

Non-paper from the Commission services on online advertising in the DMA¹

I. Introduction

The purpose of this non-paper from the Commission services is to provide technical assistance to inform and facilitate the exploration of a possible compromise between the European Parliament and the Council on targeted advertising in the Digital Markets Act (DMA). It also, in general terms, outlines the possible approach for addressing wider societal concerns related to online advertising, including targeted advertising, as being addressed in the Digital Services Act (DSA).

The co-legislators seem to support the measures proposed by the Commission in the two Acts as regards online advertising. They also propose further rules on targeted advertising, including rules concerning gatekeepers' processing of personal data and limitations on certain types of targeting (European Parliament), and rules concerning further transparency in influencers' advertising (Council).

II. Possible compromise

The analysis outlined below follows the specific objectives of the DSA and DMA, respectively.

- The Digital Markets Act addresses economic concerns deriving from data collection practices of gatekeepers, which raise barriers to entry and expansion and undermine contestability of markets in the digital sector as well as lead to unfair treatment of end users in commercial interactions with gatekeepers.
- The Digital Services Act tackles wider societal concerns stemming from the way online platforms shape information flows, including through advertising, and ensures that users, including minors, are adequately protected, informed and empowered online.

To this end, the non-paper, which builds on already existing legislation, in particular the GDPR, and will have effect of the Digital Markets Act targeting:

- collection of personal data,
- its cross-use and combination by the gatekeeper,
- providing end users with a free choice to opt-in to such data processing also in the situation when the processing is not based on consent and
- obliging gatekeepers to provide equivalent alternative services if users do not provide consent (was already provided for by the GDPR to the extent the processing was based on consent).

By restricting gatekeepers' access to personal data, the contestability of markets in the digital sector is increased, while users gain greater control

¹ This non-paper does not represent, nor has any bearing on, the official position of the Commission.

over the collection, cross-use and combination of their personal data and related practices.

Without prejudice to the on-going discussion between the co-legislators concerning the Digital Services Act, the DMA could tackle the relevant economic concerns identified by the co-legislators. It would complement already existing corpus of EU law addressing directly or indirectly online advertising, and build on the obligation contained in the Commission's proposal for the DMA not to combine their users' personal data from different sources without the user's consent (i.e. Article 5(a) of the proposal).

Gatekeepers could be further obliged to enable their users to choose freely to opt-in to the collection of off-site data. Further, and as already provided in the GDPR, if a user refuses to give consent to such data collection and data combination, the gatekeeper is required, in order to ensure that the consent is free, to offer an equivalent alternative service (which is either less personalised or not personalised), without making the core platform service or certain functionalities thereof conditional upon the user's consent.

The possible solutions reflects this by explicitly stating that the users would receive advertising, but it would be much less personalised and only based on the data that the user provided to the gatekeeper by using its services. The cross-service tracking of user, which today fuels mistrust and hyper-personalised micro-targeting, would be excluded. Gatekeepers' ability to capitalise on their data collection across number of core platform services and other services, including from third parties would be limited. This will in turn also limit the strong data-related indirect network effects and thereby enhance contestability of a number of core platform services and other services provided by the gatekeepers.

III. Complementarity with other instruments

The below text builds on the rules on online advertising put forward in the DSA and DMA proposals as well as existing EU law, such as the General Data Protection Regulation (GDPR), and proposed legislation, such as a proposal on transparency and targeting of political advertising.

It focuses on those rules that complement the GDPR. The GDPR provides the rules for how individuals are asked to consent to the processing of their data, where applicable, or can object to the use of their data for digital marketing, without duplicating the GDPR provisions.

In line with the GDPR, gatekeepers should enable their end users to freely choose to opt-in to combining and cross-using end user data, including by offering a less personalised but equivalent alternative, and without making the core platform service or certain functionalities thereof conditional upon the end user's consent pursuant to the GDPR. This could be further explained in the accompanying recitals.

It is essential that these instruments remain well aligned to ensure the effectiveness of the rules in question and the clarity of the enforcement process.

Annex - proposed compromise legal text for the Digital Markets Act

Article 5(a) combined with Article 6(1)(aa)

“~~refrain from combining~~ not process personal data of end users sourced from third-party services making use of core platform services, not combine or cross-use personal data sourced from the relevant core platform services with personal data sourced from any further core platform services or other services offered by the gatekeeper or with personal data sourced from third-party services, and ~~from signing~~ not sign 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 for each processing purpose, including for the purposes related to delivering advertising, in line with the requirements under Regulation (EU) 2016/679, , and provided consent in the sense of Article 6(1) point (a) and Article 7 of Regulation (EU) 2016/679. This is without prejudice to the possibility of the gatekeeper to rely on Article 6(1) points (c), (d) and (e) of Regulation (EU) 2016/679, where applicable;”