

From: [REDACTED]
To: [REDACTED] [\(COMP\)](#)
Cc:
Subject: Digital Markets Act (DMA): additional argumentation concerning extension of the scope of Article 6.1.k
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Attachments: [image001.png](#)
[image002.png](#)
[7.3.2022_DMA_Comments on Article 6-1-k_Fair und Non-Discriminatory Access_Thomas Höppner_V2.pdf](#)

Dear [REDACTED],

I am following up today on our previous exchanges regarding the DMA, as I would like to share with you additional argumentation with regards to the extension of the scope of Article 6.1.k. DMA, as proposed by the European Parliament and demanded by a wide number of national delegations in the Council.

In the **attached paper**, Prof. Dr. Thomas Höppner addresses the different concerns that have been voiced against the extension of the obligation in Article 6.1.k DMA to further core platform services. In points 4. (p. 5) and, specifically, 5. (p. 6) of the paper, **he counters the claim that enforcing fair, reasonable and non-discriminatory access conditions would turn the European Commission into a central price setting authority.**

Ensuring fair and non-discriminatory access to and distribution on the gatekeeper platforms for the free press and the media is a main priority of press publishers, as they represent one of the main gateway to newspapers and magazines' readers. This is why we have focused our efforts on ensuring that Article 6.1.k DMA is an effective instrument to tackle unfair and discriminatory conditions of access on gatekeeper platforms.

Since issues of unfair and discriminatory access conditions are a common feature of gatekeeper platforms, it is crucial that the fairness and non-discrimination obligations of **Article 6.1.k apply to all core platform services of the gatekeepers, and in particular search engines and social media.** The abundance of cases of gatekeepers' abuses in this regard demonstrate the need to look beyond App Stores, as the extension of Article 6.1.k is key for many sectors such as shopping, travel, jobs, real estate, healthcare and for the diversity of digital press. These sectors all depend on fair and non-discriminatory access to gatekeeper platforms for their survival.

Therefore, Article 6.1.k should seek to address abuses across the entire European market, as already documented by some high-profile proceedings on the press publishers' neighbouring right in France, Spain and Germany, among others, as well as similar proceedings in Australia and the USA. Therefore, these abuses are not only present on alleged "local markets", **rendering a European legislation more indispensable and urgent than ever.**

The question of unfair access conditions, which, *inter alia* (yet not exclusively), can take the form of unfair pricing conditions or the imposition of free licences for the use of content, goes beyond the implementation of the Copyright Directive. Indeed, whereas the Directive, crucially and pivotally, established the new neighbouring right, copyright law in itself is, naturally, not capable of addressing the bargaining imbalances of negotiations with the gatekeepers. Which is why this imbalance and the gatekeeper's abusive behaviours must be addressed in the framework of the DMA, by extending Article 6.1.k to all core platform services.

We believe that unfair, unreasonable and non-discriminatory conditions have always constituted an abuse of dominance pursuant to Article 102 TFEU – yet this has not turned the enforcement authorities into price setters. Furthermore, in particular when it comes to enforcing the long-established competition law standard of "Fair, Reasonable And Non-Discriminatory" (FRAND) conditions for the licensing of IP rights, competition authorities have vast experience. By insisting on FRAND-conditions, an enforcement authority can ensure a dominant company pays fair prices, without having to set such prices itself. This can be left to civil courts or specialised IP arbitration and licensing bodies.

Besides, the authority already needs to face complex pricing topics for App Stores in any event: To enforce lit. (k) in its original version, the enforcement authority will be faced with exactly the same issues that it would have to expect when enforcing such obligation vis-à-vis other gatekeepers.

I hope you will find this document helpful, and look forward to any feedback or comments you may have.

Kind regards,

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