

# Digital Markets Act Position Paper

March 2021

---



Rue de Trèves 45,  
1040 Brussels, Belgium



+32 2 792 4750



[www.ACTonline.org](http://www.ACTonline.org)



@ACTonline



[/ACTonline.org](https://www.facebook.com/ACTonline.org)

## Executive Summary

- By simply stating that the Digital Markets Act (DMA) will not impose any additional burden on small and medium-sized enterprises (SMEs), the European Commission currently ignores the intricate interdependencies of the app economy.
- The DMA risks generating unintended consequences that could indirectly affect SMEs' business models, growth ambitions, or exit strategies. Gatekeepers may recoup their losses in ways that harm SMEs, such as reducing their investments in platform infrastructure and tools that benefit SMEs, and thereby increase the cost of entry for smaller actors.
- There should be an evaluation of the impact each new gatekeeper obligation will have on SMEs to ensure it does not threaten their ability to compete in the online platform economy.
- Current provisions that allow for the identification of tipping markets and moving thresholds for gatekeepers create legal uncertainty for all players in the platform economy. Such uncertainty may discourage or slow down platforms planning to scale up, risking the further entrenchment of current gatekeepers' positions while endangering growth, investment, and honest mergers with smaller players.
- Full market investigations are needed to understand, balance, and prepare for the indirect effects that new obligations imposed on gatekeepers will have on the rest of the ecosystem. Such market investigations should be fully transparent and oblige the European Commission to consult all interested parties, especially SMEs.

## I/ Introduction

ACT | The App Association (“App Association”) welcomes the European Commission’s recent proposal on the Digital Markets Act (DMA). The App Association represents thousands of small software application developers and connected device companies globally that create mobile apps and enterprise systems. Today, the ecosystem the App Association represents—which we call the app economy—is valued at approximately 830 € billion and is responsible for millions of European jobs. Alongside the world’s rapid embrace of mobile technology, our members create innovative hardware and software solutions that power the growth of the internet of things across all sectors of the economy.

We support the Commission’s desire to strengthen the Single Market for Digital Services. Increasing the responsibilities of larger platforms encourages better safeguards for the security of consumers. It may also help to maintain an open and competitive market. **For smaller actors to benefit, new regulation must preserve the existing trust in the app ecosystem.** SMEs and start-ups depend on the trust that consumers have in the app stores to compete with globally trusted brands owned by larger competitors. While we support the Commission’s goal of keeping the market contestable, this goal should not risk reducing consumer trust or fragmenting the digital economy by artificially multiplying the number of distribution platforms. **The dynamic challenges of the digital age must be met with new co-regulatory models, as well as thoughtful, targeted, and proportionate legislation that is capable of preserving fair competition while enhancing consumer welfare and innovation in the platform ecosystem.** Some features of the DMA proposal threaten the currently well-functioning aspects of the online platform economy.

In this position paper, the App Association outlines our impression of the proposed DMA. We welcome the Commission’s commitment to ensure a well-functioning platform economy that is fair and contestable for smaller actors. We especially appreciate the aspects of the proposal that build on the Platform-to-Business (“P2B”) Regulation. For example, obliging gatekeepers to refrain from artificially enhancing the rankings of their own services and products over similar ones provided by third parties is valuable for our members. We also look forward to platforms enhancing transparency in their operations, which will improve SMEs’ ability to compete in the Digital Single Market.

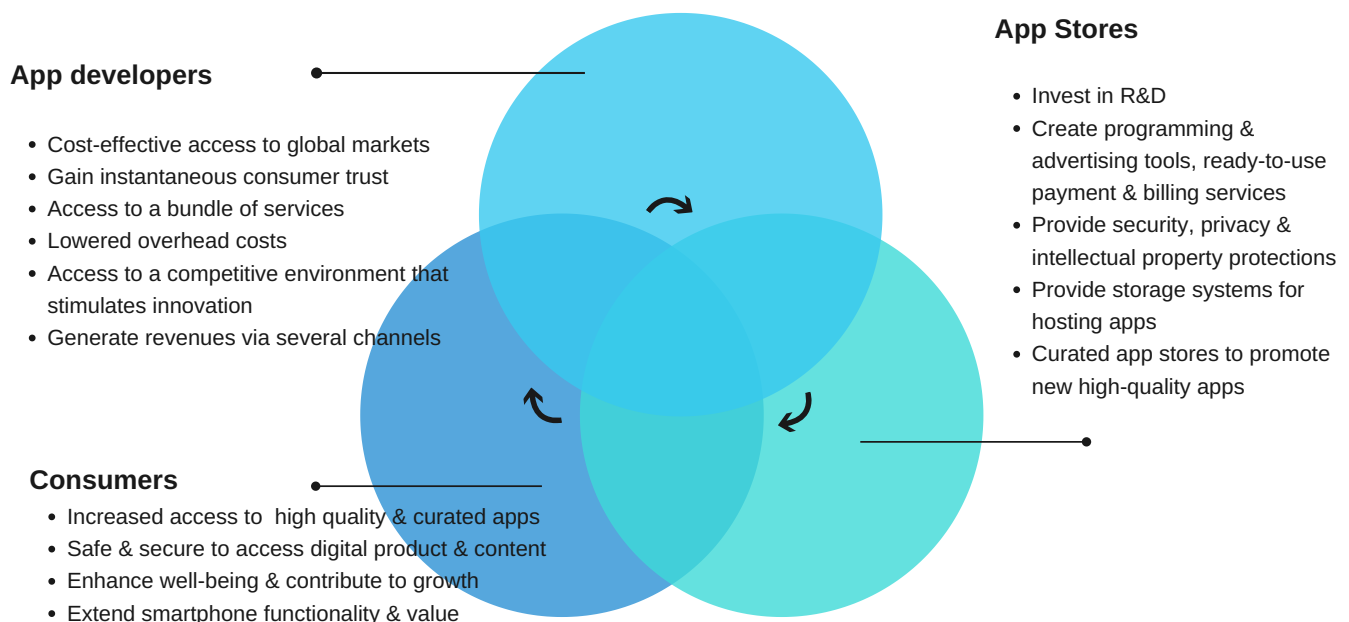
However, we are concerned that the goals of the DMA are restricted only to fairness and contestability. Consumer welfare and innovation are just as vitally important to the functioning of the online platform economy. These aspects should be considered as well when evaluating the potentially harmful practices of gatekeepers. Additionally, we are concerned that Articles 5 and 6, although well-intentioned, may harm SMEs in practice. We believe this is the case because **the Commission completely underestimated the intricate interdependencies of the online platform economy in both its impact assessment and the DMA proposal. Mandating changes to the business models of gatekeepers will send ripple effects**

**throughout the platform economy felt most strongly by the smallest actors.** In this paper and the succeeding annex, we offer recommendations to limit this oversight in the future. During the review of the DMA, we urge caution, transparent evidence-gathering, and rigorous economic modelling. This approach is necessary to correctly capture and improve the entire online platform economy.

## II/ Acknowledge the complexities of the app economy

**There is a symbiotic relationship between app stores, developers, and users.** Increased platform traffic attracts more developers, which brings in more consumers who then benefit from a higher quantity of high-quality apps. **For SMEs and start-ups, the network effects of this multi-sided market are particularly beneficial.** They allow small developers to reach new consumers instantly across borders. Strong network effects also make it possible for app stores to invest substantial resources into research and development (R&D). Investment in R&D means app stores can offer a variety of high-quality services and other benefits to developers. Programming and advertising integration tools, ready-to-use payment and billing services are particularly advantageous for the smallest app developers who would not otherwise have the resources to develop such features. The more attractive these offerings are, the more app developers flock to the app stores. Today, the largest app stores show intense competition between app developers. All developers pay the same low entry fee to make their products available online. No matter their size, they all have access to the same built-in benefits and compete under the same terms and conditions.

### The App Ecosystem



In its explanatory memorandum, the European Commission argues that the DMA will not impose an additional burden on SMEs. The stated reason is for this is that SMEs “are very unlikely to qualify as gatekeepers and [will] not be targeted by the list of obligations”.<sup>1</sup> This statement ignores the multiple and pronounced interdependencies of the app ecosystem and the platform economy at large. Therefore, the App Association views this explanation as alarmingly short-sighted. **Although they may not qualify as gatekeepers, small app developers will suffer significant consequences from the new obligations introduced in the DMA. SMEs are particularly vulnerable if those obligations threaten the tangible advantages currently provided to them by large app stores.** Reducing the app stores’ ability to provide built-in benefits may force some developers to introduce sub-par products, to the detriment of consumers. Without the advantages the app stores offer, some of the smallest actors with the most limited resources may go out of business entirely.

There are substantial differences not only between small app developers and gatekeepers, but between micro, small, medium, large, and very large developers. All of these actors innovate in diverse industries (e.g., gaming, mobile health, and education) and their needs, capabilities, and business models also differ tremendously. Thus, **the impact of each proposed obligation must have careful consideration for all actors and sectors of the app economy.** Case-by-case analysis for each obligation for each platform is the most efficient way to consider the complexities of each sector. Otherwise, instead of levelling the playing field for all platforms, the DMA will succeed only in helping the largest players compete on the same level. The rest of the market would have to fend for themselves in an increasingly uncertain and competitive economy.

### III/ Be mindful of unintended consequences in the DMA

By the European Commission’s estimates, the **R&D investment by companies that manage the largest global app stores is substantial.** According to the 2020 EU Industrial R&D Investment Scoreboard, Alphabet/Google increased its R&D investment by 165 percent in the past five years and Apple increased its investment by 168 percent.<sup>2</sup> Alphabet/Google is also the top-ranked global investor in R&D, while Apple is the fifth-highest investor. In raw terms, this means that these two companies alone invested nearly 17 billion € in R&D in 2019.<sup>3</sup> If the DMA’s new obligations threaten the amount these companies or their challengers invest in R&D, it will disadvantage the entire ecosystem. In the long term, this could shift the global balance of the information age, bringing new harms to business users and European consumers.

Unfortunately, the **Commission’s research does not estimate the indirect impact of the new obligations on the app economy.** This lack of data makes it difficult to predict how

---

<sup>1</sup><https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en>, p. 10

<sup>2</sup> <https://iri.jrc.ec.europa.eu/sites/default/files/2020-12/EU%20RD%20Scoreboard%202020%20FINAL%20online.pdf>

<sup>3</sup> <https://iri.jrc.ec.europa.eu/scoreboard/2020-eu-industrial-rd-investment-scoreboard>

the DMA may threaten a platform's ability to provide advantages to SMEs and invest in R&D. For example, the supporting study annex of the impact assessment on the DMA only briefly acknowledges the possibility of a "waterbed" effect. The Commission notes that a waterbed effect occurs when gatekeepers choose to recoup losses in other business areas or revenue-generating services, to the detriment of consumers.<sup>4</sup> However, the Commission does not consider how such an effect may disadvantage business users as well. If, for instance, app stores recoup losses by raising the price of entry for developers or by reducing the number of resources available to developers for a low entry fee, it would cause significant harm to our members. In turn, reducing the quantity, innovation, or availability of apps would also harm consumers.

Additionally, when evaluating the expected impact of the recommended option, the Commission writes that it is "assumed innovation will be encouraged". The Commission also assumes that such encouragement will lead companies to "invest in R&D rather than mergers and acquisitions".<sup>5</sup> We are concerned that the Commission appears to dismiss all mergers and acquisitions, rather than singling out killer acquisitions, as potentially undesirable. As the Commission itself acknowledges, **being bought by large platforms can be "an attractive exit strategy" for start-ups.**<sup>6</sup> The Commission's justification of this statement is also troublesome as they **advocate for greater R&D investment from companies that are already two of the world's biggest investors.**

As the EU introduces ex-ante regulation on gatekeepers, it must **take the entire online platform economy into account. Notably, this includes consumers and the wider ecosystem as well as gatekeepers and other business users.** We thus urge the European institutions to conduct thorough empirical research, rigorous economic modelling, and in-depth, future-oriented cost/benefit analyses that consider fairness and contestability as well as consumer welfare and possible impacts on innovation. By taking these steps, the Commission can demonstrate if intervention is justified, and how such intervention might correctly address the harms identified without threatening existing benefits, particularly for SMEs. Introducing such impactful legislation without sufficiently precise and data-driven supporting evidence forces policymakers to rely on assumptions rather than conclusions. The current approach risks damaging the aspects of the platform economy that currently function well, and it threatens the livelihoods of thousands of micro, small, and medium-sized enterprises. These companies form the backbone of the European economy and should not be ignored.

We urge the European institutions to carefully evaluate the objectives and consequences of each obligation in Articles 5 and 6. Policymakers must acknowledge the possible side effects, both positive and negative, each requirement may have on the platform economy as a whole.

---

<sup>4</sup> <https://op.europa.eu/en/publication-detail/-/publication/2a69fd2a-3e8a-11eb-b27b-01aa75ed71a1/language-en>, p. 70

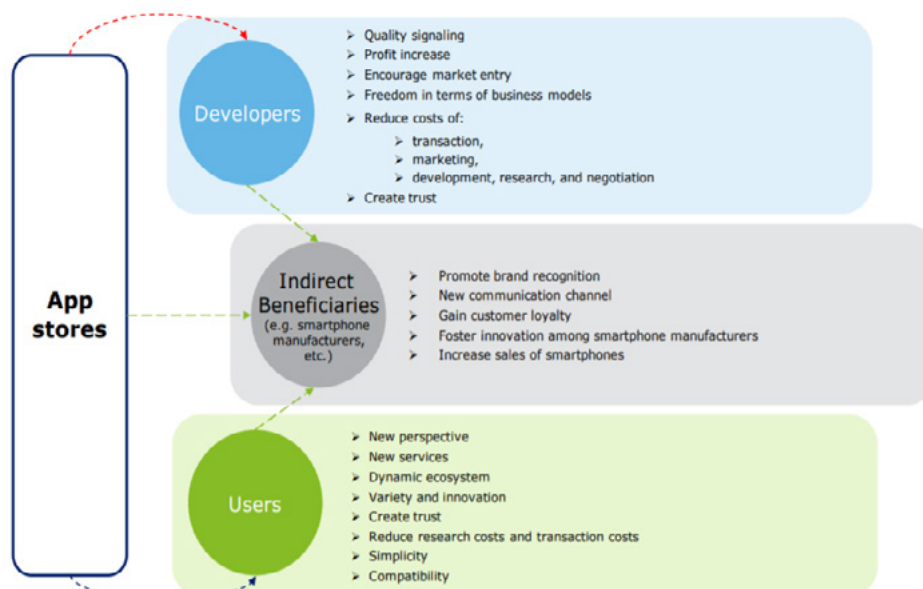
<sup>5</sup> Ibid.

<sup>6</sup> <https://op.europa.eu/en/publication-detail/-/publication/2a69fd2a-3e8a-11eb-b27b-01aa75ed71a1/language-en>, p. 472

If one of the goals of the DMA is to increase the competitiveness of European SMEs, EU institutions must acknowledge that some obligations will only benefit larger actors. Article 6 (c), for instance, mandates platforms to enable sideloading but fails to specify how third-party app stores should regulate content; it does not include safeguards to protect consumers from malicious actors. This provision risks damaging the trust consumers have in the app stores and related ecosystems, which disproportionately hurts smaller, lesser-known app developers. **Only large developers with brand recognition will benefit from this obligation. Small developers who rely on the platforms to gain consumer trust and who do not have the resources to compete with the big brands will suffer.** Obligations like these may level the playing field for larger actors, but they only widen the gap between small and large developers further.

The Commission also fails to estimate the cost that a potential multiplication of the app stores would have on SMEs. **Making an app available on more than one app store costs time and money, and the more app stores there are, the more burdensome this process is.** App developers may find themselves in a position where they pay more money to less trustworthy sources that split the consumer base and reduce both the network effects and additional benefits each developer and consumer currently enjoys. While mandating interoperability between app stores may seem like a feasible solution, creating large data pools and using a universal programming language, for example, may violate the GDPR's principle of data minimisation and weaken security, data privacy, and opportunities for innovation. The costs of entering a system of interoperable app stores will likely also be higher than current app store entry fees, raising the currently low entry barriers for smaller actors. Moreover, smaller or emerging app stores may be locked out of this marketplace entirely if they are required to follow the same security protocols for data pools as the larger app stores.

**Figure 8.** Benefits generated by app stores



Source: Deloitte analysis



We mention the aspects above to illustrate the complexities of the app ecosystem and to highlight how even well-intentioned remedies may fail to improve the functioning of the app economy and address the needs of SMEs. We recommend that the European institutions carefully define what conduct they consider undeniably harmful or anti-competitive and include only those behaviours in the DMA. Further, the European institutions must consider consumer welfare and innovation. EU bodies should only add additional obligations to the DMA once they have conducted further research.

The App Association also urges the European institutions to ensure that all industry stakeholders can participate in regulatory dialogues with the Commission, particularly with respect to the obligations included in Article 6. A proper regulatory dialogue and a time period in which an affected company can justify its business practices would ensure that the Commission gains a clear understanding of the impact an obligation may have on the ecosystem. We would like to see the opportunities for regulatory dialogue that are mentioned in the DMA recitals developed further in its articles. A provision for regulatory dialogue could introduce more space for clarification and ensure continuity with the P2B regulation. For example, Section 5 of the Digital Services Act calls for codes of conduct and standards developed by industry, which could be replicated in the DMA.

Throughout the legislative process, we hope that the focus of Articles 5 and 6 shifts away from specific and potentially misappropriated harms from past antitrust cases. Instead, we encourage policymakers to focus on developing flexible, general and future-proof standards for the digital age.

## IV/ Preserve legal certainty in the Digital Single Market

The DMA recommends that the Commission use delegated acts to update the operational threshold for gatekeepers. Further, the Commission shall regularly, and at least every two years, review the list of designated gatekeepers. As part of the review, the Commission shall determine whether any new platform services meet the gatekeeper requirements.<sup>7</sup>

The App Association understands that such provisions seek to account for the dynamism of the online platform economy. Given the fast pace of the platform economy, periodic reviews are appropriate. However, **we remain concerned that a frequently shifting threshold may decrease legal certainty for larger, not-yet-gatekeeper platforms in the Digital Single Market if the reviews are not transparent.** The Commission must establish safeguards and clear grounds on which reviews are conducted in order to prevent legal uncertainty. **Such uncertainty may unintentionally discourage larger platforms from scaling up. This scenario risks further entrenching the position of the current gatekeepers while endangering growth, investment, and honest mergers with smaller players.**

---

<sup>7</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en>



Moreover, each new gatekeeper added to the Commission's list risks creating ripple effects that different verticals of the online platform economy will feel. The smallest actors with the fewest resources to react and adapt are likely to experience the strongest consequences. We already pointed out that the Commission has overlooked the numerous indirect effects this legislation may have on SMEs. In light of the DMA's regular evaluation, **the App Association is highly concerned that the Commission will continue to forget our members as it undertakes its reviews.**

Additionally, the DMA recommends that the Commission have the ability to designate a provider of core platform services as a gatekeeper when it “does not yet enjoy an entrenched and durable position in its operations, but it is foreseeable that it will enjoy such a position in the near future”.<sup>8</sup> The Commission already identified digital markets as being dynamic enough to warrant regular reassessment at least once every two years. Consequently, the App Association is uncertain how the Commission plans to predict the evolution of digital markets. Incorrectly identifying a market as tipping, and the subsequent introduction of new obligations, could threaten medium and larger platforms' ability to grow and challenge existing gatekeepers. **Ultimately, we are concerned that the ability to regulate such “tipping” markets also threatens the legal certainty of both larger and smaller platforms. This provision risks stagnating the market instead of enriching it.**

The DMA is designed for rapid intervention. Nonetheless, small and micro-enterprises cannot react quickly to legislation that will indirectly affect their business models, growth ambitions, or exit strategies. A more reasonable time horizon would decrease this risk and help to increase legal certainty in the Digital Single Market.

We recommend that the DMA allows sufficient time for the Commission to fully analyse the effect a new gatekeeper designation may have on the entire platform economy. This analysis must happen before that enterprise is subject to additional obligations. We recommend further to ensure sufficient time to monitor the actual effect a gatekeeper designation has on the entire platform economy before considering further changes. To preserve high levels of transparency, the DMA should also ensure that the European Commission consults all interested parties in the gatekeeper designation process. We also recommend the Commission avoid the regulation of “tipping” markets and ensure the proper balance of efficient and effective review to preserve legal certainty in the Digital Single Market.

---

<sup>8</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en>, p. 45

## V/ Conclusion

The App Association would like to reiterate its support of the European Commission's desire to strengthen the Digital Single Market and to establish the EU as a market in which the digital sector can thrive. We appreciate the Commission's commitment to a level playing field and its goal to make the online platform economy fair and contestable, especially for SMEs.

However, considering the already-highly competitive app ecosystem, we are concerned that this proposal may fail to address existing concerns and risks. Instead, if realised in its current form, we expect this legislation to widen the gap between the smallest and largest app developers as well as between developers and app stores.

If European institutions must implement a new regulatory framework for the global platform economy, they have to develop it thoughtfully, thoroughly, and with robust evidentiary support. This approach helps to ensure the design and application of effective legislation in Europe and around the world.

The App Association would welcome the opportunity to lend its support as these proposals pass through the ordinary legislative process. We stand ready to provide further insights and share our members' experiences with the functioning, the benefits, and the existing problems of the online platform economy. **We encourage the European institutions to design a regulation that considers the interdependencies of the entire platform economy. Legislation like the DMA must protect and enhance the innovation potential of small app developers and other actors who design the software that improves consumers' lives every day.**

## IV/ Annex: Improvement targets in the DMA

### Obligations for gatekeepers – Articles 5 and 6

Trust is an essential component of success in the app ecosystem. Platforms related to social media or e-commerce, for example, have struggled to identify and remove illegal content or goods, weakening consumer trust in their products and services. The app stores' rigorous review processes, on the other hand, have helped to protect their users from these threats. These internal reviews allow consumers to feel it is safe to download apps from unknown companies without accidentally inviting a virus, malware, or illegal content onto their device. This trust is especially fundamental to the survival of small app developers or new market entrants that do not yet enjoy the broad recognition of larger brands.

Some of the well-intentioned obligations in the DMA risk damaging the trust consumers have in the app stores. Article 6 (c), for example, includes only limited safeguards to protect consumers from malicious actors. Article 6 (h) specifies that data portability should be “effective” but does not include any safeguards to ensure that it will be ported securely by consumers between platforms. Articles 6 (i) and (j) may work against the GDPR's principle of data minimisation. Under article 6 (k) in its current form, it would be unclear how application store review processes may continue to discriminate against illegal content for the protection of consumers.

The App Association recommends that the DMA include only a list of obligations to address practices that are undeniably harmful for competition, consumer welfare, and innovation. The DMA could further assess other practices that require trade-offs between various costs and benefits that affect the wider ecosystem at a later stage and on a case-by-case basis after the Commission conducts further research. At a minimum, we recommend that before a new obligation under Article 6 is introduced, the Commission evaluate its potential positive and negative impacts. During this analysis, we recommend the Commission conduct a fully transparent and participatory regulatory dialogue, so that even the smallest business users can provide their input. We would also welcome it if affected businesses had the ability to object and justify their business practices to the Commission before a new obligation is introduced.

## Designation of Gatekeepers – Articles 3, 15, and 37

Pursuant to Articles 3 and 15, the Commission may conduct market investigations to designate new gatekeepers in the Digital Single Market. Pursuant to Article 37, the Commission may adopt delegated acts to specify the methodology for determining or adjusting the quantitative thresholds to designate a gatekeeper and to regularly adjust it if necessary.

We recommend that the designation process always include a market investigation that accounts for the possible impact that the designation of each new gatekeeper may have on the entire ecosystem. Both the adoption of delegated acts and market investigations should be conducted transparently. The Commission should share its rationale for conducting the market investigations, include all relevant stakeholders in the process, be clear about how the investigation is being conducted, and publish its results upon conclusion. This mechanism is especially necessary if research on a new obligation is lacking, and because the process of compliance for each new designated gatekeeper may have unintended consequences in the wider online platform economy.

Given the dynamism of digital markets, we recommend further that the Commission avoid the regulation of “tipping” markets, as specified in Article 15.

## Review of the status of gatekeepers – Article 4

To ensure high procedural standards, we recommend that the DMA requires the Commission to conduct a market investigation as intended under Article 15 DMA. This investigation should occur before reconsidering or amending the status of gatekeepers in the framework of Article 4.

We recommend further that the European Commission’s review of the status of gatekeepers is fully transparent and considers the impact such review may have on SMEs. All interested parties should have the opportunity to provide their feedback during the Commission’s regular review.

## Updating obligations and market investigations into new services and practices – Articles 10 and 17

We recommend that the DMA ensures that the Commission conducts market investigations into new services and practices transparently. In particular, the European Commission should be required to consult all interested parties on its findings. Additionally, the DMA should guarantee that the Commission assesses the impact adding these new services and practices to the list of obligations may have on SMEs.



 @ACTonline  
 /ACTonline.org