Brussels, 23 February 2021

WK 2554/2021 INIT

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From: Council of the European Union
To: Working Party on Competition
Subject: The Digital Markets Act

Delegations will find in annex the PowerPoint presentation given by the European Commission during the Working Party meeting on Competition on 19 February 2021: Agenda Item 2.
Digital Markets Act
Obligations
“[a gatekeeper shall] refrain from combining personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services, and from signing 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 and provided consent in the sense of Regulation (EU) 2016/679”

• **Content**: Opt-in obligation for **combining personal data** from different data sources, including from third parties, or **signing-in of users to different services**. Consent requirement aligned with GDPR.

• **Objective**: Addressing potential advantages in terms of **excessive accumulation of data**, which could raise **barriers to entry**. Gatekeepers should therefore enable their end users to freely and explicitly opt-in to such business practices (in line with GDPR).

• **Example**: Provider of online social network site collecting data from its users obtained through several different services.
Article 5(b) – Prohibition of parity clauses (Distribution channels)

“[a gatekeeper shall] allow business users to offer the same products or services to end users through third party online intermediation services at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper”

• **Content:** Ban on use of clauses with business users that would prevent the latter to offer their goods or services to end users under different (e.g. more favourable) conditions through other online intermediation services (wide MFN clauses). The prohibition applies to any measures with equivalent effect, such as for example increased commission rates or de-listing of the offers of business users.

• **Objective:** Foster inter-platform contestability, ensure free choice of alternative online intermediation services, allow multi-homing and free choice of (differentiated) conditions under which business users offer their products or services to their end users.

• **Example:** A provider of online intermediation services does not allow hotels/e-books publishers to offer better prices on different online travel agents/e-books platforms.
Article 5(c) – Anti-steering provision (Distribution channels)

“[a gatekeeper shall] allow business users to promote offers to end users acquired via the core platform service, and to conclude contracts with these end users regardless of whether for that purpose they use the core platform services of the gatekeeper or not, and allow end users to access and use, through the core platform services of the gatekeeper, content, subscriptions, features or other items by using the software application of a business user, where these items have been acquired by the end users from the relevant business user without using the core platform services of the gatekeeper”

- **Content**: Obligation to ensure that business users can use different channels to promote their offer to their end users and obligation that these end users can access and use services acquired outside gatekeeper’s platforms.

- **Objective**: Prevent disintermediation and exclusivity of gatekeeper in relation with end users, ensure freedom of business users to promote and chose the distribution channel they consider most appropriate to interact with any end users that they have already acquired through core platform services provided by the gatekeeper. Second part of provision prevents circumvention and guarantees use of services acquired outside gatekeeper service.

- **Examples**: A publisher cannot inform a new user through its newspaper app that the subscription is also available via the publisher’s website. A music streaming subscription is concluded through a website, but cannot be subsequently used via the app acquired in the gatekeeper’s appstore.
Article 5(d) – Prohibition of contacts with authorities (Miscellaneous)

“[a gatekeeper shall] refrain from preventing or restricting business users from raising issues with any relevant public authority relating to any practice of gatekeepers”

• **Content:** Prohibition to misuse the “dependency” position of business users by preventing them (by means of confidentiality clauses in agreements or other written terms) to reach out and/or complain to authorities about gatekeeper’s (unfair) behaviour.

• **Objective:** Safeguard investigation and enforcement powers by competent authorities.

• **Example:** Business user would like to complain about unfair practice by gatekeeper, but would face contractual penalties or contract termination if it did.
Article 5(e) – Prohibition of requiring business users to use a given ID service (Leveraging access to CPS)

“[a gatekeeper shall] refrain from requiring business users to use, offer or interoperate with an identification service of the gatekeeper in the context of services offered by the business users using the core platform services of that gatekeeper”

• Content: Prohibition to use the “dependency” position of business users to require inclusion of identification services provided by a gatekeeper together with one or more core platform services.

• Objective: The ensure freedom of business users to be able to use alternative identification services, prevent leveraged access to key end user data which is provided in the context of ID services.

• Example: An app store operator unilaterally requires all app developers to integrate the app store’s own user ID functionality in their apps and to show this ID functionality to the customers of their apps.
Article 5(f) – Prohibition of making access to CPS conditional on each other

(Leveraging access to CPS)

“[a gatekeeper shall] refrain from requiring business users or end users to subscribe to or register with any other core platform services identified pursuant to Article 3 or which meets the thresholds in Article 3(2)(b) as a condition to access, sign up or register to any of their core platform services identified pursuant to that Article]”

- **Content**: Targeted ban on tying between CPS. Prohibition to use the “dependency” position of business users and/or end users to require inclusion of core platform services provided by a gatekeeper together with another core platform services.

- **Objective**: To ensure freedom of business users and/or end users to be able to use freely core platform services without being mandated to use them being integrated with other core platform services.

- **Example**: In order to use dating service of gatekeeper end user has to subscribe to gatekeeper’s social networking service.
Article 5(g) – Transparency in advertising intermediation (price) (Advertising)

“[a gatekeeper shall] provide advertisers and publishers to which it supplies advertising services, upon their request, with information concerning the price paid by the advertiser and publisher, as well as the amount or remuneration paid to the publisher, for the publishing of a given ad and for each of the relevant advertising services provided by the gatekeeper”

• **Content**: Obligation to ensure **price transparency** vis-à-vis **advertisers and/or publishers** of the advertising services, including prices charged by any advertising networks, advertising exchanges and any other advertising intermediation services.

• **Objective**: Promote **more informed choices** in the advertising chain and create pressure on disproportionate intermediary fees, partially linked to unfair practices but also consequence of the opaqueness of the online advertising value chain.

• **Example**: Advertisers seeking information about the part of overall investment in advertising project which ended up with ultimate publisher.
Article 6.1(a) – Separation of data sets (Use of data)

“[a gatekeeper shall] refrain from using, in competition with business users, any data not publicly available, which is generated through activities by those business users, including by the end users of these business users, of its core platform services or provided by those business users of its core platform services or by the end users of these business users”

- **Content:** Ban on a specific form of self-preferencing in dual role situation: a gatekeeper provides a CPS and competes with the business users of the same CPS. In these circumstances, a gatekeeper cannot use the data of its business users to compete against them, but has to ensure internal isolation of that data from its own vertical business activity. The prohibition covers any data that can be inferred from, or collected through, the commercial activities of business users or their customers on the gatekeeper’s CPS.

- **Objective:** Promote competition on the merits. Gatekeepers may not freeride on data based on the transactions generated by third-parties, which for any transaction outside the platform would not be available for the gatekeeper.

- **Example:** An online marketplace using commercially sensitive data such as sales quantities and patterns collected from individual sellers to compete with these sellers on its own online marketplace.
Article 6.1(b) – App un-installing
(Device neutrality)

“[a gatekeeper shall] allow end users to un-install any pre-installed software applications on its core platform service without prejudice to the possibility for a gatekeeper to restrict such un-installation in relation to software applications that are essential for the functioning of the operating system or of the device and which cannot technically be offered on a standalone basis by third-parties”

- **Content**: Obligation to enable full end user choice by giving them an opportunity to freely un-install any pre-installed software applications.

- **Objective**: Addresses a specific form of self-preferencing by the gatekeeper which reduces incentives for users to obtain and use same or similar services that are available from third parties. Shall increase incentives and facilitate the possibility of full switching by end users and promote competition on merits.

- **Example**: App stores/operating systems preventing users from un-installing pre-installed apps such as browsers or messaging apps.
Article 6.1(c) – Side loading (Device neutrality)

“[a gatekeeper shall] allow the installation and effective use of third party software applications or software application stores using, or interoperating with, operating systems of that gatekeeper and allow these software applications or software application stores to be accessed by means other than the core platform services of that gatekeeper. The gatekeeper shall not be prevented from taking proportionate measures to ensure that third party software applications or software application stores do not endanger the integrity of the hardware or operating system provided by the gatekeeper”

- **Content:** Ban of rules for the distribution of apps that restrict the ability of end users to (i) **install and effectively use** third party apps or app stores on operating systems or hardware of the gatekeeper and (ii) **to access** these apps or app stores outside the core platform services of that gatekeeper.

- **Objective:** Increase contestability of appstores, create pressure on unfair conditions in appstores, enable app developers to use alternative distribution channels and end users to choose between different apps from different distribution channels.

- **Example:** Consumer is prevented from installing an app store of a mobile game provider and the relevant applications directly from the provider’s app store.
Article 6.1(d) – Ban on self-preferencing in ranking
(Platform neutrality)

“[a gatekeeper shall] refrain from treating more favourably in ranking services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third party and apply fair and non-discriminatory conditions to such ranking”

• **Content:** Ban of a **specific form of self preferencing** in case of **vertical integration:** a gatekeeper shall not **reserve a better position** to its own offering, in terms of ranking, as opposed to the products of third parties also operating on that core platform service.

• **Objective:** Ensure that gatekeeper’s dual role position as **intermediary for third party providers** and as **direct provider of products or services** does not undermine the contestability for those products or services.

• **Example:** A search engine preferring its own vertically integrated services in its search engine results (e.g. shopping or travel services are featured on top of search results); a social network ranking its own dating service more prominently in users’ timelines than those of third-party dating services.
Article 6.1(e) – Prohibition of restricting user switching
(Device neutrality)

“[a gatekeeper shall] refrain from technically restricting the ability of end users to switch between and subscribe to different software applications and services to be accessed using the operating system of the gatekeeper, including as regards the choice of Internet access provider for end users”

- **Content:** Obligation on gatekeepers in operating systems not to restrict or prevent the free choice of end users to switch between different apps and services by technical means.

- **Objective:** Prevent that operating system provider can determine end user choice for apps and services. Ensure equal opportunities for providers to offer their services and enhance choice for the end user.

- **Example:** End user would like to switch to a different internet access provider, but the gatekeeper has reserved certain functionalities of the hardware (e.g. 4G internet connectivity) only to those providers which have a partnership agreement with it.
Article 6(1)(f) – Access to OS and other features
(\textit{Device neutrality})

“\textit{[a gatekeeper shall]} allow business users and providers of ancillary services access to and interoperability with the same operating system, hardware or software features that are available or used in the provision by the gatekeeper of any ancillary services”

- **Content**: Ban on self-preferencing in situation of integration of hardware, operating system and software, where gatekeeper gives preferential access to such features to its own ancillary services.

- **Objective**: Address leveraging of gatekeeper OS into ancillary services, increase contestability of ancillary services, empower alternative and innovative providers of ancillary services in gatekeeper’s ecosystems, increase choice for end users of such ancillary services.

- **Example**: Provider of financial services online would like to obtain access to certain features (e.g. near field communication) available to the payment services of the gatekeeper that are needed to perform certain operations, but is refused access to such features.
Article 6(1)(g) – Transparency in advertising intermediation (performance) (Advertising)

“[a gatekeeper shall] provide advertisers and publishers, upon their request and free of charge, with access to the performance measuring tools of the gatekeeper and the information necessary for advertisers and publishers to carry out their own independent verification of the ad inventory”

• **Content:** Obligation on gatekeepers to ensure transparency vis-à-vis advertisers and/or publishers as regards effect of a given ad campaign. Closely related to Article 5(g) obligation concerning price transparency.

• **Objective:** Promote more informed choices in the advertising chain and create pressure on disproportionate conditions, partially linked to unfair practices but also consequence of the opaqueness of the online advertising value chain.

• **Example:** Advertiser would like to verify concrete impact of its investment in ad campaign, identify potential ad fraud and track what actions the consumer took after being exposed to the advert, but is refused access to the necessary performance measuring tools.
“[a gatekeeper shall] provide effective portability of data generated through the activity of a business user or end user and shall, in particular, provide tools for end users to facilitate the exercise of data portability, in line with Regulation EU 2016/679, including by the provision of continuous and real-time access;”

- **Content**: Obligation to ensure effective data portability in real time and thereby ensure the contestability of core platform services as well as the innovation potential of the digital sector.

- **Objective**: Facilitate switching or multi-homing to lead, in turn, to an increased choice for business users and end users and an incentive for gatekeepers and business users to innovate. Address an important barrier to entry (i.e. data advantage due to collection of vast amount of data).

- **Example**: Business user of market place shall be able to port catalogue and transaction data to alternative market place provider. End user shall be able to port profile data to alternative social network provider.
Article 6.1(i) – Access to data generated by users of business users
(Data access and data portability)

“[a gatekeeper shall] provide business users, or third parties authorised by a business user, free of charge, with effective, high-quality, continuous and real-time access and use of aggregated or non-aggregated data, that is provided for or generated in the context of the use of the relevant core platform services by those business users and the end users engaging with the products or services provided by those business users; for personal data, provide access and use only where directly connected with the use effectuated by the end user in respect of the products or services offered by the relevant business user through the relevant core platform service, and when the end user opts in to such sharing with a consent in the sense of the Regulation (EU) 2016/679”

- **Content**: Obligation to provide access to **data provided for or generated** by business users or their end users in the context of the provision of core platform services.

- **Objective**: Prevent exclusive absorption of all relevant data by intermediary and cut-off of business users from key information about their own end users.

- **Example**: Online newspaper asks the provider of online intermediation service for profiles of the customers who subscribed to its service through software application store of the gatekeeper, but is refused such data, even if subscriber was never asked for consent.
Article 6(1)(j) – Access to search data
(Data access and data portability)

“[a gatekeeper shall] provide to any third party providers of online search engines, upon their request, with access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data in relation to free and paid search generated by end users on online search engines of the gatekeeper, subject to anonymisation for the query, click and view data that constitutes personal data”

- **Content**: Obligation to provide access, on fair, reasonable and non-discriminatory terms, to ranking, query, click and view data in relation to free and paid search generated by consumers on online search engine services to other providers of such services.

- **Objective**: To address the key barrier to entry for online search services (i.e. economies of scale concerning click-and-query data). Enable alternative online search engines to improve their algorithms to provide more relevant search results.

- **Example**: Provider of rival online search engine wants to acquire access to its click-and-query data, which is refused without any consideration or explanation.
Article 6(1)(k) – Ban on unfair access conditions for app stores (Platform neutrality)

“[a gatekeeper shall] 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”

- **Content**: Obligation to apply fair and non-discriminatory access (to app stores) conditions for business users (NB: Not establishing an access right).

- **Objective**: To address imbalance in commercial relationship that could lead to unfair and unjustifiably differentiated conditions to the detriment of business users (e.g. prohibitive fees) and end users (e.g. pass on of prohibitive fees resulting in higher prices).

- **Example**: Provider of an app store charges different commission rates to different business users without clear identification of reasons for such differentiation.
Article 12 – Obligation to inform of acquisitions (Miscellaneous)

“[a gatekeeper shall] inform the Commission of any intended concentration within the meaning of Article 3 of Regulation (EC) No 139/2004 involving another provider of core platform services or of any other services provided in the digital sector irrespective of whether it is notifiable to a Union competition authority under Regulation (EC) No 139/2004 or to a competent national competition authority under national merger rules”

- **Content:** Requirement to **inform** the Commission about intended acquisition within the meaning of EUMR irrespective if such a concentration is notifiable under EU or national legislation.

- **Objective:** Increased transparency about acquisition activities to serve several transparency related objectives and support other activities: (i) to ensure the effectiveness of the **review of gatekeeper status**; (ii) to facilitate reflection on the **need to adjust the list of core platform services** provided by a gatekeeper or (iii) to facilitate **monitoring broader contestability trends** in the digital sector (i.e. input for market investigation).

- **Example:** Gatekeeper for social network service to inform the Commission of intended acquisition of messaging service (CPS) or virtual reality entertainment services (other digital service).
Article 13 – Obligation to inform of consumer profiling (Use of data)

“[a gatekeeper shall] submit to the Commission an independently audited description of any techniques for profiling of consumers that the gatekeeper applies to or across its core platform services identified pursuant to Article 3. This description shall be updated at least annually”

- **Content**: Requirement to audit consumer profiling techniques with minimum transparency requirements, such as for example:
  - description of the basis for profiling;
  - use of personal data;
  - purpose of preparation of profile

- **Objective**: By ensuring transparency, external pressure should be enhanced on gatekeepers to prevent making deep consumer profiling the industry standard, which cannot be matched by other operators.

- **Example**: Provider of video sharing platform services shall audit its consumer profiling technique.