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DuckDuckGo's position on the Digital Markets Act

DuckDuckGo is a privacy technology company. We believe that privacy is a human right and that getting privacy online should be simple and accessible to everyone. Every day, millions of people rely on our free all-in-one solution to stay private online. With one download of the DuckDuckGo Privacy Browser for mobile or the Privacy Essentials browser extension for desktop, we offer seamless protection to our users. This includes our tracker blocking technology and our private search engine that is the fourth largest in the European Union and serves over two billion queries a month. Established in 2008, we have been robustly profitable since 2014 as a result of revenue generated from contextual search advertising, which is based on the context of a page you are viewing, as opposed to behavioral advertising, which is based on detailed profiling about you as a person.[1]

We welcome the Commission's unprecedented ambition in opening up digital markets with the Digital Markets Act (DMA). We concur that it is critical to dilute the power of online gatekeepers, for the good of society, innovation, and competition. Google's 93% search market share in Europe[2] is the result of market foreclosure tactics, including hoarding default positions, either self-granted (Chrome, Android)[3] or acquired (iOS). The DMA has the potential to address deep market imbalances like this one, but it shouldn't jeopardize the proper implementation of antitrust decisions in the process – and it also shouldn't repeat mistakes evident in past enforcement failures.

Many of the issues that people are rightfully concerned about on the Internet all stem from the same root: a lack of privacy. The collection and exploitation of personal data strengthens the position of digital monopolists and leads to filter bubbles, discriminatory targeting, identity theft, misinformation campaigns, and chilling effects. As more people choose privacy, and as governments facilitate and buttress those choices, we can redress these harms. While privacy-protective businesses are coming from market innovators, governments need to ensure a truly competitive market actually exists. Today, such businesses cannot effectively reach users because of gatekeepers. **Together, the vigorous**

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[1] "What if We All Just Sold Non-Creepy Advertising?", *The New York Times,* Gabriel Weinberg, June 19th, 2019

[2] https://gs.statcounter.com/search-engine-market-share/all/europe (as of January 26th, 2021)

[3] We discuss further below how the current design of the search preference menu on Android acts as a practice of equivalent effect to self-preferencing.

enforcement of ex-post competition law and the DMA as a strong ex-ante regulatory framework, could form an effective architecture for tackling this competition problem.

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DMA recommendation #1: a stronger enforcement framework.

- The Commission's hiring target in the **annex** (80 full time equivalents) should be substantially increased by at least an order of a magnitude, and much closer to, for instance, the 600+ staff of the UK Competition and Markets Authority. The Commission should also formally commit to hiring a variety of expert profiles.
- While the Commission should remain the decision-maker of last resort**, national competent authorities should have a formal supportive role in handling complaints**, cooperating with market participants, conducting investigations, and monitoring compliance. They should act under the remit of a coordinating body which would replace the Digital Markets Advisory Committee, since such committees are usually composed of officials from national ministries.

DMA recommendation #2: close the loophole in the gatekeeper identification procedure.

- **There should be a three month deadline** (the same as the proposed notification deadline) for the **gatekeeper identification procedure** of article 3.6, which also applies when a presumed gatekeeper seeks to demonstrate it isn't one (article 3.4).

Both regulatory speed and technical savvy are key to success. Strict deadlines measured in months, not years must be imposed and followed. The Commission must have substantial professional staff (lawyers, economists, engineers, researchers, technicians) and procedural power to obtain and understand documents, data, code, and other information. Without these resources, the Commission has no practical ability to do its job.[4] It is therefore of primary importance for the successful enforcement of the new regulatory framework that the legislature dedicates the necessary resources to the Commission in its oversight role. The enforcement framework should also give a supporting role to competent

[4] For example, a business that relies on Google for core services is bound by contract not to disclose restrictive contract provisions in the absence of compulsory process. Similarly, companies dependent on large gatekeepers may be reluctant to jeopardize their business by affirmatively reaching out to regulators but may be eager to respond to a legal requirement to provide information.

national authorities (competition, regulatory and/or data protection authorities depending on the country) given their breadth of experience in tackling big tech power and their resources and connection with local markets.[5] Should that not occur, the problem will only be exacerbated, much like the **deeply flawed search preference menu** instituted as a remedy in the aftermath of the **Commission's Android competition case.**[6] More than a year after its rollout, the Android search preference menu, by which alternative search engines are forced to bid for a spot on an artificially limited user selection screen, has unsurprisingly had no impact on diversifying market shares.

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DMA recommendation #3: a formal participation framework

The DMA should include **formal avenues of participation**:

- In the gatekeeper designation procedure;
- In designing and monitoring remedies;
- With a possibility to lodge a formal complaint for alleged non-compliance;

In addition, competent national authorities should be able to cooperate with stakeholders in receiving complaints and undertaking their monitoring and investigation tasks.

The failure of the case against Google's anticompetitive practices with Android devices in restoring search competition has also revealed how a lack of participatory processes prevents effective enforcement. The "remedy" was designed solely by Google, which continues to keep intense secrecy on its functioning from market participants. In October 2020, we voiced these concerns with other alternative search engines, together with a simple demand: a trilateral meeting with Google in order to improve the preference menu in practical ways.[7]

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[5] In *Designing Remedies for Digital Markets: the Interplay Between Antitrust and Regulation* (November 2020), Filippo Lancieri (University of Chicago) suggests the harm identification, remedial design and monitoring tasks could be allocated to separate regulators (competition or regulatory authorities) depending on the nature of the incriminated practice. This model could serve as inspiration for designing an efficient European enforcement framework.

[6] In 2018, the Commission imposed a record fine on Google for illegal practices on Android mobile devices. The Commission found that Google leveraged its control of the mobile operating system (Android) and the app store (Play Store) to require device makers to pre-install Google's browser (Chrome) and search app, therefore securing default positions. Google is also required to take action to reverse the improper advantage it obtained with a behavioral remedy, which led to the current search preference menu.

[7] https://spreadprivacy.com/trilateral-search-meeting/

Unfortunately, in its current form, the DMA reproduces this deficiency – market participants are given no role in providing the Commission with input, not even for complaints. Should the DMA continue to let the Commission engage in closed dialogues with very well-resourced gatekeepers, its proper enforcement will be in jeopardy.

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DMA recommendation #4: include browsers in the list of Core Platform Services.

- Browsers should be defined as a "Core Platform Service", giving the Commission the possibility to intervene in a key area of gatekeeper control, as it demonstrates in its own impact assessment.[8] It would open the door to banning Google from setting its own search service as default on Chrome, or to set Chrome itself as default on Android.

DMA recommendation #5: make it easier for the Commission to impose remedies in relation to all obligations.

- The DMA proposal rightly acknowledges that restrictions to **self-preferencing and tying would need to be "further specified"**, i.e. by imposing specific remedies, listing these under Article 6. But under Article 5, the Commission lists provisions which it deems "self-executing".
- **That artificial distinction between article 5 and 6 therefore needs to be removed**. It means that Article 7.2 on compliance needs to be amended to encompass Article 5 obligations. The Commission would thus be more easily able to "specify the measures that the gatekeeper concerned should implement" with regard a given obligation, without the need to go through the more burdensome non-compliance procedure.
- The relevant distinction between both articles could be maintained by **more clearly limiting the application of article 6 obligations to certain types of digital services**, while giving the regulator the ability to design remedies for specific gatekeepers in order to fulfill the overall objectives of this regulation.[9]

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[8] European Commission's impact assessment report on the DMA, SWD(2020) 363, pp 23, 41, 58

[9] BEREC supports such approach in its March 2021 Opinion on the DMA. JRC experts suggest to create a "dark grey list" as a way to put the burden of proof on the gatekeeper. In *The EU Digital Markets Act: A Report from a Panel of Economic Experts, JRC European Commission, 2021* https://publications.jrc.ec.europa.eu/repository/handle/JRC122910

The Android decision has been instrumental in revealing how the combined forces of dominance in the browser (Google Chrome) and operating system (Android) markets enabled Google to entrench its search dominance and how a lack of attention to remedies can lead to a cure that is worse than the disease. In a series of blog posts, we explained how **Google has only pretended to put an end to its abusive practices:**[10]

- Google's commitment to introduce **a "pay-to-play" auction format** is egregiously flawed.[11] This format incentivizes bidders to bid what they can expect to profit per user selection. The long-term result is that the participating Google alternatives must give all their preference menu profits to Google! Google's auction further incentivizes search engines to be worse on privacy, to increase ads, and to not donate to good causes because, if they do those things, then they could afford to bid higher.[12]
- Although many search engines exist**, Google only allows three choices in addition to Google itself**. User testing demonstrates that users will in fact scroll through multiple screens to see a full list of search engines. Even without scrolling, 96% of Android phones in Europe can display five search engines on the first screen, and 51% can display six or more, while still showing descriptions for all. Just 4% can only display four options – yet the Google-designed preference menu only displays four search engines.
- The Google-designed preference menu **uses dark patterns to give users the impression of choice**, when in fact subtle cues are driving those users toward Google. This can be corrected in part with a scrollable menu, logos, simpler language, company descriptions, and an introductory screen. Additionally, users are unable to access the preference menu ever again without doing a complete factory re-set of the device.

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[10] Other organizations agree. In January 2021, trade group FairSearch published a paper showing how Google circumvented the Android decision – not only through the flawed preference menu, but also by maintaining a *de facto* tying of Google Search and Chrome with its application store. DuckDuckGo is not a member of FairSearch.

[11] Every quarter, Google asks market participants to bid a price per user that selects them on the preference menu. The 3 highest bidders win and appear on the menu for the following quarter, paying Google for each user that selects them, at the price bid by the fourth (and losing bidder). See more on Google's page: https://www.android.com/choicescreen/

[12] A paper by Prof. Michael Ostrovsky of Stanford University, published on November 7th, 2020, demonstrates that the current auction mechanism favors those search engines, even small, that make the most money per user (e.g., through intrusive ads), because search engines pay for each time a user installs them ("per install"). Google has so far disregarded other mechanisms that would be mathematically more neutral towards search engines' business models, such as if payments were done for each time a user sees a search engine on the preference menu ("per appearance").

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DMA recommendation #6: introduce an explicit default / pre-installation ban for Core Platform Services (CPS).

- Article 5.f bans gatekeepers from "*requiring [users] to subscribe to or register with any other CPS (...) as a condition to access, sign up or register to any of their CPS (...)".* While the impact assessment connects this with the Android decision[13] the article falls short of **preventing gatekeepers from setting other CPS** (as defined in the DMA[14]) **as default on their platform(s).** The co-legislators should connect the dots and make this explicit, as recommended by the group of national regulatory authorities BEREC.[15] This provision as written is nonetheless positive as it would allow users to **set up their Android device without creating a Google account**, which would limit Google's ability to lock-in consumers.
- Similarly, article 6.1.b on **allowing end-users to un-install pre-installed apps** is positive, but not sufficient given the power of defaults. Additionally, that provision should also cover default settings in situations others than pre-installed apps, such as a search default on a browser.
- Article 6.1.e which prohibits gatekeepers from "***technically restricting the ability of end users to switch*** *between (...) different software applications*" is also helpful, but insufficient. It may address, for instance, the **impossibility for users to easily change all search defaults on Android**, but this should be clarified in recital (51), which for now is focused on switching between Internet access service providers. Additionally, the mention in related recital (50) that "*pre-installed apps do not constitute a barrier to switching*" should be removed.

Setting a service as default is the most direct, effective form of self-preferencing. When a dominant company does so, consumers rarely switch to an alternative.[16] As a result, when a company has

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[13] Commission's impact assessment report for the DMA, SWD(2020) 364, page 55.

[14] Core Platform Services serving as an important gateway for business users to reach end-users, as defined in recital 15.

[15] BEREC's March 2021 Opinion on the DMA

[16] In *Deciding by Default (2013)*, Cass R. Sunstein of the University of Pennsylvania exposed the remarkable power of default settings with consumers and provided a set of possible explanations. Google has well understood

dominance in one gatekeeping market, it should not be permitted to obtain such automatic dominance in another one of these markets. This would effectively ban Google's tying practices in search and browsing, as most plainly seen in the default settings or pre-installation of Google Search in its products (e.g., the Android default home screen search bar, the search default in the Chrome browser on both mobile and desktop devices, and the pre-installed Google Search app and associated widgets on Android). Such prohibition should be effective, e.g., equally apply to bundling agreements with third-parties,[17] backed by an anti-circumvention provision, tight regulatory control, and the ability for the Commission to proactively impose a remedy driven by consumer preference (see recommendation #8). **That way, substitutes that only serve to entrench the gatekeeper's position, such as Google's current Android search preference menu, would be prohibited and replaced with successful implementations.** The regulator should also be empowered to counter other strategies gatekeepers might deploy to maintain market dominance via self-preferencing (e.g., the exclusion of Google's Pixel phones from a preference menu incentivizes Google to funnel consumers to Pixel phones).

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DMA recommendation #7: banning the acquisition of default settings by gatekeepers on third-party CPS.

- The ban on gateway default settings mentioned above should also apply to **gatekeepers acquiring a default setting for a CPS on another gatekeeping platform** – for example, Google Search on Apple's iOS. It should be considered an 'absolute' obligation in article 5.

Google leverages its vast financial resources to control all default search access points on mobile. Google each year pays Apple billions of dollars in order to be set as default general search engine on Safari, Siri, and Spotlight.[18] Because this denies rivals the ability to compete on the same scale in the

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that defaults stick so much with consumers, paying Apple every year billions to be the default search engine on iOS – see *infra.*

[17] In the Android decision, the Commission considered Google's agreements with Original Equipment Manufacturers (OEM) for pre-installing its Chrome browser and its search service as a form of indirect self-preferencing practice of equivalent effect.

[18] According to the US Department of Justice, the public estimates of the Apple-Google deal range around USD 8-12 billion annually. *"The revenues Google shares with Apple make up approximately 15–20 percent of Apple's worldwide net income."* *Justice Department Sues Monopolist Google For Violating Antitrust Laws,* October 2020.

market, which is characterized by strong network effects, gatekeepers should not be allowed to mutually reinforce their competitive positions.

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DMA recommendation #8: putting consumers on the driving seat.

- Recital (46) already specifies that gatekeepers use pre-installation to favor their own services. The recital should go further and suggest that a genuine consumer choice architecture, such as in the form of an easily accessible preference menu, may be an appropriate substitute to abusive CPS defaults.

We think well-designed preference menus are an excellent fix to gateway defaults and should be mandated, with granular attention to design and implementation.[19] In mobile, we showed that a preference menu that changes all search defaults and includes the most common Google alternatives can deliver meaningful search engine choice to consumers and significantly increase competition in the search market. **Using our proposed design, 24% of Europeans choose a Google alternative, which is 8 times higher than the 3% today.[20]**

We also believe that the regulator should be able to **mandate preference menus to all existing users at once** in order to swiftly address competition problems, and not just progressively over time. For example, with Android devices, Google delayed the preference menu for over 19 months after the liability decision, and then only displayed the search preference menu on some new devices. While Google has apparently claimed that it is impossible to display an effective preference menu on existing devices (i.e., one that would change all the search defaults including the home screen search bar), we find this hard to believe given the common practice of pushing out important Android software updates for other reasons that change all aspects of the device software (e.g., recent COVID exposure notification updates). Even if technological or contractual barriers prevent a change to the home screen search bar on existing devices, those barriers certainly do not prevent Google from displaying an alert

[19] We commend the analysis of the UK Competition and Market Authority (CMA). In its landmark market study on online platforms and digital advertising, the CMA argued that the regulator should have the power to enforce such positive obligations, including to "introduce choice screens."

[20] https://spreadprivacy.com/search-preference-menu-research/

box on existing devices to change the Chrome search default or replace the Google app with an alternative within the Play Store. [21]

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DMA recommendation #9: interoperability enabling consumer choice.

- Article 6.1.f states that gatekeepers should "*allow business (…) access to and interoperability with the same operating system, hardware or software features that are available or used in the provision by the gatekeeper (…)".*
- This is a helpful provision, but recital (52) should clarify that this also applies to accessing default settings in a simple, programmatic way and change all of the device's defaults.
- Article 6.1.c which would "*allow the installation and effective use of third-party software applications or software application stores"*, means that **the above-mentioned 'one-click default switch' would also enable direct app installation**, without the intermediation of the gatekeeper's app store.

In practice, such obligations mean that the Chrome browser and the Android operating system would be updated such that consumers can easily change their search engine themselves across the whole device by a simple click (i.e., get back to the preference menu setting). We would be able to prompt the consumer (e.g., "do you want to change your default search engine to DuckDuckGo? click here") to jump directly to the preference menu such that, if the consumer selects DuckDuckGo, all those defaults would change at once with one tap and our app would be downloaded. Instead, these are currently multi-step, non-intuitive changes, with the home search screen bar change not even possible without very advanced technology skills.[22]

The regulator should also address practices that unfairly draw consumers back to the dominant platform. For instance, certain Android features (like Google Assistant and other Google widgets) and other Google products (like Gmail), coupled with Google prompts to users (such as pop-up boxes), can have such effect in search.

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[21] Google did so in Russia in April 2017: "*For the devices that are currently circulating on the Russian market, Google will develop an active 'choice window' for the Chrome browser which at the time of the next update will provide the user with the opportunity to choose their default search engine."* See the Russian antitrust regulator's decision

[22] DuckDuckGo's SpreadPrivacy blog, October 14th, 2020: "Dear Google: We Agree Search Competition Should Be "Only 1 Click Away" – So Why Is It 15+ on Android?" https://spreadprivacy.com/one-click-away/

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DMA recommendation #10: end the data advantage in the search market.

- Article 6.1.j states that gatekeepers should "*provide to any third party providers of online search engines, upon their request, with access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data in relation to free and paid search generated by end users on online search engines of the gatekeeper (...)".*
- We strongly support this provision, which can be instrumental in opening up the search market. But because it would be such a complex endeavor, recital (56) should clarify that this would require the technical cooperation of industry players and the involvement of the regulator, which might need to look into syndication contracts and potentially reject non-satisfactory schemes.

In the general search market, Google's billions of daily user queries means it accumulates invaluable data on users' preferences and is able to refine its search results at a larger scale. The UK CMA previously suggested that the regulator should therefore be empowered to "*require Google to provide click and query data to third-party search engines to allow them to improve their search algorithms.*"[23] In our White Paper on the Search Engine Market, we further explain the strategic importance of such data, whose access would necessitate untangling a complex web of commercial and legal barriers.[24]

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DMA recommendation #11: end bad data collection practices in both the DMA and the DSA.

- Recital (61) rightly notes that consumer profiling practices help gatekeepers entrench their position while harming people's rights. But the corresponding Article 13 doesn't live up to this logic since it merely mandates transparency on such practices.
- Article 13 of the **DMA should ban such practices for gatekeepers**, just as the **Digital Services Act should bring an end to pervasive data collection and user profiling for the purpose of behavioral advertising.**

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[23] *Online platforms and digital advertising – Market study*, CMA, July 1st, 2020

[24] https://docs.house.gov/meetings/JU/JU05/20190716/109793/HHRG-116-JU05-20190716-SD021.pdf

- Such prohibition would naturally strengthen article 5.1.a, which we welcome: gatekeepers should "*refrain from combining personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services, and from signing in end users to other services of the gatekeeper in order to combine personal data (...)*".

We support a prohibition of pervasive user tracking for the purpose of behavioral advertising, in line with the advice of the European Data Protection Supervisor of February 10, 2021.[25] The monetization of personal data fundamentally incentivizes viral content and traps people into "filter bubbles".[26] At minimum, legal effect should be given to opt-out preferences expressed by users, including through centralized browser settings such as the Global Privacy Control.[27] The GDPR leaves the door open for such legal effect, which should be asserted law.

In reality, user profiling is not indispensable to provide users with more relevant organic results and make money through advertisement. Our own business shows that it is possible to provide users with a competitive search experience and be robustly profitable, solely based on contextual advertising. Outlawing behavioral advertising (in whole or in part) would open up significant competition for advertising to these users, because they could only be served by contextual advertising. That method of advertising would finally get the investment it needs (from big corporations, venture capital, etc.) to compete on a level playing field with behavioral advertising.

Separately, limiting the data sharing between business units for the dominant firms, e.g., no user data sharing between Google Search and YouTube or Instagram and Facebook, would further increase competition in the digital advertising market by limiting the "data advantage" of gatekeepers.

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We applaud the Commission's ambition to comprehensively address platform regulation, towards fair, competitive, and rights-protective digital markets. We stand ready to provide additional insights and data to lawmakers as they amend the Digital Markets Act.

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[25] *EDPS Opinions on the Digital Services Act and the Digital Markets Act*, European Data Protection Supervisor, February 10th, 2021

[26] https://spreadprivacy.com/google-filter-bubble-study/

[27] https://spreadprivacy.com/announcing-global-privacy-control/

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