Commission proposal - ST 14172/20	SK - SE - FR - NL - MT - LU - DK - IE - AT drafting suggestions and 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],	
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	

1 OJ C , , p. .
2 OJ C , , p. .
3 OJ C , , p. .

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) 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.	
(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	

[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).

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. 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.	

[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).

(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 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.	

[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.

(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.	

[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).

(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 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 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.	

[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).

(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.	
(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.	SE (Drafting): 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. It shall also be ensured that the Commission only use the information collected by the Commission for the purpose of this Regulation. 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. SE (Comments): The amendment corresponds to Article 31.1.
(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	FR (Drafting):

exercised in accordance with Regulation (EU) No 182//2011 of the European Parliament and of the Council[13].	In order to ensure uniform conditions for the implementation of Articles 3, 6, 12, 13, 15, 16, 17, 20, 22, 23, 25, ~~and~~ 30 and XXX, 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. FR (Comments): To take account of the articles to be created, in particular the one creating (in Chapter V) the alert mechanism requested by the French authorities.
(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	

[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).

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 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	

[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).

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	
Article 2 *Definitions*	LU (Comments): Please refer to our comments on the relevant block.

For the purposes of this Regulation, the following definitions apply:	
(1) 'Gatekeeper' means a provider of core platform services designated pursuant to Article 3;	
(2) 'Core platform service' means any of the following:	
(a) online intermediation services;	
(b) online search engines;	
(c) online social networking services;	
(d) video-sharing platform services;	
(e) number-independent interpersonal communication services;	
(f) operating systems;	

(g) cloud computing services;	
(h) advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by a provider of any of the core platform services listed in points (a) to (g);	
(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;	
(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;	

(8) 'Video-sharing platform service' means a service as defined in point (aa) of Article 1(1) of Directive (EU) 2010/13[15];	
(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;	
(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[16];	
(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;	

[15] 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).

[16] 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).

(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;	
(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;	
(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;	
(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;	
(23) 'Control' means the possibility of exercising decisive influence on an undertaking, as understood in Regulation (EU) No 139/2004.	
Article 30 *Right to be heard and access to the file*	IE (Comments): **If a gatekeeper chooses a judicial review of the decision to designate under Article 3, which is an option available to them as confirmed previously by the Commission at this Working Party, can the gatekeeper access the designation file under Article 42 of the Charter of Fundamental Rights?**
1. Before adopting a decision pursuant to Article 7, Article 8(1),	MT

Article 9(1), Articles 15, 16, 22, 23, 25 and 26 and Article 27(2), the Commission shall give the gatekeeper or undertaking or association of undertakings concerned the opportunity of being heard on:	(Drafting): 1. Before adopting a decision pursuant to Article 7, Article 8(1), Article 9(1), Articles 15, 16, 22, 23, 25 and 26 and Article 27(2), the Commission shall give the gatekeeper or undertaking or association of undertakings concerned the opportunity of being heard on **and make any submissions thereon**: MT (Comments): This is ancillary to the right to a fair hearing to any subject to a given investigation. LU (Comments): Luxembourg considers there is a justification for consulting other concerned stakeholders than just the gatekeeper or undertaking or association of undertakings concerned. For example, business users could provide helpful input into the implementation of obligations or provide views on concrete practices that may be relevant for the decisions to be adopted by the Commission. IE (Comments): • **Why is Article 17 not included?** Article 30 DMA specifically refers to the right for an undertaking to be heard prior to the EC adopting a decision under Articles 8 and 9. However, Articles 8 and 9 do not set out any requirement for the EC to provide preliminary

	findings to the gatekeeper. Why is this?
(a) preliminary findings of the Commission, including any matter to which the Commission has taken objections;	IE (Comments): • While Article 30 refers to the companies' right to be heard and access to file in relation to any preliminary findings (and specifically refers to Article 22), Article 22 does not in turn require the EC to provide any preliminary findings to the gatekeeper regarding the need for interim measures. Why is this the case?
(b) measures that the Commission may intend to take in view of the preliminary findings pursuant to point (a) of this paragraph.	
2. Gatekeepers, undertakings and associations of undertakings concerned may submit their observations to the Commission's preliminary findings within a time limit which shall be fixed by the Commission in its preliminary findings and which may not be less than 14 days.	SK (Comments): *Would the EC be open to extent this period given the circumstance of complexity to provide all kinds of observation? not less than 1 month for instance?* FR (Drafting): **2.** Gatekeepers, undertakings and associations of undertakings concerned

	may submit their observations to the Commission's preliminary findings within a time limit which shall be fixed by the Commission in its preliminary findings and which may not be less than 14 days. If the Commission considers it necessary, it may also hear any natural or legal person who shows a sufficient interest and applied to be heard. FR (Comments): The drafting of this article establishing the rights to be heard and to access the file is based on Article 27 of the Regulation 1/2003. However, in its current version, the DMA does not grant, as does that Regulation, the exercise of a right to be heard to all interested third parties with a legitimate interest who so demand. DK (Comments): We generally believe that if the investigating and sanctioning powers are the same as in competition enforcement, then the right to be heard should be similar. In this sense, the Commission should consider whether the two-weeks time limit is sufficient to enable a full exercise of the right to be heard.
3. The Commission shall base its decisions only on objections on which gatekeepers, undertakings and associations of undertakings concerned have been able to comment.	MT (Drafting): 3. The Commission shall base its decisions only on objections on which gatekeepers, undertakings and associations of undertakings concerned have been able to comment **and make any submissions**

	thereon. MT (Comments): Rewording should be done in line with the CION's presentation (WK 4999/2021), whereby it states that decisions by the Commission can only be based on objections that undertaking(s) or association of undertakings had the possibility to comment on.
4. The rights of defence of the gatekeeper or undertaking or association of undertakings concerned shall be fully respected in any proceedings. The gatekeeper or undertaking or association of undertakings concerned shall be entitled to have access to the Commission's file under the terms of a negotiated disclosure, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the authorities of the Member States. In particular, the right of access shall not extend to correspondence between the Commission and the authorities of the Member States. Nothing in this paragraph shall prevent the Commission from disclosing and using information necessary to prove an infringement.	MT (Drafting): 4. The rights of defence of the gatekeeper or undertaking or association of undertakings concerned shall be fully respected in any proceedings. The gatekeeper or undertaking or association of undertakings concerned shall be entitled to have access to the Commission's file under the terms of a negotiated disclosure, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the authorities of the Member States. In particular, the right of access shall not extend to correspondence between the Commission and the authorities of the Member States **unless there is any material which may lead to the eventual prejudice of the rights of the said gatekeeper or undertaking or association of undertakings**. Nothing in this paragraph shall prevent the Commission from disclosing and using information necessary to prove an infringement. MT (Comments): MT considers the fact that safeguarding the rights and business interests of the gatekeeper or undertaking or association of undertakings to also be a paramount consideration, and that these have a right to defend their

	interests just as much as any other party to the proceedings. LU (Drafting): 4. The rights of defence of the gatekeeper or undertaking or association of undertakings concerned shall be fully respected in any proceedings. The gatekeeper or undertaking or association of undertakings concerned shall be entitled to have access to the Commission's file under the terms of a negotiated disclosure, subject to the legitimate interest of undertakings in the protection of their business secrets. **At their request, concerned national competition authorities shall also have access to the Commission's file, in full compliance with their obligation to professional secrecy pursuant to Article 31.** The right of access to the file shall not extend to confidential information and internal documents of the Commission or the authorities of the Member States. In particular, the right of access shall not extend to correspondence between the Commission and the authorities of the Member States. Nothing in this paragraph shall prevent the Commission from disclosing and using information necessary to prove an infringement. LU (Comments): It is unclear from this paragraph whether information obtained by the Commission on the basis of the DMA could be used in competition law cases. If this is not the case, it should be spelled out (eg in Article 31). Luxembourg considers that national competition authorities should also have access to the file, subject to the professional secrecy obligation as spelled out in Article 31, especially if NCAs are asked to contribute or are involved in the case. DK

	(Comments): We encourage the Commission to evaluate whether the absence of oral hearings is capable to affect the right to be heard. IE (Comments): • **As Article 30(4) does not cross-refer to any other Articles in the DMA Proposal, it is not clear whether the right of access to the file applies to all the provisions in the DMA or only those mentioned in Article 30(1). Could the Commission clarify what Articles apply to Article 30(4)?**
	SE (Drafting): 5. Where the Commission intends to adopt a decision pursuant to Article 23, it shall publish a concise summary of the investigation and the main content of the commitments or of the proposed course of action. Interested third parties may submit their observations within a time limit which is fixed by the Commission in its publication and which may not be less than two weeks. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets. SE (Comments): SE suggest adding a provision on market testing for commitments. This suggestion is based on article 27(4) in Regulation 1/2003. It should be noted that the applicable deadline was shortened to two weeks to take account of the short deadlines in the DMA.
Article 31 *Professional secrecy*	IE

	(Comments): • **There is still ambiguity around how auditors and experts will be appointed under Article 24? Can the Commission provide more clarity on this?** AT (Comments): *Please note that we still have our scrutiny reservation and all comments are preliminary.*
1. The information collected pursuant to Articles 3, 12, 13, 19, 20 and 21 shall be used only for the purposes of this Regulation.	NL (Drafting): The information collected pursuant to Articles 3, 13, 19, 20 and 21 shall be used only for the purposes of this Regulation. NL (Comments): •We understand that the Commission envisions being able to scrutinise relevant mergers and acquisitions in digital markets by using art. 22 of the Merger Regulation. •The information obtained through art. 12 of the DMA could prove very useful in this process. Namely, showing that a concentration threatens competition so it may be referred to the Commission. •When information obtained through article 12 may only be used in the context of the DMA, this makes the article 22 route appear less promising in terms of gatekeeper concentrations. LU (Drafting):

	1. The information collected pursuant to Articles 3, 12, 13, 19, 20, ~~and~~ 21**, 23 and 30** shall be used only for the purposes of this Regulation. LU (Comments): We propose to include the commitments according to Article 23 in this Article to ensure the necessary confidentiality. Further we wonder why this rule doesn't cover the information obtained under Article 30? We would argue to add "30" in the list of articles mentioned. DK (Comments): This paragraph does not allow sharing information collected under Art.12 in the ECN network for the purpose of merger control, and Art.22 EURM in particular. We underline the importance of clarity on the use of information collected under the DMA. AT (Drafting): 1. The information collected pursuant to Articles 3, ~~12,~~ 13, 19, 20 and 21 shall be used only for the purposes of this Regulation. **The information collected pursuant to Article 12 shall be used for the purposes of this Regulation, Regulation (EC) No 139/2004 or national merger rules.** AT (Comments):

	As already mentioned in previous discussions, we think that a mere duty to inform on planned mergers by the gatekeeper according to Art. 12 is not sufficient enough. Therefore, it is essential that at least the flow of information to NCAs is ensured and action can be possibly taken at least at national level. So there shall be an exemption for information collected pursuant to Art. 12, that it can be used for purposes of Merger Control as well.
2. Without prejudice to the exchange and to the use of information provided for the purpose of use pursuant to Articles 32 and 33, the Commission, the authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities and any natural or legal person, including auditors and experts appointed pursuant to Article 24(2), shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy. This obligation shall also apply to all representatives and experts of Member States participating in any of the activities of the Digital Markets Advisory Committee pursuant to Article 32.	SK (Comments): *We would like to call for a clear legal basis/ground, aiming at strengthening the exchange of information in the course of its control activities with other authorities if they contain personal data.* MT (Drafting): 2. Without prejudice to the exchange and to the use of information provided for the purpose of use pursuant to Articles 32 and 33, the Commission, the authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities and any natural or legal person, including auditors and experts appointed pursuant to Article 24(2), shall not disclose information acquired or exchanged **for any reason and under any circumstance** by them

	pursuant to this Regulation and of the kind covered by the obligation of professional secrecy. This obligation shall also apply to all representatives and experts of Member States participating in any of the activities of the Digital Markets Advisory Committee pursuant to Article 32. MT (Comments): This suggestion is meant to further enhance the importance which should be given to business secrets which may come to light in the course of the investigation. LU (Comments):
Chapter VI	
General provisions	
Article 34 *Publication of decisions*	
1. The Commission shall publish the decisions which it takes pursuant to Articles 3, 7, 8, 9, 15, 16, 17, 22, 23(1), 25, 26 and 27. Such publication shall state the names of the parties and the main content of the	

decision, including any penalties imposed.	
2. The publication shall have regard to the legitimate interest of gatekeepers or third parties in the protection of their confidential information.	MT (Drafting): 2. The publication shall have regard to the legitimate interest of gatekeepers or third parties in the protection of their confidential information **and state that such publication is in line with the GDPR rules**. MT (Comments): This shows that the Commission is likewise dutybound to observe the provisions which are applicable to data protection and should set an example whenever it conducts an investigation, especially where business secrets may be at stake.
Article 35 *Review by the Court of Justice of the European Union*	IE (Comments): • **The Designation decision is open to appeal to the ECJ so it is unclear why Article 35 cites only judicial review by the ECJ on fines or periodic penalty payments imposed. Can the Commission provide a response on this?** • **Can the Commission confirm that all decisions made under the DMA are open to Judicial Review?**

In accordance with Article 261 of the Treaty on the Functioning of the European Union, the Court of Justice of the European Union has unlimited jurisdiction to review decisions by which the Commission has imposed fines or periodic penalty payments. It may cancel, reduce or increase the fine or periodic penalty payment imposed.	SK (Comments): *We would welcome the addition of description of remedies, also for other type of decisions under the draft regulation, such as decisions imposing fines or periodic penalty payments (f.ex. a decision on designation as gatekeeper as per Art. 3 (7).* *Why only these two sanction mechanisms were chosen?* MT (Drafting): In accordance with Article 261 of the Treaty on the Functioning of the European Union, the Court of Justice of the European Union has unlimited jurisdiction to review decisions by which the Commission has imposed fines or periodic penalty payments. It may cancel, reduce or increase the fine or periodic penalty payment imposed **giving a detailed explanation which substantiates its amendment to the original decision delivered by the Commission**. MT (Comments): The Court of Justice of the European Union should always give an express indication of the factors which led it to amend/modify a decision which had already been delved into and delivered by the Commission, particularly where such decision is more taxing than the one originally delivered by the Commission. LU

	(Comments): We do not understand the necessity of this Article. Our understanding is that any decision adopted by the Commission on the basis of a 114TFEU legislation is subject to judicial review by the CJEU. In comparison: in the DSA, where the Commission can also take decisions (articles 58 and 59), no such article is foreseen. AT (Comments): We have a general remark on review by the CJEU: We understand that decisions of the DMA which directly and individually concern the gatekeeper are subject to a standard review according to Art. 263 TFEU and these proceedings do not have a suspensive effect according to Art. 278 TFEU. As the DMA also provides for decisions, which do not directly and individually concern the addressed party (e.g. opening of proceedings in Art. 18) we think it might helpful to clarify in the text (either by adding a second paragraph to Art. 35 or in the Articles e.g. Art. 18 itself) that those are not subject to a review.
Article 36 *Implementing provisions*	
1. The Commission may adopt implementing acts concerning: 3, 6, 12, 13, 15, 16, 17, 20, 22, 23, 25 and 30	FR (Drafting): 1. The Commission may adopt implementing acts concerning articles 1, 3,

	6, 7, 12, 13, 15, 16, 17, 20, 22, 23, 25, ~~and~~ 30 and XXX, with respect to : FR (Comments): Since the Commission is not obliged to adopt such implementing acts, Article 36(1)(b) could be opened for all the obligations laid down in Article 6(1). Indeed, all of them can be specified in the procedure provided for in Article 7. The French authorities support the introduction of a compulsory regulatory reporting mechanism for gatekeepers on the modalities and means of enforcement of their obligations (which has been suggested in an amendment to Article 7, via Article 7.1.bis). The provisions of Article 36 may provide for the adoption of an implementing act concerning the form, content and details of the information that gatekeepers shall include in such reports. The French authorities support the introduction of a reporting mechanism for third parties to inform and report to the Commission any information relating to the regulation implemented by the DMA. The provisions of Article 36 may provide for the adoption of an implementing act concerning the modalities for the submission of information and reports by these parties to the Commission. Rectification of a formatting problem: the first part of §2 is the last point of §1. LU (Comments): Which aspects of Article 20 will be covered by the implementing act? DK

	(Drafting): 1. The Commission may adopt implementing acts concerning: 3, 6, 12, 13, 15, 16, 20, 22, 23, 25 and 30 DK (Comments): The provision lists Art.17 among the implementing acts that can be adopted by the Commission in accordance with the advisory procedure. However, a market investigation under Art.17 would not conclude with a decision, but with a public report. For this reason, it should be removed from Art.36.1.
(a) the form, content and other details of notifications and submissions pursuant to Article 3;	
(b) the form, content and other details of the technical measures that gatekeepers shall implement in order to ensure compliance with points (h), (i) and (j) of Article 6(1).	FR (Drafting): b) the form, content and other details of the technical measures that gatekeepers shall implement in order to ensure compliance with ~~points (h), (i) and (j) of~~ Article 6(1).
	FR (Drafting): c) the form, content and other details of the regulatory reports delivered pursuant to Article 7.1.bis

(c) the form, content and other details of notifications and submissions made pursuant to Articles 12 and 13;	FR (Drafting): d) the form, content and other details of notifications and submissions made pursuant to Articles 12 and 13;
(d) the practical arrangements of extension of deadlines as provided in Article 16;	FR (Drafting): e) the practical arrangements of extension of deadlines as provided in Article 16; LU (Comments): What is a "practical arrangement of extension of deadlines"? Why is it not possible to provide this simple information in the Regulation itself?
(e) the practical arrangements of the proceedings concerning investigations pursuant to Articles 15, 16, 17, and proceedings pursuant to Articles 22, 23 and 25;	SE (Drafting): the practical arrangements of the proceedings concerning investigations pursuant to Articles 15, 16, 17, and proceedings pursuant to Articles 20, 22, 23 and 25; FR (Drafting): f) the practical arrangements of the proceedings concerning investigations pursuant to Articles 15, 16, 17, and proceedings pursuant to Articles 20, 22, 23 and 25;

	FR (Drafting): g) the terms and conditions for filing alerts or claims by third parties pursuant to Article XXX;
(f) the practical arrangements for exercising rights to be heard provided for in Article 30;	FR (Drafting): h) the practical arrangements for exercising rights to be heard provided for in Articles 30; LU (Comments): What further details would be contained in an implementing act that are not yet provided for in Article 30?
(g) the practical arrangements for the negotiated disclosure of information provided for in Article 30;	FR (Drafting): i) the practical arrangements for the negotiated disclosure of information provided for in Article 30;
	SE (Drafting): (h) the practical arrangements for the cooperation and coordination between the Commission and Member States provided for in Article 1(7). FR

	(Drafting): (j) the practical arrangements for the cooperation and coordination between the Commission and Member States provided for in Article 1(7). FR (Comments): Correction of a drafting error. Add a point (j) by moving up the first sentence of point 2: "the practical arrangements for cooperation and coordination between the Commission and the Member States provided for in Article 1(7)".
2. the practical arrangements for the cooperation and coordination between the Commission and Member States provided for in Article 1(7).Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 32(4). Before the adoption of any measures pursuant to paragraph 1, the Commission shall publish a draft thereof and invite all interested parties to submit their comments within the time limit it lays down, which may not be less than one month.	SE (Drafting): Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 32(4). Before the adoption of any measures pursuant to paragraph 1, the Commission shall publish a draft thereof and invite all interested parties to submit their comments within the time limit it lays down, which may not be less than one month. FR (Drafting): 2. ~~the practical arrangements for the cooperation and coordination between the Commission and Member States provided for in Article 1(7).~~Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 32(4). Before the adoption of any measures pursuant to paragraph 1, the Commission shall publish a draft thereof and invite all interested parties to submit their comments within

	the time limit it lays down, which may not be less than one month. FR (Comments): Correction of a drafting error. Add a point (j) by moving up the first sentence of point 2: "the practical arrangements for cooperation and coordination between the Commission and the Member States provided for in Article 1(7)". NL (Drafting): the practical arrangements for the cooperation and coordination between the Commission and Member States provided for in Article 1(7).Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 32(4). Before the adoption of any measures pursuant to paragraph 1, the Commission shall publish a draft thereof and invite all interested parties to submit their comments within the time limit it lays down, which may not be less than one month. NL (Comments): On the basis of article 2(2)(a) of Regulation (EU) No 182/2011 (the Comitology Regulation), the examination procedure applies, in particular, for the adoption of implementing acts of general scope. The advisory procedure, as a general rule, applies to the adoption of implementing acts not falling within the ambit of article 2(2) of the Comitology Regulation.

	Since the practical arrangements for the cooperation and coordination between the Commission and Member States would have a general scope, the Netherlands considers it appropriate to adopt the implementing acts establishing those practical arrangements by means of the examination procedure. MT (Drafting): 2. the practical arrangements for the cooperation and coordination between the Commission and Member States provided for in Article 1(7). Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 32(4). Before the adoption of any measures pursuant to paragraph 1, the Commission shall publish a draft thereof and invite all interested parties to submit their **detailed** comments **in writing** within the time limit it lays down, which may not be less than one month. MT (Comments): This suggestion is more for the sake of clarity and there should be an emphasis on the fact that such comments be detailed and almost self-explanatory in such a way that the Commission will not prolong the proceedings unnecessarily in order to try and understand the submissions of the interested parties. LU

	(Comments): We do not consider that the practical arrangement of the cooperation between the Commission and Member States is an appropriate issue for an implementing act. Such cooperation should be spelled out in the Regulation itself. DK (Drafting): (i) the practical arrangements for the cooperation and coordination between the Commission and Member States provided for in Article 1(7). 2. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 32(4). Before the adoption of any measures pursuant to paragraph 1, the Commission shall publish a draft thereof and invite all interested parties to submit their comments within the time limit it lays down, which may not be less than one month. DK (Comments): It appears that the provision contains an editing error, which is addressed in the drafting suggestion. The cooperation and coordination between the Commission and MSs will play a fundamental role for the monitoring and enforcement of the DMA. For this reason, the Commission should include in the operative part of the proposal more details about how such cooperation and coordination will take place. IE (Comments):

	Why is Article 4 of the 2011 Regulation chosen in Article 32?
Article 37 *Exercise of the delegation*	LU (Comments): Please refer to our previous comments on the opportunity of delegated acts. In general, we consider that in several instances, the objective of the proposed delegates acts 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.
1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.	SK (Comments): *We would like to stress to re-examine, whether that the proposed model of delegated power complies with the limits of Art. 290 TFEU (see, for example, Case C-696/15 P EU Court of Justice, pp. 48-54, 74 - 78, 81, 85 -86)* SE (Comments): SE supports that the regulation will be made future proofed and can be adjusted to market changes. According to SE it is important that it is regulated exactly what the delegation includes. SE considers that it is reasonable that the obligations laid down in Articles 5 and 6 could be

	subject to updating (by adding new obligations, alter or remove the obligations in the proposal) by delegated acts but find article 3.5 unclear. According to SE it should be clarified and follow from that article or in the recitals that the aim is not to alter the circle of gatekeepers.
2. The power to adopt delegated acts referred to in Articles 3(6) and 9(1) shall be conferred on the Commission for a period of five years from DD/MM/YYYY. The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.	SK (Drafting): The power to adopt delegated acts referred to in Articles 3(~~6~~)**5** and ~~9(1)~~ **10 (1)** shall be conferred on the Commission for a period of five years from DD/MM/YYYY. The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period. SE (Drafting): The power to adopt delegated acts referred to in Articles 3(5) and 10 (1) shall be conferred on the Commission for a period of five years from DD/MM/YYYY. The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period. FR (Drafting): 2. The power to adopt delegated acts referred to in Articles ~~3(6) and 9(1)~~

	3(5) and 10(1) shall be conferred on the Commission for a period of five years from DD/MM/YYYY. The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period. FR (Comments): Correction of referral errors LU (Comments): We are unsure whether "tacit extension" of the duration of delegated power would be compliant with the Comitology Regulation. DK (Drafting): The power to adopt delegated acts referred to in Articles 3(5) and 10(1) shall be conferred on the Commission for a period of five years from DD/MM/YYYY. The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.

	DK (Comments): The provision contains a wrong cross-reference, which is addressed in the drafting suggestion.
3. The delegation of power referred to in Articles 3(6) and 9(1) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.	SK (Drafting): The delegation of power referred to in Articles 3(~~6~~) **5** and ~~9(1)~~ **10 (1)** may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force. SE (Drafting): The delegation of power referred to in Articles 3(5) and 10(1) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force. FR (Drafting): 3. The delegation of power referred to in Articles ~~3(6) and 9(1)~~ 3(5) and 10(1) may be revoked at any time by the European Parliament or by the

	Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force. FR (Comments): Correction of referral errors MT (Drafting): 3. The delegation of power referred to in Articles 3(6) and 9(1) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall ~~**not affect the validity of**~~ ***be without prejudice*** to any delegated acts already in force. MT (Comments): In this way, MT feels that from the legalistic point of view, the wording is more precise. DK (Drafting):

	The delegation of power referred to in Articles 3(5) and 10(1) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force. DK (Comments): The provision contains a wrong cross-reference, which is addressed in the drafting suggestion.
4. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Inter-institutional Agreement of 13 April 2016 on Better Law-Making.	
5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.	
6. A delegated act adopted pursuant to Articles 3(6) and 9(1) shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of that act to the European Parliament and to the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period	SK (Drafting): A delegated act adopted pursuant to Articles 3(~~6~~) **5** and ~~9(1)~~ **10** shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of two months of

shall be extended by two months at the initiative of the European Parliament or of the Council.	notification of that act to the European Parliament and to the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council. SE (Drafting): 6. A delegated act adopted pursuant to Articles 3(5) and 10(1) shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of that act to the European Parliament and to the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council. FR (Drafting): 6. A delegated act adopted pursuant to Articles ~~3(6) and 9(1)~~ 3(5) and 10(1) shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of that act to the European Parliament and to the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council. FR (Comments): Correction of referral errors MT

	(Drafting): 6. A delegated act adopted pursuant to Articles 3(6) and 9(1) shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of that act to the European Parliament and to the Council or if, before the expiry of that period, the European Parliament and the Council have ~~both~~ ***conjointly and expressly*** informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council. MT (Comments): In this way, the wording would be clearer as it gives an exact indication of how the Commission should be informed.
Article 38 *Review*	IE (Comments): • **Will the evaluation also report on some of the aspects set out in the Impact Assessment such as changes in contestability, concentration, and fairness and whether regulation and oversight remains fragmented across the Union.** • **Will evaluations under Article 38 incorporate analysis of how the DMA regime has worked with/co-existed with the competition regime?**

1. By DD/MM/YYYY, and subsequently every three years, the Commission shall evaluate this Regulation and report to the European Parliament, the Council and the European Economic and Social Committee.	
2. The evaluations shall establish whether additional rules, including regarding the list of core platform services laid down in point 2 of Article 2, the obligations laid down in Articles 5 and 6 and their enforcement, may be required to ensure that digital markets across the Union are contestable and fair. Following the evaluations, the Commission shall take appropriate measures, which may include legislative proposals.	SE (Drafting): The evaluations shall establish whether additional, altered or removed rules, including regarding the list of core platform services laid down in point 2 of Article 2, the obligations laid down in Articles 5 and 6 and their enforcement, may be required to ensure that digital markets across the Union are contestable and fair. Following the evaluations, the Commission shall take appropriate measures, which may include legislative proposals. SE (Comments): According to SE it is, from a single market and business perspective, important that rules are not maintained if they, due to market changes, are no longer necessary, adequate and proportionate. FR (Drafting): 2. The evaluations shall establish whether additional rules, including regarding the list of core platform services laid down in ~~point 2 of~~ Article 2(2), the obligations laid down in Articles 5 and 6 and their enforcement, may be required to ensure that digital markets across the Union are contestable and fair. Following the evaluations, the Commission shall take appropriate measures, which may include legislative proposals.

FR

(Comments):

Drafting suggestion:
Drafting consistency: "in point 2 of Article 2 in Article 2(2)".

MT

(Drafting):

2. The evaluations shall establish whether additional rules, including regarding the list of core platform services laid down in point 2 of Article 2, the obligations laid down in Articles 5 and 6 and their enforcement, may be required to ensure that digital markets across the Union are contestable and fair ***and that there is an express justification for such rules***. Following the evaluations, the Commission shall take appropriate measures, which may include legislative proposals.

MT

(Comments):

MT feels that any additional rules should be justified, otherwise these may lead to an unnecessary prolongation of the review process and most of all make the process of evaluation more burdensome to the parties involved.

LU

(Drafting):

2. The evaluations shall **consider in particular** ~~establish whether additional rules, including regarding~~ the list of core platform services laid

	down in point 2 of Article 2, the obligations laid down in Articles 5 and 6 and their enforcement, ~~may be required~~ **in order** to ensure that digital markets across the Union are contestable and fair **and contribute to a fully functioning Single Market**. Following the evaluations, the Commission shall take appropriate measures, which may include legislative proposals. LU (Comments): The result of the evaluation shall not be pre-empted. Indeed, if the Regulation is effective, no additional rules would be necessary but possibly less rules. We therefore propose to reformulate in a more objective manner. DK (Comments): As it currently stands, the evaluation carried out under Art.38 would only allow to include additional CPSs or obligations. We believe the provision should also allow to remove CPSs or obligations where they are no longer necessary. Furthermore, for the sake of clarity, the recital should clarify the relationship between the review under Art.38 and the market investigation into new services and practices under Art.17. In this sense, the Commission could specify e.g. that the investigative tools in Articles 19-21 are only available in the context of the market investigation. Finally, we understand that the evaluations will take into account the effects of the DMA on consumers. We welcome this aspect, since it is of utmost importance to mitigate the risk that the DMA can have unintended

	negative consequences in the long-term, especially for consumer welfare. For this reason, we propose to make this aspect explicit in recital 78 clarifying that the review under Art.38 will include an evaluation of the positive and negative, direct and indirect, effects of the DMA on consumer welfare. IE (Comments): • **Article 38(2) seems to suggest that these evaluations will consider whether additional core platform services and/or additional obligations should be specified - the same issues can be considered in a market investigation under Article 17. So is Article 38 merely a requirement to carry out a market investigation similar to that carried out pursuant to Article 17 every three years?**
3. Member States shall provide any relevant information they have that the Commission may require for the purposes of drawing up the report referred to in paragraph 1.	SE (Comments): According to SE the national authorities that could be subject to a request from the Commission should be stated. IE (Comments): • **On Article 38 why are Member States the only stakeholders allowed to furnish information to assist in the compilation of the evaluation report under Article 38(1). Do the Commission envisage no role for the the Digital Markets Advisory**

	Committee, National Competent Authorities and Independent Online Platform Observatory in the Review process? Can the Commission provide further guidance as regards to information that may be required pursuant to Article 38(3)?
	<u>General comments</u> AT (Comments): On Art. 39 (2) we welcome the fact that the Articles related to gatekeeper designation process are applicable from the date of entry into force of this Regulation in order to have a swift designation process.
	SK (Comments): *Please note our general scrutiny reservations for the above mentioned.* *Thank you*
	END

Council of the European Union
General Secretariat

Interinstitutional files:
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Brussels, 03 May 2021

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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 30, 31, 34-38 (block VIII and IX)

Delegations will find attached the final consolidated table with MS comments on block VIII and IX on the document ST 14172/20 - Articles 30, 31, 34-38.