

## egta – Association of Television and Radio Sales Houses

### Position on the proposal for a Digital Markets Act

*egta is the media trade body for television and radio advertising, representing 160 companies in Europe and beyond. egta members come from both public and private sectors and cover respectively 80% and 60% of the total TV and radio ad spend in Europe, thus playing a fundamental role in the sustainable funding of the European audiovisual and radio industries.*

#### EXECUTIVE SUMMARY

TV and radio broadcasters and their sales houses are now present across all devices, allowing audiences to access their content from channels and services in analogue to digital and online, in a linear and non-linear fashion, through their own services or mediated by online platforms. The monetisation of content has adapted to these evolutions and while broadcasting advertising remains predominantly served on a one-to-many basis, new online perspectives arose, facilitated by said-gatekeepers.

egta welcomes the European Commission's proposal for a Digital Markets Act (DMA) and its principle-based approach imposing obligations and prohibitions to designated gatekeepers. To ensure this horizontal regulation can benefit television and radio sales houses, we call for the following provisions to be addressed in the proposal:

- Maintain a limited but clarified scope that reflects market realities by **including digital voice assistants, connected TVs and web browsers**;
- Guarantee information **transparency** across the advertising value chain;
- Ensure gatekeepers provide fair **access to data** to TV and radio companies in relation to their own content while refraining from using it to compete with broadcasters;
- Prevent a take-it-or-leave it approach by gatekeepers to the prohibition of end-user data combination and to the obligation of data sharing to business users, by being gatekeepers **to end-user consent**;
- Enable independently mandated third-parties to access reliable and granular **measurement data**;
- Allow the **interoperability** of services and products online advertising designated by broadcasters with online platforms proprietary tools;
- Ensure broadcasters **access** gatekeepers' services and negotiate the **monetisation** of their content on these services, on fair and non-discriminatory general conditions;
- Prohibit gatekeepers' capacity to **rank more favourably** their own services and third-party sponsored content.

## INTRODUCTION

egta welcomes the European Commission's proposal for a Digital Market Act (DMA), harmonising rules ensuring contestable and fair markets in the digital sector across the Union where gatekeepers are present. In particular, we support the Commission's provisions that acknowledge issues raised by TV and radio sales houses in recent years. This paper puts forward recommendations to strengthen these measures so that the DMA ensures a level playing field in the online advertising ecosystem for TV and radio broadcasters.

### **1. CONTEXT**

The monetisation of TV and radio broadcasters' content relies on a variety of resources, including advertising. While other models exist, such as pay-to-access, they cannot be considered as viable alternatives to all TV and radio offers as they would drastically limit the funding of and access to content to many. Ultimately, maintaining a free and pluralistic media environment depends on advertising revenues.

TV and radio advertising inventory are traditionally sold by broadcasting sales houses thanks to a direct relationship with advertisers, often mediated through agencies. As today's viewers and listeners now have access to TV and radio as part of wider video and audio formats, on a rich range of platforms and (connected) devices, the monetisation of content has evolved to adapt and fit its online environment. In this new context, broadcasters (considered as 'online publishers') remain in a position to sell their inventory to advertisers within a value chain that is composed of two or more external actors, supporting and intermediating the process.

### **2. ISSUES POSED BY ONLINE ADVERTISING EVOLUTIONS**

#### **A complex and opaque online advertising value chain**

The online advertising ecosystem is best described as being an environment where broadcasters and online platforms are in a situation of power imbalance. Online platforms mediate online publishers' relationship to advertisers through a complex and opaque value chain, often described as a 'black box'. In particular, the model of programmatic advertising is gradually taking over mutual agreements, therefore adding (third-party) intermediaries and supervision to an exchange that was initially made as a direct contract between parties.

The online advertising business model imposes intermediation practices to function and to sell one's inventory, often through ad exchange and public auction mechanisms. They lead to a loss of advertising revenues for broadcasters and a weakened online advertising model, in which the intermediaries that are part of the value chain are the main beneficiaries of the revenue collected from advertising. Data shows that (online) publishers receive 75% of the advertiser's investment through direct advertising deals with advertisers/agencies compared to an average of 51 to 65%<sup>1</sup> when it is programmatic, due to fees charged by intermediaries.

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<sup>1</sup> CMA, 'Online platforms and digital advertising', Market study final report, 1 July 2020, p.63-64

TV and radio broadcasters' reliance on online platforms services is characterised by a lack of competition in ad tech and an environment in which a small number of companies determine the rules of the game. Fostering opportunities for new players (DSPs, Ad Exchanges, SSPs and Ad Servers) to enter the market as well as an increased interoperability of services is paramount to broaden broadcasters' choices of providers, ultimately leading to better commercial deals for online publishers.

### **A handful of market players acting as gatekeepers to valuable data**

Data is an asset for broadcasting content monetisation. As online platforms increasingly facilitate the relation between broadcasters and their viewers and listeners, there is a data asymmetry and poor access to data for broadcasters, in particular on content consumption and marketing performance. A handful of powerful companies control how the data generated by TV and radio audiences is shared with broadcasters and thereby benefit from a privileged competitive situation.

Due to their dominant position and the lack of alternatives, these online platforms leverage their position of gatekeeper to impose unfair trading practices and contractual terms to business users. The largest actors in the online advertising market, Google, Facebook and Amazon, have managed to secure a duopoly in large part thanks to the massive quantity of data they hold, exclusivity agreements they impose on advertisers and the lack of transparency of their services.

### **Gatekeepers' powers to adopt unilateral decisions with strong ramifications for media**

We acknowledge the recent privacy policy changes adopted by large gatekeeping online platforms, to supposedly protect EU consumers' online privacy. However, as any development by such online platforms are bound to have consequences on TV and radio sales houses' online operations, we are cautious that by doing so, they act as quasi-regulators of an environment on which many actors, small and large, are dependent. Privacy is being used to foreclose the market to competitors, thus strengthening the gatekeeper's dominant position.

This particular situation is intensified by the fact that these decisions are relatively unchecked. As such, neither Data Protection Authorities nor Government Institutions are given the opportunity to act. We therefore encourage the opening up of these discussions and a *droit de regard* for both public bodies (executive powers, Parliaments etc.) and private actors over commercial or technological decisions taken by these companies, in particular when these result in the changing of market access conditions. We consider it to be crucial for all actors of the advertising value chain to be involved so as to prevent any decisions unilaterally adopted by gatekeepers having an adverse effect on the rest of the market participants.

## **3. SOLUTIONS PROPOSED IN THE DMA**

Based on member experiences, egta proposes the following recommendations to the current DMA proposal with the ultimate goal to allow TV and radio broadcasters to maintain the undertaking of sustainable activities, and provide European viewers and listeners with quality content and trusted information.

#### a. Gatekeepers: scope and designation

**We support a limited scope**, applying to online platforms benefiting from strong network effects, who can leverage their assets by entering news areas of activity, raising new barriers to entry for competitors, accumulating valuable and diverse data and information, with very few alternative services available on the market. The current thresholds to designate a provider of core platform service as a gatekeeper, as outlined at article 3 of the proposal for a DMA, are therefore satisfactory.

Further clarifications as to the list and notion of core platform services are however warranted. *Firstly*, as core platform services have ‘*the ability to connect many business users with many end users through their services*’ (recital 3 of the proposal), it is key to include **web browsers** on the list of core platform services in article 2(2) of the proposal. Browsers are indeed the main, if not the sole, route for many broadcasters to make available and monetise their content online.

*Secondly*, the current wording leaves room for interpretation as to the scope of activities covered by one gatekeeper’s core platform services. As gatekeepers leverage their position on a given market thanks to the strong network effects of one or more services, it is paramount that all core platform services of a designated gatekeeper abide by all the ‘dos and don’ts’ of the proposal. In that sense, we recommend adding a reference to **digital voice assistants** and **connected TVs** as they are increasingly acting as gatekeepers to radio and television content.

The designation process of a gatekeeper as outlined in the proposal is lengthy. We are concerned it may mitigate the substantive effects of an ex-ante intervention, which are to minimise the harmful structural effect of unfair practices. To prevent core platform services from further delaying the designation process, we recommend clarifying the current wording in article 3 so that core platform services comply with the obligations attached with the DMA proposal from the moment they meet all the quantitative criteria set in article 3 (1). In the same vein, we encourage the opening up of the designation process mechanism, notably in the market investigation procedure, in such a way that business users or consumer organisations can flag-up online platforms believed to be acting as gatekeepers to the European Commission or national authorities, without having to launch of an ex post investigation.

#### b. Data-related provisions

It is crucial for broadcasters and their sales houses to access data about their services and audiences regardless of the device used by viewers and listeners. We particularly welcome the data-related provisions of the DMA proposal in **articles 5 (a) and (g), and 6 (1) (a) and (i)** and believe that they must be strengthened and specified to address sales houses’ identified issues.

- **Data transparency:** guarantee information transparency across the advertising value chain

The increasing presence of intermediaries in the relationship that exists between advertisers and online publishers for the buying and selling of broadcasters’ inventory has led to the current opacity of the online advertising value chain. It is therefore paramount that both ends of the value chain have access to information on the price paid by their counterpart, and **article 5 (g)** is welcome in providing more transparency in this regard. We recommend that the current measure is amended so to remove any burden for advertisers and publishers. In addition, as gatekeepers mediating the relationship

between advertisers and publishers tend to take unwarranted compensations, the obligation should also cover the providing of information on the methodology used by the gatekeeper to calculate the price and the **advertising intermediation fees**.

Also, while the corresponding **recital 42** includes valuable explanation of the opacity of the online advertising system, it would gain in future relevance if it did not refer to a single and specific event. We suggest it states instead the broader concept of **decisions unilaterally adopted by gatekeepers that have substantial consequences on an entire ecosystem**. Such behaviour would indeed cover gatekeepers that are abusing their dominant position, in a relatively unchecked fashion.

- **Access to and use of data:** ensure gatekeepers provide data to TV and radio companies in relation to their own content while refraining from using it to compete with broadcasters

Gatekeepers mediate broadcasters' relation with their audience online, therefore holding significant data generated by and from business users' content and services accessed by audiences. The obligations in **article 6 (1)(i)** of the proposal bring valuable legal certainty to broadcasters who currently receive limited data from online platforms stemming from their own services and content online. To ensure this obligation benefits business users of all services of a designated gatekeeper, we recommend broadening of the scope so that it is not limited to the business user directly connected with the use of the service by the end-user.

We welcome the Commission's **article 6 (1)(a)** that prohibits the use by gatekeepers of data generated or provided by TV and radio to compete with the latter. This provision has the ability to prevent gatekeepers from leveraging their unique dual position of intermediary and provider of advertising services to use it to their own advantage in contexts where they compete with broadcasters, **if not limited to a specific competing business user**. It would also reflect the wording in the relating recitals 43 and 44 of the proposal that are extending the provision to all business users, as opposed to a particular business, therefore ensure more legal certainty.

- **End-user consent:** prevent a take-it-or-leave it approach by gatekeepers to the prohibition of end-user data combination and to the obligation of data sharing to business users

**Article 5(a)** introduces a positive prohibition that precludes gatekeepers from deriving their market power from combining user's personal data sourced from their proprietary environment. We however warn against the inclusion of a **consent exemption** to this prohibition as it will inevitably lead to gatekeepers adopting a take-it-or-leave it approach to consent, consequently enabling them to leverage their market power to their advantage. Similarly, the current wording of **article 6 (1)(i)** enables a gatekeeping situation in which the provider of the core platform service is the sole party able to obtain consent, and a comparable approach is necessary.

### c. Audience measurement

Audience measurement is essential for the TV and radio ecosystems as a whole. As such, **reliable and independently verified information** ensures sales houses sell broadcaster's inventory and monetise their content at a price that reflects market realities, thereby safeguarding media pluralism.

While the multiplication in screen types and devices has proven to be challenging to application of the typical uniformed audience measurement systems to the online environment, industry-wide mechanisms have been developed to grasp the complexity of viewing and listening data on broadcasters' proprietary channels and platforms (such as VOD). Broadcaster output on other

platforms such as YouTube or Facebook is usually not included by these industry measurement solutions; when it is however the case, the data is limited to the extent that the exercise of audience measurement can be challenging, and may differ from one market to another, in accordance with each actors' leverage.

We therefore welcome the provision outlined in **article 6 (1)(g)** that imposes a new European obligation for audience measurement to ensure a minimum European-wide access to performance measuring tools and information so that relevant actors can carry out their own independent verification of the ad inventory. To strengthen this provision, we strongly recommend that it is amended to explicitly empower publishers and advertisers to receive **granular, reliable and transparent data on a continuous and real time basis that has been independently verified by trusted, approved and neutral third parties.**

#### **d. Interoperability of services and products in the online advertising environment**

Online advertising is bought and sold following mechanisms that are primarily controlled by online platforms, so much so that it is difficult for broadcasters to sell their inventory on their own services or third-party platforms, using alternative tools. The interoperability of tools designated by broadcasters with online platforms' advertising services is imperative to overcome gatekeepers' exclusionary practices. We therefore welcome the prohibition and obligation in **articles 5 (e)** and **6 (1)(f)** respectively and call for their scope to cover **ancillary services**, thereby including advertising services.

By prohibiting gatekeepers from requiring broadcasters and their sales houses to use their proprietary or designated advertising services, gatekeepers will be **prevented from imposing or favouring their products** when substitutes can be implemented. Open access to third-party providers and competitors to ad servers, ad exchanges, supply-side platforms etc., on platforms' property will subsequently enable competition and avoid user lock-in.

#### **e. Fair and non-discriminatory access to gatekeeper's services and monetisation of content**

Gatekeepers are important access points to video and audio content for many Europeans, and TV and radios broadcasters have increased their online presence to ensure appropriate distribution. As they control users' access to content, gatekeepers are in a position that enables them to impose take-it-or-leave-it general conditions to broadcasters for provision of their content and services to their core platform services. While we welcome the proposed **article 6 (1)(k)**, we strongly suggest its scope be broadened so the imposed obligation is not limited to software application stores but applies to core platform services and their operating systems. This provision should also prevent gatekeepers and their operating systems from associating sponsorship and advertising to third-party content without the content provider's prior consent.

Sales houses monetise broadcasters' online content when accessed both from the TV or radio's own platforms and from third-party platforms (e.g. online social networking services). As online platforms mediate audiences' access to broadcasting content and control the tools necessary for the monetisation of this content, it is crucial that business users are able to **negotiate, on fair and non-discriminatory general conditions**, with designated gatekeepers. In this sense, gatekeepers should

not be enabled to escape from their negotiation obligations by setting up technical barriers, such as by refusing the monetisation of broadcasters' content through joint marketing mechanisms.

Equally, the **sharing of revenues** resulting from the access and monetisation of TV and radio content on these third-party platforms must be carried out on fair and non-discriminatory general conditions, so to allow a return on investment, and stimulate the production of quality content and trusted information.

#### **f. Ranking and preferential treatment**

By giving preferential treatment to its own services or designated third-parties in the online advertising ecosystem, a gatekeeper is in a position that allow it to set its own market conditions to the detriment of other market actors and consumers. **Article 5 (d)** and the corresponding ranking definition in **article 2 (18)** must be amended to extend the prohibition to more services that are provided by a wide array of actors that affect TV and radio sales houses activities, which includes online intermediation services, **video-sharing platforms, operating systems, web browsers** and online social networking services.

We equally recommend that this ban is applied to ranking and other settings as well as to access and conditions for the use of technical functionalities and interfaces, which may be conditional on direct or indirect remuneration, in accordance with the Platform-to-Business Regulation. In practice, this prohibition would ensure that audiences are accurately given access, by the gatekeepers, to TV and radio services and content they have requested, instead of the platforms' own competing offers, in line with the users' queries.

Finally, as core platform services such as online search engines are gatekeepers to content via search results, limiting their capacity to promote paid-for online intermediation services is fundamental to provide a level playing field. This would further curb gatekeepers' quasi limitless ability to fund their services and reduce the distorted impact top sponsored search results can have on consumers' search for relevant content and information. As a way of comparison, broadcasters must follow quantitative rules that limit the advertising spots in linear and analogue.