

Comments on Article 6 (1) (k) DMA – Fair and Non-Discriminatory Access to Gatekeeper Services

The goal of the DMA is to promote fair trading conditions between gatekeepers and their dependent business partners. A crucial obligation reflecting this overall purpose is Article 6 (1) (k). This paper outlines why it is crucial that the obligations of fairness and non-discrimination in this article apply to all gatekeepers and how these obligations could and should take effect in practice.

A. Background: state of affairs regarding Art. 6 (1) (k)

Original Commission proposal

In the Commission's proposal Article 6 (1) (k) DMA reads as follows:

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

(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.

Perception by the internet economy

The Commission's proposal to subject a gatekeeper to a ban on discriminatory as well as unfair conditions was widely welcomed by the internet economy. In particular the description of what constitutes fair and non-discriminatory conditions in Recital (57¹) was well received.

¹ (57) *In particular gatekeepers which provide access to software application stores serve as an important gateway for business users that seek to reach end users. In view of the imbalance in bargaining power between those gatekeepers and business users of their software application stores, those gatekeepers should not be allowed to impose general conditions, including pricing conditions, that would be unfair or lead to unjustified differentiation. Pricing or other general access conditions should be considered unfair if they lead to an imbalance of rights and obligations imposed on business users or confer an advantage on the gatekeeper which is disproportionate to the service provided by the gatekeeper to business users or lead to a disadvantage for business users in providing the same or similar services as the gatekeeper. The following benchmarks can serve as a yardstick to determine the fairness of general access conditions: prices charged or conditions imposed for the same or similar services by other providers of software application stores; prices charged or conditions imposed by the*

However, a broad coalition of associations² representing business users from various industries has criticised the fact that the obligation was limited to app stores, stating that this (i) contradicts the horizontal approach of the regulation and thereby (ii) completely contrary to its purpose, legalises discriminatory, unfair and unreasonable conditions imposed by any other identified core platforms service. If the DMA disallows such conditions only for app stores, *e contrario* this means that such conditions are allowed for every other gatekeeper. This is a result that is not just incompatible – it clearly contradicts the entire purpose of the DMA.

Amendments proposed by European Parliament (EP) Report on 15th December 2021

Based on these observations, on 15th December 2021 the EP proposed to amend the wording so as to align it with the structure of the DMA:

*(k) apply **transparent, fair, reasonable and non-discriminatory** general conditions of access **and conditions that are not less favourable than the conditions applied to its own service** for business users to **its core platform services** designated pursuant to Article 3 of this Regulation.*

Thus, the EP proposed to (i) expand the obligation to all core platform services, (ii) include the requirement of transparency and reasonableness and (iii) clarify that the obligation of non-discrimination also applies vis-à-vis an undertaking's own services.

B. Why the EP expansion beyond app stores is indispensable

1. Equal competition concerns require equal regulatory responses

The Commission proposal limited lit. (k) to app stores. However, exactly the same concerns that are described in Recital (57) have been observed in relation to other core platform

provider of the software application store for different related or similar services or to different types of end users; prices charged or conditions imposed by the provider of the software application store for the same service in different geographic regions; prices charged or conditions imposed by the provider of the software application store for the same service the gatekeeper offers to itself. This obligation should not establish an access right and it should be without prejudice to the ability of providers of software application stores to take the required responsibility in the fight against illegal and unwanted content as set out in Regulation [Digital Services Act].

² See (amongst others) joint position of ACT/AER/EBU/EGTA/EMMA/ENPA/EPC/NME, "European Media encourages swift adoption of Digital Markets Act with targeted improvements & a clear focus on gatekeepers" [European Media encourages swift adoption of Digital Markets Act with targeted improvements & a clear focus on gatekeepers | ACT \(acte.be\)](#): "The principle foreseen in Article 6(1)k is limited to App stores. We recommend that in order to ensure the effectiveness of the DMA, the obligation must be applied beyond App stores to all core platform services, in particular to search engines and social networks."

services of digital gatekeepers, in particular for search services and social networks (see Annex I).

All such instances of conduct result from the same economic power that only digital gatekeepers possess – intermediation power. As explained in greater detail in Annex I, intermediation power is the connecting element of the power of all gatekeepers. Taming such power is at the heart of the DMA. A DMA without a provision that addresses such power in lit. (k) would miss the most significant tool of gatekeepers of distorting competition and exploiting their business users.

It is likely that the Commission had originally limited lit. (k) to app stores because of DG Comp's first-hand experience from the competition investigation against Apple's app store commissions. However, the DMA is supposed to be geared to events and processes in the future. By treating equal commercial situations unequally, the DMA would favour certain businesses over others and, more problematically, in effect legalise unfair and discriminatory trading conditions for all gatekeepers other than app stores. Each of these gatekeepers could convince courts by arguing that, if such conduct is only prohibited for app stores, the obligation does not apply to them. Since the DMA is supposed to be more specific than general competition law, such a clear legalising effect could even preclude competition law actions based on abuse of dominance.

Since the DMA is intended to harmonise the law on gatekeepers, national legislators would not be able to do anything to ensure that market-dominant search engines (Google), marketplaces (Amazon) or social networks (Facebook) do not apply unfair, disproportionate or discriminatory conditions.

2. Only a comprehensive ban provides legal certainty and consistency

For reasons of legal certainty as well, the DMA should treat all gatekeepers equally wherever there are common features. Specific obligations, such as pre-installations or ranking conditions, may be imposed on those gatekeepers that only use such practices. However, conduct that is carried out by all gatekeepers needs to be addressed equally. Otherwise, the DMA will create legal uncertainty.

As explained in Annex I, unfair and discriminatory access conditions are a common feature and concern relating to each gatekeeper. Given this, there is simply no plausible reason as to why Article 6 (1) (k) should be limited to app stores.

3. Only a comprehensive ban is practically workable and credible

There is likewise no reason whatsoever to assume that the enforcement authority would have any more difficulties in enforcing a horizontal ban of unfair and non-discriminatory conditions vis-à-vis core platform service other than app stores.

There is no doubt that such obligations will trigger complex questions as regards appropriate access conditions, in particular as regards pricing. However, for the following reasons such complexity cannot constitute a legitimate reason for advocating an ineffective regulation:

- **Recital (57) sets out a clear, consistent legal framework for what constitutes fair and non-discriminatory prices:** Recital (57) is already sufficiently precise and well-drafted to provide a general legal yardstick to determine what fair pricing or other fair general access conditions constitute, e.g. the conditions imposed by the gatekeeper for similar services. Such yardstick will enable every gatekeeper to adjust its conduct accordingly. If the Commission feels that the legal yardstick in Recital (57) is not sufficiently precise to deal with every possible scenario, further clarifications can be added (see proposals below). As a last resort, the expansion of lit. (k) could be limited to include app stores, search engines and social networks, so as to exclude unknown terrain (such as cloud services). In such a case, however, a further clarification - that the limited scope of lit. (k) does not imply the legality of equivalent conduct carried out by other core platform services – would be required.
- **The obligation in Article 6 (1) (k) can be further specified by the authority:** Moreover, the obligations in Article 6 DMA are “*susceptible of being further specified*”. Thus, the obligation can be further specified wherever this might be necessary.
- **There is more experience with access to search engines than there is for app stores:** There have been several investigations by national competition authorities into the fairness of access conditions to search engines³. By now, we know more about what constitutes fair access to search than we know about access to app stores. Hence, if there is a case for a *per se* prohibition, it is in search. Conversely, precluding search would make the DMA fall back behind what national authorities have long established.

³ See Federal Cartel Authority (BKartA), 8.9.2015, B6-126/14 – *Google/VG Media*; Autorité de la concurrence, Décision n° 20-MC-01 du 9 avril 2020 - *Syndicat des éditeurs de la presse magazine et al. / Google*; Regional Court Berlin, 16 O 546/15 – *VG Media/Google*.

- **There is broad experience from non-discriminatory access obligations in other regulated areas:** Non-discriminatory access remedies are a common feature of European sector-specific regulation⁴. In nearly every regulated market, from airways via energy, telecoms and railways, we find such obligations in a wide variety of instances. This will allow the enforcement authority to rely on established principles about enforcing such rules. In any case, the experience from this particular industry does not suggest that non-discrimination and fairness obligations are not practically enforceable.
- **The authority 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. The case that led to the proposal of Article 6 (1) (k) centres around the 30% commission fee charged by the Apple app store as gatekeeper. To enforce lit. (k) in this case, the Commission has to determine which prices and fees are fair as regards the various types of apps on the store. If the authority can deal with such complex app store pricing conditions, it can also deal with access conditions of search engines or social networks. Conversely, if the DMA harmonises the law on gatekeepers, do we have any choice other than to bundle expertise on fair access conditions for gatekeepers at the EU level?
- **Most gatekeepers apply identical pan-European conditions – and app stores could conversely start differentiating among Member States:** Some may argue that the case of app stores is easier because such stores apply equal pricing conditions for all business users in Europe. However, this is not a valid argument. Firstly, app stores could change such strategy at any time and pursue different pricing models in each Member State. Secondly, it is also the case that all other gatekeepers prefer identical terms and conditions for all EU Member States. The fact that, for instance, Google differentiates among countries is often the result of legal differences between such countries – in those countries where competition law enforcement is weaker, Google's unfair practices are more extensive. By shying away from taking on a topic as central as access conditions at

⁴ Access obligations can be found e.g. for instance the obligation of telecoms providers to ensure "net neutrality" in Regulation No 2015/2120 to tame the intermediation power of such providers vis-à-vis ISPs. According to Article 3 para. 3 of the Net-Neutrality Regulation "Providers of internet access services shall treat all traffic equally, when providing internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used". According to Recital (9), "Any such differentiation should, in order to optimise overall quality and user experience, be permitted only on the basis of objectively different technical quality of service requirements (for example, in terms of latency, jitter, packet loss, and bandwidth) of the specific categories of traffic, and not on the basis of commercial considerations. Such differentiating measures should be proportionate in relation to the purpose of overall quality optimisation and should treat equivalent traffic equally."

the EU level, the DMA would further encourage such a separating strategy, involving cherry picking / path of lowest national resistance. This would undermine the very purpose of the DMA – to create a pan-European digital economy.

- **To be credible and effective, a regulation of gatekeepers cannot shy away from core topics such as pricing and proportionality:** Conditions to access gatekeeper services are at the very heart of the DMA. A regulation of gatekeepers that shies away from such an economically crucial topic loses any credibility, deterrence and effectiveness.
- **Fear of complexity can be no argument:** If the Commission fears that it cannot cope with the complexity of anti-competitive conduct, there are just three options – (i) no blocking of stricter national laws, (ii) national enforcement of the DMA or (iii) more staff for the EU enforcement entity. Allowing such anti-competitive conduct to continue is not an option.

4. If EU harmonisation is supposed to be convincing, Article 6 cannot lag far behind national laws requiring non-discrimination by gatekeepers (e.g. § 19a (2) 7 GWB)

Germany, a clear pioneer in competition enforcement in digital markets, was the first country to enact powerful rules to tame gatekeepers. Its § 19a (2) No 7 GWB constitutes the counterpart to lit. (k). It prohibits all gatekeepers from demanding unfair access conditions⁵.

If the DMA is supposed to harmonise national law on gatekeepers and thereby block all corresponding national laws, it must not fall behind § 19a (2) No 7 GWB (or any other provision of this norm). Otherwise, the DMA would amount to a gatekeeper-protection law.

Again, the prohibition of unfair and discriminatory access conditions is at the heart of the concerns that business users are faced when dealing with digital gatekeepers.

5. There is neither time nor any need to wait for the unrelated outcome of copyright reforms

⁵ Section 19a: Abusive Conduct of Undertakings of Paramount Significance for Competition Across Markets [...] “(2) In the case of a declaratory decision issued pursuant to subsection (1), the Bundeskartellamt may prohibit such undertaking from [...] 7. demanding benefits for handling the offers of another undertaking which are disproportionate to the reasons for the demand, in particular a) demanding the transfer of data or rights that are not absolutely necessary for the purpose of presenting these offers, b) making the quality in which these offers are presented conditional on the transfer of data or rights which are not reasonably required for this purpose.”

It has been suggested that, instead of making Article 6 (1) (k) meaningful now so as to also provide a tool against unjustified exploitations of press publishers, we should wait for the implementation of the EU Copyright Directive in national Member States. However:

- **Expanding Article 6 (1) (k) is in the interest of not just press publishers, all business users:** It is a misconception that the EP report would only improve the situation of press publishers. As evidenced by the criticism of other associations regarding the original Commission proposal, press publishers would just be one of many industries that would benefit from a legalisation of unfair terms.
- **Even in theory, the gatekeeper-related issues of market power addressed by Article 6 (1) (k) DMA cannot be resolved by the Copyright Directive, which applies horizontally to every company.** In the past, the very weaknesses of horizontally applicable copyright law resulted in the need for press publishers to turn to competition law to address unfair licensing agreements. The fairness of such conditions to access search engines or social networks is linked to gatekeeper power, not copyright. Hence, we cannot expect that the implementation of the Copyright Directive will be able to resolve these concerns. Again, to constitute a credible legal framework for fair conditions vis-à-vis gatekeepers, the Commission / DMA cannot shy away from such core issues of gatekeeper dominance.
- **The relevance of press publishers for a democratic society mandates a powerful DMA.** Instead of, in effect, excluding press publishers from the protection envisaged by lit (k), if anything their relevance for our democratic society would demand a strong focus on their protection. To put it diplomatically, a DMA that was not even able to protect press publishers against exploitation by search engines and social networks would be setting questionable priorities. The entire world is watching the EU in its battle for a fair regulation of press publishers. Adopting EU thoughts, even the USA is now discussing laws that regulate fair access to such platforms (Journalism Competition and Preservation Act, etc.).

C. How could the wording of lit. (k) be further improved?

Expanding lit. (k) to search engines, marketplaces and social networks appears indispensable. However, some clarifications could further enhance the effectiveness of the obligation.

1. No option to escape fair and reasonable conditions by harming fake subsidiaries

To start off with, at an earlier stage of the negotiations in the EP's responsible IMCO committee, a preliminary draft of Article 6 (1) (k) included a small (but crucial) drafting error. Namely, instead of the "and" between the obligation for fair and non-discriminatory conditions of access and the obligation for conditions to not be less favourable than the conditions applied to its own services, the preliminary draft included an "or". However, it makes little sense to give a gatekeeper the choice to either (i) *apply **transparent, fair, reasonable and non-discriminatory general conditions of access** or (ii) [to apply] **conditions that are not less favourable than the conditions applied to its own service** for business users*. This is because such a choice would allow the gatekeeper to avoid any transparency, fairness or reasonableness, as long as it provides the same conditions to its own service.

This would trigger a "race to the bottom" – gatekeepers could artificially set up a "fake" proprietary downstream service (for instance: a search engine with its own news portal) and then conclude an agreement with such subsidiary on the most intransparent, unfair, unreasonable and third-party-discriminating conditions (for instance, the search engine can display all press publications in full size for free) – only to then be able to tell the market: "Look, this is now the benchmark that every other business user is invited to match".

This is not just theory. It is exactly what Google has done to effectively avoid the remedy that the European Commission imposed on it in case *Google Search (Shopping)*⁶. Accordingly, we assume that the word "or" was an unintended drafting error and that the new half-sentence was only meant to clarify that "non-discrimination" implies that an undertaking's own services may not be favoured either. For this reason, it is paramount that the current version of Article 6 (1) (k) from the EP's report remains unchanged and that the "and" from the provision is not, under any circumstance, again changed into an "or".

2. Further clarification of fair terms and conditions in Recital (57)

First and foremost, and to ensure consistency, Recital (57) must also be extended to all core platform services, as proposed by the EP. In addition, to enhance legal certainty, Recital (57) should further clarify what fair and reasonable conditions pre-suppose.

⁶ See *Hoppner*, Google's (Non-) Compliance with the EU Shopping Decision, 2020, Chapter 3, explaining how Google artificially split its shopping comparison service (Google Shopping) into two independent services to avoid an obligation of equal treatment.

With regard to determining a fair price, it could also be specified that conditions are unfair if the gatekeeper charges prices or imposes conditions, such as the granting of a royalty-free licence, without entering into genuine negotiations with business users or collective management organisations representing such business users, and making the findability on the platform, including on the search engine, dependent on it, as already proposed by the Council in Recital (57). Generally, we do not see any justification as to why such an assessment of what constitutes fair or unfair access conditions on the basis of the DMA proposal should not be applicable for search engines and social networks.

To this end, the **official reasoning of Section 19a (2) No 7 of the German Act** against Restraints of Competition may provide some authoritative guidance⁷.

To better understand the important distinction between the “if” (= if access is granted at all) and the “how” (= quality of access), we refer to Annex I.

Such reasoning could easily be transferred to Recital (57) DMA (see proposed wording below).

3. Binding and administered price-setting procedure

If the Commission is concerned about the complex setting of fair access conditions for press publishers, based on their copyrights for press publications, a mandatory proceeding to set a fair price could be envisaged. To this end, Article 6 (1) (k) could include an obligation for gatekeepers to participate in a binding procedure to set a fair price, such as on the licensing of the neighbouring right for press publishers (“publishers’ right”). This procedure would then allow for the determination of the amount of the remuneration to be paid to all rightsholders.

D. Conclusion: Proposed Wording

⁷ Amongst others, it contains the following clarifications:

“An indication for unreasonableness can be seen in the fact that the company with paramount cross-market relevance does not offer to engage in genuine negotiations with the market counterparty as regards a benefit that the gatekeeper demands, such as regarding the appropriate remuneration for the required benefit. [...] The first provision (Number 7a) covers cases in which, simply for the display [of a business user] as such, the transfer of data or rights that are not necessary for this [= the provision of the intermediation service] is required. This is about the ‘if’ of the provision of an intermediation service. This can cover sets of circumstances in which the intermediation as such is conditioned on the granting of licences for copyright-protected content without this being necessary for the provision of such intermediation service. A second provision (Number 7b) covers sets of circumstances in which the way of displaying offers is made dependent on the transfer of data or rights that are not proportionate for that. This relates to the ‘how’ of the provision of services. [...] This covers scenarios where a search engine displays websites inferiorly if the operator of the website does not grant the search engine a licence for the display of its copyright-protected content” (unofficial translation, for the original see here <https://dserv.bundestag.de/btd/19/258/1925868.pdf>)

To conclude, we call upon adopting the EP version of lit. (k), with Recital (57) as suggested below on the basis of the EP's and Council's negotiating positions :

Article 6 (1) (k)

*k) apply **transparent**, fair, **reasonable** and non-discriminatory general conditions of access **and conditions that are not less favourable than the conditions applied to its own service** for business users to **its core platform services** designated pursuant to Article 3 of this Regulation.*

Recital (57)

*In particular gatekeepers which provide access to **core platform services** serve as an important gateway for business users that seek to reach end users. In view of the imbalance in bargaining power between those gatekeepers and business users of their **core platform services**, those gatekeepers should not be allowed to impose general conditions, including pricing conditions, **data usage conditions or conditions related to the licensing of rights held by the business user**, that would be unfair or lead to unjustified differentiation. **Imposing conditions encompasses both explicit and implicit demands, by means of contract or fact, including, for example, an online search engine making the ranking results dependent on the transfer of certain rights or data.** Pricing or other general access conditions should be considered unfair if they lead to an imbalance of rights and obligations imposed on business users or confer an advantage on the gatekeeper which is disproportionate to the service provided by the gatekeeper to business users or lead to a disadvantage for business users in providing the same or similar services as the gatekeeper. The following benchmarks can serve as a yardstick to determine the fairness of general access conditions: prices charged or conditions imposed for the same or similar services by other providers of **core platform services**; prices charged or conditions imposed by the provider of the ~~software application store~~ **core platform service** for different related or similar services or to different types of end users; prices charged or conditions imposed by the provider of the ~~software application~~ **store core platform service** for the same service in different geographic regions; prices charged or conditions imposed by the provider of the ~~software application store~~ **core platform service** for the same service the gatekeeper offers to itself. **It should also be considered unfair if access to the service or the quality and other conditions of the service are made dependent on the transfer of data or the granting of rights by the business user which are unrelated to or not necessary for providing the core platform service..** **While** this obligation should not establish an*

***unconditional** access right, **and it shall ensure that the conditions of access to and treatment by the core platform service are fair and non-discriminatory. This obligation** should be without prejudice to the ability of providers of **core platform services** to take the required responsibility in the fight against illegal and unwanted content as set out in Regulation [Digital Services Act].*

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