Vice-President Vestager

Commissioner Breton,

EUROPEAN COMMISSION

April 15, 2021

Subject: Joint opinion and recommendations of our associations with regard to the DMA

Madam Vice-President, Mister the Commissioner,

Please let us introduce ourselves. Our organisations represent business users of digital technologies in the Netherlands, Belgium, France and Germany. We form communities of Chief Information Officers (CIOs) and other senior leaders who are responsible for digital technologies and digital transformation within private or public organisations. We do not represent ICT suppliers or consultants.

Digital technologies are essential to our members. A sound and fair regulatory framework for the use of licenses for digital products and services, in particular software products (as most of them are essential to the core business and support functions of businesses, such as customer relations software, invoicing software, HR IS software, office automation software, security software, etc.), that provides a transparent and shared responsibility between business users of digital technologies and suppliers of digital solutions and services (hereinafter: suppliers) is key to our members. We strive:

1. To stop the abuse of **vendor lock-in** and unfair practices by suppliers of digital solutions and services and to ensure fair market practice in the digital technology markets.
2. To ensure that digital products and services - including software - which enter the European market, are **demonstrably safe and comply with European regulations.**
3. To ensure that **control over data remains with business users of digital technologies** without this leading to additional costs or being frustrated by other impeding practices.
4. To increase cyber security awareness, measures and coordination at national and European level.

With respect to these purposes, we are very pleased with the Commission's ambitions to ensure an effective competition in digital markets. In terms of digital services, small and medium size as well as multinational organizations, both public and private, are facing unfair practices and unbalanced business relations with suppliers. This past summer we jointly and individually contributed to the New Competition Tool consultation to address the unfair practices on software and cloud services markets as well as lock-in effects on these markets. Our associations have denounced these unfair practices for years.

We welcome the instrument of the proposed Digital Markets Act (DMA) that aims to dispense with the constraints of competition law by defining gatekeepers and prohibiting practices **that are unfair and harmful to competition and to innovation in digital markets. We see the DMA as an opportunity to rebalance the relationships on those markets**. Unfortunately, we find reason to reach out to you, as we feel some important

aspects for European business users of digital technologies are missing in the DMA. Specifically, the 3 items below:

1. The definition of gatekeepers: a too restrictive view of platforms,
2. The proposed remedies: high expectations and potentialities on blacklisted practices,
3. The ex-ante approach in a fast-evolving market: an imperative need for an evolutive regulation.

We'll elaborate on these items below. This letter concludes with our request for an appointment with you in order to illustrate our concerns and to discuss our suggestions.

I. A TOO RESTRICTED DEFINITION OF GATEKEEPERS

Cloud providers are included in the list of gatekeepers, which we applaud. We understand that the Commission focusses on large players, and that the DMA is not intended to apply to smaller players, notwithstanding their foreclosure practices or market dominance. However**, we are concerned about the Commission's focus on the concept of two-sided players.** We already expressed this concern in our letter of 11 December 2020. The Commission's political will to limit itself, in the DMA, to structuring platforms whose cloud activity is coupled with other services, thereby strengthening their gatekeeper positions, seems to us to be too reductive. This is **despite the fact that the Commission does not rule out the possibility of going beyond the thresholds via the notion of "emerging gatekeeper"** to deal with the smaller players.

We propose to not restrict the definition of gatekeeper to parties that offer services as intermediaries between business suppliers and end users (B2C). The definition should also include suppliers that focus on the business-to-business market and solely supply digital products and services to business users.

II. HIGH EXPECTATIONS AND POTENTIALITIES ON BLACKLISTED PRACTICES

We propose that the designation as a gatekeeper is to be based on quantitative or qualitative criteria that indicate **an excessive bargaining power vis-à-vis (business) end users** (and the way that this power is used). The determination as gatekeeper should go beyond turnover and numbers of business and/or end users, and should include criteria like availability of alternative suppliers, interoperability of solutions between suppliers and the like. **The fewer options business users have to switch suppliers, the heavier the regulations for gatekeepers should be, to prevent unfair practices.** For example, requiring the interoperability of software and IT systems and ensuring flexibility in moving data - including metadata - between locations/suppliers/systems by the data owner (i.e. the business user of digital technologies).

In that regard we note the failure of self-regulation in the digital services market, due to the structural imbalance between the parties in this market, and **recommend that existing codes of conduct become ex-ante rules.** We suggest In particular to have a look at the codes of conduct from the SWIPO (SWitching Cloud and POrting Data) self-regulatory approach. These codes already provide a list of good or wrong practices. Unfortunately, their implementation relies on voluntary adherence and enforcement of their principles. So far, none of the major suppliers, who have worked on these codes and made every effort to reduce the burden on their business, have signed up. Besides**,** the two SWIPO codes of conduct should be revised to take into account the detailed analysis and the remarks formulated by our national user associations.

Over the years and through the numerous works carried out with our members, our associations have collected and documented a significant number of unfair and abusive practices, where hegemonic suppliers drive potential contestants out of the digital market. This limits the competition and the options to switch to another supplier. Such practices also create legal and financial risks for business users of digital technologies, of which most are

subject to very heavy regulations, for instance on personal data protection, or sectoral regulations in sectors like healthcare and finance. Four specific examples of unfair and harmful practices that should be addressed in the DMA are:

- Software licensing contracts that include clauses allowing the suppliers to impose unilateral changes to the contract and/or related terms and conditions.
- Support and maintenance of products that are automatically linked to the use of a software product.
- The by-default activation of non-free options in a standard installation of a software product.
- The introduction of new digital products or versions of those products for the sole purpose of forcing business users to migrate to those products, while they offer functions that are not needed nor wanted by the business users and which lead to amendments of contractual terms and conditions, including pricing and support.

We are more than happy to further clarify these unfair practices and the need to address these issues in a personal meeting.

III. AN IMPERATIVE NEED FOR AN EVOLUTIVE REGULATION OVER TIME

Effective enforcement must include a mechanism to continually address unfair practices in the rapidly evolving digital technology markets. Regulation must be able to evolve with situations encountered in practice, and not be frozen for many years to come. Therefore, we welcome the European Commission's choice to introduce an ex-ante regulatory framework that may be updated without heavy and lengthy legislative procedures, and in which an effective cooperation between the authorities in charge of monitoring the market and conducting market investigations is embedded.

However, we urge **the Commission to establish clear rules of governance between its prerogatives and those of the Member States. Extended enforcement powers of national regulators may be more effective in a case-by-case approach,** better adapted to the short time to market for digital services and the need for appropriate remedies. Case-by-case compliance investigations should be as quick as possible, with firm timelines and, ultimately, tailor-made remedies.

The mechanism detailed in Article 10 of the DMA for updating the list of obligations could therefore be strengthened by **adding a specific timeline in the procedure for the adoption of delegated acts**. The DMA should also set clear timelines for market investigations as well as for gatekeepers to end their unfair practices. Non-compliance with those timelines by gatekeepers should be subject to severe sanctions to ensure their timely enforcement.

We recommend including a **governance model whereby one national 'lead-authority' issues a ruling, which subsequently** applies in other Member States also. This governance model would allow for the effective implementation and updating of ex-ante rules from the DMA, in a market as fast-moving as the digital one.

Finally, we would like to point out two deeply held convictions shared by our associations. Firstly, our members feel that the Commission focusses predominantly on establishing rules to protect the European consumers and only slightly takes in to account the need to provide adequate protection to European business users of digital technologies. Due to the sheer size of many of the suppliers of digital technology and the dependency on their digital technologies, the vast majority of business users of digital technologies are not actually in a position to negotiate for equal and fair terms and conditions of licenses for the use of digital technology. Adequate

regulations and enforcement should be in place to provide protection to European business users of digital technologies.

Secondly, manufacturers and suppliers should be responsible for the quality and safety of the products they place on the market in the EU. For example, business users of digital technologies should not need to pay for patches to correct by-design software vulnerabilities. However, this is current practice and has been for the past decades. To address these issues, regulators could draw inspiration from approaches in other industries. For example, medicinal products and vaccines need market approval by a competent authority before the product may be placed on the European market. It would be unsafe and inefficient to have each medical professional test and evaluate the safety and way of administering drugs and vaccines to patients. Yet this is how users of digital technologies are now supposed to be able to evaluate software. This says a lot about the weight of habitus and in our opinion this needs to change.

Our four associations are **at your disposal to cooperate and exchange experiences and knowledge** to make sure that the DMA delivers its promise and helps put an end to the unfair commercial practices of suppliers. We would appreciate it, if you would provide us the opportunity to discuss with you the unfair practices referred to in this letter.

Your sincerely,

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