

DIGITAL MARKETS ACT

AFEP POSITION ON THE TRILOGUE NEGOCIATIONS

The French Association of Large Companies (AFEP) supports the Digital Markets Act (DMA). The very large platforms represent structuring economic actors in the digital single market, with business particularly dependent on the intermediary services that they offer. European competition law should be adjusted to tackle these systemic digital challenges. The traditional methods of antitrust remain relevant for other actors but do not address efficiently structural competition issues proper to these platforms. French large companies therefore support an ex-ante Regulation targeting the largest online platforms acting as gatekeepers.

Both the European Parliament and the Council positions have the double advantage of offering the Commission a **tool applicable to the most structuring platforms** and **maintaining the legal framework** known to companies operating in other economic sectors.

You will find below AFEP **key recommendations** for trialogues negotiations.

■ Scope and designation of gatekeepers

The definition of core platforms services and criteria designating gatekeepers are central for companies. The clarifications made **to ensure that its scope is strictly circumscribed to gatekeepers should be maintained**. Digital actors, including those that do not pose gatekeeping issues, should indeed have **legal clarity** on who qualifies and who could potentially fall within the scope of Article 3. AFEP therefore supports:

- Clarifications brought by both institutions on the distinction between a **business user and end-user** (Article 3), **key notions for the quantitative and cumulative thresholds**, with the complementary annexes helping with legal clarity;
- The addition by the European Parliaments of **web browsers to the list of core services**, as they show a large concentration of user data, potentially locked in the platform ecosystem, and lead to risks of bundling with the operating systems;
- The shortened delay for gatekeepers to declare themselves (Article 3.2) adopted by both the Council and Parliament.

■ Obligations

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

- a fair, transparent and non-discriminatory right of access to markets for other economic operators

- the guarantee of interoperability of services with the providers of complementary and alternatives services, ensuring multi-homing and mobility for businesses and consumers
- the ban of self-preferencing and discriminatory access.

AFEP supports the following improvements from the European Parliament, corroborated or reinforced by the Council, **to better reflect identified unfair practices**:

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

■ Exemptions and suspensions of obligations

Regarding Articles 8 and 9 and the possibility for gatekeepers to get exceptions, AFEP companies regret that no clarification was brought to the **notion of economic viability** introduced in Article 8, as it is quite broad and could lead gatekeepers to suspend their obligations when thinking they might be endangering their business model. AFEP however supports the deletion by the Council of the notion of public morality in Article 9.

■ Enforcement and investigation tools

AFEP welcomes the sole enforcement of these rules at the European level by the Commission and supports effective provisions on market investigation, supported by effective sanctions. The Commission services should be vested with **clear competencies and powers** (Articles 16 and 20) such as information gathering powers to ensure efficient oversight, necessary tools and resources to process data and investigate market practices, power to impose behavioural and structural remedies, power to impose interim measures and a dispute settlement competence.

AFEP therefore supports the Council's amendments going in that direction and clarification on the coordination with and supporting **role of national competitions authorities**, in particular in light of the ECN+ directive and of the Digital Advisory Committee introduced by Article 32.

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

Emmanuelle Flament-Mascaret - Director of Economic Law - concurrence@afep.com

Alix Fontaine - EU Policy Advisor - a.fontaine@afep.com

ANNEX: DIGITAL MARKETS ACT AFEP'S COMMENTS ON TRILOGUES NEGOCIATIONS

■ Scope and designation of gatekeepers

Commission's proposal	Council's amendment	Parliament's amendment	Comments
<p>Article 2 Definitions</p> <p>For the purposes of this Regulation, the following definitions apply: (...) (2) 'Core platform service' means any of the following:</p> <p>(a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services;</p>	<p>Article 2 Definitions</p> <p>For the purposes of this Regulation, the following definitions apply: (...) (2) 'Core platform service' means any of the following:</p> <p>(a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services;</p>	<p>Article 2 Definitions</p> <p>For the purposes of this Regulation, the following definitions apply: (...) (2) 'Core platform service' means any of the following:</p> <p>(a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services;</p>	<p>AFEP supports the Parliament's amendment to ensure that one of the most structural actors with risks of anti-competitive practices falls within the scope, web browsers should be added to the core platform system to take into account:</p> <ul style="list-style-type: none"> - their concentration of user data, potentially locked in the platform ecosystem - the risks of bundling with the operating systems.

(e) number-independent interpersonal communication services; (f) operating systems; (g) cloud computing services; (h) advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by a provider of any of the core platform services listed in points (a) to (g);	(e) number-independent interpersonal communication services; (f) operating systems; (g) cloud computing services; (h) advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by a provider of any of the core platform services listed in points (a) to (g);	(e) number-independent interpersonal communication services; (f) operating systems; (g) cloud computing services; (fa) web browsers; (10a) Web browser' means software application that enables users to access and interact with web content hosted on servers that are connected to networks such as the Internet, including standalone web browsers as well as web browsers integrated or embedded in software or similar	
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■ Obligations

Commission's proposal	Council's position	Parliament's position	Comments
<p>Article 5</p> <p>Obligations for gatekeepers</p> <p>(b) allow business users to offer the same products or services to end users through third party online intermediation services at prices or conditions that are different from those offered through the online</p>	<p>Article 5</p> <p>Obligations for gatekeepers</p> <p>(b) allow business users to offer the same products or services to end users through third party online intermediation services at prices or conditions that are different, in particular more favourable than those offered through the online</p>	<p>Article 5</p> <p>Obligations for gatekeepers</p> <p>(b) refrain from applying contractual obligations that prevent business users from offering the same products or services to end users through third party online intermediation services or through their own direct online sales channel</p>	<p>AFEP supports both the Parliament's amendment to this article. Most-favoured nation (MFN) clauses limit the price at which a supplier can offer a product through alternative sales channels. Under narrow MFN clauses, suppliers agree not to set lower prices through their own websites compared to prices</p>

intermediation services of the gatekeeper;	intermediation services of the gatekeeper;	at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper;	offered on the comparison website imposing the MFN, without specifying conditions for the sales through other rival channels. Wide MFNs, on the other hand, restrict a supplier from charging lower prices on their website, as well as through any other sales channel, including other digital comparison tools (DCT). Both narrow and wide MFN clauses should be prohibited as proposed by the European Parliament.
(c) allow business users to promote offers to end users acquired via the core platform service, and to conclude contracts with these end users regardless of whether for that purpose they use the core platform services of the gatekeeper or not,	(c)allow business users to communicate and promote offers including under different conditions to end users acquired via the core platform service or through other channels , and to conclude contracts with these end users regardless of whether for that purpose they use the core platform services of the gatekeeper or not;	(c)allow business users to communicate and promote offers including under different purchasing conditions to end users acquired via the core platform service or through other channels , and to conclude contracts with these end users or receive payments for services provided regardless of whether they use for that purpose the core platform services of the gatekeeper;	

Commission's proposal	Council's position	Parliament's position	Comments
<p>Article 5 Obligations for gatekeepers</p> <p>(e) refrain from requiring business users 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;</p>	<p>Article 5 Obligations for gatekeepers</p> <p>(e)refrain from requiring business users or end users to use, and in the case of business users, also to offer or interoperate with, an identification or payment service of the gatekeeper in the context of services offered by the business users using the core platform services of that gatekeeper;</p>	<p>Article 5 Obligations for gatekeepers</p> <p>(e) refrain from requiring business users to use, offer or interoperate with an identification service or any other ancillary service of the gatekeeper in the context of services offered by the business users using the core platform services of that gatekeeper;</p>	AFEP supports both Parliament's amendments, as the first extends the prohibition of bundling of gatekeeper's services to non-core services and the second strengthens the prohibition of product or service bundling, as practice has shown that it might lead to lock-in of users within a broader ecosystem,
<p>Article 5 Obligations for gatekeepers</p>	<p>Article 5 Obligations for gatekeepers</p>	<p>Article 5 Obligations for gatekeepers</p>	

(f) refrain from requiring business users or end users to subscribe to or register with any other core platform services identified pursuant to Article 3 or which meets the thresholds in Article 3(2)(b) as a condition to access, sign up or register to any of their core platform services identified pursuant to that Article;	(f) refrain from requiring business users or end users to subscribe to or register with any further core platform services identified pursuant to Article 3 or which meets the thresholds in Article 3(2) point (b) as a condition to access, sign up or register to any of their core platform services identified pursuant to that Article;	(f) not require business users or end users to subscribe to or register with any other core platform services as a condition for being able to use , access, sign up for or registering with any of their core platform services identified pursuant to that Article	
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Commission's proposal	Council's position	Parliament's position	Comments
<p>Article 6 Obligations for gatekeepers susceptible of being further specified</p> <p>1. In respect of each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall:</p> <p>(k) apply fair and non-discriminatory general conditions of access for business users to its software application store designated pursuant to Article 3 of this Regulation.</p>	<p>Article 6 Obligations for gatekeepers susceptible of being further specified</p> <p>1. In respect of each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall:</p> <p>(k) apply fair, reasonable and non-discriminatory general conditions of access for business users to its software application store designated pursuant to Article 3 of this Regulation.</p>	<p>Article 6 Obligations for gatekeepers susceptible of being further specified</p> <p>1. In respect of each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall:</p> <p>(k) apply transparent, fair, reasonable and non-discriminatory general conditions of access and conditions that are not less favourable than the conditions applied to its own service for business users to its core platform services designated</p>	<p>AFEP supports the Parliament's amendment, as it strengthens the obligation of no self-preference in treatments.</p>

		pursuant to Article 3 of this Regulation.	
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■ Exemptions and suspensions of obligations

Commission's proposal	Council's position	Parliament's position	Comments
<p>Article 9</p> <p>Exemption for overriding reasons of public interest</p> <p>1. The Commission may, acting on a reasoned request by a gatekeeper or on its own initiative, by decision adopted in accordance with the advisory procedure referred to in Article 32(4), exempt it, in whole or in part, from a specific obligation laid down in Articles 5 and 6 in relation to an individual core platform service identified pursuant to Article 3(7), where such exemption is justified on the grounds set out in paragraph 2 of this Article. The Commission shall adopt the exemption decision at the latest three months after receiving a complete reasoned request</p>	<p>Article 9</p> <p>Exemption <i>on grounds of public health and public security</i></p> <p>1. The Commission may, acting on a reasoned request by a gatekeeper or on its own initiative, by decision adopted in accordance with the advisory procedure referred to in Article 37a(2), exempt it, in whole or in part, from a specific obligation laid down in Articles 5 and 6 in relation to an individual core platform service identified pursuant to Article 3(7), where such exemption is justified on the grounds set out in paragraph 2 of this Article. The Commission shall adopt the exemption decision without delay and at the latest 3 months after receiving a complete reasoned request.</p>	<p>Article 9</p> <p>Exemption on <i>grounds of public morality, public health or public security</i></p> <p>1. The Commission may, acting on a reasoned request by a gatekeeper or on its own initiative, by decision adopted in accordance with the advisory procedure referred to in Article 32(4), exempt it, in whole or in part, from a specific obligation laid down in Articles 5 and 6 in relation to an individual core platform service identified pursuant to Article 3(7), where such exemption is justified on the grounds set out in paragraph 2 of this Article. The Commission shall adopt the exemption decision at the latest three months after receiving a complete reasoned request. <i>Such decision shall be accompanied by a</i></p>	<p>AFEP supports the Council's amendment as it deletes the notion of public morality as ground for exemption. This notion is particularly unclear and could lead to over and mis-interpretation issues.</p>

<p>2. An exemption pursuant to paragraph 1 may only be granted on grounds of:</p> <p>(a) public morality;</p> <p>(b) public health;</p> <p>(c) public security</p>	<p><i>1a. Where an exemption is granted pursuant to paragraph 1, the Commission shall review its exemption decision if the ground for the exemption no longer exists or at least every year. Following such a review the Commission shall either wholly or partially lift the exemption or decide that the conditions of paragraph 1 continue to be met.</i></p> <p>2. An exemption pursuant to paragraph 1 may only be granted on grounds of:</p> <p>(b) public health;</p> <p>(c) public security</p>	<p><i>reasoned statement explaining the grounds for the exemption.</i></p> <p><i>1a. Where the exemption is granted pursuant to paragraph 1, the Commission shall review its exemption decision every year. Following such a review the Commission shall either wholly or partially lift the exemption or decide that the conditions of paragraph 1 continue to be met.</i></p> <p>2. An exemption pursuant to paragraph 1 may only be granted on grounds of:</p> <p>(a) public morality;</p> <p>(b) public health;</p> <p>(c) public security</p>	
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■ Enforcement and investigation tools

Commission's proposal	Council's position	Parliament's position	Comments
<p>Article 14</p> <p>Opening of a market investigation</p>	<p>Article 14</p> <p>Opening of a market investigation</p>	<p>Article 14</p> <p>Opening of a market investigation</p> <p><i>3a. The Commission may also ask one or more competent national authorities to support its market investigation.</i></p>	<p>AFEP supports here the Council's amendments as they are clearer with the procedures and are vesting the Commission services with clear competencies and powers. The Commission should have a clear sole enforcement role, with the national competition authorities</p>

<p>Article 16 Market investigation into systematic non-compliance</p> <p>1. Where the market investigation shows that a gatekeeper has systematically infringed the obligations laid down in Articles 5 and 6 and has further strengthened or extended its gatekeeper position in relation to the characteristics under Article 3(1), the Commission may by decision adopted in accordance with the advisory procedure referred to in Article 32(4) impose on such gatekeeper any behavioural or structural remedies which are proportionate to the infringement committed and necessary to ensure compliance with this Regulation. The Commission shall conclude its investigation by adopting a decision within twelve months from the opening of the market investigation.</p>	<p>Article 16 Market investigation into systematic non-compliance</p> <p>1. <i>The Commission may conduct a market investigation for the purpose of examining whether a gatekeeper has engaged in systematic non-compliance.</i> Where the market investigation shows that a gatekeeper has systematically infringed one or several of the obligations laid down in Articles 5 or 6 and has maintained, strengthened or extended its gatekeeper position in relation to the characteristics under Article 3(1), the Commission may by decision adopted in accordance with the advisory procedure referred to in Article 37a(2) impose on such gatekeeper any behavioural or structural remedies which are proportionate to the infringement committed and necessary to ensure compliance with this Regulation. The Commission shall conclude its investigation by adopting a decision within twelve months from the opening of the market investigation.</p>	<p>Article 16 Market investigation into systematic non-compliance</p> <p>1. <i>The Commission may conduct a market investigation for the purpose of examining whether a gatekeeper has engaged in systematic non-compliance.</i> Where the market investigation shows that a gatekeeper has systematically infringed the obligations laid down in Articles 5 and 6, the Commission may impose on <i>that</i> gatekeeper <i>such</i> behavioural or structural remedies which are <i>effective</i> and necessary to ensure compliance with this Regulation. The Commission shall, <i>where appropriate, be entitled to require the remedies to be tested to optimise their effectiveness. The Commission shall</i> conclude its investigation by adopting a decision <i>as soon as possible and in any event no later than</i> twelve months from the opening of the market investigation.</p>	<p>offering only a supportive coordinated role in the investigation and information gathering.</p> <p>AFEP however supports the Parliament's amendment giving the Commission a preventive role with the possibility to restrict gatekeepers from making acquisitions (said restriction on "killer acquisitions") in case of systematic non-compliance to prevent further damage to the internal market.</p>
		<p>1a. Pursuant to paragraph 1, the Commission may for a limited period</p>	

		<i>restrict gatekeepers from making acquisitions in areas relevant to this Regulation provided that such restrictions are proportionate, and necessary in order to remedy the damage caused by repeated infringements or to prevent further damage to the contestability and fairness of the internal market</i>	
<p>Article 20 Power to carry out interviews and take statements</p> <p>The Commission may interview any natural or legal person which consents to being interviewed for the purpose of collecting information, relating to the subject-matter of an investigation, including in relation to the monitoring, implementing and enforcing of the rules laid down in this Regulation</p>	<p>Article 20 Power to carry out interviews and take statements</p> <p>1. <i>In order to carry out the duties assigned to it by this Regulation</i>, the Commission may interview any natural or legal person which consents to being interviewed for the purpose of collecting information, relating to the subject-matter of an investigation. <i>The Commission shall be entitled to record such interview by any technical means.</i></p> <p>2. <i>Where an interview pursuant to paragraph 1 is conducted on the premises of an undertaking, the Commission shall inform the competent authority of the Member State, enforcing the rules referred to in Article 1(6), in whose territory the interview takes place. If so requested</i></p>	<p>Article 20 Power to carry out interviews and take statements</p> <p>1. The Commission <i>and the national competent authorities in accordance with Article 31c</i>, may interview any natural or legal person which consents to being interviewed for the purpose of collecting information, relating to the subject-matter of an investigation, including in relation to the monitoring, implementing and enforcing of the rules laid down in this Regulation</p>	

	<p><i>by the said competent authority, its officials may assist the officials and other accompanying persons authorised by the Commission to conduct the interview.</i></p>		
	<p><i>Article 32b</i> <i>Cooperation with national courts</i></p> <p><i>1. In proceedings for the application of this Regulation, national courts may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of this Regulation.</i></p> <p><i>2. Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of this Regulation. Such copy shall be forwarded without delay after the full written judgment is notified to the parties.</i></p> <p><i>3. Where the coherent application of this Regulation so requires, the Commission, acting on its own initiative, may submit written observations to national courts. With the permission of the court in question, it may also make oral observations.</i></p>	<p><i>Article 31c</i> <i>Role of national competition authorities and other competent authorities</i></p> <p><i>1. National competition authorities as well as other competent authorities designated by the Member State shall support the Commission in monitoring compliance with and enforcement of the obligations laid down in this Regulation and report regularly to the Commission on compliance with this Regulation.</i></p> <p><i>2. National competition authorities as well as other competent authorities may, under the coordination of the Commission, provide support to a market investigation or proceedings pursuant to Article 7(2), 15, 16, 17, 19, 20, 21 by collecting information and providing expertise.</i></p> <p><i>3. National competition authorities as well as other competent authorities may collect complaints in accordance</i></p>	

	<p><i>4. For the purpose of the preparation of their observations only, the Commission may request the relevant national court to transmit or ensure the transmission to the Commission of any documents necessary for the assessment of the case.</i></p> <p><i>5. National courts shall not give a decision which runs counter to a decision adopted by the Commission under this Regulation. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated under this Regulation. To that effect, the national court may assess whether it is necessary to stay its proceedings. This is without prejudice to the ability of national courts to request a preliminary ruling under Article 267 of the TFEU.</i></p>	<p><i>with the procedure laid down in Article 24a.</i></p>	
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