



June 2021

## DuckDuckGo's position on the Digital Markets Act (DMA)

### Overview of proposed amendments

*Annex I contains our proposed amendments, compared with the European Commission's proposal.*

#### 1/ Ban search defaults for gatekeepers and require preference menus

- Add a new provision under article 6 in order to prevent search gatekeepers from securing or establishing default positions across the search access points of an operating system.
- In a new recital after (46), indicate that the regulator should substitute these default positions with a preference menu that lets users choose their search default on their device.

#### 2/ Ensure the right to switch defaults

- In support of article 6.1(e) on switching, specify in recital (41) or (50)<sup>1</sup> that restricting the user's ability to change default settings is a barrier to switching.
- Amend recital (51) to specify that restricting the ability to switch online search engine default harms the users' right to access an open Internet.
- Amend article 6.1(b) and recital (46) on un-installation to ensure users are not barred from changing default settings.

#### 3/ Maintain the click-and-query provision

- Keep the provision 6.1(j) on click-and-query as is, and amend recital (56) to clarify that this would require the technical cooperation of industry players and the involvement of the regulator in contractual matters.

#### 4/ Introduce remedies more swiftly and more effectively

- Amend article 7.2 to make it as easy for the Commission to implement remedies for article 5 obligations as it is for article 6 obligations.
- Include formal avenues of participation for market stakeholders.

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<sup>1</sup> These recitals are duplicates.

**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. 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.<sup>2</sup>

**We welcome the Commission’s unprecedented ambition in opening up digital markets with the DMA, but regret the absence of provisions enabling the free choice and easy switching of search engine defaults.** This is despite the Commission’s ambition to ensure contestability in the search engine market<sup>3</sup> and its acknowledgement of the power of defaults,<sup>4</sup> in line with abundant international literature.<sup>5</sup> Google’s 93% search market share in Europe<sup>6</sup> is indeed the result of market foreclosure tactics, including hoarding default positions, either self-granted (Chrome) or acquired (iOS). On Android, Google announced a half-baked preference menu following pressure from the European Commission, which allows for choice at device setup, but doesn’t allow for easy switching later on.

**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. While privacy-protective businesses are coming from market innovators, governments need to ensure a truly competitive market actually exists. **The DMA is the right instrument to put an end to gatekeepers’ practices that prevent such businesses from effectively reaching users.**

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<sup>2</sup> [“What if We All Just Sold Non-Creepy Advertising?”](#), *The New York Times*, Gabriel Weinberg, June 19, 2019

<sup>3</sup> Recital (56) and article 6.1(j) aim at reinvigorating competition in the search engine market.

<sup>4</sup> Commission’s impact assessment, SWD(2020) 363, pp 23, 41, 58.

<sup>5</sup> The October, 2020 [US Department of Justice’s lawsuit against Google](#) specifically targets Google’s default acquisition strategy. See also [UK Competition and Markets Authority’s 2020 report on online platforms](#), proposing to let consumer choose their search defaults following the findings of their months-long investigation: “default behaviour by consumers has had a profound impact on the shape of competition in search. (...) defaults play a very important role in influencing consumers’ use of search engines.”

<sup>6</sup> <https://gs.statcounter.com/search-engine-market-share/all/europe> (as of January 26th, 2021) – note that Statcounter’s “Europe” region includes Russia.

## 1. BAN SEARCH DEFAULTS FOR GATEKEEPERS AND INTRODUCE PREFERENCE MENUS

### Proposed amendments

- Add a new article 6.1(bb) in order to prevent search gatekeepers from securing or establishing default positions across the search access points of an operating system.
  - *(bb) refrain from securing or establishing default positions for the online search engines of the gatekeeper across the search access points of the operating systems owned by any gatekeeper.*
- In a new recital after (46), indicate that the regulator should substitute these default positions with a preference menu that lets users choose their search default on their device:
  - *(46a) Securing or establishing defaults positions across the search access points of an operating system, such as the pre-installed browser or another, dominant browser, the home screen bar widget, or the voice assistant, can entrench the dominant position of an established online search engine and prevent contestability on the online search engine market. Even where users can change the default manually, they rarely do so, due to behavioral bias for inertia. In order to ensure contestability, end users should be able to select their preferred online search engine default through a preference menu when they set up their device. The preference menu should comprise the most popular online search engines on a given market, on the basis of objective criteria such as market share, and should be designed in a fair and non-discriminatory manner to ensure that end users are not nudged to select a particular provider. The preference menu should be effective, that is the end user's choice of a search engine default should immediately apply across the search access points of the operating system. End users must subsequently be able to access such preference menu after the device is set up, including through a prompt on another online search engine's website or software application.*
- Maintain article 5(f), which would limit Google's ability to lock-in consumers:<sup>7</sup>

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<sup>7</sup> Amending the anti-bundling provision of article 5(f) can be an alternative to the addition of a specific ban on search defaults that we are proposing: “(f) refrain from **setting as default, or 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**”. Under that option, browsers should be defined as a “Core Platform Service” since they are the main access point for search.

- Article 5.f bans gatekeepers from “*requiring [users] to subscribe to or register with any other core platform service (...) as a condition to access, sign up or register to any of their core platform service (...)*”

**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.<sup>8</sup> Defaults are particularly prevalent in search, which explains Google’s strategy to secure or establish default positions and making it hard for people to switch. In a 2018 strategy deck quoted by the US Department of Justice (DOJ), Google observed that “*people are much less likely to change [the] default search engine on mobile.*”<sup>9</sup>

This strategy translated into Google securing the search default on its own operating system Android through licensing agreements, establishing the Google default on its own devices (Pixel phones or Chromebooks), and acquiring default positions elsewhere. According to the DOJ, Google pays Apple between \$8-12 billion annually in order to secure the search default across the Apple ecosystem. As a result, the DOJ estimates in its lawsuit against Google that “*over 85 percent of all browser usage in the United States occurs on Google’s own Chrome browser or on one of the browsers covered by these revenue sharing agreements.*”<sup>10</sup>

In Europe, Google isn’t automatically the default on Android since 2020. The European Commission’s 2018 Android decision<sup>11</sup> was a realization of Google’s illegal exclusionary strategy and a first attempt to fix competition in the search market. In order to comply with the order, Google introduced a flawed pay-to-play search preference menu. In June 2021, Google accepted to replace its pay-to-play preference menu on Android with a free-of-charge version.<sup>12</sup> Consumers now have a choice for their initial defaults across certain search access points on Android. However, they are not able to get back to the preference menu in settings, either on their own or at the tap of a link on a third-party search engine’s website or

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<sup>8</sup> In [Deciding by Default \(2013\)](#), Cass R. Sunstein of the University of Pennsylvania exposed the remarkable power of default settings with consumers.

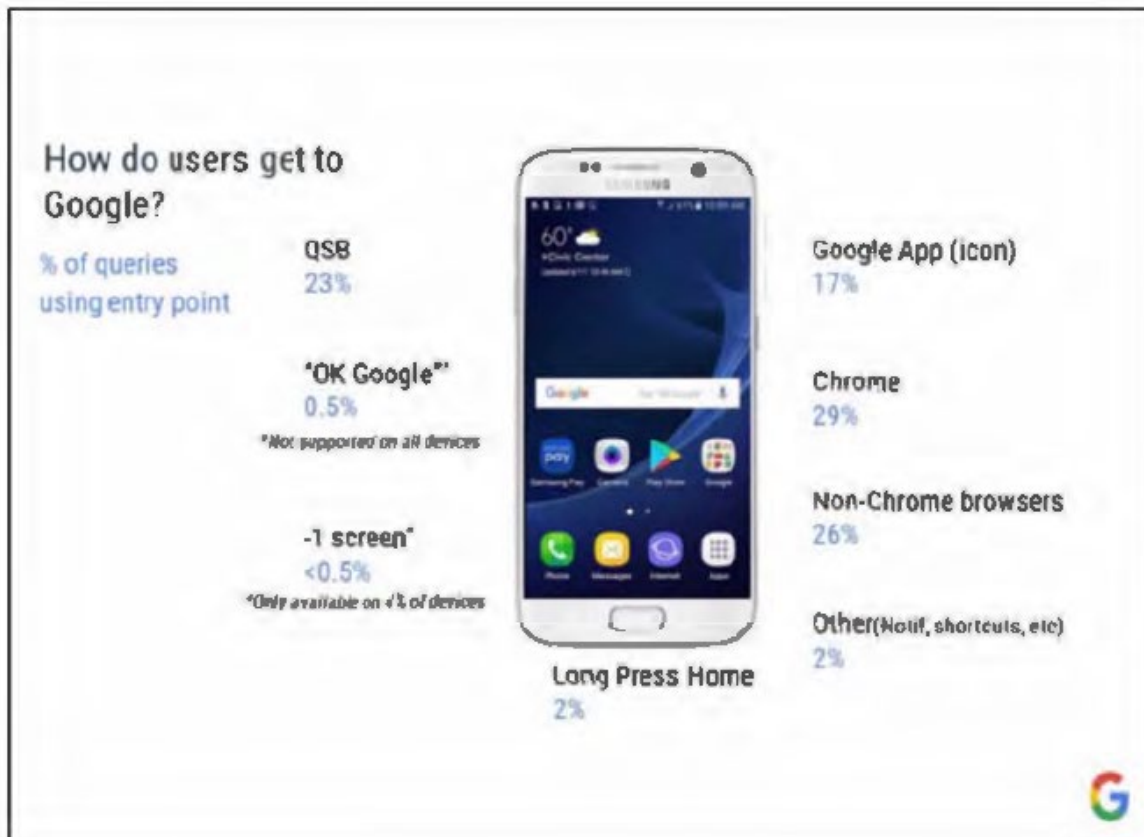
<sup>9</sup> ["Justice Department Sues Monopolist Google For Violating Antitrust Laws"](#), October 2020, paragraph 47.

<sup>10</sup> *Ibid*, paragraph 118 and paragraph 158.

<sup>11</sup> In 2018, the [Commission imposed a record fine on Google](#) for illegal practices on Android mobile devices. Google was required to take action to reverse the improper advantage it obtained, which led to the current search preference menu. See our [series of blog posts on why this is a flawed solution](#).

<sup>12</sup> “[Google ditches pay-to-play Android search choice auction for free version after EU pressure](#)”, *Techcrunch*, Natasha Lomas, June 8, 2021

app. The current ability to change the search default on the Chrome browser isn't sufficient, since consumers use a variety of access points for their search queries. This was the rationale deciding the applicability of the pre-cited Android preference menu, and is further evidenced in a 2018 Google strategy deck quoted by the US DOJ.<sup>13</sup> Significantly, 23% of users accessed Google search through the "quick search box," according to this image from the deck:



Google therefore continues making it hard to switch search engine default on Android, despite their claim that competition is "one click away." Switching one's device's main search defaults is, in fact, 15+ clicks, or one factory reset away.<sup>14</sup> Additionally, iOS or desktop users are not given that choice.

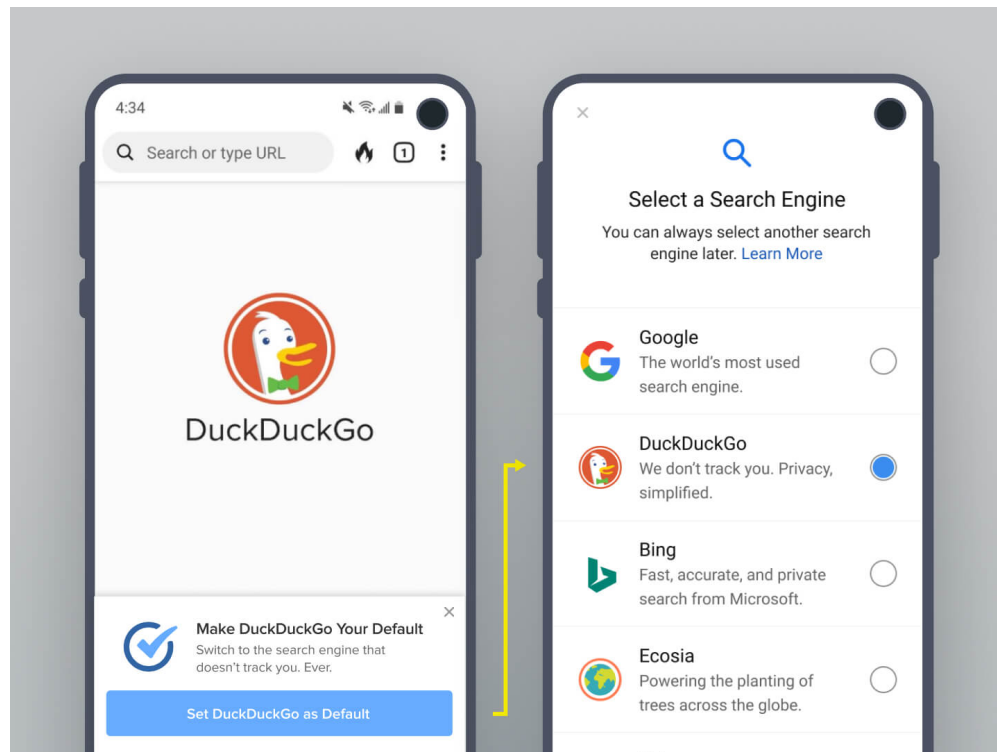
The DMA should therefore **ban the Google search defaults and mandate preference menus instead.** This would **secure the Android preference menu in law** and protect it with all the guarantees and

<sup>13</sup> *Ibid*, paragraph 44.

<sup>14</sup> "[Dear Google: We Agree Search Competition Should Be 'Only 1 Click Away' – So Why Is It 15+ on Android?](#)", *DuckDuckGo's SpreadPrivacy blog*, October 14, 2020

safeguards of the DMA framework, as it is now merely a non-binding commitment from Google. Putting the preference menu in law would **generalize it to other gatekeeping access points such as Chrome desktop and on iOS**. In a [series of blog posts](#), we explained how a genuine preference menu would look like. **Using the following features, up to 24% of Europeans would choose a Google alternative:**<sup>15</sup>

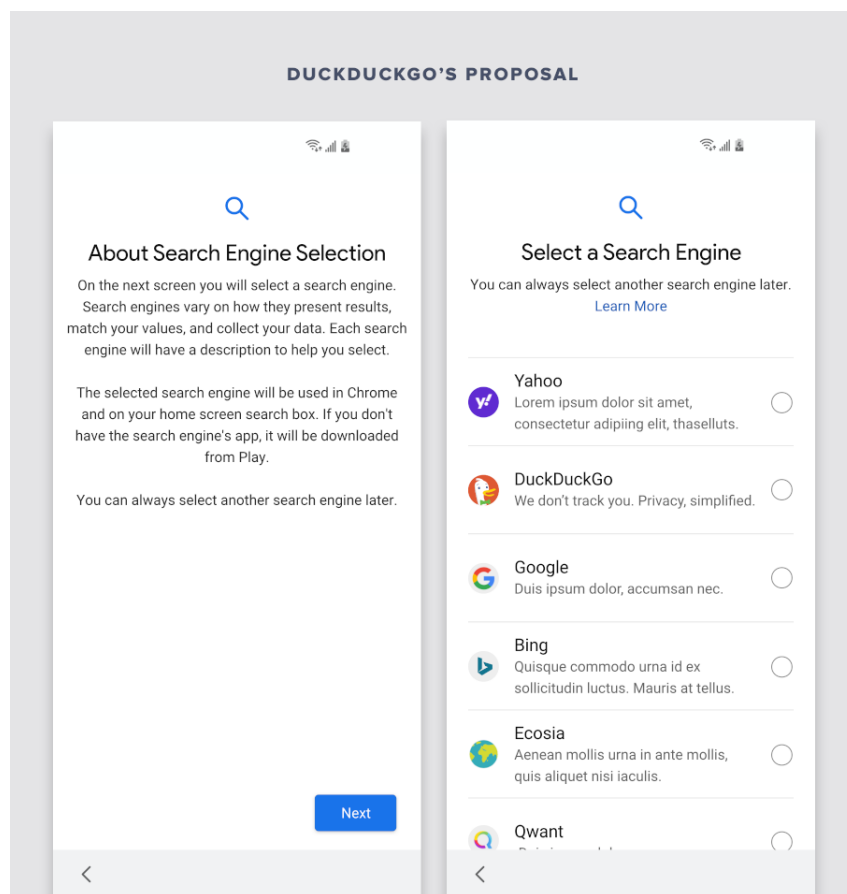
- **The preference menu should be easily available post-activation:**<sup>16</sup> that way, consumers could easily change their search engine themselves across the whole device by a simple click (i.e., get back to the preference menu setting). We would be able to prompt the consumer (e.g., “do you want 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 search access points would change at once with one tap and our app would be downloaded. *Below is our visual proposal for a search engine guided launch path to the preference menu.*



<sup>15</sup> “[Google Search Mobile Market Share Likely to Drop Around 20% through Search Preference Menus](#)”, DuckDuckGo’s SpreadPrivacy blog, August 10, 2020

<sup>16</sup> “[Search Engines Should be Able to Guide Consumers to Search Preference Menus](#)”, DuckDuckGo’s SpreadPrivacy blog, May 18, 2021

- **The preference menu and the OS shouldn't nudge people to choosing Google:**<sup>17</sup> the Android preference menu continues to have design flaws, with “dark patterns” discouraging people from choosing a Google alternative. Instead, people should be able to easily see information about the search engine options they are presented with, including with bigger logos and descriptions. Additionally, the current intro sentence<sup>18</sup> states that people can switch to another search engine at any time, which implies they can do it as easily, when they in fact can't. Finally, 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 push people back to Google. *Below is our preference menu proposal, including an introductory info screen.*



<sup>17</sup> “[Search Preference Menus: Improving Choice With Design](#)”, DuckDuckGo’s SpreadPrivacy blog, January 28, 2020

<sup>18</sup> See Google’s design here: <https://www.android.com/choicescreen/>



- **The preference menu should display search engines according to their popularity on a given market:** people need to see on the preference menu the search engines they most expect—i.e., those that are the most popular on their market. The regulator should do so without placing Google systemically first—for instance by ranking search engines in buckets of 5, randomly ordered within each bucket. The Commission had Microsoft adopt a similar system in 2010 in its free-of-charge browser “ballot screen.”<sup>19</sup> The regulator could randomize certain spots, which would be left available to eligible startup search engines, in order to facilitate market entry.
- **The preference menu should be made available 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 in 2018, 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), and Google’s implementation of a preference menu on all devices in Russia.<sup>20</sup> 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 box on existing devices to change the Chrome search default or replace the Google app with an alternative within the Play Store.

The ban on gatekeepers’ search defaults we are proposing should be effective, e.g., equally apply to bundling agreements with third parties,<sup>21</sup> backed by an anti-circumvention provision, and tight

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<sup>19</sup> “[Search Preference Menus: No Auctions Please](#)”, *DuckDuckGo’s SpreadPrivacy blog*, March 10, 2020

<sup>20</sup> 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](#).

<sup>21</sup> 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.



regulatory control.<sup>22</sup> That way, tactics used to discourage switching, such as in Google's current Android search preference menu, would be prohibited and replaced with successful implementations.

## 2. ENSURE THE RIGHT TO SWITCH DEFAULTS

### Proposed amendments

- In support of article 6.1(e) on switching, specify in recital (41) or (50)<sup>23</sup> that restricting the user's ability to change default settings is a restriction to the free choice of users.
  - (41) Gatekeepers should not restrict the free choice of end users by technically preventing switching between or subscription to different software applications and services. **Restricting the users' ability to switch applications or services preset as default is a barrier to switching.** Gatekeepers should therefore ensure a free choice irrespective of whether they are the manufacturer of any hardware by means of which such software applications or services are accessed and should not raise **artificial** technical barriers so as to make switching impossible, **difficult**, or ineffective. The mere offering of a given product or service to end users, ~~including by means of pre-installation, as well the improvement of end user offering, such as better prices or increased quality~~, would not in itself constitute a barrier to switching.
- Amend recital (51) to specify that restricting the ability to switch online search engine default harms the users' right to access an open Internet.
  - (51) Gatekeepers can hamper the ability of end users to access online content and services including software applications. Therefore, rules should be established to ensure that the rights of end users to access an open internet are not compromised by the conduct of gatekeepers. Gatekeepers can also technically limit the ability of end users to effectively switch **the online search engine default, or between different Internet access service providers**, in particular through their control over operating systems or hardware. This distorts the level playing field for **online search engines and Internet access services** and ultimately harms end users. It should therefore be ensured that gatekeepers do not unduly restrict end users in choosing their Internet

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<sup>22</sup> 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."

<sup>23</sup> These recitals are duplicates.

*access service provider, or the default online search engine across the search access points of their operating system.*

- Amend article 6.1(b) and recital (46) on un-installation to ensure users are not barred from changing default settings:
  - *(b) allow end users to un-install any pre-installed software applications, or switch the default for any other service on its core platform service without prejudice to the possibility for a gatekeeper to restrict such un-installation or default switching in relation to software applications or services that are essential for the functioning of the core platform service, the operating system or of the device and which cannot technically be offered on a standalone basis by third-parties;*
  - *(46) A gatekeeper may use different means to favour its own services or products on its core platform service, to the detriment of the same or similar services that end users could obtain through third parties. This may for instance be the case where certain software applications or services are pre-installed by a gatekeeper, or when they are preset as default on a core platform service. To enable end user choice, gatekeepers should not prevent end users from un-installing any pre-installed software applications, or change default services on its core platform service and thereby favour their own software applications or services;*

The Commission confuses “pre-installation” with “default.” For search engines, the critical entry points are the default position on a browser—which itself may be pre-installed—and other search access points like the home screen bar widget on a smartphone.

### 3. MAINTAIN THE CLICK-AND-QUERY PROVISION

#### *Proposed amendments*

- 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:

- (56) *The value of online search engines to their respective business users and end users increases as the total number of such users increases. Providers of online search engines collect and store aggregated datasets containing information about what users searched for, and how they interacted with, the results that they were served. Providers of online search engine services collect these data from searches undertaken on their own online search engine service and, where applicable, searches undertaken on the platforms of their downstream commercial partners. Access by gatekeepers to such ranking, query, click and view data constitutes an important barrier to entry and expansion, which undermines the contestability of online search engine services. **Additionally, the current contractual arrangements in search syndication agreements may limit the downstream provider's access to click-and-query data. Gatekeepers should therefore be obliged to provide access, on fair, reasonable and non-discriminatory terms, to these ranking, query, click and view data in relation to free and paid search generated by consumers on online search engine services to other providers of such services, so that these third-party providers can optimise their services and contest the relevant core platform services. Such access should also be given to third parties contracted by a search engine provider, who are acting as processors of this data for that search engine. The Commission shall encourage search engines to establish a technical architecture enabling the transfer of such data, and ensure that contractual arrangements, for instance in search syndication agreements, do not constitute barriers to effectively accessing click-and-query data. When providing access to its search data, a gatekeeper should ensure the protection of the personal data of end users by appropriate means, without substantially degrading the quality or usefulness of the data.***

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.*"<sup>24</sup> In our White Paper on the Search Engine Market, we further explain the strategic importance of such data. However, its effective access would necessitate untangling a complex web of commercial barriers.<sup>25</sup>

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<sup>24</sup> [Online platforms and digital advertising – Market study](#), CMA, July 1<sup>st</sup>, 2020

<sup>25</sup> "[White Paper on the Search Engine Market – Features and Competitive Landscape](#)", March 2021, DuckDuckGo

#### 4. INTRODUCE REMEDIES MORE SWIFTLY AND MORE EFFECTIVELY

##### *Proposed amendments*

- Amend Article 7.2 so that the Commission can also easily impose remedies for article 5 obligations without the need to first make three non-compliance decisions:
  - *2. Where the Commission finds that the measures that the gatekeeper intends to implement pursuant to paragraph 1, or has implemented, do not ensure effective compliance with the relevant obligations laid down in **Article 5** and in Article 6, it may by decision specify the measures that the gatekeeper concerned shall implement. The Commission shall adopt such a decision within six months from the opening of proceedings pursuant to Article 18.*
- 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.<sup>26</sup> This is the spirit of our proposal in article 6.1(bb).
- Include **formal avenues of participation for market stakeholders**:
  - In the gatekeeper designation procedure;
  - In designing and monitoring remedies;
  - With a possibility to lodge a formal complaint for alleged non-compliance; and
  - In addition, competent national authorities should cooperate with stakeholders in receiving complaints and undertaking their monitoring and investigation tasks.

**Both regulatory speed and technical savvy are key to the success of the DMA framework.** It should be presumed that gatekeepers will seek to circumvent seemingly straightforward obligations. Besides the proposed anti-circumvention provisions, the Commission should be able to impose remedies from the get-go, like it can do for article 6 - that is, not just after three non-compliance decisions. 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

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<sup>26</sup> BEREC supports such approach in its March 2021 [Opinion on the DMA](https://publications.jrc.ec.europa.eu/repository/handle/JRC122910). 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>

Commission has no practical ability to do its job.<sup>27</sup> 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. Should that not occur, the problem will only be exacerbated, much like the **deeply flawed search preference menu** initially instituted by Google as a follow-up to the 2018 Android decision. This auction-based format, which ran in 2020 and 2021, incentivized bidders to bid what they can expect to profit per user selection, effectively transferring their profits to Google, and to be worse on privacy.<sup>28</sup> The new format, running as of September 2021, continues to raise concerns (see [section I](#)).

**This case also revealed how a lack of participatory processes prevents effective enforcement.** The “remedy” was designed solely by Google, a fact which sheds light on the preference menu’s flaws. 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.<sup>29</sup> 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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<sup>27</sup> 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.

<sup>28</sup> A [paper](#) by Prof. Michael Ostrovsky of Stanford University, published on November 7<sup>th</sup>, 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”).

<sup>29</sup> 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.



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