FEDERATION OF EUROPEAN PUBLISHERS
FÉDÉRATION DES ÉDITEURS EUROPÉENS

European and International Booksellers Federation

Digital Markets Act: Explanatory statement

1) Clarifying the scope to cover ancillary retailing activities

Over the years, some online marketplaces have become essential for publishers and booksellers to reach out to their customers, even more so since the outbreak of the covid pandemic. The ever increasing dominance of these marketplaces and the multiplication of unfair and uncompetitive behaviours they implement have turned them into real gatekeepers of unparalleled scope and scale. These fast growing monopolies are affecting the whole book ecosystem by increasing the sector's vulnerability and impoverishing cultural diversity, while being ultimately detrimental to consumers.

A number of marketplaces acting as gatekeepers relies on a business model that combines two different activities, running alongside each other, in a manner that is indistinguishable by the average consumer: an intermediation service (e.g. a bookseller selling books as a third party through the marketplace) and a retailing activity (i.e. the marketplace selling books directly). In the latter, publishers act as direct suppliers of the marketplace, while in the former, booksellers act as business users of the marketplace. In both cases, gatekeepers have been using their position to engage in unfair and uncompetitive behaviour against publishers and booksellers, whether in terms of self-preferencing, lack of data-sharing, the imposition of Most-Favoured Nation clauses or a lack of interoperability.

While the intermediation activity falls within the scope of the DMA, it is currently unclear if the parallel retailing activity of marketplaces acting as gatekeepers would be subject to the obligations of Article 5 and 6. Indeed, the definition of "online intermediation services" only covers the facilitation of direct transactions between third party business users and consumers. Book publishers (and other suppliers to the retail activity) not being business users of the marketplace and not selling directly their books to end users, the marketplace would not be subject to the obligations of the DMA for this side of its business model, despite this retailing activity targeting consumer alongside the intermediation activity.

Should this unclarity remain, it would maintain the great vulnerability the book sector has been suffering from ever since gatekeepers entered the market. It would also be detrimental for users who would not be able to use interoperable books in many cases when they are using the marketplace services of a gatekeeper (the offer of the gatekeeper being intertwined with the offer of third party business users like booksellers).

Clarifying that the parallel retailing activity of gatekeepers are also covered by the DMA is therefore necessary to ensure that the DMA fulfils its ambitions.

2) Fair treatment of gatekeepers' suppliers

In their relationship with gatekeepers as a supplier, publishers face a number of unfair practices and abuses, notably through the unilateral and disproportionate enforcement of the gatekeeper's terms and conditions, amounting to the gatekeeper inflicting a « death by a thousand cuts » to its suppliers, especially when those also act as their competitor on the market. Among the common abuses figure disproportionate sanctions and fines that are very difficult for the supplier to contest due to a lack of mechanism or by the impossibility for the supplier to use its own language, despite the gatekeeper being active in the supplier's own Member State.

3) Broader interoperability requirements

The DMA proposal includes some provisions for interoperability. However, the scope for interoperability is severely limited, applying only to ancillary services, applications services (apps) and applications stores (app stores).

Furthermore, no definition for interoperability is provided in the proposal, which leads to potential ambiguity on the precise meaning of interoperability in this context.

The interoperability of digital services and digital content, along with the required software and hardware with which they operate, is essential to ensure that consumers can truly choose how to access the digital content and services that they wish to purchase.

Therefore, the DMA's Article 6 obligations should be reinforced to ensure further and broader interoperability requirements not just for ancillary services or apps/app stores, but to include a wider range of digital services, formats, software and hardware used by digital gatekeepers that bind consumers to them.

Consumers should be able to switch and choose alternative services and not remain locked into the digital ecosystems and formats provided by the gatekeeper.

To achieve a fair, open and competitive internet ecosystem, we call for an ambitious definition and scope for interoperability, which should build on the definition in the EU Directive 2019/770 on contracts for supply of digital content.

4) Further clarifications to ensure future proofness

Clarifying the scope to cover ancillary retailing activities, ensuring fair treatment of gatekeepers' suppliers and broadening the interoperability requirements represent the main clarifications that are needed for the DMA to have a true impact on the sustainable development of the book sector.

However, a few other points have to be taken into account to ensure the DMA regulation includes more clarity, legal certainty and future proofness for the benefit of the European book sector.

A. Stricter obligations for gatekeepers on most-favoured-nation (MFN) clauses and contractual obligations with third-party sellers.

Currently, a number of online gatekeepers restricts, through contractual conditions, the ability of third party business users to offer their products and services at different prices and/or conditions through other channels to end users. Very often these contractual conditions apply not only to the use of other intermediation services, but also to the business user's own online direct sales channels. Business users should be allowed to freely conduct their trade on the online direct sales channels they own and at conditions that are not set by the gatekeeper. Therefore, it should be clearly specified that obligations for gatekeepers on MFN clauses also apply the business user's own online direct sales channels.

B. Clear information on the jurisdiction of specific courts

If the DMA provides for third party business users to raise concerns about unfair behaviour by gatekeepers with any relevant administrative or other public authorities, it should also be clear for the business user and, from the start, which court jurisdiction applies. Too often, when seeking available redress, business users learn, at their personal expense, that the applicable law for settling the dispute with a gatekeeper is not the one of the country where they are established. Therefore, information on court jurisdiction should be drafted in plain and intelligible language and communicated to the business users in a clear and straightforward way from the start of his using the gatekeeper's core platform service.

C. Review clause and future proofness

It should be brought to the attention of the regulator, that if the DMA current quantitative thresholds to designate gatekeepers apply to providers of core platform services that achieve a substantial annual turnover and operate in at least three Member States, these thresholds do not cover 'smaller' gatekeepers. These 'smaller' gatekeepers operate on regional or neighbouring markets, thus not falling under the financial thresholds set up in the DMA. However, it doesn't mean that they are less harmful than gatekeepers falling under the scope of the DMA, neither that they do not implement the same unfair behaviours. On the contrary, some of them have developed a regional monopoly that surpasses 'bigger' gatekeeper's entrenched position on a given market.

As the DMA will be subject to a review clause, we therefore suggest to take stock of the lessons learned until the first review, and then take into consideration the possible benefit that its application to 'smaller' gatekeepers might bring to regional markets.