

Friday 22 October 2021

Subject: Digital Markets Act

Ministers,
Excellencies,

Writing on behalf of the European Magazine Media Association (EMMA), the European Newspaper Publishers Association (ENPA), the European Publishers' Council (EPC) and News Media Europe (NME), we wish to share our concerns regarding the direction of Council negotiations on the Digital Markets Act (DMA).

We believe the opportunity to bring fairness to digital markets must be seized with determination, and while procedural and enforcement aspects of the proposal are important, a more ambitious discussion on the nature of the obligations under Art. 5 and 6 is urgently needed. The EU's historic chance to effectively address the market imbalances by the gatekeeper platforms should not be sacrificed for the sake of a swift adoption of the Regulation. A unique opportunity would be missed, and the DMA would become an empty promise.

In addition, we are likewise concerned that key questions about these obligations are being overlooked due to concerns raised about enforceability and legal certainty. While we fully support legally sound regulation, the approach proposed by European Commission to restrict DMA obligations to problematic conduct with which it has direct present (or past) enforcement experience *de facto* and arbitrarily excludes all other forms of problematic conduct regardless of merit.

Therefore, we caution against a DMA that will leave substantiated concerns about the conduct of gatekeepers unchallenged. The media sector is a uniquely important example of the problems that can arise from gatekeeping as our content reaches audiences through various Core Platform Services (CPS), in particular search engines and social networks. It is not a mere coincidence that Publishers were at the forefront in bringing about complaints that led to the seminal decisions in the Google Shopping case as well as the Google Android case.

In fact, lessons should be drawn from this to prevent future harms as other economic sectors become more digital. Ensuring dynamic competition in digital markets through fairness and contestability requires a broader obligation to provide fair and non-discriminatory access (FRAND terms) to all CPS, search engines and social networks in particular. Below, we provide concrete concerns and precedents and demonstrate why this approach is not only justified but warranted.

We conclude that the proposal to extend an obligation to provide fair and non-discriminatory access terms to all CPS in Article 6 paragraph 1(k) is substantiated by sufficient case law and evidence to justify this approach in the DMA and that, by extension, imposing a FRAND obligation only on app stores would consequently constitute an arbitrary approach that is not future proof nor technologically neutral. We likewise do not believe that extending Article 6.1(k) to other core platform services such as, in particular, search engines and social networks would cause issues of legal certainty and enforceability.

First and foremost, the obligation is covered in Article 6, which "*is susceptible of being further specified.*" As such, an assessment in determining what is fair or discriminatory will depend on the specific case and circumstances at hand, also for app stores. Similarly, the yardstick that the corresponding recital 57 provides to determine what fair pricing and other general access conditions

constitute for app stores, e.g. conditions imposed by the gatekeeper for similar services, equally apply to possible assessments with regards to search engines or social networks. As such, we do not see any justification why such an assessment should not be feasible for other core platform services.

Last, and while some of the concerns on the limited scope of Article 6.1(k) shared by the media sector relate to ensuing a level playing field in the negotiations with gatekeepers on the basis of the neighbouring right for press publishers introduced in the EU's Copyright Directive, it is important to highlight that these are two distinct issues.

While the introduction of the EU Publishers' Right is a historic and important step to ensure the sustainability of the free press, as it provided an exclusive right to press publishers, this instrument alone does not tackle or address imbalances in bargaining power or the ability of gatekeepers to impose unfair and discriminatory conditions of access to their CPS, as evidenced by ongoing antitrust probes in France and Germany.

While the neighbouring right settled the case on whether publishers did have a claim for remuneration for the digital uses of their content, it did not settle the issue of enforcement against the digital gatekeepers. For this reason, the issues that we raise are not copyright-related issues, but indeed of regulation of the gatekeeper platforms and therefore rightly fit in the DMA.

The following examples substantiate the need for an extension of the obligation for fair and non-discriminatory access conditions at least to search engines and social networks. While the evidence is drawn from the experiences of publishers around Europe, we believe that this obligation is vitally important to secure a level playing field to the digital economy as a whole.

| Core Platform Service | Unfair and discriminatory conduct |
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| Search engines | <p>The quasi-monopolistic position of Google in search has led to concerns about discrimination in different contexts. One current example relates to the implementation of the publishers' right where Google is able to arbitrarily restrict the display of editorial media content (in order to circumvent remuneration rights under the Copyright Directive) and to cherry-pick which publishers should benefit from the publishers' right and which should not. As such, two pending cases in France and Germany, as well as past cases are a testimony to that.</p> <p>Another example is the Google Shopping case which highlighted unfair and discriminatory conditions of access to business users, namely by ensuring an illegal advantage to its own services, which FRAND terms could address.</p> |
| Social networks | Facebook's new hyperlink policy, which mimics Google's reaction to the implementation of the publishers' right in France, seeks to coerce publishers into providing their rights for free or to risk effective exclusion from participation on the platform by way of restricting the display of editorial |

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| | content. It also appears that Facebook is striking selective agreements cherry-picking which publishers should benefit from the publishers' right and which should not. FRAND terms are therefore needed. |
| Voice assistants | The Commission's interim report on the IoT sector inquiry clearly identifies the risks that reflect the need for FRAND terms. The report notes that voice assistants are playing a key role in the evolution of search engines and that the concurrent presence of such services as part of larger ecosystems requires specific attention. Importantly, tying agreements are already problematic in the context of such devices, creating problems of unfair and discriminatory access. |
| Browsers | The privacy sandbox investigation of the Commission and the accompanying shift of problematic conduct and monopolization strategies by Google from its advertising services to its browser highlights the need to ensure fair and non-discriminatory conditions for business users. |
| Advertising services | Gatekeepers tend to hold uniquely strong if not dominant positions in online advertising markets (Google in search and Facebook in display). In light of ongoing and systemic concerns about the functioning of these markets, following major investigations by many competition authorities globally and in the EU (eg. France, Germany, Spain) and past and ongoing probes of DG COMP (eg. AdSense – abuse of exclusivity clauses – and privacy sandbox), fair and reasonable conditions of access is needed, in particular so that smaller players in advertising markets may operating a contestable market. This is particularly important since some gatekeepers are very active both on the buy and sell side of these markets. |

We thank you for your attention and remain available for any further information you may need.

Sincerely,

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