her, which he or she has provided to a controller, and the right to transmit those data to another controller. As clarified by the Article 29 Working Party and later confirmed by the EDPB<sup>27</sup>, **the scope** of the personal data which can be ‘ported’ encompass the personal data provided knowingly and actively by the data subject, **as well as the personal data generated by his or her activity** (provided the legal basis of the processing is consent or contract, which is likely to be the case here). Therefore, the EDPS also welcomes the reference to “data generated through the activity of a [...] end user” in Article 6(1)(h) of the Proposal.

The EDPS however considers that Article 6(1)(h) should be worded more precisely as to who would be entitled to port personal data and which data, if personal or non-personal, would form the object of the portability. The EDPS recommends specifying that, insofar as it concerns the data portability to end-users, a gatekeeper shall provide the end-user with **tools** to facilitate effective portability of the **personal data relating to her or him, including personal data generated through her or his activity as end-user** of platform services in accordance with Article 20 of Regulation 2016/679, including by the provision of continuous and real-time access.

30. **Article 6(1)(i)** of the Proposal 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**”.*

31. The EDPS considers that the current wording of Article 6(1)(i) may cause confusion that could lead to inconsistency with the GDPR. As currently drafted, the Proposal might be understood in the sense that “aggregated or non-aggregated data” (referred to in the first sentence before “;”, and as opposed to the second sentence starting with “for personal data”) do **not** include personal data, whereas aggregated or non-aggregated data might include personal data.

In addition, the reference to “**in the sense of the Regulation (EU) 2016/679**” could be better specified.

The EDPS therefore recommends specifying that a gatekeeper shall 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 non-personal 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; and that a gatekeeper shall provide, **in full compliance with the GDPR**, business users the possibility to obtain the **consent of the data subject**, allowing to the business users the access to and use of the **personal data** 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. The EDPS also recommends specifying that the

functionalities for giving information and offering of the opportunity to grant consent should be **as user-friendly as possible**.

32. **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;**”*

In this regard, the EDPS notes that the **query, click and view data** in relation to searches generated by individuals constitute **personal data**. Moreover, these data are likely to be of a **highly sensitive nature** because they can contribute to build up a profile of individual’s preferences, status (including health status), interests and convictions (including religious and political beliefs).

The EDPS also considers that in practice often due attention is not paid by the controller to the **effective anonymisation** of personal data and that, as a consequence, sharing this information leads to a high risk of re-identification. Indeed, given the high level of insight offered into the private life of data subjects by query, click and view data, the EDPS considers that the impact of a re-identification would in general be very high.

In the light of the above, the EDPS recommends specifying in a recital that the gatekeeper shall be able to demonstrate that anonymised query, click and view data **have been adequately tested against possible re-identification risks**.

33. The EDPS welcomes the specification under **Article 7(1)** of the Proposal that “*The measures implemented by the gatekeeper to ensure compliance with the obligations laid down in Articles 5 and 6 shall be effective in achieving the objective of the relevant obligation. The gatekeeper shall ensure that these measures **are implemented in compliance with Regulation (EU) 2016/679 and Directive 2002/58/EC**, and with legislation on cyber security, consumer protection and product safety.*”
34. On **Article 10** of the Proposal, *Updating obligations for gatekeepers*, the EDPS recommends adding in **Article 10(2)(a)** a reference to **end-users**, in addition to business users, when referring to the imbalance of rights and obligations with the gatekeeper and to the advantage that would be obtained by the gatekeeper. This addition would be in line with and further support the overall objectives of the Proposal, aiming at enhancing contestability and fairness of core platform services having regard also to the imbalance between the gatekeeper and the end-user.
35. **Article 11(2)** of the Proposal stipulates that “[w]here consent for collecting and processing of personal data is required to ensure compliance with this Regulation, a gatekeeper shall take the necessary steps to either **enable business users to directly obtain the required consent to their processing, where required under Regulation (EU) 2016/679 and Directive 2002/58/EC, or to comply with Union data protection and privacy rules and principles in other ways** including by providing business users with duly anonymised data where appropriate. The gatekeeper shall not make the obtaining of this consent by the business user more burdensome than for its own services.”

In this regard, the EDPS recommends replacing “or” [to comply with..] with “and” for the sake of precision.

36. **Article 13**, Obligation of an audit, provides another clear example of the strong **complementarity** between competition law and data protection law. Article 13 states that a gatekeeper “*shall 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 identified pursuant to Article 3. This description shall be updated at least annually.*”

In this regard, the EDPS considers that this obligation can be beneficial to reduce the ‘data driven advantage’ of the gatekeeper and at the same time reduce the **information asymmetry** between the gatekeeper and public oversight authorities (as well as ultimately between gatekeepers and data subjects) on the processing of personal data. Moreover, this audit can contribute to the identification of consumer profiling which is **not** proportionate, or otherwise not compliant with the GDPR and the fundamental rights to privacy and to the protection of personal data as established under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union<sup>28</sup>.

In the light of the above, the EDPS recommends that the Proposal specifies that the audited description, as well as any relevant materials that is collected in the context of supervising the gatekeepers that relate to the processing of personal data, shall be shared by the Commission with any competent supervisory authority represented in the European Data Protection Board, upon its request.

### 3.5. Platform interoperability

37. The EDPS considers that issues of lack of contestability and possibilities of market entry that the Proposal seeks to address are exacerbated by the closed nature of gatekeepers (“walled gardens”). **Increased interoperability** has the potential to facilitate the development of a more open, pluralistic digital environment, as well as to create new opportunities for the development of innovative digital services.
38. The EDPS recommends the co-legislature to consider introducing 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. The EDPS suggests to draw up at European level **technical standards on interoperability** which should be supported by gatekeepers (in its various specifications, namely protocol interoperability, data interoperability, full protocol interoperability<sup>29</sup>). Such technical standards should be in compliance with European data protection law, not lower the level of security provided by platforms and not hinder innovation via too detailed interoperability standards. The European standardisation organisations, in consultation with the European Data Protection Board where appropriate, should draw up standards which satisfy these requirements. The Commission should have the possibility to request the European standardisation organisations to develop such European standards, in accordance with the applicable Union legislation on European standardisation.<sup>30</sup>

### 3.6. Digital Markets Advisory Committee

39. On the **Digital Markets Advisory Committee**, established under **Article 32** of the Proposal, the EDPS recommends **expressly referring** to the authorities of which the Advisory Committee will be composed. Considering the impact of the Proposal on different areas of EU law, and notably, due to interactions with **the protection of personal data**, the EDPS recommends specifying under Article 32(1) that the Digital Markets Advisory Committee

shall consist of representatives of **the European Data Protection Board established in accordance with Article 68 GDPR**, as well as of representatives of the competent authorities of the Member States for competition, electronic communications, audio-visual services, electoral oversight, and consumer protection.

40. Building on the experience with the Digital Clearinghouse<sup>31</sup>, the EDPS strongly recommends an **institutionalised and structured cooperation** between the competent oversight authorities and, notably, the data protection authorities. In this regard, the EDPS considers that the Commission should consult with relevant competent authorities, including data protection authorities, in the context of their investigations and assessments (for instance, on the designation of a gatekeeper); therefore, the EDPS submits that the Proposal should specifically mention this power for the Commission, for the sake of legal certainty.
41. Chapter V of the Proposal **should also lay down a clear legal basis to enable the exchange of any relevant information among the relevant authorities** (e.g., any relevant material that is collected in the context of supervising the gatekeepers that concerns aspects related to the processing of personal data). This would also entail a modification of Article 31 of the Proposal, which explicitly limits the use of the information collected pursuant to Articles 3, 12, 13, 19, 20 and 21 to the purposes of the DMA only. Doing so would further support the underlying objectives of the Proposal by enabling each competent authority to fulfil their complementary roles, while also acting in accordance with their respective mandate and public service mission.

#### 4. CONCLUSIONS

In light of the above, the EDPS makes the following recommendations:

- to specify that the Proposal **complements** both Regulation 2016/679 and **Directive 2002/58/EC**, and that the Proposal **does not particularise or replace** any of the obligations of core platform services under Regulation 2016/679 and Directive 2002/58/EC;
- to specify in **Article 5(a)** of the Proposal that the gatekeeper shall provide end-users with **a user-friendly solution** (of easy and prompt accessibility) for **consent management** in line with Regulation 2016/679, and, in particular, the requirement of privacy by design and privacy by default laid down in Article 25 of Regulation 2016/679;
- to add a reference to **end-users** under **Article 5(f) of the Proposal**;
- to clarify the scope of the data portability envisaged in **Article 6(1)(h)** of the Proposal;
- to reword **Article 6(1)(i)** of the Proposal to ensure consistency with the GDPR, taking into account in particular the definition of “personal data” under Article 4(1) of the GDPR;
- to strengthen the reference in **Article 6(1)(j)** of the Proposal specifying in a recital that the gatekeeper shall be able to demonstrate that the anonymised query, click and view data have been adequately tested against possible reidentification risks;
- to add reference to **end-users** in **Article 10(2)(a)** of the Proposal;

- to reword **Article 11(2)** of the Proposal by replacing “or” with “and”;
- to specify that **the audited description** shall be shared by the Commission with the EDPB or at least the competent supervisory authorities under the GDPR at their request;
- to specify under **Article 32(1)** that the Digital Markets Advisory Committee shall consist of representatives of the European Data Protection Board, as well as of representatives of the competent authorities of the Member States for competition, electronic communications, audio-visual services, electoral oversight, and consumer protection;
- to consider introducing minimum **interoperability requirements** for gatekeepers and to promote the development of technical standards at the European level, in accordance with the applicable Union legislation on European standardisation;
- to establish an **institutionalised and structured cooperation** between the relevant competent oversight authorities, including data protection authorities. This cooperation should ensure in particular that all relevant information can be exchanged with the relevant authorities so they can fulfil their complementary role, while acting in accordance with their respective institutional mandate.

Brussels, 10 February 2021

Wojciech WIEWIÓROWSKI  
(*e-signed*)

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## NOTES

<sup>1</sup> OJ L 119, 4.5.2016, p. 1.

<sup>2</sup> OJ L 201, 31.7.2002, p. 37.

<sup>3</sup> OJ L 295. 21.11.2018, p. 39.

<sup>4</sup> COM(2020) 842 final.

<sup>5</sup> COM(2020) 67 final.

<sup>6</sup> COM(2020) 842 final p. 1.

<sup>7</sup> COM(2020) 842 final p. 2.

<sup>8</sup> [https://edps.europa.eu/press-publications/press-news/press-releases/2020/shaping-safer-digital-future-new-strategy-new\\_de](https://edps.europa.eu/press-publications/press-news/press-releases/2020/shaping-safer-digital-future-new-strategy-new_de)

<sup>9</sup> Explanatory Memorandum of the Proposal, p. 2.

<sup>10</sup> Recital (61) of the Proposal.

<sup>11</sup> “A new pro-competition regime for digital markets Advice of the Digital Markets Taskforce”, 8 December 2020, available at:

[https://assets.publishing.service.gov.uk/media/5f9e7567e90e07562f98286c/Digital\\_Taskforce\\_-\\_Advice\\_--.pdf](https://assets.publishing.service.gov.uk/media/5f9e7567e90e07562f98286c/Digital_Taskforce_-_Advice_--.pdf)

<sup>12</sup> “Investigation of competition in digital markets, Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, United States, 2020, available at:

[https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf)

<sup>13</sup> Among others, “Preliminary Opinion of the European Data Protection Supervisor Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy”, March 2014, available at:

[https://edps.europa.eu/sites/edp/files/publication/14-03-26\\_competition\\_law\\_big\\_data\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/14-03-26_competition_law_big_data_en.pdf)

Opinion 7/2015, “Meeting the challenges of big data. A call for transparency, user control, data protection by design and accountability”, available at:

[https://edps.europa.eu/sites/edp/files/publication/15-11-19\\_big\\_data\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/15-11-19_big_data_en.pdf)

Opinion 8/2016, “Opinion on coherent enforcement of fundamental rights in the age of big data”, available at:

[https://edps.europa.eu/sites/edp/files/publication/16-09-23\\_bigdata\\_opinion\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/16-09-23_bigdata_opinion_en.pdf)

<sup>14</sup> EDPS Opinion on coherent enforcement of fundamental rights in the age of Big Data, 23 September 2016, available at: [https://edps.europa.eu/data-protection/our-work/publications/opinions/big-data\\_en](https://edps.europa.eu/data-protection/our-work/publications/opinions/big-data_en)

<sup>15</sup> EDPS blogpost “Carrying the torch in times of darkness”, 30 April 2020 available at:

[https://edps.europa.eu/press-publications/press-news/blog/carrying-torch-times-darkness\\_en](https://edps.europa.eu/press-publications/press-news/blog/carrying-torch-times-darkness_en)

<sup>16</sup> COM(2020) 842 final p. 4.

<sup>17</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

<sup>18</sup> We note that Article 1(3) of the Proposal **excludes** markets related to **electronic communications networks and electronic communications services** from its scope. A particularity of the e-Privacy Directive, however, is that two of its provisions (Article 5(3) and Article 13) have a **wider scope** of application than the other provisions, for which the scope of application is limited to the provision of publicly available electronic communications services in public communications network. As a result, the e-Privacy Directive having regard to aforesaid provisions applies to providers of electronic communication services **as well as website operators (e.g. for cookies) or other businesses** (e.g. for direct marketing). See European Data Protection Board, “*Opinion 5/2019 on the interplay between the ePrivacy Directive and the GDPR, in particular regarding the competence, tasks and powers of data protection authorities*”, adopted on 12 March 2019, in particular at paragraphs 23 and 28.

This triggers the applicability of the e-Privacy Directive also in the context of the Proposal.

<sup>19</sup> Article 2, definition (20).

<sup>20</sup> Article 2, definition (21).

<sup>21</sup> Recital (61); Article 13 of the Proposal; see the definition of ‘profiling’ in Article 4(4) GDPR.

<sup>22</sup> Recital (55); (61); Articles 5(a); 6(1)(i); 11(2) of the Proposal; see the definition of ‘consent’ in Article 4(11) GDPR.

<sup>23</sup> Article 6(1)(h) of the Proposal; see Article 20 GDPR for the right to data portability.

<sup>24</sup> See also Recital (2) of the Proposal

<sup>25</sup> In the “EDPS feedback to the Roadmap for the Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law”, the EDPS observed the following: “As experienced by Supervisory Authorities in charge of data protection including the EDPS, in most cases digital services rely on the processing of personal data relating to the users (extensive processing of personal data, providing insight on users’ preferences and behaviours) as key component -if not the most important one- of their “for free” business model.

*The Regulation (EU) 2016/679 (hence, “the GDPR”), as interpreted and enforced by Supervisory Authorities, is therefore a **key interfacing regulation** having regard to competition law and policy, and, more specifically, with reference to issues of **market power** and **market definition**. Let me point out in this regard, among others, to the principles relating to processing of personal data under Article 5 of the GDPR, to the **right to data portability** under Article 20 (aiming, among others, at addressing the issue of user’s lock-in) of the GDPR, as well as to the provisions of the GDPR relating to “**profiling**”.*

*With specific reference to the Commission Notice, we would like to highlight, as preliminary observation, that the so-called ‘**data power**’ (market power stemming from the capability of the undertaking to process vast amount and types of personal data) is relevant under both:*

*(i) **demand** substitution (for instance, once personal data from different sources are collected by and made available to the same undertaking, for instance a digital platform -either since most of user’s data are on that platform, and/or because most of the persons the user is interested in are on that platform- this makes more difficult for the user to **switch** to another provider, so-called user’s lock-in);*

*(ii) **supply** substitution (the integration of data, and of services based on these data) can make more difficult, if not possible, for competitors to **supply similar products** in the short term).*

*These considerations, linked to the processing of personal data, might feed the assessment by DG Competition of **market power** and of the possibility to **raise the price** to consumers (also the **non-monetary price**, in a freemium model) after the merger. Having regard to this last aspect, we highlight that there is growing consensus in the academia on the need to consider the ‘privacy cost’ or ‘privacy harm’ (the possible degradation of the level of protection of personal data) as degradation of service, and hence as non-monetary price.”*

<sup>26</sup> See EDPB Guidelines on Targeting of social media users, para 50: “[...] the WP29 has previously considered that it would be difficult for controllers to justify using legitimate interests as a legal basis for intrusive profiling and tracking practices for marketing or advertising purposes, for example those that involve tracking individuals across multiple websites, locations, devices, services or data-brokering.”

<sup>27</sup> Guidelines on the right to data portability, Adopted on 13 December 2016, as last Revised and adopted on 5 April 2017, available at: [https://ec.europa.eu/newsroom/article29/item-detail.cfm?item\\_id=611233](https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=611233)

See in particular at page 9, “The following categories can be qualified as “**provided by the data subject**”: - **Data actively and knowingly provided by the data subject** (for example, mailing address, user name, age, etc.) - **Observed data provided by the data subject by virtue of the use of the service or the device**. They may for example include a person’s search history, traffic data and location data. It may also include other raw data such as the heartbeat tracked by a wearable device. In contrast, inferred data and derived data are created by the data controller on the basis of the data “provided by the data subject”. For example, the outcome of an assessment regarding the health of a user or the profile created in the context of risk management and financial regulations (e.g. to assign a credit score or comply with anti-money laundering rules) cannot in themselves be considered as “provided by” the data subject.”

<sup>28</sup> Recital (61): “Ensuring an adequate level of transparency of profiling practices employed by gatekeepers facilitates contestability of core platform services, by putting external pressure on gatekeepers to prevent making deep consumer profiling the industry standard [...]”.

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<sup>29</sup> See also J. Crémer, Y.-A. de Montjoye and H. Schweitzer, “Competition Policy for the digital era”, 2019, p. 58 and following, at: <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> . See also the EDPS Opinion on the Digital Services Act.

<sup>30</sup> The European Commission should ask the European Standardisation Organisations in accordance with Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council. *OJ L 316, 14.11.2012, p. 12–33.*

<sup>31</sup> See at <https://www.digitalclearinghouse.org/>. The Digital Clearinghouse serves a forum for discussion among data protection, consumer protection, competition authorities which contributed to shifting the analysis of the interaction among the three policy areas from the more academic level to the policy-making and regulatory context. The Digital Clearinghouse was established by the EDPS in 2016 with the Opinion on coherent enforcement of fundamental rights in the age of Big Data, 23 September 2016, more info available at [https://edps.europa.eu/data-protection/our-work/subjects/big-data-digital-clearinghouse\\_en](https://edps.europa.eu/data-protection/our-work/subjects/big-data-digital-clearinghouse_en)