

ANNEX I

Gatekeeper's Intermediation Power

Why Article 6 (1) (k) Must Not Be Limited to App Stores

The DMA is intended to address the dangers of the abuse of intermediation power.

The most obvious potential of a gatekeeper is that the intermediary exploits the dependency of the intermediated companies in an effort to obtain special benefits from them. Special benefits are those commercial benefits that are not directly related to the exchange relationship and are not necessary for maintaining the quality of the intermediation service; in particular, they are not necessary for matching the different user groups of a platform.

If – as in the case of gatekeepers – intermediated companies do not have sufficient and reasonable alternative possibilities to gain access to a certain procurement or sales market, the intermediary's intermediation service simultaneously determines competition on this market (upstream or downstream of the intermediation). The intermediary then controls the competition between the dependent business users in the ancillary market in question. By deciding which dependent companies are presented to the other side of the market, in which order, in which format and how often, and thus intermediated, the intermediary determines which dependent business user gains or loses market share in the affected market to competitors that are placed more prominently or more frequently. Thus, in the present environment, intermediaries with intermediation power decide on their own and in a completely unregulated manner which intermediated companies succeed in neighboring markets, and which do not.

This ability of intermediaries to control the market creates enormous potential for abuse. A particular danger is that the intermediary may favor one of its own upstream or downstream services in the intermediation process by making it look better. Such self-preferencing is currently addressed (at least) by Art. 6 (1)(d) for search engine ranking. However, intermediation power can also be abused by the intermediary obtaining certain special benefits from the dependent, intermediated business users in exchange for a better ranking or display, which the intermediary could never obtain if competition existed. Such special benefits need not be limited to benefits for an upstream or downstream service. They can also lie in the fact that the intermediary can further expand its position on the intermediated market itself or exploit its intermediation power.

In recent years, there have been numerous examples of this strategy of abuse: **Booking.com** has obtained privileged hotel intermediation from such best price clauses¹. On its Amazon Marketplace, **Amazon** displays in better positions such merchants in relation to their direct competitors who transmit a particularly large amount of sensitive data to Amazon – and thus strengthen Amazon's competitive position². **Facebook** has, among other things, more frequently displayed in its News Feed content from

¹ Federal Cartel Office (*Bundeskartellamt*), dated 12/22/2015, B9-121/13 – Booking.com, overruled by Higher Regional Court of Düsseldorf, dated 6/3/2019, Kart 2/16 (V), WuW 2019, 386.

² See Commission Inquiry, Case AT.40462 – Amazon Marketplace.

those press publishers who give Facebook more data and use other Facebook services (particularly the Facebook Audience Network)³. Conversely, it is also the case that users can use Facebook's social network only if they allow Facebook to use all personal data through all Facebook services, although such data is not required for the network service⁴. **Apple** displays in better positions in its App Store those apps that pay Apple the highest commission⁵. Finally, the most obvious practice is at **Google**.

Google has, among other things,

- (i) in its general search results pages, given better positions to product and price comparison services that provide Google with a particularly large amount of product data and information free of charge, although such data is not required for the intermediation of the services (*Google Shopping*)⁶;
- (ii) given job portals that provide Google with valuable full-text ad copy for free better displays in search results pages – job portals that refuse to give away content to Google, on the other hand, are displayed in inferior positions (*Google for Jobs*)⁷;
- (iii) displayed hotel and vacation rental services in better positions in search results in exchange for giving Google valuable content for free (*Google Vacation Rental Search*)⁸; similar accusations have been made by flight search services and local search services⁹
- (iv) threatened press publishers with a more inferior display of their websites (= smaller search results / more inferior ranking) if they do not grant Google a free license to display their content (*Google/VG Media*)¹⁰;
- (v) promised press publishers who use a pay wall a better ranking of their articles in search results pages if they show Google's users the content for free – in effect giving Google a free license (the so-called "first-click free" policy)¹¹.

Complaints about such conduct have increased in recent years. Such conduct is the central reason for the rampant growth of the intermediaries – they exploit their central function to steer competition (steering function) via competition between dependent business users to have the latter grant them all the inputs (data, content, conditions, etc.) that the intermediaries need to enter neighboring markets – in

³ Capital Forum, 11/4/2016, "Facebook: By Prioritizing Natively Published Articles in its News Feed, Facebook Risks Antitrust Enforcement, Cuts off Traffic and Data to Publishers" <https://thecapitolforum.com/wp-content/uploads/2016/07/Facebook-2016.11.04.pdf>

⁴ Federal Cartel Office, dated 2/6/2019, B6-22/16, NZKart 2019, 178 – Facebook.

⁵ See European Parliament, dated 9/26/2019, "Subject: Official complaint by Spotify against Apple for discrimination and Apple Music's unfair advantage over Spotify: the power of digital platforms," https://www.europarl.europa.eu/doceo/document/E-9-2019-002996_EN.html

⁶ European Commission, dated 6/27/2017, Case AT.39740 – Google Search (Shopping).

⁷ European Commission, Case AT.40592 – Google for Jobs.

⁸ See Letter to Competition Commissioner Vestager dated 2/10/2020, https://www.deutscher-ferienhausverband.de/wp-content/uploads/2020/02/Travel-Sector-Raises-Concerns-Against-Favouring-of-Google-Vacation-Rentals_10-02-2020.pdf.

⁹ European Commission, Case AT.40585 – Google Local Search.

¹⁰ Federal Cartel Office, 9/8/2015, B6-126/14 – Google/VG Media.

¹¹ See SearchEngineLand, 6/5/017, "Wall Street Journal's Google traffic drops 44% after pulling out of First Click Free," <https://searchengineland.com/wsj-google-traffic-down-276387>; News Media Alliance, Comments of News Media Alliance Before the FTC, 8/20/2018, p. 6.

competition with the intermediated ones. *Google for Jobs, Google Flight Search, Google Shopping, Google News, Google Weather, Google Smart Bidding*, etc. – all these services are based, for example, on the fact that Google has had content or data transferred from companies for their display in general search, which Google could then use for its own competitive offers – without having to bear the costs for the content. At the same time, such conduct allows the intermediary to use intermediation to skim margins on the intermediated markets to which it provides access. This is because, without a legal ban, dependent business users will continue to grant special benefits to the intermediary up to the limit of profitability.

In none of the competition proceedings listed have the competition authorities so far succeeded in preventing abuse via the general prohibition on hindrance and discrimination. This is based, on the one hand, on the generally applicable principle in the law of abuse – that even companies with strong brands are free to determine the nature and scope of their economic activity and to decide which goods or services they offer, or do not offer, to third parties¹². In the case of gatekeepers with intermediation power, however, such principle can only apply to a limited extent, because of their market-regulating steering function. This is because any change in their intermediation service has a direct impact on competition in intermediated markets. On the other hand, the general prohibition on hindrance and discrimination also does not fit when viewed in isolation, because the abusiveness of the conduct in question consists precisely in a special combination of hindrance, discrimination and exploitation. When a gatekeeper systematically intermediates all companies depending on which one grants it the greatest economic special benefits, it is not a matter of deliberately hindering individual companies. Intermediation terms that apply to all intermediated companies also do not constitute discrimination or self-preferencing. At the same time, it is difficult to assess such intermediation conditions in isolation as unreasonable exploitation within the meaning of Article 102 TFEU, since the intermediated companies, which find themselves in a prisoner's dilemma, supposedly "voluntarily" grant the special benefits to the intermediary in order to gain even short-term advantages over their direct competitors (who are also intermediated).

Rather, the reprehensibility of the conduct in question is based on the particular exploitation of competition among the dependent business users. Companies that depend on the intermediation services of an intermediary to gain access to their procurement or sales market have no choice but to comply with the intermediary's requirements. They must comply with its demands if they want to gain access to their market. This allows gatekeepers to attach conditions to an intermediation that they would never be able to enforce if competition existed. If dependent business users compete with each other for the best intermediation (the highest ranking, the best display in results), the intermediary can exploit such competition to its own advantage. Yet, such competitive advantage is not performance-based. It is not based on any performance of the intermediary, but solely on the exploitation of its market-regulating steering function. If – as in the cases of Google and Amazon – it then uses such competitive advantage to penetrate the market of the intermediated companies, the intermediated companies are not only exploited and discriminated against among themselves, but also hindered. To make matters worse, the intermediary's decision to place dependent business users that do not grant it undue special benefits in a

¹² Federal Court of Justice (*Bundesgerichtshof*), dated 1/27/05, I ZR 170/02, Friedhofsruhe, WuW/E DE-R 1555, 1557; dated 11/4/03, KZR 16/02, Strom und Telefon I, WuW DE-R 1206, 1210.

more inferior position across the board massively distorts competition in the intermediated market. This is because, at that point, the companies that succeed in this market are no longer those with the best offers, but those that grant the gatekeeper the greatest special benefits.

The particular accumulation of elements of hindrance, discrimination and exploitation in the conduct described requires an independent prohibition.

Regarding the content and effect of the regulation

In terms of content, it is important that the cases included are not only those in which the "if" of the intermediation is made dependent on the granting of special benefits. Cases in which the "how," i.e. the result of the intermediation (= ranking, display, etc.), is influenced by special benefits must also be prohibited. For example, a promise that intermediated companies will be displayed in a more visually attractive way to the other user group (better ranking, greater result) if they grant special benefits to the intermediary can be just as effective as threatening to no longer intermediate a company at all if it does not grant certain benefits.

In order to determine what constitutes an unreasonable special benefit, it is primarily necessary to consider which cooperation services of the intermediated companies are actually required by the intermediary for the intermediation. Inputs that are mandatory for intermediation do not constitute such benefits. This concerns, for example, the granting of the indexing of web pages or the insertion of links in search results pages. However, the threshold is exceeded if the intermediary makes the ranking of intermediated companies dependent on whether such companies grant it content, data or rights that are not required for such ranking. The same applies if an intermediary for an intermediation insists that the dependent business user grant it a license to display copyright-protected content at a price that would not be enforceable on the market, such as a free license for press products.

Using *Google for Jobs* as an example, this would mean that Google is not permitted to make the inclusion of job boards in the prominently placed "Job Units" (special boxes in general search results containing only job offers) dependent on such job boards making previously valuable job content (including full-text job ads) accessible to Google via structured data, even though such content is not necessary at this level of detail for the creation of such Job Units. Similarly, it means that Facebook or Google is not permitted to make the decision as to whether or how they display publisher articles in their news feeds dependent on whether the publisher has granted them a free license for such articles. The regulation would not preclude Facebook and Google from completely refraining from displaying publisher content in order to avoid having to obtain licenses. Thus, the prohibition does not amount to an obligation to purchase. However, the prohibition norm would prevent an intermediary from selectively displaying more prominently those publishers who have granted free licenses to the intermediary – even though other publisher content would be objectively more relevant to the search query in question.

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