Out of scope

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Personal data

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Sent: Friday, March 18, 2022 1:36 PM
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Subject: follow up on DMA and DSA

Dear Roberto,

Thank you for the interesting discussion this week with the CICI colleagues and many thanks for providing me with the opportunity to comment further in a more specific way regarding our essential priorities for the DMA and DSA.

I will stick to only two, which are the most crucial to resolve:

1. DMA Article 6.1.k

I understood from what you said that although you were not against -in principle- an extension of the article to go beyond app stores, the Commission is concerned about the enforceability of an obligation to provide fair and non-discriminatory access conditions for all designated core platform services besides app stores and, in particular as we have requested, search engines and social networks. If I understood correctly, you are concerned that the wording applicable to app stores is not sufficiently specific when applied more generally and could lead to a situation whereby the Commission could be expected to become a central price setting authority.

We believe that these concerns are unfounded for the following reasons:

a) **Recital (57) already sets out a clear, consistent legal framework for what constitutes fair and non-discriminatory prices:** Recital (57), as supplemented

and fine-tuned by Parliament and Council, already contains clear criteria to provide a precise legal benchmark to determine what constitutes unfair pricing and unfair general conditions to access gatekeeper services. The criteria are based on well-evidenced conduct and are further specified by a broad jurisprudence on such terms. Thus, such a benchmark will enable every gatekeeper to self-assess and adjust its conduct accordingly. If the Commission feels that the legal benchmark in Recital (57) is still not sufficiently precise to deal with every possible scenario, further clarifications, such as put forward in the Council's General Approach, can be added to provide for **"actionability" of Article 6.1.k.** We believe that the criteria listed in Recital (57) of the Council's text already constitute a solid basis for interpretation. In practice, every anticompetitive conduct needs to be assessed on a case-by-case basis. No legal provision can ever be entirely "self-executing" but requires administrative supervision.

b) **To demand and enforce fair, reasonable and non-discriminatory access conditions would not turn the European Commission into a central price setting authority as:** Unfair, unreasonable and 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. The ban on unfair, unreasonable and discriminatory access conditions in lit. k) would constitute the specific equivalent for core platform services of what is prohibited under Article 102 TFEU for dominant companies anyway. According to Article 102 s. 2 lit. a) TFEU, an "abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions". This is the case, for instance, if the operator of an essential infrastructure grants access only on unfair, unreasonable or discriminatory conditions. Hence, the European Commission has always been expected to assess and determine the fairness and proportionality of access conditions, without this turning the authority or any national authority enforcing Article 102 TFEU into a price setting body.
c) Furthermore, **it does not appear possible to tame the gatekeeping platforms without also looking at the fairness and reasonableness of their access conditions.** In any event, it is difficult to see how the DMA is supposed to fulfil its function **if the enforcement authority is incapable of prohibiting unfair, unreasonable or discriminatory conditions even to use core platform services** (let alone all ancillary services). Access conditions and prices are central competitive factors that cannot be left aside. Gatekeepers could effectively escape nearly every envisaged prohibition in Articles 5 and 6 by conditioning what is expected from them under such provisions on unfair, unreasonable of discriminatory conditions to access their core service. For

instance, any allowance to offer products, to communicate with customers, to use alternative services, to un-install apps or install third-party apps – all could be linked with an unrelated requirement for end user or business to pay more or to providing more content, data, IP rights etc. for using the core platform service. **This would render all prohibitions in Article 5 and 6 ineffective**; not just 61.k). In other words, it appears impossible to ignore access conditions – whether with or without the envisaged adjustment of Article 6.2.k. When it comes to classical, physical infrastructure, for good reasons the rules on the prices and conditions for the use of such infrastructure have always formed the central and most effective elements of the ex-ante regulation.

d) We fear that **restricting Article 6.1.k to cases of "systemic", "sustained" or "repeated abuses"** would mean that a central provision of the DMA, would no longer condemn, but – on the contrary – legalise unfair and discriminatory conditions, if it cannot be proven that they are "systemic", "sustained" or "repeated" abuses. **This would lead to a situation whereby *un*fair, *un*reasonable and discriminatory conditions to access core platform services are legitimatised and lawful as long as they are applied irregularly, erratically, arbitrarily or at random.**

e) It is also unclear how additional criteria are supposed to increase legal certainty or enhance the self-executing character of the DMA. **In fact, additional criteria would create an incentive for gatekeepers to design strategies to use unpredictably unfair, disproportionate and discriminatory access conditions to escape any obligations under the DMA.**

f) **There is no legitimate reason to allow *any* unfair, unreasonable or discriminatory conditions to access core platform services. Such practices need to be prohibited entirely.** Fear of a lack of sufficient enforcement capacities may not justify any leniency but **should call for stronger enforcement powers or more involvement of national enforcement authorities** or external advisory bodies. An additional threshold of "systemic" or else would undermine the core effectiveness of the obligation, including by the way towards app stores. Such an additional requirement would leave it **completely unclear which gatekeeper conditions must be fair and non-discriminatory and which conditions are allowed to be discriminatory and unfair**.

For the aforementioned reasons, we kindly ask the Commission to consider the Parliament proposal on Article 6.1.k (hereunder), together with the Council's proposal on Recital 57.

Suggested wording: European Parliament's position

Article 6(1)(k)

Apply ***transparent, fair, reasonable*** ~~*fair*~~*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* ~~*software application store*~~ ***core platform services*** *designated pursuant to Article 3 of this Regulation.*

Enclosed you will find the most recent joint position paper from all the media associations at EU level (press, radio and broadcasting).

2. DSA: content moderation policies and the freedom of the media

a) EPC, together with all the media associations, are not asking for a 'media exemption' from the DSA; **we are asking that the DSA recognises the proper protections of our fundamental rights, and establishes due process for how platforms deal with lawful content under the editorial control and legal liability of the publisher** (or broadcaster) under their content moderation policies and terms and conditions. Putting it another way, unless the DSA is amended, **a Regulation will enshrine in law for the first-time that decisions about whether content under the editorial control of a publisher (or broadcaster) can be judged to be lawful or otherwise by gatekeeping platforms on the basis of their own, private content moderation policies with no process in place to be informed of, or to challenge their decisions**. This fundamental issue lies at the very heart of a free press and it is therefore essential that this matter is dealt with satisfactorily by the co-legislators:

- Let us imagine a world where platforms can censor negative news about themselves, where they can make arbitrary adjustments to their terms and conditions to block or remove news stories for their own commercial purposes, or curtail real debate between citizens online. This is what happens if platforms will not in future be obliged to respect European fundamental rights including the freedom of the press when both *drawing up*, *and* enforcing their Ts and Cs and content moderation rules under the DSA;
- The platforms' algorithms are not remotely capable of making the very sophisticated judgements which editors make as part of their legal responsibilities, and which they defend in Court if necessary;
- Furthermore, it is proven all too often that algorithms cannot understand context; for instance, an algorithm will be unable to understand the difference between a video of a terrorist incident used by a terrorist website to promote its aims, and the same piece of content used by a news publisher to illustrate a legitimate news report.

b) EPC, along with all the media associations at EU level, is highly frustrated by the lack of understanding of our serious request for the maintenance of our constitutional protections, and by **the conflation of this issue with the way in which disinformation is distributed and often amplified by platforms**.

It is essential that platforms take action to desist in the making available and amplification of disinformation alongside their obligations in the DSA to remove illegal content; but this must not be used as an excuse to justify inaction to safeguard the freedom of the media.

As a bare minimum, please consider the wording adopted in plenary by the European Parliament to amend article 12, to ensure that platforms take into consideration fundamental rights and media freedom, when drawing up and enforcing their content moderation rules.

Commercial interests Art 4(2) first indent

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Please do not hesitate to contact me should you have any questions.

With kind regards,

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