



Nordic Centre
for Internet and Society



Brussels, 15.12.2020
COM(2020) 842 final

2020/0374 (COD)

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)

{SEC(2020) 437 final} - {SWD(2020) 363 final} - {SWD(2020) 364 final}

The Digital Markets Act (DMA)

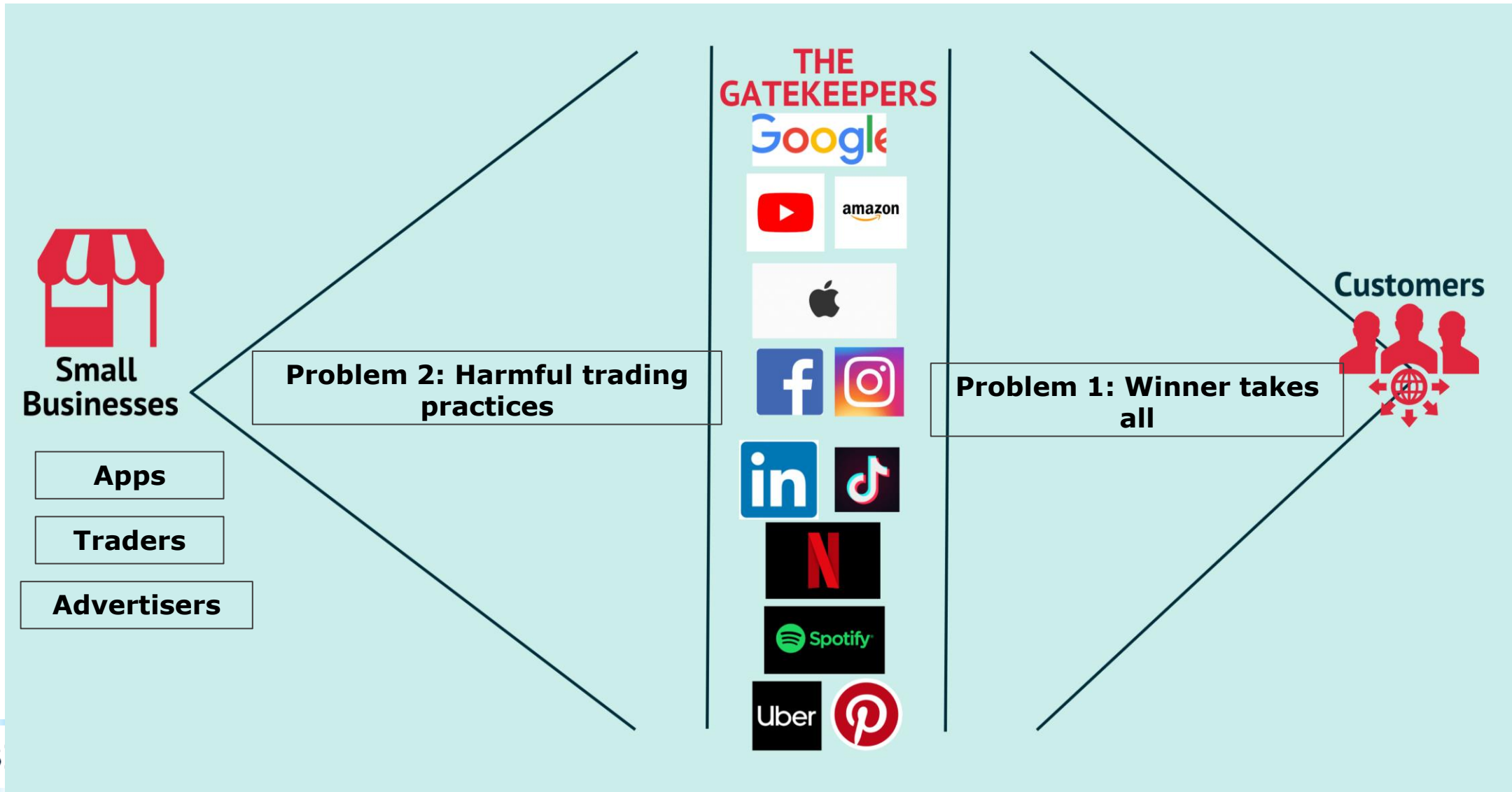
NFJE Members Meeting

12 April 2021

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Context: What is the problem?



Two central goals of the DMA

- **Ensuring contestability or removing obstacles to entry**
 - Facilitating access to competition relevant data
 - Interoperability obligations
 - Prohibiting some practices e.g. tying and bundling
- **Fairness in the relationship with dependants**
 - Prohibitions on self-preferencing
 - Prohibitions on certain uses of data
 - Transparency obligations

Why new law? Why has competition law failed?

- **Competition law ill-suited to address the ‘tipping’ problem**
- **Fact specific**
- **Very slow**
 - Google Search (Shopping) case – took 7 years
 - Still ongoing in the Courts
- **Comes too late**
 - It is difficult to “unscramble the eggs” and restore competition once harm is done

DMA complements competition law

- Addresses the contestability/tipping problem
- Applies before harm materializes (ex-ante)
- Rapid enforcement

Previous similar experience with sector specific competition rules

- **Electronic communications sector**

- SMP – as the target of regulation
- Obligations
 - Access rights
 - Interconnection obligations
 - Transparency
 - Non-discrimination

- **DMA**

- Gatekeepers – as target of regulation
- Obligations
 - Data access rights
 - Interoperability obligations
 - Transparency obligations
 - Non-discrimination

DMA builds upon EU Platform-to-Business (P2B) Regulation

- **Platform-to-Business (P2B) Regulation**
 - Applies to all platforms
 - Transparency obligations re
 - Use of data by platforms
 - Parameters of ranking
 - Reasons for suspension or termination
 - Grounds for differential treatment of own service
- **DMA**
 - A subset of very large gatekeeper platforms.



11.7.2019

EN

Official Journal of the European Union

L 186/57

**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
(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⁾,

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure ⁽²⁾,

Whereas:

(1) Online intermediation services are key enablers of entrepreneurship and new business models, trade and innovation, which can also improve consumer welfare and which are increasingly used by both the private and public sectors. They offer access to new markets and commercial opportunities allowing undertakings to exploit the benefits of the internal market. They allow consumers in the Union to exploit those benefits, in particular by increasing their choice of goods and services, as well as by contributing to offering competitive pricing online, but they also raise challenges that need to be addressed in order to ensure legal certainty.



Two important distinguishing features of DMA

- **Very simplified procedure**
 - No market definition
 - No establishment of dominance/SMP
- **Centralized enforcement at the EU level**
 - EU commission as federal regulator


GDPR as a catalysts for distrust in the ‘country of origin’ principle

- “We have had a lot of distrust between the destination of services [country] and country of origin and we need to rebuild that trust [so] that there is ‘for real’ enforcement. So without having a position on things I don’t know about, I hope you can see that we need a stronger push than what we had before in order to create the necessary trust.” said Ms Vestager.

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EU can step in if data enforcement fails, says Vestager

Europe's digital and competition chief says having firms here comes with consequences



Rules: Margrethe Vestager said Ireland has a special responsibility. Photo: Jacobia Dahm/Bloomberg

nter på bid.contextweb.com ...

Annonser fra Google
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Hvorfor vises denne annon

DMA application process

1. Designating companies as 'gatekeepers'
2. Adhering to list of obligations
3. Imposing remedies in case of infringements



2

Designation of a
gatekeeper

What is a
gatekeeper?

'Gatekeeper' means a provider of core platform services designated pursuant to Article 3

Who is a provider of core platform services?

- (a) online intermediation services;
- (b) online search engines;
- (c) online social networking services;
- (d) video-sharing platform services;
- (e) number-independent personal communication services;
- (f) operating system services;
- (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);

Commission can propose to add new services to the list – Art 17

General criteria for designating a provider of core platform as gatekeeper – Art 3(1)

It has a **strong economic position, significant impact on the internal market** and is active in multiple EU countries

It has a **strong intermediation position**, meaning that it links a large user base to a large number of businesses

It has (or is about to have) an **entrenched and durable position in the market**, meaning that it is stable over time

Quantitative criteria for designating a platform as gatekeeper – Art 3(2)

It has a **strong economic position, significant impact on the internal market** and is active in multiple EU countries

The group to which it belongs has

- **annual EEA turnover above €6.5 billion** in the last three years, or
- **average market capitalisation or equivalent fair market value above €65 billion in the last year**, and
- it provides a core platform **service in at least three Member States**;

It has a **strong intermediation position**, meaning that it has a **large user base** to a significant number of businesses

• **more than 45 million monthly active end users** established or located in the Union and

- **more than 10 000 yearly active business users** established in the Union in the last financial year;

It has (or is about to have) an **entrenched and durable position in the market**, meaning that it is stable over time

- **more than 45 million monthly active end users** established or located in the Union and
- **more than 10 000 yearly active business users** established in the Union

in each of the last three financial years

Rebuttable presumption

Who is in already?

Alphabet Inc

- Google search
- Android MOS
- Google Play
- YouTube
- AdSense
-

Facebook Inc

- Facebook
- Messenger
- Instagram

Amazon Inc

- Amazon Market Place
- AWS

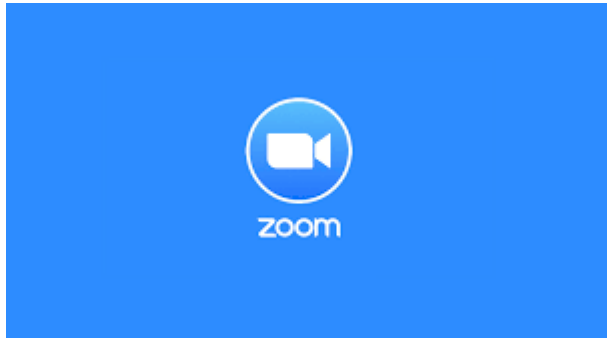
Microsoft Inc

- Microsoft OS
- Microsoft Azure

Apple Inc

- iOS
- Apple app store

Who may be out?



Companies that meet some criteria



Qualitative criteria for designating a platform as gatekeeper

- Based on market investigation, Commission can designate gatekeepers considering
 - (a) the size, including turnover and market capitalisation, operations and position of the provider of core platform services;
 - (b) the number of business users depending on the core platform service to reach end users and the number of end users;
 - (c) entry barriers derived from network effects and data driven advantages, in particular in relation to the provider's access to and collection of personal and non-personal data or analytics capabilities;
 - (d) scale and scope effects the provider benefits from, including with regard to data;
 - (e) business user or end user lock-in;
 - (f) other structural market characteristics.

Once a core platform services meets all the thresholds

- Company should notify the Commission + provide information on turnover and users ...
- Commission designates the core platform as gatekeeper
- Once designated, it has to comply with the **obligations** laid down in the DMA, particularly those under Art 5 and 6 and
- It has to do so within 6 months since its designation.

Getting rid of time-consuming procedure under competition law

- **Competition law procedure**
 - Market definition
 - Establishing dominant position
 - Establishing abuse
 - Effect-based and efficiency defenses
- **DMA**
 - Quick designation of target of regulation based on objective & easily verifiable information
 - Application of the obligations within 6 months of designation
 - No efficiency defense



2

Obligations

Obligations

- **Key provisions**

- Article 5 “obligations for the gatekeepers”
- Article 6 “obligations for gatekeepers **susceptible of being further specified**”
 - Possibility for individualization
 - Regulatory dialog
- Contain a list of 18 obligations imposed on designated gatekeepers
- Drawn from past and pending competition cases

- **Additional provisions**

- Article 12 – obligation to inform about mergers/acquisitions
- Article 13 – auditing of consumer profiling techniques

Commission can update or add new obligations – Art 10 cum 17

Article 5
Obligations for gatekeepers

In respect of each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall:

- (a) 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, unless the end user has been presented with the specific choice and provided consent in the sense of Regulation (EU) 2016/679. ;
- (b) allow business users to offer the same products or services to end users through third party online intermediation services at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper;
- (c) allow business users to promote offers to end users acquired via the core platform service, and to conclude contracts with these end users regardless of whether for that purpose they use the core platform services of the gatekeeper or not, and allow end users to access and use, through the core platform services of the gatekeeper, content, subscriptions, features or other items by using the software application of a business user, where these items have been acquired by the end users from the relevant business user without using the core platform services of the gatekeeper;
- (d) refrain from preventing or restricting business users from raising issues with any relevant public authority relating to any practice of gatekeepers;
- (e) refrain from requiring business users to use, offer or interoperate with an identification service of the gatekeeper in the context of services offered by the business users using the core platform services of that gatekeeper;
- (f) refrain from requiring business users or end users to subscribe to or register with any other core platform services identified pursuant to Article 3 or which meets the thresholds in Article 3(2)(b) as a condition to access, sign up or register to any of their core platform services identified pursuant to that Article;
- (g) provide advertisers and publishers to which it supplies advertising services, upon their request, with information concerning the price paid by the advertiser and publisher, as well as the amount or remuneration paid to the publisher, for the publishing of a given ad and for each of the relevant advertising services provided by the gatekeeper.

Article 5 – Don'ts

- Prohibition against cross-service combination of data
 - (a) **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**, unless the end user has been presented with the specific choice and provided consent in the sense of Regulation (EU) 2016/679.
- **Earlier or pending cases**
 - Facebook Germany Case
 - Google's 2012 combination of data

Art 5 – Do's

- Prohibition against most favorable customer clauses
 - (b) **allow business users to offer the same products or services to end users through third party online intermediation services** at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper
- Earlier or pending cases
 - Amazon ebook case
 - Hotel booking websites – Germany and other MS

Article 5 – Don'ts

- Prohibition against bundling
 - **(f) refrain from requiring business users or end users to subscribe to or register with any other core platform services** identified pursuant to Article 3 or which meets the thresholds in Article 3(2)(b) as **a condition to access, sign up or register to any of their core platform services** identified pursuant to that Article;
- **Earlier or pending cases**
 - Google Android case

Article 6

Obligations for gatekeepers susceptible of being further specified

1. In respect of each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall:
 - (a) refrain from using, in competition with business users, any data not publicly available, which is generated through activities by those business users, including by the end users of these business users, of its core platform services or provided by those business users of its core platform services or by the end users of these business users;
 - (b) allow end users to un-install any pre-installed software applications on its core platform service without prejudice to the possibility for a gatekeeper to restrict such un-installation in relation to software applications that are essential for the functioning of the operating system or of the device and which cannot technically be offered on a standalone basis by third-parties;
 - (c) allow the installation and effective use of third party software applications or software application stores using, or interoperating with, operating systems of that gatekeeper and allow these software applications or software application stores to be accessed by means other than the core platform services of that gatekeeper. The gatekeeper shall not be prevented from taking proportionate measures 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;
 - (d) refrain from treating more favourably in ranking services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third party and apply fair and non-discriminatory conditions to such ranking;
 - (e) refrain from technically restricting the ability of end users to switch between and subscribe to different software applications and services to be accessed using the operating system of the gatekeeper, including as regards the choice of Internet access provider for end users;
 - (f) allow business users and providers of ancillary services access to and interoperability with the same operating system, hardware or software features that are available or used in the provision by the gatekeeper of any ancillary services;
 - (g) provide advertisers and publishers, upon their request and free of charge, with access to the performance measuring tools of the gatekeeper and the information necessary for advertisers and publishers to carry out their own independent verification of the ad inventory;
 - (h) provide effective portability of data generated through the activity of a business user or end user and shall, in particular, provide tools for end users to facilitate the exercise of data portability, in line with Regulation EU 2016/679, including by the provision of continuous and real-time access ;
 - (i) provide business users, or third parties authorised by a business user, free of charge, with effective, high-quality, continuous and real-time access and use of aggregated or non-aggregated data, that is provided for or generated in the and the end users engaging with the products or services provided by those business users; for personal data, provide access and use only where directly connected with the use effectuated by the end user in respect of the products or services offered by the relevant business user through the relevant core platform service, and when the end user opts in to such sharing with a consent in the sense of the Regulation (EU) 2016/679; ;
 - (j) 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, subject to anonymisation for the query, click and view data that constitutes personal data;
 - (k) apply fair and non-discriminatory general conditions of access for business users to its software application store designated pursuant to Article 3 of this Regulation.

Article 6 – Don'ts

- Prohibition against using customer data
 - (a) **refrain from using, in competition with business users, any data not publicly available,** which is generated through activities by those business users, including by the end users of these business users, of its core platform services or provided by those business users of its core platform services or by the end users of these business users;
- **Earlier or pending cases**
 - Pending Amazon investigation

Article 6 – Don'ts

- Prohibition against self-preferencing
 - (d) **refrain from treating more favourably in ranking services and products offered by the gatekeeper itself** or by any third party belonging to the same undertaking compared to similar services or products of third party and apply fair and non-discriminatory conditions to such ranking;
- **Earlier or pending cases**
 - Google Shopping case
 - Pending Amazon - Buy Box case

Art 6 – Do's

- Interoperability
 - (f) **allow business users and providers of ancillary services access to and interoperability with the same operating system, hardware or software** features that are available or used in the provision by the gatekeeper of any ancillary services;
- **Earlier or pending cases**
 - Pending Apple Pay case

Art 6 – Do's

- Data portability
 - (h) **provide effective portability of data generated through the activity of a business user or end user** and shall, in particular, provide tools for end users to facilitate the exercise of data portability, in line with Regulation EU 2016/679, including by the provision of **continuous and real-time access** ;
- Expands the data portability right under the GDPR

Art 6 – Do's

- Data access based on FRAND terms
 - (j) **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, subject to **anonymisation** for the query, click and view data that constitutes personal data;;

What of merger control?

- **Article 12**
 - The obligation to inform the Commission of intended acquisitions
 - It does not include any powers to intervene to block these mergers however
- **Ongoing parallel work revising the effectiveness of merger rules**
 - Strengthening the referral mechanism
 - Possible revision of notification thresholds

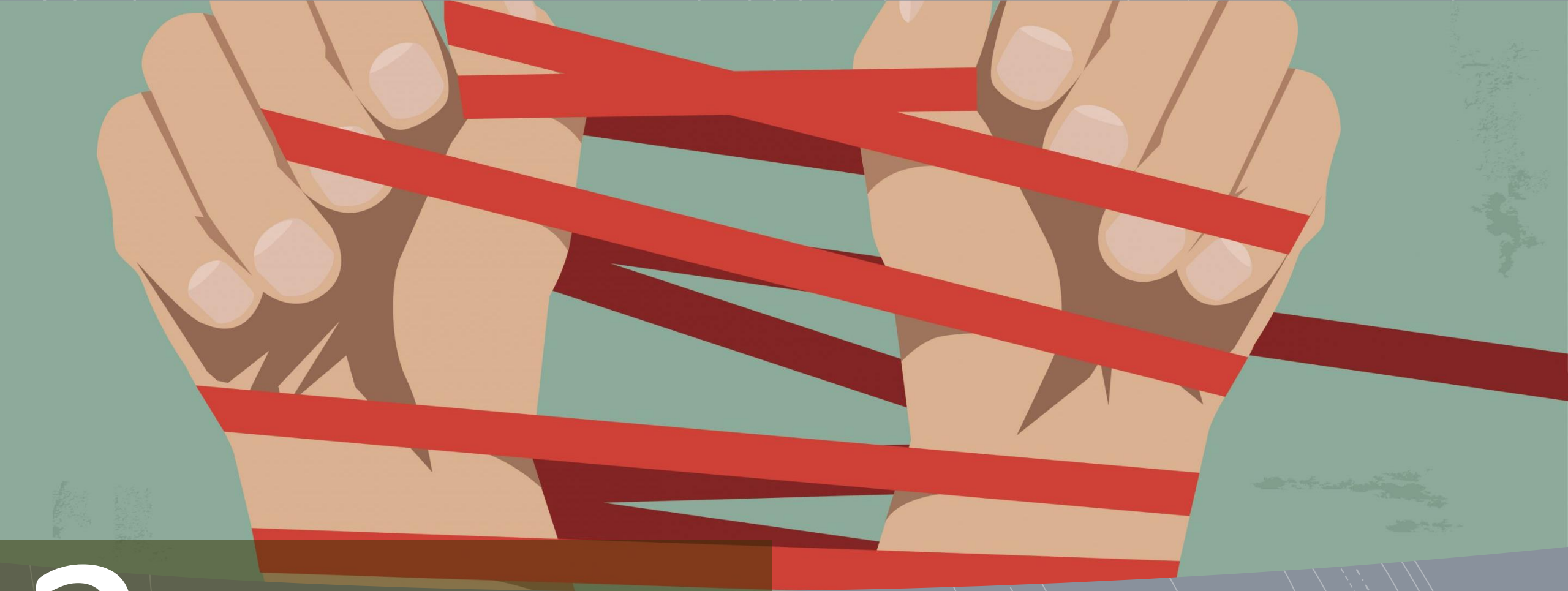
Independent auditing of consumer profiling practices - Art 13

- Transparency on consumer profiling practices
 - a gatekeeper shall submit to the Commission **an independently audited description of any techniques for profiling of consumers that the gatekeeper applies to or across its core platform services** identified pursuant to Article 3. This description shall be updated at least annually.

- Could it help with GDPR Art 22 enforcement?
 - Commission not allowed to share data for other purposes (Article 31)

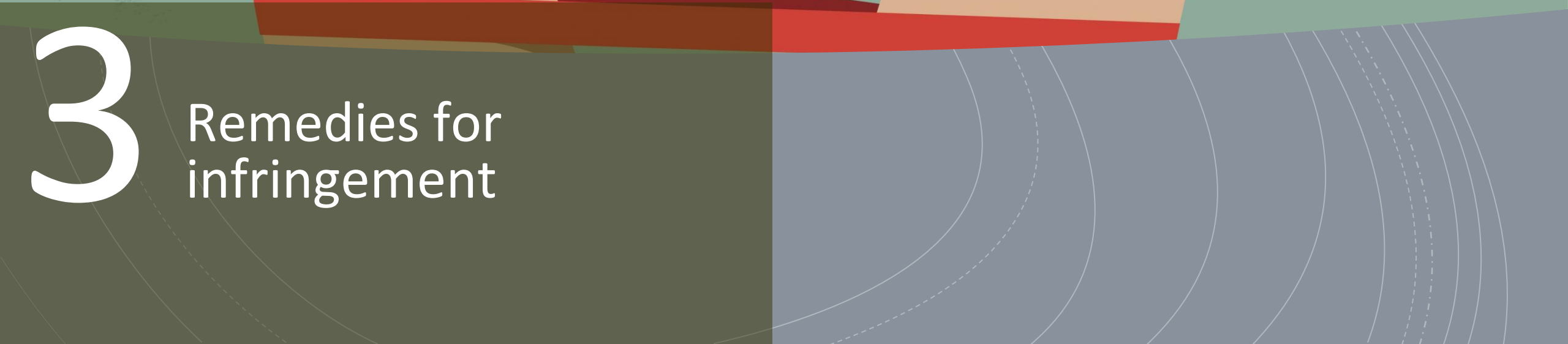
Competition rationale

- “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..**” Recital 61



3

Remedies for
infringement



What will be the consequences of non-compliance?

- Fines of up to 10% of annual turnover (Article 26)
- Behavioral remedies (Article 16)
- Interim measures (Article 22)

Break 'em up?

- Art 16(2) as a last resort





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Andreas Schwab 🇪🇺 🌐 MdEP ✓
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News on [#DMA](#): if gatekeepers cannot be obliged easily for structural measures, we can easily introduce a ban of activities in specific [#criticalsectors](#) like [#health](#) [#finance](#) [#insurance](#) [@EPPGroup](#) [@EP_SingleMarket](#)

Oversett tweeten

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Closing remarks

- DMA positive development
- Weak interoperability
- Centralized enforcement
- No complaint procedure



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