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From:	General Secretariat of the Council
To:	Working Party on Competition
Subject:	Digital Market Acts: MS comments on document ST 14172/20 - Articles 1, 2, 10, 14, 17, 32 and 33

Delegations will find attached the MS comments on block IV and V on the document ST 14172/20 - Articles 1, 2, 10, 14, 17, 32 and 33.

Commission proposal - ST 14172/20	BE - SK - SI - RO - SE - FI - ES - NL - HU - CZ - LU MS drafting suggestions and comments MS comments
Proposal for a	
REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL	
on contestable and fair markets in the digital sector (Digital Markets Act)	
(Text with EEA relevance)	
THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,	
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,	
Having regard to the proposal from the European Commission,	
After transmission of the draft legislative act to the national parliaments,	
Having regard to the opinion of the European Economic and Social Committee[1],	
Having regard to the opinion of the Committee of the Regions[2],	

[1] OJ C , , p. .
[2] OJ C , , p. .

Having regard to the opinion of the European Data Protection Supervisor[3],	
Acting in accordance with the ordinary legislative procedure,	
Whereas:	
(1) Digital services in general and online platforms in particular play an increasingly important role in the economy, in particular in the internal market, by providing new business opportunities in the Union and facilitating cross-border trading.	
(2) Core platform services, at the same time, feature a number of characteristics that can be exploited by their providers. These characteristics of core platform services include among others extreme scale economies, which often result from nearly zero marginal costs to add business users or end users. Other characteristics of core platform services are very strong network effects, an ability to connect many business users with many end users through the multi-sidedness of these services, a significant degree of 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. All these characteristics combined with unfair conduct by providers of these services can have the effect of substantially undermining the contestability of the core platform services, as well as impacting the fairness of the commercial relationship between providers of such services and their business users and end users, leading to rapid and potentially far-reaching decreases in business users' and end users' choice in practice, and therefore can confer to the provider of those services the position of a so-called gatekeeper.	

[3] OJ C , , p. .

(3) A small number of large providers of core platform services have emerged with considerable economic power. Typically, they feature an ability to connect many business users with many end users through their services which, in turn, allows them to leverage their advantages, such as their access to large amounts of data, from one area of their activity to new ones. Some of these providers exercise control over whole platform ecosystems in the digital economy and are structurally extremely difficult to challenge or contest by existing or new market operators, irrespective of how innovative and efficient these may be. Contestability is particularly reduced due to the existence of very high barriers to entry or exit, including high investment costs, which cannot, or not easily, be recuperated in case of exit, and absence of (or reduced access to) some key inputs in the digital economy, such as data. As a result, the likelihood increases that the underlying markets do not function well – or will soon fail to function well.	
(4) 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.	
(5) It follows that the market processes are often incapable of ensuring fair economic outcomes with regard to core platform services. Whereas Articles 101 and 102 TFEU remain applicable to the conduct of gatekeepers, their scope is limited to certain instances of market power (e.g. dominance on specific markets) and of anti-competitive behaviour, while enforcement occurs ex post and requires an extensive investigation of often very complex facts on a case by case basis. Moreover, existing Union law does not address, or does not address effectively, the identified challenges to the well-functioning of the internal market posed by the conduct of gatekeepers, which are not necessarily dominant in competition-law terms.	

(6) Gatekeepers have a significant impact on the internal market, providing gateways for a large number of business users, to reach end users, everywhere in the Union and on different markets. The adverse impact of unfair practices on the internal market and particularly weak contestability of core platform services, including their negative societal and economic implications, have led national legislators and sectoral regulators to act. A number of national regulatory solutions have already been adopted or proposed to address unfair practices and the contestability of digital services or at least with regard to some of them. This has created a risk of divergent regulatory solutions and thereby fragmentation of the internal market, thus raising the risk of increased compliance costs due to different sets of national regulatory requirements.	
(7) Therefore, business users and end-users of core platform services provided by gatekeepers should be afforded appropriate regulatory safeguards throughout the Union against the unfair behaviour of gatekeepers in order to facilitate cross-border business within the Union and thereby improve the proper functioning of the internal market and to address existing or likely emerging fragmentation in the specific areas covered by this Regulation. Moreover, while gatekeepers tend to adopt global or at least pan-European business models and algorithmic structures, they can adopt, and in some cases have adopted, different business conditions and practices in different Member States, which is liable to create disparities between the competitive conditions for the users of core platform services provided by gatekeepers, to the detriment of integration within the internal market.	
(8) By approximating diverging national laws, obstacles to the freedom to provide and receive services, including retail services, within the internal market should be eliminated. A targeted set of harmonised mandatory rules should therefore be established at Union level to ensure contestable and fair digital markets featuring the presence of gatekeepers within the internal market.	

(9) A fragmentation of the internal market can only be effectively averted if Member States are prevented from applying national rules which are specific to the types of undertakings and services covered by this Regulation. At the same time, since this Regulation aims at complementing the enforcement of competition law, it should be specified that this Regulation is without prejudice to Articles 101 and 102 TFEU, to the corresponding national competition rules and to other national competition rules regarding unilateral behaviour that are based on an individualised assessment of market positions and behaviour, including its likely effects and the precise scope of the prohibited behaviour, and which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question. However, the application of the latter rules should not affect the obligations imposed on gatekeepers under this Regulation and their uniform and effective application in the internal market.	
(10) Articles 101 and 102 TFEU and the corresponding national competition rules concerning anticompetitive multilateral and unilateral conduct as well as merger control have as their objective the protection of undistorted competition on the market. This Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, likely or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market. This Regulation therefore aims at protecting a different legal interest from those rules and should be without prejudice to their application.	HU (Comments): **Hungary supports the clear statement that the *ex ante* regulation outlined in the draft Regulation plays a complementary role to 'traditional' competition law.**
(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) 2019/1150 of the European	

Parliament and of the Council[4], Regulation (EU) xx/xx/EU [DSA] of the European Parliament and of the Council[5], Regulation (EU) 2016/679 of the European Parliament and of the Council[6], Directive (EU) 2019/790 of the European Parliament and of the Council[7], Directive (EU) 2015/2366 of the European Parliament and of the Council[8], and Directive (EU) 2010/13 of the European Parliament and of the Council[9], as well as national rules aimed at enforcing or, as the case may be, implementing that Union legislation.	
(12) Weak contestability and unfair practices in the digital sector are more frequent and pronounced for certain digital services than for others. This is the case in particular for widespread and commonly used digital services that mostly directly intermediate between business users and end users and where features such as extreme scale economies, very strong network effects, an ability to connect many business users with many end users through the multi-sidedness of these services, lock-in effects, a lack of multi-homing or vertical integration are the most prevalent. Often, there is only one or very few large providers of those digital services.	

[4] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (OJ L 186, 11.7.2019, p. 57).

[5] Regulation (EU) …/.. of the European Parliament and of the Council – proposal on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC.

[6] 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).

[7] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/ (OJ L 130, 17.5.2019, p. 92.).

[8] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ L 337, 23.12.2015, p. 35).

[9] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ L 95, 15.4.2010, p. 1).

These providers of core platform services have emerged most frequently as gatekeepers for business users and end users with far-reaching impacts, gaining the ability to easily set commercial conditions and terms in a unilateral and detrimental manner for their business users and end users. Accordingly, it is necessary to focus only on those digital services that are most broadly used by business users and end users and where, based on current market conditions, concerns about weak contestability and unfair practices by gatekeepers are more apparent and pressing from an internal market perspective.	
(13) In particular, online intermediation services, online search engines, operating systems, online social networking, video sharing platform services, number-independent interpersonal communication services, cloud computing services and online advertising services all have the capacity to affect a large number of end users and businesses alike, which entails a risk of unfair business practices. They therefore should be included in the definition of core platform services and fall into the scope of this Regulation. Online intermediation services may also be active in the field of financial services, and they may intermediate or be used to provide such services as listed non-exhaustively in Annex II to Directive (EU) 2015/1535 of the European Parliament and of the Council[10]. In certain circumstances, the notion of end users should encompass users that are traditionally considered business users, but in a given situation do not use the core platform services to provide goods or services to other end users, such as for example businesses relying on cloud computing services for their own purposes.	
(14) A number of other ancillary services, such as identification or payment services and technical services which support the provision of payment services, may be provided by gatekeepers together with their	

[10] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241, 17.9.2015, p. 1.

core platform services. As gatekeepers frequently provide the portfolio of their services as part of an integrated ecosystem to which third-party providers of such ancillary services do not have access, at least not subject to equal conditions, and can link the access to the core platform service to take-up of one or more ancillary services, the gatekeepers are likely to have an increased ability and incentive to leverage their gatekeeper power from their core platform services to these ancillary services, to the detriment of choice and contestability of these services.	
(15) The fact that a digital service qualifies as a core platform service in light of its widespread and common use and its importance for connecting business users and end users does not as such give rise to sufficiently serious concerns of contestability and unfair practices. It is only when a core platform service constitutes an important gateway and is operated by a provider with a significant impact in the internal market and an entrenched and durable position, or by a provider that will foreseeably have such a position in the near future, that such concerns arise. Accordingly, the targeted set of harmonised rules laid down in this Regulation should apply only to undertakings designated on the basis of these three objective criteria, and they should only apply to those of their core platform services that individually constitute an important gateway for business users to reach end users.	
(16) In order to ensure the effective application of this Regulation to providers of core platform services which are most likely to satisfy these objective requirements, and where unfair conduct weakening contestability is most prevalent and impactful, the Commission should be able to directly designate as gatekeepers those providers of core platform services which meet certain quantitative thresholds. Such undertakings should in any event be subject to a fast designation process which should start upon the entry into force of this Regulation.	
(17) A very significant turnover in the Union and the provision of a core platform service in at least three Member States constitute	

compelling indications that the provider of a core platform service has a significant impact on the internal market. This is equally true where a provider of a core platform service in at least three Member States has a very significant market capitalisation or equivalent fair market value. Therefore, a provider of a core platform service should be presumed to have a significant impact on the internal market where it provides a core platform service in at least three Member States and where either its group turnover realised in the EEA is equal to or exceeds a specific, high threshold or the market capitalisation of the group is equal to or exceeds a certain high absolute value. For providers of core platform services that belong to undertakings that are not publicly listed, the equivalent fair market value above a certain high absolute value should be referred to. The Commission should use its power to adopt delegated acts to develop an objective methodology to calculate that value. A high EEA group turnover in conjunction with the threshold of users in the Union of core platform services reflects a relatively strong ability to monetise these users. A high market capitalisation relative to the same threshold number of users in the Union reflects a relatively significant potential to monetise these users in the near future. This monetisation potential in turn reflects in principle the gateway position of the undertakings concerned. Both indicators are in addition reflective of their financial capacity, including their ability to leverage their access to financial markets to reinforce their position. This may for example happen where this superior access is used to acquire other undertakings, which ability has in turn been shown to have potential negative effects on innovation. Market capitalisation can also be reflective of the expected future position and effect on the internal market of the providers concerned, notwithstanding a potentially relatively low current turnover. The market capitalisation value can be based on a level that reflects the average market capitalisation of the largest publicly listed undertakings in the Union over an appropriate period.	
(18) A sustained market capitalisation of the provider of core platform services at or above the threshold level over three or more years should	

be considered as strengthening the presumption that the provider of core platform services has a significant impact on the internal market.	
(19) There may be a number of factors concerning market capitalisation that would require an in-depth assessment in determining whether a provider of core platform services should be deemed to have a significant impact on the internal market. This may be the case where the market capitalisation of the provider of core platform services in preceding financial years was significantly lower than the average of the equity market, the volatility of its market capitalisation over the observed period was disproportionate to overall equity market volatility or its market capitalisation trajectory relative to market trends was inconsistent with a rapid and unidirectional growth.	
(20) A very high number of business users that depend on a core platform service to reach a very high number of monthly active end users allow the provider of that service to influence the operations of a substantial part of business users to its advantage and indicate in principle that the provider serves as an important gateway. The respective relevant levels for those numbers should be set representing a substantive percentage of the entire population of the Union when it comes to end users and of the entire population of businesses using platforms to determine the threshold for business users.	
(21) An entrenched and durable position in its operations or the foreseeability of achieving such a position future occurs notably where the contestability of the position of the provider of the core platform service is limited. This is likely to be the case where that provider has provided a core platform service in at least three Member States to a very high number of business users and end users during at least three years.	
(22) Such thresholds can be impacted by market and technical developments. The Commission should therefore be empowered to adopt delegated acts to specify the methodology for determining whether the	

quantitative thresholds are met, and to regularly adjust it to market and technological developments where necessary. This is particularly relevant in relation to the threshold referring to market capitalisation, which should be indexed in appropriate intervals.	
(23) Providers of core platform services which meet the quantitative thresholds but are able to present sufficiently substantiated arguments to demonstrate that, in the circumstances in which the relevant core platform service operates, they do not fulfil the objective requirements for a gatekeeper, should not be designated directly, but only subject to a further investigation. The burden of adducing evidence that the presumption deriving from the fulfilment of quantitative thresholds should not apply to a specific provider should be borne by that provider In its assessment, the Commission should take into account only the elements which directly relate to the requirements for constituting a gatekeeper, namely whether it is an important gateway which is operated by a provider with a significant impact in the internal market with an entrenched and durable position, either actual or foreseeable. Any justification on economic grounds seeking to demonstrate efficiencies deriving from a specific type of behaviour by the provider of core platform services should be discarded, as it is not relevant to the designation as a gatekeeper. The Commission should be able to take a decision by relying on the quantitative thresholds where the provider significantly obstructs the investigation by failing to comply with the investigative measures taken by the Commission.	
(24) Provision should also be made for the assessment of the gatekeeper role of providers of core platform services which do not satisfy all of the quantitative thresholds, in light of the overall objective requirements that they have a significant impact on the internal market, act as an important gateway for business users to reach end users and benefit from a durable and entrenched position in their operations or it is foreseeable that it will do so in the near future.	

(25) Such an assessment can only be done in light of a market investigation, while taking into account the quantitative thresholds. In its assessment the Commission should pursue the objectives of preserving and fostering the level of innovation, the quality of digital products and services, the degree to which prices are fair and competitive, and the degree to which quality or choice for business users and for end users is or remains high. Elements that are specific to the providers of core platform services concerned, such as extreme scale economies, very strong network effects, an ability to connect many business users with many end users through the multi-sidedness of these services, lock-in effects, a lack of multi-homing or vertical integration, can be taken into account. In addition, a very high market capitalisation, a very high ratio of equity value over profit or a very high turnover derived from end users of a single core platform service can point to the tipping of the market or leveraging potential of such providers. Together with market capitalisation, high growth rates, or decelerating growth rates read together with profitability growth, are examples of dynamic parameters that are particularly relevant to identifying such providers of core platform services that are foreseen to become entrenched. The Commission should be able to take a decision by drawing adverse inferences from facts available where the provider significantly obstructs the investigation by failing to comply with the investigative measures taken by the Commission.	
(26) A particular subset of rules should apply to those providers of core platform services that are foreseen to enjoy an entrenched and durable position in the near future. The same specific features of core platform services make them prone to tipping: once a service provider has obtained a certain advantage over rivals or potential challengers in terms of scale or intermediation power, its position may become unassailable and the situation may evolve to the point that it is likely to become durable and entrenched in the near future. Undertakings can try to induce this tipping and emerge as gatekeeper by using some of the unfair conditions and practices regulated in this Regulation. In such a	

situation, it appears appropriate to intervene before the market tips irreversibly.	
(27) However, such an early intervention should be limited to imposing only those obligations that are necessary and appropriate to ensure that the services in question remain contestable and allow to avoid the qualified risk of unfair conditions and practices. Obligations that prevent the provider of core platform services concerned from achieving an entrenched and durable position in its operations, such as those preventing unfair leveraging, and those that facilitate switching and multi-homing are more directly geared towards this purpose. To ensure proportionality, the Commission should moreover apply from that subset of obligations only those that are necessary and proportionate to achieve the objectives of this Regulation and should regularly review whether such obligations should be maintained, suppressed or adapted.	
(28) This should allow the Commission to intervene in time and effectively, while fully respecting the proportionality of the considered measures. It should also reassure actual or potential market participants about the fairness and contestability of the services concerned.	
(29) Designated gatekeepers should comply with the obligations laid down in this Regulation in respect of each of the core platform services listed in the relevant designation decision. The mandatory rules should apply taking into account the conglomerate position of gatekeepers, where applicable. Furthermore, implementing measures that the Commission may by decision impose on the gatekeeper following a regulatory dialogue should be designed in an effective manner, having regard to the features of core platform services as well as possible circumvention risks and in compliance with the principle of proportionality and the fundamental rights of the undertakings concerned as well as those of third parties.	

(30) The very rapidly changing and complex technological nature of core platform services requires a regular review of the status of gatekeepers, including those that are foreseen to enjoy a durable and entrenched position in their operations in the near future. To provide all of the market participants, including the gatekeepers, with the required certainty as to the applicable legal obligations, a time limit for such regular reviews is necessary. It is also important to conduct such reviews on a regular basis and at least every two years.	
(31) To ensure the effectiveness of the review of gatekeeper status as well as the possibility to adjust the list of core platform services provided by a gatekeeper, the gatekeepers should inform the Commission of all of their intended and concluded acquisitions of other providers of core platform services or any other services provided within the digital sector. Such information should not only serve the review process mentioned above, regarding the status of individual gatekeepers, but will also provide information that is crucial to monitoring broader contestability trends in the digital sector and can therefore be a useful factor for consideration in the context of the market investigations foreseen by this Regulation.	
(32) To safeguard the fairness and contestability of core platform services provided by gatekeepers, it is necessary to provide in a clear and unambiguous manner for a set of harmonised obligations with regard to those services. Such rules are needed to address the risk of harmful effects of unfair practices imposed by gatekeepers, to the benefit of the business environment in the services concerned, to the benefit of users and ultimately to the benefit of society as a whole. Given the fast-moving and dynamic nature of digital markets, and the substantial economic power of gatekeepers, it is important that these obligations are effectively applied without being circumvented. To that end, the obligations in question should apply to any practices by a gatekeeper, irrespective of its form and irrespective of whether it is of a contractual, commercial, technical or any other nature, insofar as a practice corresponds to the	

type of practice that is the subject of one of the obligations of this Regulation.	
(33) The obligations laid down in this Regulation are limited to what is necessary and justified to address the unfairness of the identified practices by gatekeepers and to ensure contestability in relation to core platform services provided by gatekeepers. Therefore, the obligations should correspond to those practices that are considered unfair by taking into account the features of the digital sector and where experience gained, for example in the enforcement of the EU competition rules, shows that they have a particularly negative direct impact on the business users and end users. In addition, it is necessary to provide for the possibility of a regulatory dialogue with gatekeepers to tailor those obligations that are likely to require specific implementing measures in order to ensure their effectiveness and proportionality. The obligations should only be updated after a thorough investigation on the nature and impact of specific practices that may be newly identified, following an in-depth investigation, as unfair or limiting contestability in the same manner as the unfair practices laid down in this Regulation while potentially escaping the scope of the current set of obligations.	
(34) The combination of these different mechanisms for imposing and adapting obligations should ensure that the obligations do not extend beyond observed unfair practices, while at the same time ensuring that new or evolving practices can be the subject of intervention where necessary and justified.	
(35) The obligations laid down in this Regulation are necessary to address identified public policy concerns, there being no alternative and less restrictive measures that would effectively achieve the same result, having regard to need to safeguard public order, protect privacy and fight fraudulent and deceptive commercial practices.	

(36) 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.	
(37) Because of their position, gatekeepers might in certain cases restrict the ability of business users of their online intermediation services to offer their goods or services to end users under more favourable conditions, including price, through other online intermediation services. Such restrictions have a significant deterrent effect on the business users of gatekeepers in terms of their use of alternative online intermediation services, limiting inter-platform contestability, which in turn limits choice of alternative online intermediation channels for end users. To ensure that business users of online intermediation services of gatekeepers can freely choose alternative online intermediation services and differentiate the conditions under which they offer their products or services to their end users, it should not be accepted that gatekeepers limit business users from choosing to differentiate commercial conditions, including price. Such a restriction should apply to any measure with equivalent effect, such as for example increased commission rates or de-listing of the offers of business users.	
(38) To prevent further reinforcing their dependence on the core platform services of gatekeepers, the business users of these gatekeepers should be free in promoting and choosing the distribution channel they consider most appropriate to interact with any end users that these business users have already acquired through core platform services	

provided by the gatekeeper. Conversely, end users should also be free to choose offers of such business users and to enter into contracts with them either through core platform services of the gatekeeper, if applicable, or from a direct distribution channel of the business user or another indirect distribution channel such business user may use. This should apply to the promotion of offers and conclusion of contracts between business users and end users. Moreover, the ability of end users to freely acquire content, subscriptions, features or other items outside the core platform services of the gatekeeper should not be undermined or restricted. In particular, it should be avoided that gatekeepers restrict end users from access to and use of such services via a software application running on their core platform service. For example, subscribers to online content purchased outside a software application download or purchased from a software application store should not be prevented from accessing such online content on a software application on the gatekeeper's core platform service simply because it was purchased outside such software application or software application store.	
(39) To safeguard a fair commercial environment and protect the contestability of the digital sector it is important to safeguard the right of business users to raise concerns about unfair behaviour by gatekeepers with any relevant administrative or other public authorities. For example, business users may want to complain about different types of unfair practices, such as discriminatory access conditions, unjustified closing of business user accounts or unclear grounds for product de-listings. Any practice that would in any way inhibit such a possibility of raising concerns or seeking available redress, for instance by means of confidentiality clauses in agreements or other written terms, should therefore be prohibited. This should be without prejudice to the right of business users and gatekeepers to lay down in their agreements the terms of use including the use of lawful complaints-handling mechanisms, including any use of alternative dispute resolution mechanisms or of the jurisdiction of specific courts in compliance with respective Union and	

national law This should therefore also be without prejudice to the role gatekeepers play in the fight against illegal content online.	
(40) Identification services are crucial for business users to conduct their business, as these can allow them not only to optimise services, to the extent allowed under Regulation (EU) 2016/679 and Directive 2002/58/EC of the European Parliament and of the Council[11], but also to inject trust in online transactions, in compliance with Union or national law. Gatekeepers should therefore not use their position as provider of core platform services to require their dependent business users to include any identification services provided by the gatekeeper itself as part of the provision of services or products by these business users to their end users, where other identification services are available to such business users.	
(41) Gatekeepers should not restrict the free choice of end users by technically preventing switching between or subscription to different software applications and services. Gatekeepers should therefore ensure a free choice irrespective of whether they are the manufacturer of any hardware by means of which such software applications or services are accessed and should not raise artificial technical barriers so as to make switching impossible or ineffective. The mere offering of a given product or service to end users, including by means of pre-installation, as well the improvement of end user offering, such as better prices or increased quality, would not in itself constitute a barrier to switching.	
(42) The conditions under which gatekeepers provide online advertising services to business users including both advertisers and publishers are often non-transparent and opaque. This opacity is partly linked to the practices of a few platforms, but is also due to the sheer	

[11] 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) (OJ L 201, 31.7.2002, p. 37).

complexity of modern day programmatic advertising. The sector is considered to have become more non-transparent after the introduction of new privacy legislation, and is expected to become even more opaque with the announced removal of third-party cookies. This often leads to a lack of information and knowledge for advertisers and publishers about the conditions of the advertising services they purchased and undermines their ability to switch to alternative providers of online advertising services. Furthermore, the costs of online advertising are likely to be higher than they would be in a fairer, more transparent and contestable platform environment. These higher costs are likely to be reflected in the prices that end users pay for many daily products and services relying on the use of online advertising. Transparency obligations should therefore require gatekeepers to provide advertisers and publishers to whom they supply online advertising services, when requested and to the extent possible, with information that allows both sides to understand the price paid for each of the different advertising services provided as part of the relevant advertising value chain.	
(43) A gatekeeper may in certain circumstances have a dual role as a provider of core platform services whereby it provides a core platform service to its business users, while also competing with those same business users in the provision of the same or similar services or products to the same end users. In these circumstances, a gatekeeper may take advantage of its dual role to use data, generated from transactions by its business users on the core platform, for the purpose of its own services that offer similar services to that of its business users. This may be the case, for instance, where a gatekeeper provides an online marketplace or app store to business users, and at the same time offer services as an online retailer or provider of application software against those business users. To prevent gatekeepers from unfairly benefitting from their dual role, it should be ensured that they refrain from using any aggregated or non-aggregated data, which may include anonymised and personal data that is not publicly available to offer similar services to those of their business users. 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.	
(44) Business users may also purchase advertising services from a provider of core platform services for the purpose of providing goods and services to end users. In this case, it may occur that the data are not generated on the core platform service, but are provided to the core platform service by the business user or are generated based on its operations through the core platform service concerned. In certain instances, that core platform service providing advertising may have a dual role, as intermediary and as provider of advertising services. Accordingly, the obligation prohibiting a dual role gatekeeper from using data of business users should apply also with respect to the data that a core platform service has received from businesses for the purpose of providing advertising services related to that core platform service.	
(45) In relation to cloud computing services, this obligation should extend to data provided or generated by business users of the gatekeeper in the context of their use of the cloud computing service of the gatekeeper, or through its software application store that allows end users of cloud computing services access to software applications. This obligation should not affect the right of gatekeepers to use aggregated data for providing ancillary data analytics services, subject to compliance with Regulation 2016/679 and Directive 2002/58/EC as well as with the relevant obligations in this Regulation concerning ancillary services.	
(46) A gatekeeper may use different means to favour its own services or products on its core platform service, to the detriment of the same or similar services that end users could obtain through third parties. This may for instance be the case where certain software applications or services are pre-installed by a gatekeeper. To enable end user choice, gatekeepers should not prevent end users from un-installing any pre-installed software applications on its core platform service and thereby favour their own software applications.	

(47) The rules that the gatekeepers set for the distribution of software applications may in certain circumstances restrict the ability of end users to install and effectively use third party software applications or software application stores on operating systems or hardware of the relevant gatekeeper and restrict the ability of end users to access these software applications or software application stores outside the core platform services of that gatekeeper. Such restrictions may limit the ability of developers of software applications to use alternative distribution channels and the ability of end users to choose between different software applications from different distribution channels and should be prohibited as unfair and liable to weaken the contestability of core platform services. In order to ensure that third party software applications or software application stores do not endanger the integrity of the hardware or operating system provided by the gatekeeper the gatekeeper concerned may implement proportionate technical or contractual measures to achieve that goal if the gatekeeper demonstrates that such measures are necessary and justified and that there are no less restrictive means to safeguard the integrity of the hardware or operating system.	
(48) Gatekeepers are often vertically integrated and offer certain products or services to end users through their own core platform services, or through a business user over which they exercise control which frequently leads to conflicts of interest. This can include the situation whereby a gatekeeper offers its own online intermediation services through an online search engine. When offering those products or services on the core platform service, gatekeepers can reserve a better position to their own offering, in terms of ranking, as opposed to the products of third parties also operating on that core platform service. This can occur for instance with products or services, including other core platform services, which are ranked in the results communicated by online search engines, or which are partly or entirely embedded in online search engines results, groups of results specialised in a certain topic,	

displayed along with the results of an online search engine, which are considered or used by certain end users as a service distinct or additional to the online search engine. Other instances are those of software applications which are distributed through software application stores, or products or services that are given prominence and display in the newsfeed of a social network, or products or services ranked in search results or displayed on an online marketplace. In those circumstances, the gatekeeper is in a dual-role position as intermediary for third party providers and as direct provider of products or services of the gatekeeper. Consequently, these gatekeepers have the ability to undermine directly the contestability for those products or services on these core platform services, to the detriment of business users which are not controlled by the gatekeeper.	
(49) In such situations, the gatekeeper should not engage in any form of differentiated or preferential treatment in ranking on the core platform service, whether through legal, commercial or technical means, in favour of products or services it offers itself or through a business user which it controls. To ensure that this obligation is effective, it should also be ensured that the conditions that apply to such ranking are also generally fair. Ranking should in this context cover all forms of relative prominence, including display, rating, linking or voice results. To ensure that this obligation is effective and cannot be circumvented it should also apply to any measure that may have an equivalent effect to the differentiated or preferential treatment in ranking. The guidelines adopted pursuant to Article 5 of Regulation (EU) 2019/1150 should also facilitate the implementation and enforcement of this obligation.[12]	
(50) Gatekeepers should not restrict or prevent the free choice of end users by technically preventing switching between or subscription to different software applications and services. This would allow more	

[12] Commission Notice: Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council (OJ C 424, 8.12.2020, p. 1).

providers to offer their services, thereby ultimately providing greater choice to the end user. Gatekeepers should ensure a free choice irrespective of whether they are the manufacturer of any hardware by means of which such software applications or services are accessed and shall not raise artificial technical barriers so as to make switching impossible or ineffective. The mere offering of a given product or service to consumers, including by means of pre-installation, as well as the improvement of the offering to end users, such as price reductions or increased quality, should not be construed as constituting a prohibited barrier to switching.	
(51) Gatekeepers can hamper the ability of end users to access online content and services including software applications. Therefore, rules should be established to ensure that the rights of end users to access an open internet are not compromised by the conduct of gatekeepers. Gatekeepers can also technically limit the ability of end users to effectively switch between different Internet access service providers, in particular through their control over operating systems or hardware. This distorts the level playing field for Internet access services and ultimately harms end users. It should therefore be ensured that gatekeepers do not unduly restrict end users in choosing their Internet access service provider.	
(52) Gatekeepers may also have a dual role as developers of operating systems and device manufacturers, including any technical functionality that such a device may have. For example, a gatekeeper that is a manufacturer of a device may restrict access to some of the functionalities in this device, such as near-field-communication technology and the software used to operate that technology, which may be required for the effective provision of an ancillary service by the gatekeeper as well as by any potential third party provider of such an ancillary service. Such access may equally be required by software applications related to the relevant ancillary services in order to effectively provide similar functionalities as those offered by	

gatekeepers. If such a dual role is used in a manner that prevents alternative providers of ancillary services or of software applications to have access under equal conditions to the same operating system, hardware or software features that are available or used in the provision by the gatekeeper of any ancillary services, this could significantly undermine innovation by providers of such ancillary services as well as choice for end users of such ancillary services. The gatekeepers should therefore be obliged to ensure access under equal conditions to, and interoperability with, the same operating system, hardware or software features that are available or used in the provision of any ancillary services by the gatekeeper.	
(53) The conditions under which gatekeepers provide online advertising services to business users including both advertisers and publishers are often non-transparent and opaque. This often leads to a lack of information for advertisers and publishers about the effect of a given ad. To further enhance fairness, transparency and contestability of online advertising services designated under this Regulation as well as those that are fully integrated with other core platform services of the same provider, the designated gatekeepers should therefore provide advertisers and publishers, when requested, with free of charge access to the performance measuring tools of the gatekeeper and the information necessary for advertisers, advertising agencies acting on behalf of a company placing advertising, as well as for publishers to carry out their own independent verification of the provision of the relevant online advertising services.	
(54) Gatekeepers benefit from access to vast amounts of data that they collect while providing the core platform services as well as other digital services. To ensure that gatekeepers do not undermine the contestability of core platform services as well as the innovation potential of the dynamic digital sector by restricting the ability of business users to effectively port their data, business users and end users should be granted effective and immediate access to the data they provided or generated in	

the context of their use of the relevant core platform services of the gatekeeper, in a structured, commonly used and machine-readable format. This should apply also to any other data at different levels of aggregation that may be necessary to effectively enable such portability. It should also be ensured that business users and end users can port that data in real time effectively, such as for example through high quality application programming interfaces. Facilitating switching or multi-homing should lead, in turn, to an increased choice for business users and end users and an incentive for gatekeepers and business users to innovate.	
(55) Business users that use large core platform services provided by gatekeepers and end users of such business users provide and generate a vast amount of data, including data inferred from such use. In order to ensure that business users have access to the relevant data thus generated, the gatekeeper should, upon their request, allow unhindered access, free of charge, to such data. Such access should also be given to third parties contracted by the business user, who are acting as processors of this data for the business user. Data provided or generated by the same business users and the same end users of these business users in the context of other services provided by the same gatekeeper may be concerned where this is inextricably linked to the relevant request. To this end, a gatekeeper should not use any contractual or other restrictions to prevent business users from accessing relevant data and should enable business users to obtain consent of their end users for such data access and retrieval, where such consent is required under Regulation (EU) 2016/679 and Directive 2002/58/EC. Gatekeepers should also facilitate access to these data in real time by means of appropriate technical measures, such as for example putting in place high quality application programming interfaces.	
(56) The value of online search engines to their respective business users and end users increases as the total number of such users increases. Providers of online search engines collect and store aggregated datasets	

containing information about what users searched for, and how they interacted with, the results that they were served. Providers of online search engine services collect these data from searches undertaken on their own online search engine service and, where applicable, searches undertaken on the platforms of their downstream commercial partners. Access by gatekeepers to such ranking, query, click and view data constitutes an important barrier to entry and expansion, which undermines the contestability of online search engine services. Gatekeepers should therefore be obliged to provide access, on fair, reasonable and non-discriminatory terms, to these ranking, query, click and view data in relation to free and paid search generated by consumers on online search engine services to other providers of such services, so that these third-party providers can optimise their services and contest the relevant core platform services. Such access should also be given to third parties contracted by a search engine provider, who are acting as processors of this data for that search engine. When providing access to its search data, a gatekeeper should ensure the protection of the personal data of end users by appropriate means, without substantially degrading the quality or usefulness of the data.	
(57) In particular gatekeepers which provide access to software application stores serve as an important gateway for business users that seek to reach end users. In view of the imbalance in bargaining power between those gatekeepers and business users of their software application stores, those gatekeepers should not be allowed to impose general conditions, including pricing conditions, that would be unfair or lead to unjustified differentiation. Pricing or other general access conditions should be considered unfair if they lead to an imbalance of rights and obligations imposed on business users or confer an advantage on the gatekeeper which is disproportionate to the service provided by the gatekeeper to business users or lead to a disadvantage for business users in providing the same or similar services as the gatekeeper. The following benchmarks can serve as a yardstick to determine the fairness of general access conditions: prices charged or conditions imposed for	

the same or similar services by other providers of software application stores; prices charged or conditions imposed by the provider of the software application store for different related or similar services or to different types of end users; prices charged or conditions imposed by the provider of the software application store for the same service in different geographic regions; prices charged or conditions imposed by the provider of the software application store for the same service the gatekeeper offers to itself. This obligation should not establish an access right and it should be without prejudice to the ability of providers of software application stores to take the required responsibility in the fight against illegal and unwanted content as set out in Regulation [Digital Services Act].	
(58) To ensure the effectiveness of the obligations laid down by this Regulation, while also making certain that these obligations are limited to what is necessary to ensure contestability and tackling the harmful effects of the unfair behaviour by gatekeepers, it is important to clearly define and circumscribe them so as to allow the gatekeeper to immediately comply with them, in full respect of Regulation (EU) 2016/679 and Directive 2002/58/EC, consumer protection, cyber security and product safety. The gatekeepers should ensure the compliance with this Regulation by design. The necessary measures should therefore be as much as possible and where relevant integrated into the technological design used by the gatekeepers. However, it may in certain cases be appropriate for the Commission, following a dialogue with the gatekeeper concerned, to further specify some of the measures that the gatekeeper concerned should adopt in order to effectively comply with those obligations that are susceptible of being further specified. This possibility of a regulatory dialogue should facilitate compliance by gatekeepers and expedite the correct implementation of the Regulation.	
(59) As an additional element to ensure proportionality, gatekeepers should be given an opportunity to request the suspension, to the extent necessary, of a specific obligation in exceptional circumstances that lie	

beyond the control of the gatekeeper, such as for example an unforeseen external shock that has temporarily eliminated a significant part of end user demand for the relevant core platform service, where compliance with a specific obligation is shown by the gatekeeper to endanger the economic viability of the Union operations of the gatekeeper concerned.	
(60) In exceptional circumstances justified on the limited grounds of public morality, public health or public security, the Commission should be able to decide that the obligation concerned does not apply to a specific core platform service. Affecting these public interests can indicate that the cost to society as a whole of enforcing a certain obligation would in a certain exceptional case be too high and thus disproportionate. The regulatory dialogue to facilitate compliance with limited suspension and exemption possibilities should ensure the proportionality of the obligations in this Regulation without undermining the intended ex ante effects on fairness and contestability.	
(61) The 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. 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, given that potential entrants or start-up providers cannot access data to the same extent and depth, and at a similar scale. Enhanced transparency should allow other providers of core platform services to differentiate themselves better through the use of superior privacy guaranteeing facilities. To ensure a minimum level of effectiveness of this transparency obligation, gatekeepers should at least provide a description of the basis upon which profiling is performed, including whether personal data and data derived from user activity is relied on, the processing applied, the purpose for which the profile is prepared and eventually used, the impact of such profiling on the gatekeeper's services, and the steps taken to enable end	

users to be aware of the relevant use of such profiling, as well as to seek their consent.	
(62) In order to ensure the full and lasting achievement of the objectives of this Regulation, the Commission should be able to assess whether a provider of core platform services should be designated as a gatekeeper without meeting the quantitative thresholds laid down in this Regulation; whether systematic non-compliance by a gatekeeper warrants imposing additional remedies; and whether the list of obligations addressing unfair practices by gatekeepers should be reviewed and additional practices that are similarly unfair and limiting the contestability of digital markets should be identified. Such assessment should be based on market investigations to be run in an appropriate timeframe, by using clear procedures and deadlines, in order to support the ex ante effect of this Regulation on contestability and fairness in the digital sector, and to provide the requisite degree of legal certainty.	
(63) Following a market investigation, an undertaking providing a core platform service could be found to fulfil all of the overarching qualitative criteria for being identified as a gatekeeper. It should then, in principle, comply with all of the relevant obligations laid down by this Regulation. However, for gatekeepers that have been designated by the Commission as likely to enjoy an entrenched and durable position in the near future, the Commission should only impose those obligations that are necessary and appropriate to prevent that the gatekeeper concerned achieves an entrenched and durable position in its operations. With respect to such emerging gatekeepers, the Commission should take into account that this status is in principle of a temporary nature, and it should therefore be decided at a given moment whether such a provider of core platform services should be subjected to the full set of gatekeeper obligations because it has acquired an entrenched and durable position, or conditions for designation are ultimately not met and therefore all previously imposed obligations should be waived.	

(64) The Commission should investigate and assess whether additional behavioural, or, where appropriate, structural remedies are justified, in order to ensure that the gatekeeper cannot frustrate the objectives of this Regulation by systematic non-compliance with one or several of the obligations laid down in this Regulation, which has further strengthened its gatekeeper position. This would be the case if the gatekeeper's size in the internal market has further increased, economic dependency of business users and end users on the gatekeeper's core platform services has further strengthened as their number has further increased and the gatekeeper benefits from increased entrenchment of its position. The Commission should therefore in such cases have the power to impose any remedy, whether behavioural or structural, having due regard to the principle of proportionality. Structural remedies, such as legal, functional or structural separation, including the divestiture of a business, or parts of it, should only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. Changes to the structure of an undertaking as it existed before the systematic non-compliance was established would only be proportionate where there is a substantial risk that this systematic non-compliance results from the very structure of the undertaking concerned.	
(65) The services and practices in core platform services and markets in which these intervene can change quickly and to a significant extent. To ensure that this Regulation remains up to date and constitutes an effective and holistic regulatory response to the problems posed by gatekeepers, it is important to provide for a regular review of the lists of core platform services as well as of the obligations provided for in this Regulation. This is particularly important to ensure that behaviour that may limit the contestability of core platform services or is unfair is identified. While it is important to conduct a review on a regular basis, given the dynamically changing nature of the digital sector, in order to	

ensure legal certainty as to the regulatory conditions, any reviews should be conducted within a reasonable and appropriate time-frame. Market investigations should also ensure that the Commission has a solid evidentiary basis on which it can assess whether it should propose to amend this Regulation in order to expand, or further detail, the lists of core platform services. They should equally ensure that the Commission has a solid evidentiary basis on which it can assess whether it should propose to amend the obligations laid down in this Regulation or whether it should adopt a delegated act updating such obligations.	
(66) In the event that gatekeepers engage in behaviour that is unfair or that limits the contestability of the core platform services that are already designated under this Regulation but without these behaviours being explicitly covered by the obligations, the Commission should be able to update this Regulation through delegated acts. Such updates by way of delegated act should be subject to the same investigatory standard and therefore following a market investigation. The Commission should also apply a predefined standard in identifying such behaviours. This legal standard should ensure that the type of obligations that gatekeepers may at any time face under this Regulation are sufficiently predictable.	SK (Comments): *We would welcome if the 'updates' in this Recital would be elaborated more to make sure what exactly it means, what is the scope of these updates.* *What procedure will apply to predefine the standards mentioned in the Recital?* SE (Drafting): Such updates by way of delegated act should be subject to the same investigatory standard that preceded this regulation and therefore following a market investigation.
(67) Where, in the course of a proceeding into non-compliance or an investigation into systemic non-compliance, a gatekeeper offers commitments to the Commission, the latter should be able to adopt a decision making these commitments binding on the gatekeeper concerned, where it finds that the commitments ensure effective compliance with the obligations of this Regulation. This decision should also find that there are no longer grounds for action by the Commission.	

(68) In order to ensure effective implementation and compliance with this Regulation, the Commission should have strong investigative and enforcement powers, to allow it to investigate, enforce and monitor the rules laid down in this Regulation, while at the same time ensuring the respect for the fundamental right to be heard and to have access to the file in the context of the enforcement proceedings. The Commission should dispose of these investigative powers also for the purpose of carrying out market investigations for the purpose of updating and reviewing this Regulation.	
(69) The Commission should be empowered to request information necessary for the purpose of this Regulation, throughout the Union. In particular, the Commission should have access to any relevant documents, data, database, algorithm and information necessary to open and conduct investigations and to monitor the compliance with the obligations laid down in this Regulation, irrespective of who possesses the documents, data or information in question, and regardless of their form or format, their storage medium, or the place where they are stored.	
(70) The Commission should be able to directly request that undertakings or association of undertakings provide any relevant evidence, data and information. In addition, the Commission should be able to request any relevant information from any public authority, body or agency within the Member State, or from any natural person or legal person for the purpose of this Regulation. When complying with a decision of the Commission, undertakings are obliged to answer factual questions and to provide documents.	
(71) The Commission should also be empowered to undertake onsite inspections and to interview any persons who may be in possession of useful information and to record the statements made.	

(72) The Commission should be able to take the necessary actions to monitor the effective implementation and compliance with the obligations laid down in this Regulation. Such actions should include the ability of the Commission to appoint independent external experts, such as and auditors to assist the Commission in this process, including where applicable from competent independent authorities, such as data or consumer protection authorities.	
(73) Compliance with the obligations imposed under this Regulation should be enforceable by means of fines and periodic penalty payments. To that end, appropriate levels of fines and periodic penalty payments should also be laid down for non-compliance with the obligations and breach of the procedural rules subject to appropriate limitation periods. The Court of Justice should have unlimited jurisdiction in respect of fines and penalty payments.	
(74) In order to ensure effective recovery of fines imposed on associations of undertakings for infringements that they have committed, it is necessary to lay down the conditions on which the Commission may require payment of the fine from the members of the association where the association is not solvent.	
(75) In the context of proceedings carried out under this Regulation, the undertakings concerned should be accorded the right to be heard by the Commission and the decisions taken should be widely publicised. While ensuring the rights to good administration and the rights of defence of the undertakings concerned, in particular, the right of access to the file and the right to be heard, it is essential that confidential information be protected. Furthermore, while respecting the confidentiality of the information, the Commission should ensure that any information relied on for the purpose of the decision is disclosed to an extent that allows the addressee of the decision to understand the facts and considerations that led up to the decision. Finally, under certain conditions certain business records, such as communication between	

lawyers and their clients, may be considered confidential if the relevant conditions are met.	
(76) In order to ensure uniform conditions for the implementation of Articles 3, 6, 12, 13, 15, 16, 17, 20, 22, 23, 25 and 30*,* implementing powers should be conferred on the Commission. Those powers should be *exercised* in accordance with Regulation (EU) No 182//2011 of the European Parliament and of the Council[13].	
(77) The advisory committee established in accordance with Regulation (EU) No 182//2011 should also deliver opinions on certain individual decisions of the Commission issued under this Regulation. In order to ensure contestable and fair markets in the digital sector across the Union where gatekeepers are present, the power to adopt acts in accordance with Article 290 of the Treaty should be delegated to the Commission to supplement this Regulation. In particular, delegated acts should be adopted in respect of the methodology for determining the quantitative thresholds for designation of gatekeepers under this Regulation and in respect of the update of the obligations laid down in this Regulation where, based on a market investigation the Commission has identified the need for updating the obligations addressing practices that limit the contestability of core platform services or are unfair. It is of particular importance that the Commission carries out appropriate consultations and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016[14]. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to	

[13] Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, (OJ L 55, 28.2.2011, p. 13).

[14] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (OJ L 123, 12.5.2016, p.1).

meetings of Commission expert groups dealing with the preparation of delegated acts.	
(78) The Commission should periodically evaluate this Regulation and closely monitor its effects on the contestability and fairness of commercial relationships in the online platform economy, in particular with a view to determining the need for amendments in light of relevant technological or commercial developments. This evaluation should include the regular review of the list of core platform services and the obligations addressed to gatekeepers as well as enforcement of these, in view of ensuring that digital markets across the Union are contestable and fair. In order to obtain a broad view of developments in the sector, the evaluation should take into account the experiences of Member States and relevant stakeholders. The Commission may in this regard also consider the opinions and reports presented to it by the Observatory on the Online Platform Economy that was first established by Commission Decision C(2018)2393 of 26 April 2018. Following the evaluation, the Commission should take appropriate measures. The Commission should to maintain a high level of protection and respect for the common EU rights and values, particularly equality and non-discrimination, as an objective when conducting the assessments and reviews of the practices and obligations provided in this Regulation.	
(79) The objective of this Regulation is to ensure a contestable and fair digital sector in general and core platform services in particular, with a view to promoting innovation, high quality of digital products and services, fair and competitive prices, as well as a high quality and choice for end users in the digital sector. This cannot be sufficiently achieved by the Member States, but can only, by reason of the business model and operations of the gatekeepers and the scale and effects of their operations, be fully achieved at Union level. The Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the	

principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.	
This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, in particular Articles 16, 47 and 50 thereof. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principlesHAVE ADOPTED THIS REGULATION:	
Chapter I	
Subject matter, scope and definitions	
	LU (Drafting): Proposal: **Article 1a - Objective** **The objective of this Regulation is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market by laying down harmonised rules for ensuring contestable and fair markets in the digital sector.** LU (Comments): Article 1 of a Regulation should explain its ultimate objectives and the link with the legal basis (Article 114 TFEU), and not only provide a table of contents. **The current wording of Article 1 summarises the "what" of the DMA. We propose a new Article 1a explaining the "why".** This is also in line with the legal technique used in Article 1 of other Internal Market legislations. Luxembourg supports the harmonising objective of the Regulation. The substance of the Regulation needs to reflect this objective in line with its legal basis 114 TFEU.

Article 1 *Subject-matter and scope*	
1. This Regulation lays down harmonised rules ensuring contestable and fair markets in the digital sector across the Union where gatekeepers are present.	BE (Comments): **Belgium** believes the objectives of the Digital Markets Act should be stated more explicitly in the DMA itself as well as its legal basis. RO (Comments): We would welcome a more complete definition of the objectives and also, clarifications of the interaction between different concepts. As we were able to understand, the proposal is market-oriented, aiming to guarantee **contestability and fair markets by addressing structural market characteristics combined with unfair conduct.** Here, as clarified by the recital, the "unfair conduct" is "impacting the fairness of the commercial relationship between providers and their business users and end users". The overarching aim of structural market contestability – as an autonomous objective of the DMA - seems to be diluted by the focus placed on business user / consumers' welfare e.g. "leading to rapid and potentially far-reaching decreases in business users' and end users' choice in practice". For these reasons, it seems that the idea of **fair markets, linked with the notion of unfair conduct** (of behavioral nature) is a very general concept, that cannot be easily distinguished from objectives of EU / national competition law. A new formulation e.g. **"**[…] **harmonized rules ensuring contestable**

	markets by preventing unfair conduct" could point at the overarching contestability aim of the DMA (as a structural element of market design), which would sit on top of other intermediary objectives (e.g. consumer protection, UTPs or data protection matters, which in this context, are only means to a market-oriented end). Furthermore, the methodological difference of it being ex-ante ("preventing") would also substantiate a different objective than the one of ex-post protecting undistorted competition. However, accommodating other policy desiderates as intermediary objectives of the DMA - under this contestability type of logic - should not deprive competition law of its flexibility in also accommodating such intermediary objectives, if the case. The right definition of the objectives is of fundamental nature for the interaction of the DMA with other pieces of EU or national legislation, respectively the principle of *ne bis in idem*. In conclusion, **DMA should frame its objectives by putting more weight on the market-design type of approach and ex-ante nature. Also, there needs to be specified that the intermediary objectives are not ends-in-themselves.** SE (Comments): SE support the suggestion at the meeting the 19th of March to clarify the purpose of the Regulation and the link with Article 114 in Article 1, either in an introductory paragraph or in paragraph 1. SE leaves it to other Member States and the Commission to propose an appropriate text. FI

	(Comments): The aim of avoiding regulatory fragmentation in the Union by creating a cohesive regulatory environment to regulate large platforms is important to the online platforms and their users alike. It is crucial to safeguard in the DMA the aim of clarity and cohesion of the regulatory environment. This comment concerns the Art. 1(5) too. ES (Comments): **a) Insufficient definition of the aim of the proposal** Article 1(1) should provide a clear view of the aim of the proposal/intervention. A sufficient definition of the aim of the proposal is required to properly connect the proposal with its legal basis, to contextualize the elements of the regulation and to facilitate its interpretation. Moreover, it helps to stablish the coexistence of the regulation with other pieces of legislation or to specify the principles that should be considered or pondered when an exemption/suspension is being introduced. By way of example, it should be underlined that Article 1(5) lays down that MS shall not impose further obligations for the same purpose (that is, contestability and fairness). In the same line, for the suspension or exemption of an obligation, the Commission should ensure a fair balance between the interests affected and the objective of the regulation, set in article 1(1). Therefore, it may be needed to further precise the aim itself of the proposal. **b) Clarification**

	It would be needed to clarify the extent of "fair markets". It is not clear what this concept include – i.e. if this includes consumer protections and refers to end users as well as to business users-. Despite some precisions are made in Article 10, Article 1 should be clear and self-explanatory. HU (Comments): **Hungary welcomes the proposed aims of the Digital Markets Act. However, Hungary considers the further clarification of the aims and the relationship with the legal basis (internal market) to be of outmost importance. In addition in Hungary's view, reference should be made to business users and end-users as "beneficiaries" of the regulation in relation to its purpose in Article 1 (1).**
2. This Regulation shall apply to core platform services provided or offered by gatekeepers to business users established in the Union or end users established or located in the Union, irrespective of the place of establishment or residence of the gatekeepers and irrespective of the law otherwise applicable to the provision of service.	ES (Comments): HU (Comments): **Hungary welcomes the universal scope of the DMA, which will enable regulation to achieve the objective set out in Article 1 (1) effectively.** CZ (Comments): CZ: CZ would like to emphasize that the scope of the DMA should apply only to the undertakings in the position of gatekeepers. Broadening of the scope

	is not appropriate and it should be kept in mind when making future changes.
3. This Regulation shall not apply to markets:	
(a) related to electronic communications networks as defined in point (1) of Article 2 of Directive (EU) 2018/1972 of the European Parliament and of the Council[15];	
(b) related to electronic communications services as defined in point (4) of Article 2 of Directive (EU) 2018/1972 other than those related to interpersonal communication services as defined in point (4)(b) of Article 2 of that Directive.	ES (Comments): **Consistency:** It could be best to keep the consistency with article 2 (2) (e) and refer to number-independent interpersonal communication services" in Article 1(3) (b), in order to ensure the exclusion of services that are not core platform services.
4. With regard to interpersonal communication services this Regulation is without prejudice to the powers and tasks granted to the national regulatory and other competent authorities by virtue of Article 61 of Directive (EU) 2018/1972.	ES (Comments): **Review:** On interpersonal communication services, the European Electronic Communications Code (EECC) gives more powers to National Regulatory Authorities than just Article 61 of the EECC, including market monitoring, dispute resolution, and protection of end users´s rights. It should be assessed if a review of this par. would be needed.

[15] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) (OJ L 321, 17.12.2018, p. 36).

5. Member States shall not impose on gatekeepers further obligations by way of laws, regulations or administrative action for the purpose of ensuring contestable and fair markets. This is without prejudice to rules pursuing other legitimate public interests, in compliance with Union law. In particular, nothing in this Regulation precludes Member States from imposing obligations, which are compatible with Union law, on undertakings, including providers of core platform services where these obligations are unrelated to the relevant undertakings having a status of gatekeeper within the meaning of this Regulation in order to protect consumers or to fight against acts of unfair competition.	SK (Comments): *Although we understand the different perspectives and goals of each further legal regulation (EU level – P2B, EUMR etc.), we have certain reservations concerning the overlapping/overregulation with national competition rules across EU MS. How could the consistency of the rules across EU be secured?* SE (Drafting): SE (Comments): According to SE it is important that the DMA prevents regulatory fragmentation in the EU. The boundaries between DMA and national legislation must be clearly set out in the regulation. FI (Comments): It would be beneficial if the Commission could give a clear and preferably written presentation on the relationship and interplay between the DMA and possible national legislations. For example questions related to • the principle of *ne bis in idem* and possible limitations to national legislation following from it, • solving possible discrepancies with national decisions made before the entry into force of the DMA

	could be further clarified in such presentation. ES (Comments): **A) Consistency:** As it has been discussed in several meetings, there could be an inconsistency between the use of the term undertaking and provider of CPS. This lack of consistency create several interpretation problems in different articles and should be subject of revision. **B) Clarification:** There are still doubts on the interpretation of this Article and the extent to which Member States can impose obligations on gatekeepers when the purpose is other than ensuring contestable and fair markets (see also comments on Article 1(1)). It should be taken into account that the interplay with other pieces of legislation (i.e. competition rules, economic dependency provisions or other regulations in defence of consumer protection or other general interests) is a key element to ensure legal certainty and to facilitate the coordination. Due to that a review of this par. should be analysed in parallel with the rewording of Article 1(1). CZ (Comments): CZ: We would like to ask the Commission to elaborate more on situations, when the gatekeeper applies different approach in various Member States, i.e. it will introduce anticompetitive practices only in one /or several Member State/s. How the Commission will take these facts into account when investigating the particular case? We are not sure, whether there are effective tools which will enable the Commission to deal with these

	situations. CZ would like to ask the Commission for clarification of this issue. We understand the draft doesn't envisage any measures from the side of the national authorities but maybe this is the case when their assistance might be necessary. LU (Drafting): ~~**5. Member States shall not impose on gatekeepers further obligations by way of laws, regulations or administrative action for the purpose of ensuring contestable and fair markets. This is without prejudice to rules pursuing other legitimate public interests, in compliance with Union law. In particular, nothing in this Regulation precludes Member States from imposing obligations, which are compatible with Union law, on undertakings, including providers of core platform services where these obligations are unrelated to the relevant undertakings having a status of gatekeeper within the meaning of this Regulation in order to protect consumers or to fight against acts of unfair competition.**~~ LU (Comments): This paragraph creates the risk of opening the door to fragmentation by ill-intentioned interpretation. Luxembourg therefore proposes to delete this paragraph. Where the Union has exercised its competence, there is no room for Member States to legislate. This principle of EU law should not be questioned, conditioned or nuanced with descriptions as is done in this paragraph.

6. This Regulation is without prejudice to the application of Articles 101 and 102 TFEU. It is also without prejudice to the application of: national rules prohibiting anticompetitive agreements, decisions by associations of undertakings, concerted practices and abuses of dominant positions; national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to imposing additional obligations on gatekeepers; Council Regulation (EC) No 139/2004[16] and national rules concerning merger control; Regulation (EU) 2019/1150 and Regulation (EU) …./.. of the European Parliament and of the Council[17].	BE (Comments): BE notes that Art. 1(6) states that is it without prejudice to the application of national legislations insofar as they are applied to undertakings other than gatekeepers but that this article not clearly links this prohibition to the gatekeepers as defined in art. 2. Since it is not the intention to block NCAs or Member States from taking action in respect of smaller gatekeepers., we would thus prefer a clarification by adding in article 1(6) a reference to the gatekeepers in the meaning of article 2. **Belgium** would like to make a remark in relation to recital 10: The fact that the proposed regulation will be based on article 114 TFEU (and not on art. 103 TFEU), and that recital 10 states that the DMA pursues an objective that is complementary to but different from the protection of undisturbed competition as pursued in competition law, risks to give the impression that the protection of contestable and fair markets cannot also be the purpose of the rules of competition. We suggest to avoid this confusion by a more neutral wording of recital 10 or a further clarification of the relations between the DMA and the rules of competition. RO (Comments):

[16] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

[17] Regulation (EU) …/.. of the European Parliament and of the Council – proposal on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC.

	If articles 101 and 102 TFEU (and their national equivalents) follow the same objectives as other national competition rules prohibiting different forms of unilateral conduct, could there be the view that only Treaty articles can be applied in parallel with the DMA? CZ (Comments): CZ: We would like to ask for further clarification of mutual interactions between the application of the DMA and competition or other regulatory rules, at least in order to avoid possible ambiguities related to *ne bis in idem.* LU (Drafting): 6. This Regulation is without prejudice to the application of Articles 101 and 102 TFEU**, Council Regulation (EC) No 139/2004[18] and national rules concerning merger control; Regulation (EU) 2019/1150 and Regulation (EU) …./.. of the European Parliament and of the Council[19]**. It is also without prejudice to the applicationof: a) national rules prohibiting**, in purely national contexts,** anticompetitive agreements, decisions by associations of undertakings, concerted practices and abuses of dominant positions;

[18] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

[19] Regulation (EU) …/.. of the European Parliament and of the Council – proposal on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC.

	b) national competition rules prohibiting other forms of unilateral conduct **in a purely national context** insofar as they are applied to undertakings other than gatekeepers ~~**or amount to imposing additional obligations on gatekeepers; Council Regulation (EC) No 139/2004**[20] **and national rules concerning merger control; Regulation (EU) 2019/1150 and Regulation (EU) …./.. of the European Parliament and of the Council**[21]~~. LU (Comments): The objective of harmonisation of the Regulation should be maximised. We see a risk of fragmentation by allowing Member States to impose additional obligations on gatekeepers. We therefore propose to significantly limit this provision, so to avoid possible overlaps. More generally, we would welcome a more in-depth discussion on the articulation between Internal Market law with EU competition law. Why did the Commission not foresee any other articulation clauses with existing EU legislation in order to clarify possible clashes or conflicting obligations? How does the Commission propose that conflicting obligations should be addressed? There is a risk that the DMA obligations may not be applied and the goals of the DMA not achieved. If there are no likely conflicting obligations to arise, could the Commission provide evidence or a table illustrating how articulations with other EU legislations is not problematic?

[20] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

[21] Regulation (EU) …/.. of the European Parliament and of the Council – proposal on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC.

7. National authorities shall not take decisions which would run counter to a decision adopted by the Commission under this Regulation. The Commission and Member States shall work in close cooperation and coordination in their enforcement actions.	BE (Comments): **Belgium** believes this close cooperation should be further specified in the DMA itself. ES (Comments): **Clarification:** This par. should be further specified. This Regulation will interact with many other pieces of EU and national legislation, so it is important to specify the scope of the cooperation refer to in this Article. To this extent, it is not clear if this is just referring to the general principle of sincere cooperation, to the instruments in set by this Regulation in articles 32 and 33, or to a specific targeted coordination with the NCAs. NL (Comments): The Netherlands would like to have a bit more clarity regarding how this cooperation and coordination will take place, as it seems very open-ended right now. LU (Comments): Could the Commission clarify whether "run counter to a decision" includes additional obligations imposed on gatekeepers? Does "national authorities" refer to authorities other than competition authorities?
Article 2 *Definitions*	SE

	(Comments): SE proposes to add a definition for "gateway" as mentioned in article 3(1)(b). CZ (Comments): CZ: CZ welcomes the possibility to update definitions of relevant terms, as we think that these should reflect the dynamic development on the digital markets. The definitions of key terms, such as "digital sector", "core platform services" or "gatekeeper" are very important in order to minimize the risk of ambiguity and thus legal uncertainty concerning the question which markets and entities will be affected by the DMA. For this reason, it is important to define these terms/concepts clearly, properly and correctly.
For the purposes of this Regulation, the following definitions apply:	BE (Comments): **BE** remarks that the term "profiling" is not defined in article 2, whereas it is used in Article 13. We wonder if, to avoid confusion, its definition should be added to article 2 by using the same definition as in Art. 4.4 of the GDPR. The term "consent" is not defined in article 2 of the DMA, although it is used in article 5 (a), 6.1 (i) and 11 (2). Given the importance of these provisions, its definition should be added to article 2 and reference should be made to article 4.11 of the GDPR.

	Further we remark that under article 6.1 (h), gatekeepers must ensure effective data portability. We believe the definition of this term should be added to article 2 and/or clarification should be given in article 6.1 (h) of the DMA. LU (Comments): For purposes of legal certainty and coherence, Luxembourg suggests to avoid modifying definitions that already exist in EU law and rather use the same definitions.
(1) 'Gatekeeper' means a provider of core platform services designated pursuant to Article 3;	SK (Drafting): *'Gatekeeper' means a provider of **a** core platform service~~s~~ designated pursuant to Article 3;* SI (Drafting): (1) 'Gatekeeper' means **an undertaking that** provides or ~~**offers** of~~ core platform services designated pursuant to Article 3; SI (Comments): We propose this change for harmonizing the terminology with Article 1 of this regulation. ES (Comments): **Consistency**:

	There might be a consistency problem in relation to the definition of gatekeeper (2 (1)) as a provider of CPS and the definition of undertaking (2 (22)) as a group or conglomerate. This consistency problem has been detected in different articles and recitals in the text and should be clarified. Either by defining the provider of core platform services in this article and using this term when referring to potential or designated gatekeepers or by using the general term undertaking and changing the definition of 2 (22) to other terms such as conglomerate, group or undertaking concerned to clearly differentiate the player subject to obligations and potential sanctions.
(2) 'Core platform service' means any of the following:	ES (Comments): There are concerns whether the definition of core platform services, as it defines the scope of the proposal, could be better placed in article 1 instead of article 2. CZ (Comments): CZ: We would like to ask for clarification whether web browsers were considered as CPS. LU (Comments): Luxembourg agrees with the suggestion of the Council Legal Service that this definition is part of the scope of the DMA and proposes to move it to Article 1. Any amendment of this list should go through the legislative procedure.
	NL

	(Comments): How does the DMA apply when (C)PS are strongly interlinked? For example: are market places that are only available through a specific social networking service seen as a standalone online intermediation service, as an ancillary service to the social networking service or not regarded as a separate type of service at all?
(a) online intermediation services;	
(b) online search engines;	
(c) online social networking services;	
(d) video-sharing platform services;	
(e) number-independent interpersonal communication services;	BE (Comments): **Belgium** acknowledges that the DMA does not apply to markets related to electronic communications networks and services that are regulated under the European Electronic Communications Code (EECC) – as stated in Article 1(3). We believe that the inclusion of number-independent interpersonal communications services (NI-ICS) among the CPSs (Article 2) should be considered with caution. NI-ICSs are already regulated under the EECC, which aims at promoting competition, developing the internal market and protecting end-users' rights. Any overlap/conflict with the EECC should be avoided in order to ensure regulatory certainty for market players and consumers. A thorough analysis on this matter will be carried out in the coming months by BEREC (the umbrella organisation of NRA's) as a basis for further considerations.
(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);	SK (Comments): *We would welcome an explanation of the differences between advertising services on Art. 2 (2)(h) and advertising services as ancillary service on Art. 2 (14). Why all advertising services are not defined as ancillary services if advertising services on Art. 2 (2)(h) cannot be an individual core platform service (reference to points (a) to (g) in Art. 2 (2)(h)?* CZ (Comments): CZ: We would like to ask for clarification whether the scope are advertising services in narrow sense (classic banners, contextual advertising) or in broad sense (any offer of products/services including electronic marketplaces). LU (Comments): Why is the addition "provided by a provider of any of the core platform services listed in points (a) to (g)" necessary in this definition but not in others?
(3) 'Information society service' means any service within the meaning of point (b) of Article 1(1) of Directive (EU) 2015/1535;	
(4) 'Digital sector' means the sector of products and services provided by means of or through information society services;	HU

	(Comments): **Hungary welcomes the broad definition of 'digital sector', which will enable regulation to achieve the objective set out in Article 1 (1) effectively.** LU (Comments): This definition is broad and rather vague. Could the Commission indicate whether for example a digitised car manufacturing plant is covered by the definition? Is an autonomous-driving car covered by this definition? Why did the Commission not include a recital explaining the rationale for defining the scope of the DMA to the "digital sector" or "digital markets"?
(5) 'Online intermediation services' means services as defined in point 2 of Article 2 of Regulation (EU) 2019/1150;	
(6) 'Online search engine' means a digital service as defined in point 5 of Article 2 of Regulation (EU) 2019/1150;	
(7) 'Online social networking service' means a platform that enables end users to connect, share, discover and communicate with each other across multiple devices and, in particular, via chats, posts, videos and recommendations;	NL (Comments): It appears as if there is overlap between this definition and the definition of video sharing platform service in the next paragraph. Specifically, based on this definition, video sharing service can be seen as a special case of social networking service; the most well-known video sharing platform services enable end users to connect, share, discover and communicate with each other across multiple devices via videos, posts and recommendations. Can this be further clarified?

(8) 'Video-sharing platform service' means a service as defined in point (aa) of Article 1(1) of Directive (EU) 2010/13[22];	BE (Comments): **Belgium** remarks that point (aa) in article 1 (1) of Directive 2010/13 does not exist. Is the COM referring to point a) i) & ii)? Did the COM mean to refer to art. 1.1 (g) of the Directive instead? Referring to Art. 1.1 (a) as a whole seams unclear for us (for example a "classic" tv channel could be a video-sharing platform service in the DMA?) RO (Comments): We understand that video streaming services have a different business model by not placing intermediation at the core of their commercial activity (not being multi-sided markets). However, given the amount of data they collect and the integrated nature of their business model (production and streaming) we would welcome to have a recital mentioning about possible competition concerns of their sole use of these data.
(9) 'Number-independent interpersonal communications service' means a service as defined in point 7 of Article 2 of Directive (EU) 2018/1972;	
(10) 'Operating system' means a system software which controls the basic functions of the hardware or software and enables software applications to run on it;	

[22] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ L 95, 15.4.2010, p. 1).

(11) 'Cloud computing services' means a digital service as defined in point 19 of Article 4 of Directive (EU) 2016/1148 of the European Parliament and of the Council[23];	
(12) 'Software application stores' means a type of online intermediation services, which is focused on software applications as the intermediated product or service;	
(13) 'Software application' means any digital product or service that runs on an operating system;	
(14) 'Ancillary service' means services provided in the context of or together with core platform services, including payment services as defined in point 3 of Article 4 and technical services which support the provision of payment services as defined in Article 3(j) of Directive (EU) 2015/2366, fulfilment, identification or advertising services;	NL (Comments): There appears to be some lack of clarity regarding this definition. Can it be made clearer what does and does not fall within its scope? LU (Comments): Could the Commission explain the difference between advertising services as ancillary services and advertising services under point Art 2.2(h)?
(15) 'Identification service' means a type of ancillary services that enables any type of verification of the identity of end users or business users, regardless of the technology used;	
(16) 'End user' means any natural or legal person using core platform services other than as a business user;	ES (Comments):

[23] Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union (OJ L 194, 19.7.2016, p. 1).

	Clarification: It would be adequate to further specify the definition of end users and business users. Moreover, it would be useful to have a general definition of "active" and "monthly" users. Even if the Commission maintains the possibility to change or adapt the term if it does not fit all CPS or if the situation changes in the future, a general definition in this article would be desirable in terms of legal certainty.
(17) 'Business user' means any natural or legal person acting in a commercial or professional capacity using core platform services for the purpose of or in the course of providing goods or services to end users;	ES (Comments): **Clarification**: It would be adequate to further specify the definition of end users and business users. Moreover, it would be useful to have a general definition of "active" and "monthly" users. Even if the Commission maintains the possibility to change or adapt the term if it does not fit all CPS or if the situation changes in the future, a general definition in this article would be desirable in terms of legal certainty.
(18) 'Ranking' means the relative prominence given to goods or services offered through online intermediation services or online social networking services, or the relevance given to search results by online search engines, as presented, organised or communicated by the providers of online intermediation services or of online social networking services or by providers of online search engines, respectively, whatever the technological means used for such presentation, organisation or communication;	
(19) 'Data' means any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audiovisual recording;	

(20) 'Personal data' means any information as defined in point 1 of Article 4 of Regulation (EU) 2016/679;	
(21) 'Non-personal data' means data other than personal data as defined in point 1 of Article 4 of Regulation (EU) 2016/679;	
(22) 'Undertaking' means all linked enterprises or connected undertakings that form a group through the direct or indirect control of an enterprise or undertaking by another and that are engaged in an economic activity, regardless of their legal status and the way in which they are financed;	SE (Comments): SE notes that the term undertaking is defined with reference to the same term. SE therefore suggests reformulating this definition in line with EU case law. NL (Comments): What precisely is within the scope of 'indirect control' in this definition? HU (Comments): **Hungary welcomes the broad definition of 'undertaking', which will enable regulation to achieve the objective set out in Article 1 (1) effectively.**
(23) 'Control' means the possibility of exercising decisive influence on an undertaking, as understood in Regulation (EU) No 139/2004.	BE (Comments): **Belgium** wonders why for this definition under the DMA, the COM does not directly refer to art. 3.2 of the Regulation (EU) nr. 139/2004, as in the case of the P2B-regulation?
Article 10 *Updating obligations for gatekeepers*	SE

	(Comments): SE notes that there is no reference to article 10 (1) in article 37. Such a reference should be added in that article.
1. The Commission is empowered to adopt delegated acts in accordance with Article 34 to update the obligations laid down in Articles 5 and 6 where, based on a market investigation pursuant to Article 17, it has identified the need for new obligations addressing practices that limit the contestability of core platform services or are unfair in the same way as the practices addressed by the obligations laid down in Articles 5 and 6.	BE (Drafting): "The Commission is empowered to adopt delegated acts in accordance with article 37 (…)" BE (Comments): **Belgium** has a question regarding this article in combination with recital 77: What will be the concrete scope of the opinions delivered by the Advisory Committee regarding updating obligations for gatekeepers? In general Belgium would like to get some more specification regarding the role of the Member States in this regard. SK (Drafting): *The Commission is empowered to adopt delegated acts in accordance with Article* ~~***34***~~ ***37*** *to update the obligations laid down in Articles 5 and 6 where, based on a market investigation pursuant to Article 17, it has identified the need for new obligations addressing practices that limit the contestability of core platform services or are unfair in the same way and* ***with similar effects*** *as the practices addressed by the obligations laid down in Articles 5 and 6.* SK (Comments): *What are there guarantees of legal certainty if some obligations would be set in the Regulation and others (with the same or similar effect on*

	contestability and fairness at the market) would be defined by delegated acts? *Could the EC explain why and how are the delegated acts envisaged under art. 10 compatible with requirements and limitations set by article 290 TFEU as interpreted by the Court of Justice of the EU (see especially C-696/15 P Czech Republic v. European Commission (p. 48 – 54, 74 –78, 81, 85 –86 and case-law cited therein).* *Could the EC elaborate more on the term "same way".* *Letter b) Based on what criteria will the EC decide to add the new practices under art. 5? Based on what criteria will the EC decide to add the new practices under art. 6? How will be ensured the predictability and consistency of the extension of Art. 5 or Art. 6?* SE (Drafting): The Commission is empowered to adopt delegated acts in accordance with Article 37 toupdate or remove the obligations laid down in Articles 5 and 6 or add new obligations in these articles where, based on a market investigation pursuant to Article 17, it has identified the need for new obligations addressing practices that limit the contestability of core platform services or are unfair to the same extent as the practices addressed by the obligations laid down in Articles 5 and 6. SE (Comments):

	SE generally support the ambition from the Commission to make the regulation future proof and adjust it to market changes. It is important for SE, though, that that the scope and limits of the empowerment for the Commission to adopt delegated acts is precisely specified in the regulation. It could therefore be clarified what the Commission is empowered to do with regard to article 5 and 6. FI (Comments): Finland considers that it would be useful, if the Council Legal Service could analyse the scope and appropriateness of the power transferred to the Commission to adopt delegated acts related to the obligations in the Article 5 and 6. Finland understand that the Commission needs rapid tools to react promptly to unfair practices in the digital markets. However, Finland highlights that the obligations constitute a significant part of the DMA and therefore giving the Commission the power to change the content of articles 5 and 6 with delegated acts would seem excessive. Any substantial changes to the DMA should be done by changing the Regulation itself in accordance with the appropriate legislative procedure instead of delegated acts given by the Commission, whose role is limited to enforcing the Regulation. In its current form art 10 appears to give the Commission wide discretion to change the content of the obligations. At least, it should be clearly defined what obligation(s) could be amended and to what extent. ES (Comments): **Legal compatibility**: It may be needed to review the extent to which this is not affecting to the scope itself of the proposal. A clarification of the CLS would be useful.

	Clarification:
	
	The term "unfair" may be clarified, as it is one of the two aims of the proposal (see comment on Art.1). It may be needed to relocate the precisions on the extension of these concepts.
	
	Participation of MS:
	
	It is important to guarantee the participation of Member States in updating new obligations of this regulation.
	NL
	
	(Comments):
	
	We welcome any provisions ensuring future-proofness. We understand from the Commission's presentation that only new obligations that are quite *similar* to those already included in art. 5, 6 can be added by means of delegated act. *Rather different* obligations can only be included by amending the Regulation.
	
	• How similar do obligations need to be to be able to be included by delegated act?
	  o Should they always :
	  ▪ Have the same objective as those in art. 5 and 6?
	  ▪ Be about the same practice, but applied to more core platform services than currently defined for specific obligations in art. 5 and 6?
	  ▪ Be about the same practice but in a different situation than in art. 5 and 6?
	• What does this imply for the future-proofness of obligations in the dynamic environment of digital markets? For practices that are quite different, the Regulation will have to be amended, which takes a lot of time.

	• Also, any new obligation will apply to all designated core platform services. For proportionality, practices that are only relevant for some gatekeepers will need to be addressed in such a way that other gatekeepers are not overregulated. • This can mean that obligations need to be weakened and do not effectively address the practices giving rise to the need to add new obligations. • We believe additional flexibility offered by a supplementary ability consisting of more general obligations to be imposed in a more case-specific way on top of articles 5 and 6 would help here. HU (Comments): **Hungary is concerned that pursuant to Article 10 of the draft Regulation, the Commission could, following a market investigation under Article 17 of the draft Regulation, supplement the list of unfair practices by means of a delegated act, the adoption of which allows only moderate intervention by Member States.** CZ (Comments): CZ: Pursuant to the Article 10, it is possible to extent the obligations set in Article 5 and 6. CZ agrees with flexible approach to proposed procedure. However, we think that when it is possible to add new prohibited practices into this list, it should be also possible to remove existing practices when they are no longer effective. We should also think about the possibilities of not only extending the list of gatekeepers, but also the issue concerning removal of the gatekeeper who no longer fulfils the relevant criteria. The same can be applied to core platform services. Also it is necessary to keep in mind that the adoption of delegated act is less transparent procedure in comparison to formal legislative (codecision) procedure.

	LU (Comments): Is the market investigation made solely on the Commission's initiative? Or could it be based on complaints or Member States' suggestions? (cf Art 32, Recital 77?) Since Recital 33 states that the obligations are limited to what is necessary and justified, would it be conceivable to "update" the list in removing an obligation where the market investigation concludes that it goes against consumer welfare? We understand that "updating obligations" means modifying, adding or removing obligations. **Luxembourg supports a dedicated discussion on the opportunity of delegated acts (and implementing acts) in the DMA**. In this case, the objective of the delegated act is to modify essential elements of the DMA, which is contrary to the Treaty and the Comitology Regulation. For **any delegated act, the DMA needs to define the objectives, content, scope and duration of the delegation of power which is not the case here**. Updating the obligations in Articles 5 and 6 is a core element of the DMA and should only be modified via the Regulation itself, i.e. the legislative process. The objective of this Article is therefore already covered by Article 38 (review). If review and renegotiation are perceived as too lengthy and heavy, then the idea of having more principles-based obligations, combined with an inclusive regulatory dialogue , in Article 5 is more appropriate.
1. A practice within the meaning of paragraph 1 shall be considered to be unfair or limit the contestability of core platform services where:	SE (Drafting): A practice within the meaning of paragraph 1 shall, based on the same investigatory standard that preceded this regulation, be considered to be unfair or limit the contestability of core platform services where:

	ES (Comments): We would appreciate a clarification on how the effects on end users can be addressed through an updating of obligations, as this paragraph seems to prevent it. HU (Comments): **The general rules for the adoption of delegated acts are set out in the Annex to the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the Commission on better law-making ("the Interinstitutional Agreement").** **In the case of a delegated act, the control of the Member States is moderate, the so-called *ex ante control* by Member States manifested in the fact that pursuant to Article 290 of TFEU, which is the legal basis for the Interinstitutional Agreement, delegated acts shall specify the objectives, content, scope and duration of the delegation and the conditions for the exercise of the delegation.** **While it is indeed necessary to be able to deal quickly with unfair practices in order to ensure the effectiveness of the regulation, the limited of scope for intervention by Member States is concerning. In this respect, Member States can most effectively exercise control by defining the details of delegation (scope, content and objective) thus the delegated act as precisely as possible.** **However Article 10 seems to be too broad in scope and too vague in terminology.** LU

	(Comments): Can recital 33 be understood that if a competition law case doesn't lead to a satisfying result ("for example in the enforcement of the EU competition rules, shows that they have a particularly negative direct impact on the business users and end users"), then the Commission can revert to the DMA?
(a) there is an imbalance of rights and obligations on business users and the gatekeeper is obtaining an advantage from business users that is disproportionate to the service provided by the gatekeeper to business users; or	SK (Comments): *How can the imbalance of rights and obligations on business users in terms of disproportionate advantage be more specified? If leaves an unproportioned interpretation gap.* SE (Drafting): there is an imbalance of rights and obligations on business users and the gatekeeper is obtaining an advantage from business users that is disproportionate to the service provided by the gatekeeper to business users; and ES (Comments): The "imbalance of rights" could be further specified. See also previous comment. HU (Comments):

	Hungary would like to ask the Commission for further clarification on the definition of 'imbalance of rights and obligations' and 'disproportionate advantage'. CZ (Drafting): (a) there is an imbalance of rights and obligations on business users or end-users and the gatekeeper is obtaining an advantage from business users that is disproportionate to the service provided by the gatekeeper to business users; or CZ (Comments): Adding a reference to end-users, in addition to business users is suggested, 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.
(b) the contestability of markets is weakened as a consequence of such a practice engaged in by gatekeepers.	SK (Comments): *Will the EC consider any quantitate indicators in its consideration?* HU (Comments): **Hungary would like to ask the Commission how it intends to measure if the contestability of the concerned market is weakened.**

Chapter IV	
Market investigation	
Article 14 *Opening of a market investigation*	FI (Comments): When conducting market investigations the possible effects on consumers/end-users should also be taken into account in addition to effects on SMEs, especially in relation to market investigations conducted under article 17.
1. When the Commission intends to carry out a market investigation in view of the possible adoption of decisions pursuant to Articles 15, 16 and 17, it shall adopt a decision opening a market investigation.	BE (Comments): **Belgium:** in what language does this opening decision need to be in? When it is aimed at a market investigation for designating a gatekeeper (article 15) or to investigate into systematic non-compliance (article 16) does this need to be in the language of the country where the gatekeeper resides? RO (Comments): For full transparency reasons, the Commission should formally notify the national authorities, given the obligations prescribed by art. 1(7).
2. The opening decision shall specify:	
(a) the date of opening of the investigation;	

(b) the description of the issue to which the investigation relates to;	
(c) the purpose of the investigation.	
3. The Commission may reopen a market investigation that it has closed where:	
(a) there has been a material change in any of the facts on which the decision was based;	SI (Drafting): (a) there has been a **substantial** ~~material~~ change in any of the facts on which the decision was based;
(b) the decision was based on incomplete, incorrect or misleading information provided by the undertakings concerned.	BE (Comments): **Belgium** wonders if the undertaking concerned will be exposed to fines when providing misleading or incorrect information? SI (Drafting): (b) the decision was based on incomplete, incorrect or misleading information ~~provided by the undertakings concerned~~. SI (Comments): We think that during the market investigation the Commission will take into observation also information received from third parties, not only from the undertaking concerned. In consequence it could happen that the Commission's decision is based on incomplete, incorrect or misleading information from third parties. For this reason, we propose to delete the wording "by the undertaking concerned" in paragraph 3, point b).

Article 17 *Market investigation into new services and new practices*	CZ (Comments):
The Commission may conduct a market investigation with the purpose of examining whether one or more services within the digital sector should be added to the list of core platform services or to detect types of practices that may limit the contestability of core platform services or may be unfair and which are not effectively addressed by this Regulation. It shall issue a public report at the latest within 24 months from the opening of the market investigation.	BE (Comments): **BE** notes that art. 33 only refers to article 15 and thus not to article 17. In general, we believe the role of the member states should be strengthened with respect to the updating process of obligations laid down in Article 5 and 6, pursuant to market investigations into new (core platform) services and new practices. For that purpose, we believe the provisions of Article 33 should be extended to also include the possibility for (a group of) member states to request the opening of such an investigation and that Article 33 should also refer to Article 16, dealing with market investigations into systematic non-compliance. As well as that the advisory procedure as set forth in Article 32(4) should apply to Article 17 as well. A "close cooperation with and between the competent independent authorities of the Member States, will be crucial. This should be further reflected in the DMA regulation. We believe that the EU competent authority should rely on the experience of National Independent Authorities, which could support the EU authority with - among others - the continuous monitoring of markets and compliance with the regulatory measures. **Belgium** estimates that seeing how quick things can change in the digital environment, 24 months can be a long period before adding new platform services or now practices.

	SK (Comments): *How could the role of the MS be strengthened here? Could MS instigate the opening?* *Did the EC consider any other effective tools securing future-proofing than those mentioned in Article 17 (and 10 and 14)? If yes, why it did not opt for them?* RO (Comments): When debating the report conclusions, before its publication, we would welcome involving Member States in this process (at least in regard to letter b). This should be done in accordance with the advisory procedure referred to in Article 32(4). SE (Drafting): The Commission may conduct a market investigation with the purpose of examining whether one or more services within the digital sector should be added to the list of core platform services or to detect types of practices that limit the contestability of core platform services or are unfair and which are not effectively addressed by this Regulation. It shall issue a public report at the latest within 24 months from the opening of the market investigation. HU

	(Comments): **Hungary supports the procedural deadline framework under Article 17, but the extension of the list of unfair practices through a delegated act raises the concerns outlined under Article 10.** **Hungary would also like to ask the Commission to explore the possibility to share the results of the market investigations under Article 15 and 17 with the Member State authorities, while also ensuring that national competition authorities may also share information on the results of market investigations and detected market anomalies with the Commission.**
Where appropriate, that report shall:	SK (Comments): *Could the EC explain the choice of legal instruments in Art. 17 (a) and (b) -why the new services should be added to the list of core platform services by an amendment to the Regulation while new unfair practices should be defined by delegated acts? Is there a balance and legal guarantee?*
(a) be accompanied by a proposal to amend this Regulation in order to include additional services within the digital sector in the list of core platform services laid down in point 2 of Article 2;	NL (Drafting): be accompanied by a proposal to amend this Regulation in order to include either new obligations that are very different from those already included in articles 5 and 6 or additional services within the digital sector in the list of core platform services laid down in point 2 of Article 2; NL (Comments): It was not clear from the text that there is a difference between similar obligations (to be added by delegated act) and new and different obligations (to be added by amending the regulation), but this is what we

	do now understand from the Commission's presentation. We propose clarifying this.
(b) be accompanied by a delegated act amending Articles 5 or 6 as provided for in Article 10.	LU (Comments): See our comments above on the opportunity of delegated acts in this case.
Chapter V	
Investigative, enforcement and monitoring powers	
Article 32 *Digital Markets Advisory Committee*	SE (Comments): SE understands from the Commission that the Commissions standard Advisory Committee procedure will be applied in the DMA and that it will comply with the Committee Regulation. It is important for SE that budget and resources issues are taken into account so that the tasks of the Advisory Committee are not extended beyond this and what is assessed to be necessary to assist the Commission in its supervisory tasks. FI (Comments): It would be useful to have in the Article or in the recitals a summary of the Commission´s decisions (Articles) that should be processed in advance in the Digital Markets Advisory Committee. This would give a whole picture of the Committee´s role. NL (Comments): We think it's important to have more clarity regarding the DMAC. Since the DMAC advises on both case-specific decisions as well as decisions

	that touch upon the broader framework of the DMA, we believe this is needed so that it is clear what role member states' policy makers have and what role is played by various national authorities. CZ (Comments): CZ: CZ supports the proposal to establish new advisory committee composed of the representatives of the Member States. If the committee will be working in the same format as advisory committees dealing with cases pursuant to Article 101 and 102 SFEU, it seems that there will be sufficient possibilities for proper investigation of particular cases, even if the gatekeepers would be operating at just a few Member States. We are aware of the fact that it is in the discretion of MS who will be involved in this committee. However, it might be useful to indicate preferred composition of the committee.
	CZ (Comments): The Commission might also consider, whether it is appropriate to accept the opinion of the EDPS, which 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."
1. The Commission shall be assisted by the Digital Markets Advisory Committee. That Committee shall be a Committee within the meaning of Regulation (EU) No 182/2011.	BE (Comments):

	BE is glad to take note that working together with the Member States is considered as a key principle as local authorities have more relevant information of how local markets function, but considers that in order to give concrete shape to the overall cooperative framework the COM has in mind, the structural involvement of established national independent authorities of the member states should be well elaborated and embedded in the DMA as also highlighted in the Impact Assessment Report. The limited formal advisory power of MSs through the DMAC (a comitology procedure) would not be sufficient to address this necessary cooperation. (regarding the Impact assessment report we refer to §409 and § 326: In §409 it is mentioned that the Commission will ensure close cooperation with and between the competent independent authorities of the MSs, with a view to informing its implementation and to building out the Union´s expertise in tackling fairness and contestability issues in the digital sector. In this context, the Commission will establish an information exchange and consultation network consisting of relevant independent authorities of the MSs, which shall also deliver opinions on the individual decisions of the Commission. §326 specifies certain costs that will need to be borne by national authorities, pertaining to the preparation and processing of information requests, the preparation of guidelines, designation of gatekeepers and enforcement of the general obligations including the specification of some of the obligations.) We would like to get a clear overview from the COM regarding in which procedures the advisory committee will exactly assist, as at the moment this is not very clear for us. **BE** refers to the COM's remark during the meeting that not only national competition authorities would be well placed to assist the COM regarding the DMA but also for example telecom authorities.

	The advisory Committee will be composed of representatives of Member States. Can a Member State in this regard be represented by (a body composed of) members of different national authorities (for example based on a concrete case). In the negative, would an expert or member of a national authority, other than the representative in the Committee, be allowed to assist the competent national authority in the Advisory Committee? SK (Comments): *We would welcome if Art. 32 is clearer about the tasks and competence of the DM Advisory Committee.* RO (Comments): Similar to the ECN, we would like to have a fora set-up where national authorities could meet with the Commission services and discuss general matters regarding the collaboration regarding the application of the DMA, and not only punctual meetings triggered by the Digital Markets Advisory Committee. ES (Comments): **Governance**: It is important to maintain an active role of Member States in the different substantive elements of the proposal (designation of gatekeepers, regulatory dialogue to specify the obligations in article 6, exemptions to obligations and the revision of the scope of the proposal). In this sense, the role of the MS in the DMA could be further clarified to guarantee an active participation in these elements. At least the fundamental elements of

	coordination and the functions of the Committee should be adequately developed and explained. It is important to underline the different nature of the participation of MS, the Digital Advisory Committee assistance in some point has a technical nature (for instance in market investigation) and in other cases a more political approach (such as balancing the overriding reasons of general interest with the objectives of the proposal to implement exception). It could be needed to define flexible structures or a more complex governance. Moreover, an additional coordination or information exchange mechanism with national competition authorities could be needed to prevent potential overlaps of the DMA and articles 101 and 102. HU (Comments): **Hungary is concerned that the draft Regulation leaves little room for Member States to participate in the future enforcement of the draft regulation . Enforcement would in principle be carried out by the Commission, with the Commission intending to ensure the participation of the Member States by setting up a Digital Markets Advisory Committee, which would only play a consultative role in certain decisions taken by the Commission.** **Thus, while enforcement is initiated by the Commission itself, there are no serious guarantees that the opinion of the Digital Markets Advisory Committee will be taken into account ("*fullest possible consideration"),* so that the powers of the Digital Markets Advisory Committee, which ensures the participation of Member States, are limited.**

2. Where the opinion of the committee is to be obtained by written procedure, that procedure shall be terminated without result when, within the time-limit for delivery of the opinion, the chair of the committee so decides or a simple majority of committee members so request.	HU (Comments):
3. The Commission shall communicate the opinion of the Digital Markets Advisory Committee to the addressee of an individual decision, together with that decision. It shall make the opinion public together with the individual decision, having regard to the legitimate interest in the protection of professional secrecy.	BE (Comments): **BE** Since we understood during the meeting that the opinions will not be binding, will the COM have the obligations to motivate why it decided not to follow the opinion of the Committee? RO (Comments): There might be situations where a national competition authority enforces art. 102 TFEU against an undertaking, which is also, in parallel, subject to procedures under the DMA, being investigated by the Commission. Given that the NCA would simultaneously enforce the EU competition law against that undertaking and also, contribute in the Digital Markets Advisory Committee in view of the Commission taking a decision, would this raise issues of due process / ne bis in idem? Should the authority maybe abstain? HU (Comments): **Hungary has concerns that the Member States' participation in the enforcement of the regulation would be ensured just in the form of the**

	Digital Markets Advisory Committee, with little scope for intervention. **We would also like to ask the Commission whether the Commission has considered *providing additional guarantees* to take into account the opinion of the Member States, aside from the fact that, under Article 32 (3), the Commission shall communicate the opinion of the Digital Markets Advisory Committee to the addressee of the individual decision.**
4. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.	BE (Comments): **BE** believes the advisory procedure as set forth in Article 32(4) should apply to Article 17 as well. CZ (Comments): CZ: We propose to consider whether Article 33 should allow Member States to initiate proceedings not only pursuant Article 15, but also pursuant Article 16 and 17. Moreover, we should consider whether the undertakings or associations of undertakings should also have the opportunity to participate on initiation of the investigation by Commission, at least by submitting the proposal to initiate the proceeding by the Commission. In practice, the Commission will initiate the proceedings based on the information obtained from undertakings, competitors, customers and other market participants. LU (Drafting):

	4. Where reference is made to this paragraph, Article **5** of Regulation (EU) No 182/2011 shall apply. LU (Comments): Pending a dedicated discussion about the opportunity of implementing and delegated acts as mentioned above, Luxembourg prefers to have the examination procedure rather than the advisory procedure to **allow for closer scrutiny by Member States**.
Article 33 *Request for a market investigation*	CZ (Comments):
1. When three or more Member States request the Commission to open an investigation pursuant to Article 15 because they consider that there are reasonable grounds to suspect that a provider of core platform services should be designated as a gatekeeper, the Commission shall within four months examine whether there are reasonable grounds to open such an investigation.	BE (Comments): **BE** understands that the DMA targets only gatekeepers present in at least three Member States. Article 33 of the DMA, moreover, provides that the request for a market investigation must be made by at least three member states. The DMA therefore excludes the submission of a request by one or two member states. BE regrets that this option is excluded and would like it to be considered. Can this decision be appealed by Member States ? Will Member States be involved in this examination? **BE** proposes that Article 33 should be extended to also include the possibility for (a group of) member states to request the opening of an

	investigation in the meaning of Article 17. Article 33 should also pertain to Article 16, dealing with market investigations into systematic non-compliance. SK (Comments): *We generally support closer involvement of Member States in monitoring and enforcing the regulation, hence we would propose to extend the possibility for Member States to request the initiation of two other types of market research pursuant to Art. 16 and 17 as it is in art. 15* RO (Comments): Given that in competition case-law the affected trade between member states criteria can also be triggered by an infringement taking place on the territory of one single MS, we would welcome using the same principle in this regard. SE (Comments): SE support the suggestion at the meeting the 19th of March to add articles 16 and 17 to the list of provisions where three MS *can* trigger an examination by the Commission in accordance with this provision. National authorities may due to their activities or complaints be in possession of information that would be of assistance to the Commission with regard to enforcement of the DMA. However, referrals based on

	article 17 should not be subject to a time limit. SE´s support is under the condition that this is voluntary for the national authorites and that it, in relation to the proposal, will be cost-neutral for the national authorities and the Commission. ES (Comments): Spain considers that it would be desirable that Member States can request the Commission to open an investigation pursuant to Article 15, but also Articles 16 and 17. NL (Drafting): When three or more Member States request the Commission to open an investigation pursuant to Article 15, 16 or 17 because they consider that there are reasonable grounds to suspect that a provider of core platform services should be designated as a gatekeeper, is systematically not complying with obligations or new services and/or practices should be added, the Commission shall within four months examine whether there are reasonable grounds to open such an investigation. NL (Comments): We believe that national authorities should play an important role in monitoring whether a market investigation pursuant to articles 15 and 16 are needed, since these are case-specific in nature. For article 17,

	involvement of MS policy makers makes sense, since this is about the framework and content of the DMA as a whole. HU (Comments): **In order to involve Member States more actively also respecting the competence of Member States, Hungary proposes that the possibility to request a market investigation pursuant to article 15 should also be extended to the market investigations pursuant to articles 16 and 17.** LU (Comments): Could the Commission explain why only Article 15 is covered here, and not Article 16 (non-compliance) and Article 17 (new services)? Does the Commission have discretion to decline the request?
2. Member States shall submit evidence in support of their request.	ES (Comments): **Burden on the request:** In relation to paragraph 2, as an investigation could be required to prove the need of designating a gatekeeper, it could be difficult for MS to submit "evidences". It could be better to refer to a reasoned, justified or documented request by MS. HU (Comments):

	Hungary would like to inquire about the required standard of proof for a successful initiation of a market investigation, proposed by Member States and what kind of evidence is considered to be appropriate by the Commission. CZ (Comments):
	<u>General comments</u>
	SK (Comments): *SK maintains a general scrutiny reservation on all comments within this proposal.* ES (Comments): Spain is presenting only comments to articles and will submit redrawing and changes proposals when the Presidency asks for them. NL (Comments): We want to stress the importance of sufficient enforcement capacity and expertise for the DMA. Giving national authorities a bigger role in supporting the Commission's enforcement of the DMA by aiding in monitoring and sharing their expertise would be a good idea.
END	**END**