Revisions to Article 5(a)

1. We understand that the Commission's proposed edits to Article 5(a) seek to combine Article 6(1)(aa) and Article 5(a).

    - We understand the purpose of Article 5(a) is to address a contestability issue that arises from gatekeepers combining personal data across services without user consents. 5(a) addresses this concern by requiring that consumers consent to that practice and are therefore aware of cross-service combinations with the personal data that they are providing to a CPS.

    - Article 6(1)(aa) appears to address a specific concern regarding the combination of personal data, including within a given service, to enable ad targeting.

2. The new edits to the text, however, introduce requirements that appear unrelated to these two objectives, create considerable ambiguity for us as to the scope of the obligation, and are liable to present significant difficulties for implementation. In particular, we are concerned that this new language will lead to counter-productive outcomes by creating duplicative and confusing consent layers and may unintentionally preclude legitimate and beneficial conduct. At this stage, we believe that clarity and legal certainty are important, particularly in the context of Art 5.

3. We see in particular the following two problems with the new language:

4. **Restriction on processing of personal data even if there is no combination.** The compromise text introduces language at the beginning of Art. 5(a) stipulating that gatekeepers must not "*process personal data sourced from third-party services*".

5. This addition is problematic because it does not address data combinations and is therefore inconsistent with the objectives of both Article 5(a) and 6(1)aa. Instead, the new language extends Article 5(a) by introducing restrictions for data uses beyond combinations that are neither well defined nor explained by reference to a contestability concern. The new language therefore overshoots.

6. Extending Art. 5a beyond data combination to cover other uses of data is liable to preclude us from offering third parties beneficial services, including where the gatekeeper acts as a mere host and processor of the third party's data.

7. For example, the new language could be read to cover a scenario where a European Cloud customer relies on a gatekeeper to host data, such as spreadsheets that list its suppliers' names, even though the cloud provider is acting purely as a processor on

behalf of that customer and does not combine the data with data from other services. This may render such services impracticable because it would not be realistic for either the gatekeeper or the third-party to secure consent from all the individuals involved. The added language would therefore in effect preclude legitimate and beneficial hosting and processing services.

8. Similarly the addition of a reference to "*cross-use*" alongside "*combination*" goes beyond the stated objective of Article 5(a) and risks obstructing beneficial services. Any entity can have another entity process their data as a data processor without securing user consent. Yet the reference to "cross-use" could, if read broadly, preclude this possibility for gatekeepers without good reason. Since this option is open to all third parties, it is not clear what concern is resolved by precluding gatekeepers from engaging in this type of standard processing. This edit therefore does not improve contestability since it does not relate to any possible advantage a gatekeeper could obtain via a CPS.

9. **Duplication of consent processes.** The compromise text introduces new language stipulating that a user must be given "*specific choice*" for "*each processing purpose*". This language appears to have been introduced out of a concern to ensure that Art. 5(a) should not override consent requirements under the GDPR. But the new language risks doing the opposite.

    - The DMA already makes clear that the DMA obligations must be implemented consistently with GDPR in Article 7(1) and Article 5(a) specifically refers to the GDPR as the benchmark for choice and consent. We fully intend to abide by our GDPR obligations in parallel to any new obligations required under the DMA.

    - The new reference to processing purposes now comes on top of these clear rules on the primacy of the GDPR and therefore creates a material risk of inconsistency, duplication, and confusion.

    - The original version of 5(a) required consent for the combination of data across services. It was therefore complementary to the GDPR, which focuses on consent for processing purposes.

    - By introducing a reference to processing purposes in Article 5(a), the DMA suggests that we must offer additional consent options for processing purposes on top of those that we already offer under GDPR and on top of the consent options for data combinations that they will have to offer under Article 5(a). This

would go against the goal of ensuring alignment with the GDPR and is liable to confront users with duplicative and confusing controls.[1]

10. In practice, this would mean that European consumers would now be seeing numerous, repeated consent moments when they try to use their profile across different services. These consents would be duplicative since, in the new text, they will relate to processing purposes – a concept already covered by the GDPR. It would be burdensome and confusing to users to need to make overlapping and potentially inconsistent privacy choices under both the DMA and the GDPR.

11. We therefore believe the new edits will make life much more difficult for end users, business users, and gatekeepers, without meaningfully improving users' control over their data or increasing contestability. The changes also make it unclear precisely what sort of consent is required for what purpose. This blurs the purpose of Article 5(a) and dilutes its core goal of creating a consent gate on the cross-service combination of data.

Proposed Wording

12. Given the concerns set out above, we believe it would be preferable to maintain a clear-cut provision that is focused on cross-service data combination and the contestability issues the DMA sets out to resolve.

13. In our view, the original Commission text did this effectively, although we welcome the clarification that gatekeepers can rely on points (c), (d), and (e) of Article 6(1) GDPR as we understand this will enable us to use personal data to prevent spam and fraud.

14. Any conceivable residual concern regarding the relationship between the GDPR and Article 5(a) can be addressed with language that makes clear that the consent requirement for data combinations under Article 5(a) is without prejudice to additional requirements under GDPR. Our proposed language below is meant to make clear that the consent requirement under Article 5(a) relates to cross-service data combinations and is without prejudice to additional requirements under the GDPR:

> *"...not combine personal data sourced from the relevant core platform service with personal data sourced from any further core platform services, other services offered by the gatekeeper, or third-party services; and not sign in end users to other services of the gatekeeper in order to combine personal data, unless the end user has been presented with the specific choice* ***to consent to such data combinations*** *and has*

[1] We discussed the downsides of excessive consent moments in the white paper we provided to the Commission on November 10, 2021.

consented in the sense of Article 6(1) point (a) and Article 7 of Regulation (EU) 2016/679. This is ***without prejudice to the requirements of the GDPR or*** *the possibility of the gatekeeper to rely on Article 6(1) points (c), (d) and (e) of Regulation (EU) 2016/679, where applicable;"*

15. As to Article 6(1)(aa), the portion of this provision that pertains to contestability – by covering *cross-service* combination – overlaps with Article 5(a), which requires consent for such combinations. Article 5(a) therefore already integrates the contestability aspects of Article 6(1)(aa). While Article 6(1)(aa) would also require gatekeepers to secure consent for combinations of personal data for advertising purposes even where the data points that are being combined were sourced from a single CPS, this does not pertain to contestability since all rival services can collect and combine data in this way. In addition, this requirement is already subject to regulation by the GDPR. It is therefore not appropriate to integrate that overlap into Article 5(a).

16. Nonetheless, we suggest text below that integrates the requirement of Art. 6(1)(aa):

"...not combine personal data sourced from the relevant core platform service with personal data sourced from any further core platform services, other services offered by the gatekeeper, or third-party services; not sign in end users to other services of the gatekeeper in order to combine personal data; and not ***combine personal data for the purpose of placing behavioural advertising on its own services,*** *unless the end user has been presented with the choice to consent to such data combinations and has consented in the sense of Article 6(1) point (a) and Article 7 of Regulation (EU) 2016/679. This is without prejudice to the requirements of the GDPR or the possibility of the gatekeeper to rely on Article 6(1) points (c), (d) and (e) of Regulation (EU) 2016/679, where applicable;"*

17. We believe that, with the language above, we can address the concerns the DMA raises and find practical and innovative ways of providing consumers with new information so that they are aware of how we combine CPS sourced personal data with non-CPS services. We hope this note is helpful and that we can discuss those ideas with the Commission shortly.