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POSITION PAPER

The Digital Markets Act: restraining gatekeepers' power

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A handful of tech companies have become global gatekeepers to the modern world. Companies including Google, Facebook, Apple and Microsoft set the terms of engagement for billions of internet users and have a sphere of influence that is rapidly expanding to encompass social and government institutions, other businesses, consumers, and citizens. There is an urgent need to disentangle the benefits of the services they provide from the risks of their dominance over public and private life.

In order to be profitable, the Big Tech companies rely on reaching a position of near-total market dominance, in which they can create, maximise and monetise network effects. Over time, the companies' unique ability to amass large amounts of data gives them a massive advantage over potential competitors. They augment this advantage by their ability (and appetite) to acquire new (often relatively young) companies. Subsuming potential competitors further secures a company's market dominance, and frequently feeds them more data, which also reinforces their power. At the same time, their control of expanding infrastructure means they are able to preference their own products whilst extracting rents from competitors who have few alternatives and depend on them to operate.

This dynamic has enabled the rise of today's centralized platform economy. A handful of global tech companies have virtual control over scarce and vital digital infrastructures, setting the terms of participation in ways that "lock in" consumers, employees, small businesses - and even governments -- to the pricing and terms and conditions they set. The dominance of the Big Tech platforms at both an infrastructure and data level, means that even their competitors are forced to rely on them.

In this way, Big Tech companies impact the economy as a whole and the way people do business, their rights as employees and consumers, as well as the choices they can exercise. It is, by now, abundantly clear that the power of Big Tech needs to be reined in. Efforts to achieve platform accountability through data protection regulation or through introducing rules on content moderation and algorithmic design and transparency, while vital, fail to address the market dominance of the Big Tech companies.

In the short term, reigning in Big Tech requires measures such as greater limits and more control on mergers and acquisitions and stronger protections for workers and smaller companies that become dependent on the platforms. The European Union's **Digital Markets Act (DMA)** is an important stepping stone along this path.

SOMO supports the proposed DMA, which it sees as a timely opportunity to create the necessary conditions to address the unhealthy market dominance of a relatively small number of companies in the European digital sector and to put an end to abusive business practices perpetrated by digital giants. This position paper aims to contribute to the trilogue debate within the European Union by outlining a few key priorities for action.

Measuring monopoly power
For too long the focus of many competition authorities has been consumer price, a data point that has significant limits in the context of Big Tech platforms, since end users often do not pay anything at all, at least not in monetary terms (the cost in terms of their data and privacy can be significant). Additionally, this metric tends to distract attention from the extent to which other actors, such as workers, small businesses and governments, are harmed by concentrated corporate power in the tech sector. We need new metrics to ensure competition responses to the growth of Big Tech do not limit our ability to address their vast acquisition of power and wealth.

1. Strengthen merger control provisions and ensure strong enforcement

Mergers and acquisitions are unarguably central to the business model of Big Tech. This approach not only eliminates potential competition and opens up new opportunities to acquire data, it also increases the range of sectors (business and public) into which the tech giants can expand. 'Non-digital' sectors rapidly become digital businesses and platforms. Tech companies have been creating new digital business sectors and have acquired non-digital companies in the process, from Fintech buying banks to 'Health tech' buying health infrastructure.

SOMO's work on the financialization of Big Tech corporations has highlighted how their business model enables Big Tech corporations to either develop with fierce organic intensity or to diversify into new fields by acquiring other enterprises, which allows them to integrate operations into a sprawling, data-driven, interconnected net of platformed activities that makes it even harder for users to opt out.

The cumulative impact of Big Tech's acquisition of smaller companies and expansion into diverse sectors has been recognised but is not well addressed by existing competition and merger control laws in the EU. The DMA language on merger control can help address this lacuna.

(a) Ensure that all mergers are controlled (Art. 12, 4CT row 228)

DMA merger controls should not be limited to mergers between gatekeepers and other service-providers in the digital sector: this would reduce the potential of the legislation to meet its objective to ensure that these platforms behave in a fair way online. The DMA should cover acquisitions of companies by gatekeepers that may fall below gatekeepers' thresholds but are highly relevant for market contestability. SOMO supports the

Parliament amendment that provides that gatekeepers shall notify the Commission about all their attempted acquisitions falling under the scope of Regulation 139/2004 (control of concentrations to protect competition) regardless of whether they target another gatekeeper, another digital services provider or any other company.

(b) Additional data provision from gatekeepers for merger controls (Art. 12, 4CT rows 230-230a)

Effective merger control can only be realised if it is based on sound data. SOMO agrees with the Council's position that turnover and numbers of users of the targeted company are not enough. Gatekeepers should also be required to provide information to the Commission about the field of activity of the targeted company, the transaction value and the rationale for the acquisition. This provision is important to ensure that gatekeepers can be more effectively prevented from making "killer acquisitions", which remove potential competitors or which give the gatekeeper new means to expand its market dominance. In addition, it is important that the information provided by gatekeepers on potential mergers is not solely restricted to financial data but includes qualitative variables that can shed light upon the impact of potential acquisitions on the contestability of the market.

(c) Diffusion and publication of information on concentrations (Art. 12, 4CT rows 231a-231c)

The amendments of both the Parliament and the Council should be retained: all information on market concentration gathered by the Commission in the framework of mergers control should be shared with Member States so that they can use it to ask the Commission to impose interim measures (see point 2). A summary of every concentration case should be immediately published as well as an annual list of the cases opened. In order to break oligopolies, maximum scrutiny is key.

2. Interim measures against market abuse (Art. 22, 4CT rows 280-280b)

Gatekeepers' practices and tools evolve constantly and rapidly. New practices might result in immediate threats to contestability. Effective action against market abuse requires an ability to impose interim measures to quickly prevent unfair practices. SOMO strongly supports the Parliament's amendments in this respect. The DMA should enable the Commission to impose interim measures on gatekeepers to prevent market abuses and unfair practices by gatekeepers.

3. Ban data cross-use between different services, the use of non-publicly available data in competition, personalised ads without consent, and all personalised ads targeting minors (Art. 5 and 6, 4CT rows 176,182f and 185a)

The DMA should ensure that the data of end users is not exploited by digital platforms. The market power of digital platforms can be substantially augmented through the combination and cross-use of personal data, undermining the rights of individuals and the objectives of the DMA. This abusive behaviour is rightfully targeted by articles 5 and 6, which lay out a list of obligations for gatekeepers to abide by. In this regard, SOMO particularly supports Article 5(a), which requires gatekeepers to refrain from combining and cross-using personal data collected through their ancillary services, unless end users have been presented with the

specific choice and provided consent in the sense of the General Data Protection Regulation (GDPR). Although a systematic ban on cross-using data would have been preferable, we agree with the Parliament's view that this choice should at least be presented to end users in an explicit and clear manner.

The exploitative use of data seriously undermines both the protection of privacy and fair competition in the digital sector. We strongly support the suggestion of the Parliament to move the obligation of gatekeepers to refrain from using data generated through platform services but that is not publicly available in their competition with other companies from Article 6 to Article 5. This will make it part of the gatekeepers obligations that do not need further specification and that will therefore be directly applicable. Finally, we support the Parliament's proposal to ban personalised advertising without consent, and under any condition targeting minors.

4. Enforce interoperability (Art. 6, Rows 190-190b)

Allowing functional interconnection of all providers of interpersonal communication and social network services is a key step towards breaking unnatural monopolies that limit consumer choice while favouring the hyper-concentration of sensitive personal data. We therefore support the Parliament's proposal on this issue.

5. Do not let digital giants off the hook (Art. 3, rows 151-153)

We support the Parliament's deletion of the possibility for companies that fulfil the quantitative criteria to be considered gatekeepers to ask to be exempted from DMA by demonstrating that they would not satisfy qualitative criteria. We also support the Parliament's deletion of the obligation for the Commission to engage in a fully-fledged market investigation where a company claims that it is not a gatekeeper despite meeting the quantitative criteria. Such provisions would waste the Commission's time and weaken the DMA.

6. A strong role for national regulators (Art. 1, 31, 4CT rows 101, 361x)

SOMO supports the view that Member States should not be limited by the DMA in their ability to place additional obligations on gatekeepers for the purpose of protecting legitimate public interests. Such interests could include the protection of consumers, the prevention of unfair competition or the protection of media pluralism, which all require both European and national regulatory and inspection capacity. In that sense, the enforcement of the DMA by the European Commission should not prejudice the enforcement of additional rules by national authorities, particularly in the context of such a fast-changing ecosystem where national authorities must have the capacity to act in the public interest. SOMO therefore strongly opposes the Parliament's proposal in Article 31 giving a veto power to the Commission on individual measures imposed by national regulators.

Cooperation between the European Commission and national authorities is necessary to conduct market investigations against gatekeepers for suspected infringements to the DMA obligations. In that regard, SOMO acknowledges the benefits that the Council's Articles 32a and 32b can bring for better market investigation and enforcement of the DMA regulation on reluctant gatekeepers. SOMO additionally supports the creation of a European High-Level Group of Digital Regulators, as proposed by Parliament in Article 31b.

Member States should also be able to ask for a market investigation on whether new actors come to qualify as gatekeepers. We therefore support the Parliament's proposal that at least two governments can request such a market investigation without having to carry the burden of proof (Article 33, 4CT rows 368, 369), as well as the Council's proposal to have a Commission reply within four months (Article 33, 4CT row 368a, 368b).

7. No privileged access for digital giants (Art. 7, 32, rows 199a-199d, 363)

We strongly oppose proposals to create a compliance dialogue between gatekeepers and the European Commission. We believe such measures could have a counter-productive impact on the application of the DMA rules as these might come at the expense of legal certainty and would create an opaque space for gatekeepers to negotiate their compliance and undermine achievement of the DMA's objectives.

SOMO opposes the concept of regulatory dialogue. We do so based on our extensive experience of regulatory capture by business actors, leading to sometimes serious regulatory failures. This has been well documented in the oil and gas sector for example, such as in the revelations that emerged after the Gulf of Mexico oil spill. Regulatory capture was also a feature of the 2008 financial crash and the failure of the regulators to properly scrutinize the sector's behavior. While regulators and the subjects of regulation will need to engage, the scope of this engagement should be careful circumscribed and take account of the risks of regulatory capture and corporate lobbying of regulators.

As suggested by the Parliament, exchanges between the Commission and the gatekeeper should be limited to clarifications and specifications in relation to how to comply. Third parties such as consumers organisations and civil society groups should also be able to give input. The full process, from commencement until the Commission issues a decision on the gatekeeper's compliance, should not last more than four months.

SOMO supports the civil society agenda on the DMA

The above priorities focus on the important role the DMA can play in curbing the unique concentration of power we observe in the tech sector. SOMO also supports priorities of civil society organisations such as:

- Freedom to change setting and uninstall pre-installed apps (Art.5, point (gb) and Article 6(1), Rows 182g, 186, 187)
- Application threshold: 6.5 billion in financial turnover and 65 billion in market capitalisation (Art. 3(2), Row 144)
- The highest possible fines for systemic non-compliance coupled by temporary restrictions in acquisitions (Art. 26, row 303)