

NECESSARY CHANGES TO THE DIGITAL MARKETS ACT (DMA)

Article 6.1(k)

20 September 2021

For your convenience, the Annex to this document (pp. 2-4) with our comprehensive suggestions for amendments follows the numeral order of the articles, with the following elements listed by order of priority:

- The DMA limits the obligation to apply fair and non-discriminatory access conditions for business users to “App Stores” only. In addition, whereas it prohibits unfair access conditions, it would not prevent the gatekeepers from applying “unfair treatment” to business users. **For this reason, this obligation must apply to all core platform services and it must also ensure that gatekeepers also apply “fair and non-discriminatory treatment” (Article 6(1)(k) DMA).**

Article 6(1)(k) DMA must prohibit all core platform services and, in particular, the gatekeeper search engine, as well as the gatekeeper social network, to require advantages from business users that are disproportionate to the intermediation service of the gatekeeper. Article 6(1)(k) can easily be amended to extend the scope to all core platform services. Furthermore, Article 6(1)(k) should not only prohibit unfair access conditions, but also “unfair treatment”, considering that every access condition can easily be converted into a “treatment condition”.

The accompanying Recital 57 already provides – although only for App Stores – that pricing conditions or other general access conditions are to be considered unfair, in particular if they provide an advantage to the gatekeeper that is disproportionate to the intermediation service it provides. This clarification must be further substantiated to the effect that the provision also explicitly covers, in particular, the refusal to fairly remunerate intellectual property rights, such as the Publishers’ Right.

→ **See Annex, amendments on Art. 6(1)(k) and Recital 57 DMA, on pages 2-4.**

- The DMA must introduce 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”).

In the event of disputes, the DMA should provide for an obligation for the gatekeeper to partake in a binding price-setting procedure. Such a procedure should apply, for instance, in the case of a dispute on the fairness of an access condition or in the event of a dispute on the fairness of a remuneration for an intellectual property right, such as the Publishers’ Right. This procedure would then allow for the determination of the amount of the remuneration to be paid to all rightsholders.

→ **See Annex, amendments on Article 6(1)(m) (new) DMA, on page 4.**

ANNEX

Amendments

	DMA	Amendment	Comments
<u>Art. 6 para. 1 point (k)</u>	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.	apply fair and non-discriminatory general conditions of access and treatment for business users to its core platform service, in particular to its software application store, its online search engine and to its online social networking service designated pursuant to Article 3 of this Regulation;	<p>This provision aims to ensure fair and non-discriminatory access to app stores.</p> <p>Limiting this crucial provision to app stores is not sufficient nor acceptable. Non-discriminatory access must be extended to all core platform services. Moreover, every access condition can easily be converted into a treatment condition with the same unfair and discriminatory effect. The DMA must also close this possible loophole in the article.</p> <p>Recital 57 already provides (so far only) for app stores that price setting or other general access conditions are in particular unfair if they provide an advantage for the gatekeeper that is disproportionate to the intermediary service. This clarification must be further substantiated to the effect that the provision also covers, in particular, the refusal to pay for a right such as the publishers' right.</p>
	<p>Recital 57:</p> <p>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 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</p>	<p>Recital 57:</p> <p>In particular Core platform services offered by 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 in particular 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” 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 or treatment 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</p>	

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	<p>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].</p>	<p>as a yardstick to determine the fairness of general access or treatment conditions: prices charged or conditions imposed for the same or similar services by other providers of software application store the relevant core platform service; prices charged or conditions imposed by the provider of the software application store gatekeeper 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 gatekeeper for the same service in different geographic regions; prices charged or conditions imposed by the provider of the software application store gatekeeper for the same service the gatekeeper offers to itself. Furthermore, conditions shall be deemed unfair if the gatekeeper charges prices or imposes conditions without entering into genuine negotiations with business users or collective management organisations representing these business users or without accepting a binding procedure of price fixing like established mechanism under laws of collective rights management or without accepting a reasonable offer of a binding arbitration by the business users. It shall also be deemed unfair if a gatekeeper demands a royalty-free license as a condition to access or treatment, or enforces royalties that are significantly below prices fixed in accordance with laws of collective rights management. It shall also be deemed unfair if access to the service or the quality or 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 strictly 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</p>	

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		<p>the core platforms are fair and non-discriminatory. This obligation should be without prejudice to the ability of providers of software application stores core platform services to take the required responsibility in the fight against illegal and unwanted content as set out in Regulation [Digital Services Act].</p>	
<p><u>Art. 6</u> <u>para.</u> <u>1</u> <u>point</u> <u>(m)</u></p>		<p>In the event of a dispute about the fairness of a price or remuneration as condition of access for business users to each of its core platform services identified pursuant to Article 3(7), the gatekeeper shall participate in and adhere to the outcome of a binding procedure for fixing a fair price or remuneration, be such a procedure established by law or be such a procedure proposed by the business users or by organisations or rights management organisation representing such business users. The procedure about the issue of remuneration and price should start, if the parties have not reached an agreement about terms for resolving the issue of remuneration and pricing within [3 months after one party has asked to start a negotiation or about one party's refusal to negotiate]. This procedure shall apply in particular in the case of a dispute about the remuneration for the use of content protected by the press publisher right in Directive (EU) 2019/790.</p>	<p>Such a price setting procedure should be applied in cases where the gatekeeper platform refuses to negotiate with rightsholders or does not negotiate in good faith.</p> <p>Considering that this provision covers, amongst others, fair pricing for the publishers' right, it is not reopening the Copyright Directive in any way shape or form. The Copyright Directive provides the right for press publishers, but the Copyright Directive does not deal in any way with the problem that digital gatekeepers are not willing to pay a fair price for a license and not even willing to negotiate with the rightsholders.</p>