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From:	General Secretariat of the Council
To:	Working Party on Competition
Subject:	Digital Markets Act : preliminary comments and questions on document ST 14172/20 - Articles 7, 8, 9 and 11

Delegation will find attached the general comments sent by PL - SE - SI -SK -MT -FI - CZ - RO -DK - DE - ES - FR - HR on block III of the Digital Markets Act (DMA).

Digital Markets Act - 3rd building block for discussion - Articles 7, 8, 9 and 11

General questions / comments

Articles	**Articles** **Articles** **PL - SE - SI - SK - MT - FI - CZ - RO -DK - DE - ES - FR - HR** **MS comments/questions**
Article 7	Article 7 Article 7 PL (Comments): **Comment:** This provision is key in relation to the obligations under Article 6. Article 3.8 suggests that the obligations set out in article 6 are directly applicable and are subject to penalties for non-compliance in accordance with Art. 26. This is in contradiction with recitals 33 and 58 which provide for a "regulatory dialogue with the gatekeepers" and for further defining the obligations which "require specific implementing measures to ensure their effectiveness and proportionality". According to these recitals, it seems to us, that the obligations set out in Art. 6 were identified as being subject to

	further clarification. Direct application of the obligations under Art. 3 sec. 8 means, however, that the gatekeeper will have to comply with Art. 6 - and will be exposed to fines and non-compliance decisions - even ahead of a planned regulatory dialogue that would set out measures that the gatekeeper concerned shall implement, in an effective and proportionate manner, to ensure compliance with the relevant obligations laid down in art. 6. Moreover, the threat of fines and non-compliance decisions seems to be inconsistent with the envisaged possibility to request guidance under Art. 7.7. We are afraid that such an approach would lead to legal uncertainty and undermine the envisaged concept of regulatory dialogue. To enable a regulatory dialogue and to ensure legal certainty, a better approach, in our opinion, would be to specify in the regulation itself or within the delegated act measures by various type of gatekeepers that may be implemented to ensure compliance with the obligations under Art. 6 taking into account their different business models or to ensure specifying measures through a regulatory dialogue with the Commission before any fines are implemented. This approach is reflected in the recent amendment to German competition law.

Digital Markets Act - 3rd building block for discussion - Articles 7, 8, 9 and 11

General questions / comments

	Questions: 1. Article 7.2 states "Where the Commission finds that the **measures that the gatekeeper intends to implement** pursuant to paragraph 1, or has implemented, do not ensure effective compliance with the relevant obligations laid down in Article 6, it may by decision specify the measures that the gatekeeper concerned shall implement." Will the Commission introduce a mechanism obliging gatekeepers to present their plans or a report on measures that it intends to implement to achieve full compliance? 2. Will the advisory committee be informed on the ongoing regulatory dialogue? SE (Comments): P.1 Could the Commission develop a bit regarding the expression "effective in achieving the *objective* of the relevant obligation"? Does the Commission consider that there is a risk for lengthy discussions between the Commission and the gatekeeper? P2. SE wonders how Commission decisions in accordance with article 7(2)

	relate to other commission powers, for example concerning interim measures (article 22) and commitments (article 23). Could the Commission explain when certain measures would be an appropriate way to ensure compliance with article 6 and when other measures such as commitments would be a more appropriate measure? SE wonders what types of measures the Commission may impose in a decision according to article 7(2). May the Commission for example impose structural measures? SE wonders if there are any consequences if the Commission does not take a decision within the specified six months in article 7(2). SE wonders if it is correctly understood that even if the Commission becomes aware that the measures a gatekeeper implements are not effective the Commission has no obligation to specify measures according to Article 7(2). Could the Commission develop about the reasons behind this? The text reads Commission "may by decision specify". P.4 SE wonders what happens if the Commission does not communicate its

	preliminary findings within the specified three months. P.6 SE wonders if the Commission could develop about how this paragraph relates to the assessment that will be done by the Commission regarding the other obligations and the reasons behind the additional part in the assessment of article 6-1 j and k. P.7 SE notes that there appears to be no requirement in article 7(7) or article 18 for the Commission to open proceedings requested by a gatekeeper. SE wonders if that is a correct interpretation of articles 7(7) and article 18. SE wonders if there is any time limit within which the Commission must open proceedings according to article 7(7) and article 18 or the gatekeeper are allowed to ask for a regulatory dialogue on whether its planned measures (Article 6) are effective. SE also wonders if the system outlined in article 7(7) is sufficient to ensure compliance with all obligations in article 6 and if compliance would require complex assessments of future investments or

	developments. SI (Comments): Paragraph 6 determines that the Commission shall also assess whether the measures do not themselves confer an advantage on the gatekeeper which is disproportionate to the service provided by gatekeeper to business users. But neither in the article nor in the corresponded recital it is not explained what does this mean. So, we would like to ask the Commission to explain the meaning of this and if it is possible to give some examples. SK (Comments): *On Art 7 (3) Would this basically mean that the EC can (acc. to this par.) decide on a decision specifying measures, and beside (or simultaneously) adopt a non-compliance decision and acc. to that apply art. 26 par. 1 b) or 27?* *On Art. 7 (6): Can the EC comment please, why it chose for Art. 6 par. 1 letters j) and k)? Recital 56 does not specify this explicitly. What does it refer to?* MT (Comments): 7 (2) At the end of the first sentence, Malta suggests the insertion of the phrase "**while bearing in mind the gatekeeper's interests too**". MT believes that not only the rights of the business users and the end-

	users should be manifestly protected, but also those of the gatekeepers are to be fully safeguarded. FI (Comments): It will be the responsibility of the gatekeepers to make sure that the implementing measures are in compliance with other legislation. We presume that there is no contradiction between the DMA and other legislation but could the Commission give examples of situations where it is especially important to take into account the Regulation (EU) 2016/679, Directive 2002/58/EC and legislation on cyber security, consumer protection and product safety when implementing an obligation? Paragraph 5 states that "In specifying the measures under paragraph 2, the Commission shall ensure that the measures are effective in achieving the objectives of the relevant obligation and proportionate in the specific circumstances of the gatekeeper and the relevant service." How would the Commission ensure the proportionality of the specified measures? Would it be necessary for the Commission to carry out some type of market investigation? CZ (Comments): Article 7

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General questions / comments

	The measures implemented by the gatekeeper to ensure compliance with the obligations laid down in Articles 5 and 6 shall be effective in achieving the objective of the relevant obligation. The gatekeeper shall ensure that these measures are implemented in compliance with Regulation (EU) 2016/679 and ~~Directive 2002/58/EC~~ legal acts on privacy in the electronic communications, and with legislation on cyber security, consumer protection and product safety. CZ suggests the correction in light of the fact that ePrivacy Directive should be soon replaced by ePrivacy Regulation. DK (Comments): • Art.7(1) indicates that the measures adopted by the gatekeeper should be effective in achieving "*the objective of the relevant obligation*". Yet, the text of the proposal does not specify the objective pursued by each obligation. In our understanding, Art.1(1) sets *fairness* and *contestability* as the general objectives that the proposed regulation seeks to achieve. If so: (i) are these the same objectives pursued by each of the relevant obligation? (ii) do these concepts rely on e.g. definitions in competition law? (iii) how will a gatekeeper, and then the Commission, evaluate in concrete terms whether the measures adopted are "effective" in achieving them? (iv) how will the EU

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	Courts review a Commission's decision? • Art.7(1) indicates that the gatekeeper shall ensure that the measures implemented by a gatekeeper have to be in compliance with the GDPR, the Directive on Privacy and Electronic Communication, as well as the legislation on cyber security, consumer protection and product safety. Does that mean that, if a measure adopted in compliance with the DMA breaches any of the abovementioned legislation, the gatekeeper will be liable? Furthermore, with regard to obligations under Art.6, could the regulatory dialogue be used for the Commission to provide assistance to the gatekeeper in ensuring that the measures implemented are in compliance with legislation from other legal systems? In its presentation, the Commission referred to Art.7.2 and 7.7 as the provisions that specify the regulatory dialogue. Yet, these provisions do not clarify what such regulatory dialogue will entail, and to which extent it will require a case-by-case analysis on the side of the Commission. In our understanding, a regulatory dialogue in the context of e.g. Art.6.1.a would appear in the direction of specifying modalities of implementation for data separation, but it is unclear what the dialogue under Art.6.1.(b) and (c) will imply, where exceptions included in the provisions need to be evaluated. Can the Commission elaborate on these points? Furthermore, can the Commission provide examples of what a regulatory dialogue for assessing the essentiality of software applications (6.1.b) or proportionate measures to not endanger the integrity of the OS (6.1.c) will entail?

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	• Art.7(5) states that in specifying the measures under para.2, the Commission shall ensure that, inter alia, "*the measures are proportionate in the specific circumstances of the gatekeeper and the relevant service*". Differently, Art.7(1) does not refer to the principle of proportionality. Does that mean that the Commission is not required to check whether the measures implemented by the gatekeeper are proportionate? • Which role – if any – will e.g. competitors and business users have in terms of the regulatory dialogue? Will there be some form of market test when it comes to the measures decided by the gatekeeper or the Commission – similarly, to how remedies are subject to a market test in merger cases? DE (Comments): What does "apply taking into account the conglomerate position of gatekeepers" in rc. 29 imply, in particular given that some of the rules do not relate to all services, and what is meant by „take into account" – is there room for discretion? Similarly, does "the obligation should correspond to those practices" in rc. 33 only represent a general introduction into the object and purpose of the obligations or does it indicate discretion and/or individual assessments beyond potentially tailor-made implementing measures, i.e. also for Art. 5? Rc. 58 and para. 1 both refer to several legal instruments. We suggest

	making clear that the instruments mentioned are not exhaustive, e.g. not to exclude legislation on unfair trading practices. To prevent any misunderstanding, we suggest do delete the following sentence in para. 1: "The gatekeeper shall ensure that these measures are implemented in compliance with …". Regarding para. 2 ("the Commission finds…") we suggest discussing whether there should be a greater role for national authorities in enforcing the obligations. Furthermore, we suggest to include a mechanism for close cooperation between COM and MS in enforcement. When we start discussing Art. 1 of the proposal, we will comment on the role in more detail. Could you elaborate whether there is a difference between a procedure in accordance with Art. 7(2) and the general enforcement procedure according to Art. 25, in particular as Art. 25 also allows for a decision declaring a commitment binding? Why and when should COM choose the former procedure given its time limit? Are there legally binding criteria that guide the COM's decision on whether it initiates a regulatory dialogue according to Art. 7 or a proceeding to adopt a decision of non-compliance pursuant to Article 25? Can the COM pursue both procedures

	in parallel? Or can COM switch between these procedures even after the six months' time limit has expired? Could you elaborate on the object and purpose of the time limit in para. 2? It appears to be rather extensive given that COM has to communicate findings after three months? Conversely, what are the legal consequences if COM does not adopt a decision within 6 months? Does this entail any kind of preclusion? If yes, how does this relate to Art. 25? Concerning para. 4 and the obligation of COM to explain the measures it considers, what is the relevant standard/level of detail? How does it relate to the term regulatory „dialogue", and is it for the COM to develop the details of the implementation of remedies? Who will COM explain the measures to? We strongly suggest informing MS as soon and as extensively as possible. What is the intended role for competitors and stakeholders within the regulatory dialogue? Will there be a sort of reporting point? The current text of the DMA focuses mainly on the interaction of the gatekeepers with COM. This creates a high degree of dependency on information provided by gatekeepers for the purpose of monitoring and enforcement. How does COM plan to alleviate this? Generally, we suggest to discuss whether the specific regulatory dialog

	procedure/system needs further clarifications in the DMA or in guidelines. As para. 6 mentions COM assessing whether measures ensure that there is no remaining imbalance of rights and obligations, is this meant to be an individual assessment of each bilateral relationship as an ex officio obligation for COM? What exactly does "confer an advantage on the gatekeeper which is disproportionate to the service" mean – this appears to broaden the scope significantly? In particular, how does this relate to the F(R)AND standard within the substantive obligations? Why does this test only apply to Art. 6 (1) (j) and (k)? How does this test relate to Art. 10 (2) (a) that also refers to the imbalance of rights and obligations? Would the obligation to grant free licenses for the platform in exchange for access be an example of such an imbalance? Concerning para. 7, what incentives do gatekeepers have to engage in such a dialogue? Is COM obliged to open a proceeding pursuant to Art. 7(7) in case a gatekeeper has requested a regulatory dialogue? Or do paras. 1-6 also apply to the procedure pursuant to Art. 7(7)? Conversely, could it be a plausible strategy for a gatekeeper to overwhelm COM with a plethora of requests regarding many different behaviours of many different CPS? How many requests does COM expect to receive and how

	long will their examination take presumably? What are the implications of such a request - will COM always open proceedings? And does this mean that there will be a formal decision in any such case, either a non-compliance or formal commitments decision? Under which circumstances can proceedings be closed without such a decision? As para. 7 allows a gatekeeper to "provide a reasoned submission": is the time limit of Art. 7(2) also applicable here? As a general remark applying to Art. 7 but also concerning the following Articles, how does COM plan to legally ensure that - for purposes of discussion of gatekeepers' behaviour and envisaged measures as well as collecting evidence - the COM and Member States can exchange relevant information, including business secrets? ES (Comments): **1. Governance** It is not sufficiently clear the role to be played by MS. While other articles (i.e. art. 8 or 9) include specific references to the participation of MS through the DMAC (art 32(4)), no particular mention has been included in this case.

	According to that, the following questions arise: - What is the role of Member States and the Digital Advisory Committee in this procedure and in the regulatory dialogue? - Can MS also request the Commission the opening of proceedings when they detect measures implemented by gatekeepers are not enough or to review if measures are efficient? **2. Procedures** In order to properly understand the content of the article it would be appreciated if the European Commission could explain the practical development of the procedure. In particular: - Could the Commission clarify the procedure of Article 7(2): how is the decision taken, what kind of methodology or investigation is the Commission envisioning? - Could the Commission clarify the link between the procedure upon its own initiative in paragraph 2 and the procedure upon request of the gatekeepers in paragraph 7?

	- Could the Commission detail how the regulatory dialogue is intended? Can the process start between the gatekeeper´s designation and the moment when the gatekeeper must comply with the obligations pursuant to Article 3(8)? **3. Exercise of the powers of the Commission (link with non-compliance, fines and periodic penalties).** Article 7.2 introduces the possibility of the COM to adopt a decision specifying the measures that the gatekeeper shall implement. Article 7.3 lays down that par. 2 is without prejudice to the powers of the COM under articles 25, 26 and 27. It is not clear the kind of contents that would have the decision that specifies the measures to be taken by the GK, or if tis specification would be needed to make the obligation applicable in practical terms. That creates concerns in relation to the fines and penalties that may be applicable before the specification decision. It would be appreciated if the European Commission could explain:

	- What would be the content of the decision? Is it completing or detailing the content of the obligation itself? Could it be considered an extension of the scope/substantial change on the obligations of article 6? - Where there is a specification decision, should we understand that this is needed to make the obligation applicable in practical terms? Could the GK be sanctioned before the specification? - Can the Commission elaborate on the purpose of art. 7.3? **4. Rationale behind specific references** An explanation on the rationale behind certain explicit references would be appreciated. In particular: - Why does the first paragraph only refer to the legislation on data protection, cyber security, consumer protection and product safety? Is that explicit mention needed? - What is the aim of paragraph 6? Why is it limited to obligations in article 6(1) j and k?

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General questions / comments

	FR (Comments): In general : 1. Should Article 7 not propose a framework for the "regulatory dialogue" provided for in recitals 29), 33) and 58)? Is it bilateral between the Commission and the access controller? Is it systematic in the context of the opening of a procedure for the clarification of obligations? Is it mandatory? 2. Does the regulatory dialogue proposed by the Commission involve third parties? If so, should it not involve them in a formal way (e.g. through mandatory public consultation)? 3. In the event that Article 7 is not implemented (neither by the Commission under Article 7.1, nor by the access controller under Article 7.7) should there not be a reporting mechanism for third parties to inform the Commission of ineffective implementation of the obligations? 4. Should a dispute settlement mechanism not be envisaged on this basis? 5. As already mentioned in the instructions of 18 February 2021, this article could envisage providing for a compulsory reporting

	mechanism by the access controller on the implementation of his obligations. This restitution mechanism could provide for two levels of detail: - a first level of restitution to the Commission, with a high level of information and transparency, which would allow the regulator, if necessary, to trigger a procedure to clarify the obligations of Article 6 under Article 7.2 - a second level of restitution, more synthetic and purged of possible business secrets, would be published, to enable third parties to be informed of the possibilities opened to them by the regulation in the context of their relations with access controllers. This publication of the conditions for implementing the obligations would enable the markets to exercise a form of control over the effectiveness of regulation. Setting up such a feedback mechanism would ensure that the Commission is able to specify operationally, without delay, how each rule should apply to each access controller, should the latter have put in place sub-optimal application measures. 6. **What is the relationship between Article 7 and Article 36(1)(b)?** While Article 7 makes it possible to specify all the rules of Article 6, Article 36(1)(b) makes it possible to specify, by

	means of an implementing act, "the form, content and other details of the technical measures which access controllers shall implement to ensure compliance with Article 6(1)(h), (i) and (j)". Why is the scope of Article 36.1 (b) reduced to three obligations? Why this possibility of a double specification of rules, one under Article 36.1 (b) and the other under Article 7? 7. Currently Articles 7, 8 and 9 cannot be the subject of implementing measures under Article 36, should it not be adapted accordingly? 8. Should the procedure for specifying an obligation under Article 6 not be subject to a temporal adjustment for newly enacted obligations following a market survey under Article 17? 9. Why exclude the possibility that the Commission may also be required to specify the obligations listed in Article 5? HR (Comments): Paragraph 1: suggestion to add competition under legislation. Paragraph 5: how should the effectiveness of proposed measures by the EC be assessed or measured or ensured?
Article 8	Article 8

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	Article 8 PL (Comments): **Comments:** In our opinion the gatekeepers should also be able to apply for an exemption from specific obligations for an individual core platform service if they can demonstrate the justifiable and proportionate reasons for such an application. Especially if those reasons are connected with providing better conditions for conducting business via platform by micro, small and medium sized enterprises. Given the broad scope of DMA and the variety of business models, we urge the Commission to analyse a legitimacy to provide for a general exemption from specific obligations for an individual core platform service of a gatekeeper in cases where introduction of measures complying with these obligations will result in reducing competitiveness and harm businesses and end-users. Introduction of a possibility for a Commission to grant justified exemptions, through a regulatory dialogue, would provide the necessary flexibility of the regulation to achieve its objectives while avoiding unintended harmful consequences to business users and end users.

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	Questions: 1. Suspension of specific obligation in full or in part – if such a suspension is granted for more than one platform, will the Commission take under consideration removal of such an obligation from article 6? 2. Are there any specific quantitative indicators related to an economic viability of the gatekeeper‘s operation within the EU, that would indicate whether compliance with a specific obligation endangers this viability? 3. Are there examples of indicated exceptional circumstances beyond the control of the gatekeeper? 4. Could the Commission present examples of indicators related to economic viability? SE (Comments): SE wonders how economic viability in article 8(1) should be defined. Could the Commission provide some concrete examples of when Article 8(1) could apply, i.e. suspension of an obligation due to a circumstance outside of the gatekeeper’s control, which endangers the economic viability of its operations in the EU?

	SE wonders if the Commission could further develop on the assessment it intends to carry out pursuant to article 8(3). SI (Comments): This article determines that a specific obligation laid down in article 5 and 6 for a core platform service can be exceptionally suspended. But in our view it is not clear whether the suspension on the implementation of individual obligations laid down in Articles 5 and 6 applies to all core platform services provided by the gatekeeper or only to one or some of core platform service provided by the gatekeeper. In this view we are asking for the clarification about the expressed concern. We would also like to ask for the clarification of the wording "*the economic viability of the operation of the gatekeeper in the Union",* because this can be understood in different ways, for example as a financial loss or just as a reduction of the profit. Does perhaps the Commission have in mind any specific case? The second subparagraph of the third paragraph provides that the suspension may be subject to conditions and obligations laid down by the Commission in order to ensure a fair balance between these interests and the objective of this Regulation. But from this provision neither from the recital 59 it is not clear what these conditions or obligations can be, so we are asking for the clarification about conditions and obligations that the Commission can determine. For the purpose of clarity, we suggest to further explain this in the recital. SK (Comments):

	What can be identified as a threat to economic viability for the GK? *Could the EC provide any example please (beyond rec. 59)?* MT (Comments): 8 (3) In the second sentence of the second paragraph, MT suggests the addition of the words "**reasonable and fair**" prior to the words "conditions and obligations". Moreover, MT would also wish to suggest the insertion of the words "**without making it too cumbersome for the gatekeeper**" at the end of the sentence "[…] to ensure a fair balance between the interests and the objectives of this Regulation" When suggesting the first addition to this paragraph, Malta wishes to highlight the importance that whenever there is the imposition of conditions and obligations, the elements of fairness and equity are kept as the philosophical underpinning of such imposition. Moreover, through the second suggestion, Malta once again feels that the wording of the Act is focusing highly on the rights of business users and end-users, and the emphasis on the gatekeeper's rights is not as strong. FI (Comments): Paragraph 1: What is the difference between a "reasoned request" and a "complete

	reasoned request“? “In assessing the request, the Commission shall take into account, in particular, the impact of the compliance with the specific obligation on the economic viability of the operation of the gatekeeper in the Union as well as on third parties”. Is it possible that the gatekeeper will not get a suspension due to impact on third parties even though the implementation of the obligation would endanger the economic viability of the gatekeeper? If the gatekeeper makes a reasoned request for suspension does it have a right to appeal the negative outcome of the request? Paragraph 3: Is the reasoned request mentioned in this paragraph the same reasoned request referred to in Paragraph 1, or would the gatekeeper need to ask for a provisional suspension with a separate reasoned request? If they are two separate requests, could the Commission clarify how the requirements would differ between these two requests? CZ (Comments): Is it presumed that the suspension will be granted every year for a period of a single year or possibly for a longer period? In case of longer periods, an issue connected with the principle of equal treatment might arise.

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	RO (Comments): Art. 8 Suspension :We would like to understand, through examples, what are the exceptionally circumstances that could appear and how will they be assessed by the Commission. DK (Comments): • Art.8(1) makes reference to a "*reasonable request*" for suspension made by the gatekeeper. What constitutes such a "reasonable" request? Is the "reasonability" of the request a different and additional requirement to the criteria that the gatekeeper have to meet to demonstrate that the obligation may endanger the "economic viability"? Has the Commission an obligation to examine the grounds of such request before rejecting it? • Can the Commission clarify when the suspension in Art.8 can be granted? Particularly, is it when the economic viability of the *whole* undertaking is threatened, or just the viability of the CPSs affected, and if so, are these CPSs identified pursuant to Art.3? If the suspension is only available when the viability of the entire undertaking is threated, can the Commission elaborate on why it consider such provision proportionate given that the obligations in Articles 5 and 6 apply to individual CPSs? • Art.8(3) indicates that, in assessing the request, the Commission shall take into account the impact of the compliance on, inter alia, "*third parties*". Can the Commission elaborate on who are the third parties considered, and why is it relevant to include their

	interest into such assessment specifically for this provision? Are not the interest of these parties already included in the obligations framed under Art.5 and 6? DE (Comments): As rc. 59 mentions „external shocks", could COM provide some illustrative examples? What does "temporarily" in "temporarily eliminated a significant part of end user demand" mean and does it also prescribe the time horizon for the viability assessment? What will be used as the relevant benchmark for "economic viability", in particular given that many CPS are offered free of charge and/or are cross-subsidized by other services or over time? As para. 1 refers to "compliance with […] obligations would endanger, due to exceptional circumstances…", what does "due to" imply? Is it necessary that the economic viability is threatened due to the obligation to comply with the DMA under exceptional circumstances? Or is it sufficient that exceptional circumstances exist for suspending an obligation, notwithstanding to what degree compliance with the obligation in question contributes to the threat to the economic viability?

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	As para. 2 only requires a review "every year", we suggest complementing "to the extent necessary" in para.1 with "to the extent and duration necessary". Could COM elaborate whether adding "In its suspension decision the Commission can specify intervals of less than one year at which the decision shall be reviewed in accordance with the second sentence of paragraph 2." would be helpful? In any case we suggest changing "every year" in para. 2 to "at least every year". From our understanding, para. 2 in its second sentence only allows for lifting the suspension or deciding that its conditions continue to be met. Could COM elaborate why there is no mechanism to partially lift a decision and/or amend it due to changed facts? As COM has to adopt a final decision pursuant to para 1 within three month following receipt of a complete reasoned request, how likely is it that the COM orders a provisionally suspension pursuant to para 3? Could the COM give some examples for possible cases? According to Art. 8 and 9, the Commission shall have the power to suspend, in whole or in part, obligations under Articles 5 and 6, or to grant exemptions from those obligations. This includes certain obligations concerning the protection of personal data (e.g. Art. 5 (a), 6 (1) (h))

	already deriving (at least in part) from the GDPR. Could COM confirm, that Art. 8 and 9 cannot suspend or exempt gatekeepers to comply with obligations that arise from the GDPR? In our view, a suspension or exemption leading to a (temporary) non-application of obligations also arising from the GDPR would not be acceptable. What is the rationale for referring to "a core platform service" in Art. 8(1) and "an individual core platform service" in Art. 9 (1) while Art. 8(3) and Art. 9(3) refer to "one or more individual core platform services" (singular/plural)? ES (Comments): **1. Clarifications:** Some clarifications may be needed in relation to the use of concepts: - Could the Commission clarify the concepts of "only to the extent necessary", "viability" and "economic viability" and if these last two mean the same? **2. Methodology and criteria used for suspension decisions:**

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	The criteria on which the suspension decision should be based are too vague. It would be needed a clearer definition of the limits and criteria for the assessment of necessity and opportunity of the suspension. - Could the Commission detail the methodology or criteria to assess if the suspension is adequate? - Could the Commission explain why the balance analysis between the viability of gatekeepers and the objectives of the regulation is so open? - Has the Commission considered the possibility to address this balance analysis as in article 9, considering to overriding reasons relating to the public interest? FR (Comments): 10. How would the Commission be informed of the effective implementation of its obligations by the access controller? HR (Comments): There is no period of time or duration specified for suspension, only that the EC would review its suspension every year. Maybe it would be good

	to add some minimum or maximum duration of the suspension such as three months, six months or one year and until the circumstances, conditions for suspension still persist.
Article 9	Article 9 Article 9 PL (Comments): **Comments:** Article 9 includes the possibilities of exempting gatekeeper, in whole or in part, froma specific obligation set out in Art. 5 or 6, in exceptional circumstances justified for overriding reasons of public interest on the limited grounds of public morality, public health or public security. In the opinion of the Polish Government, these grounds are too general and they need to precisely defined. For this reason, referring to them is associated with too much freedom. The regulation should include clarification of the understanding of these terms. **Questions:** 1. Article 9 states that the Commissions may, on its own initiative, grant an exemption for overriding reasons of public interest. Will

	the decision be made in similar timeframe, to one indicated in the regulation proposal? 2. Will the Commission include precise definitions of the grounds of exemptions - public morality, public health, public security? SE (Comments): Could the Commission develop about how the 'overriding reasons of public interest' under Article 9.2, i.e. public morality, public health and public security, was selected and how they relate to other interests (for example protection of consumers)? Can existing case law concerning public morality, such as on the lawfulness of Member States restrictions of free movement justified on such grounds, be applied? Could the Commission give some concrete examples of when Article 9 could apply, i.e. suspension of an obligation due to reasons related to public health, morality or security? How often do the Commission foresee a suspension under Article 9.3 taking place? P. 3 Please see question under article 8 (3). SI

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	(Comments): The recital 60 says that the regulatory dialogue to facilitate compliance with limited suspension and exemption possibilities should ensure the proportionality of the obligations in this Regulation without undermining the intended ex ante effects on fairness and contestability, is understood in a way that regulatory dialogue stipulated in Article 7 shell be used in the process of suspension or exemption from using a specific obligation laid down in Article 5 and 6. Is this understanding of the regulatory dialogue correct, because this is not clear form Articles 7, 8 or 9. The second subparagraph of the third paragraph stipulates that the suspension may be made subject to conditions and obligations to be defined by the Commission in order to ensure a fair balance between the goals pursued by the grounds in paragraph 2 and the objectives of this Regulation. However, it does not follow from the draft regulation what these conditions and obligation can be, so we are asking for the clarifications regarding the type and scope of these conditions and obligations. SK (Comments): *Could the EC provide more information (e.g. any examples) on application of exceptions on grounds of public morality/health/security? How should Recital 60 be interpreted ("Affecting these public interests can indicate that the cost to society as a whole of enforcing a certain obligation would in a certain exceptional case be too high and thus disproportionate.")?Related to these exceptions, there would not be*

	considered the effects of fulfillment of obligations to GK, but the cost of enforcement? *Is there any (time) limitation (theoretically) to this exception?* FI (Comments): Paragraph 1: Same question as above with Art 8(1): What is the difference between a "reasoned request" and a "complete reasoned request"? If the gatekeeper makes a reasoned request for exemption does it have a right to appeal the negative outcome of the request? Paragraph 3: Same question as above with Art 8(3) CZ (Comments): It is necessary to clarify terms used in this Article, especially public morality and public health. Otherwise the application of this provision may cause unforeseeable problems. DK (Comments): • Art.9(1) states that the Commission may exempt a gatekeeper "*in*

	whole or in part" from a specific obligation in relation to a CPS. Why did the Commission not provide the possibility for a partial suspension (i.e. the suspension of part of an obligation under art.5 and/or 6) also under Art.8? • What was the rationale for selecting the three grounds for exceptions in Art.9, i.e. public morality, public health and public security? Can the Commission provide a clarification on the meaning of these three concepts? Do these expressions have a legal definition and if so, what is their source? Is there an exhaustive list of situations that fall under each of these three categories or are they open-ended? Can the Commission provide a couple of example for each the three concepts? • The Commission can grant exemptions and take into account "*the effects of the obligation on the gatekeeper and on third parties*". Similarly, to the question posed under Art.8, can the Commission elaborate on who are the third parties considered specifically for this provision, and why is it relevant to include their interest into such assessment? Are not the interest of these parties already included in the obligations framed under Art.5 and 6? DE (Comments): How many cases does the Commission expect where Art. 9 could be applied?

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	We notice that in Art. 9 (1), last sentence the wording differs from Art. 8 in that "without delay" is missing. Is this intended? Could COM provide some illustrative examples for the scenarios mentioned in para. 2 lit. a-c? Would the COM consider to add them in the recital (in analogy to Art. 8)? ES (Comments): **1. Governance:** - What is the role of Member States in this article? **2. Time limits:** - May the exemption be temporary? Does the Commission envision a revision of this exemption as in Article 8? May a revision be needed for changes in circumstances - for instance if reasons relating to public health change? **3. Criteria used for exemption decisions:**

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	It would be needed to clearly define the limits and criteria for the assessment of necessity and opportunity of the exemption: - Why are only these three reasons the cause for exemption? Has the Commission considered including other overriding reasons related to the public interest as in other legislation? - Shouldn´t this paragraph ensure that the exemption is necessary and proportionate to this aim? - Can the Commission provide examples of when an exemption could be justified on the grounds of Article 9(2)? - Are gatekeepers qualified to balance general interests in order to request an exemption? FR (Comments): 11. Does the decision to open the procedure for clarification of obligations open the period of regulatory dialogue? 12. Why did the Commission choose to place the procedure for specifying obligations following an implementation of the obligations which does not guarantee their effective compliance? Should the specification procedure - and the related dialogue - not

	be placed upstream of this finding of non-effectiveness? 13. Within what period does the Commission intend to assess the ineffective implementation of one or more Article 6 obligations? 14. Should the specification procedure not involve stakeholders? 15. Under Article 7.7, a gatekeeper may request a procedure to determine whether the measures it intends to adopt (or has already adopted) comply with the obligations of Article 6. Apart from this assumption, and as the text stands, how will the Commission be informed of the gatekeeper's actual implementation of the Article 6 obligations? 16. Should there not be a reporting mechanism for third companies? 17. Should not the 6-month period following the opening of the Article 18 procedure be shortened when the obligation has just been laid down as part of a market investigation under Article 17? What will be the scope of the Commission's powers to specify?
Article 11	Article 11 Article 11 PL (Comments):

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	The Polish government supports the proposed solutions, aimed at containment of the circumvention of the obligations laid down in the regulation. Measures and mechanisms can't be used to slow down the compliance process, but at the same time gatekeepers should be provided with tools to engage in an effective dialogue with the Commission and advisory body, in order to ensure that the anticipated measures will ensure compliance with the obligations or the understanding of the definitions, included in the regulation proposal is correct. We are urging to take into account that the measures may affect the end users and business users. **Questions:** 1. Is the EC planning to include a set of mechanisms to enforce the application of the provisions and anti-circumvention of the regulation from third-country platforms? SE (Comments): P. 1 SE wonders if the Commission could clarify by which means it intends to ensure that gatekeepers do not circumvent any of the obligations laid down in articles 5 and 6. MT (Comments):

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	11 (1) Where there is the sentence "While the obligations of Articles 5 and 6 apply in pursuant to Article 3, their implementation shall not be undermined […], Malta suggests the words "**directly or indirectly**" exactly prior to the word "undermined". By virtue of this addition, MT believes that this proviso would be able to capture also behaviour which although prima facie may seem legal, the end result would be a mellowing down of the legislator's aim when it comes to respecting the obligations under Articles 5 and 6 in respect of core platform services pursuant to Article 3. At the end of this paragraph, Malta suggests that the word "unduly" be changed by the word "**unreasonably**". By way of such change, MT wants to ensure that whenever the gatekeeper imposes conditions to business users and end-users who avail themselves of the choices envisaged under Articles 5 & 6, a detailed reason is given, particularly in the instances when such conditions are difficult, so as to ensure that the gatekeeper does not abuse of the position it enjoys. FI (Comments): Could the Commission elaborate how the Article 11 could be monitored in practise? CZ

	(Comments): Article 11 2. Where consent for collecting and processing of personal data is required to ensure compliance with this Regulation, a gatekeeper shall take the necessary steps to either enable business users to directly obtain the required consent to their processing, where required under Regulation (EU) 2016/679 and Directive 2002/58/EC, ~~or~~ and to comply with Union data protection and privacy rules and principles in other ways including by providing business users with duly anonymised data where appropriate. The gatekeeper shall not make the obtaining of this consent by the business user more burdensome than for its own services. Obtaining consents should not preclude compliance with the rules and principles of personal data protection; on the contrary, it should go hand in hand. RO (Comments): Art. 11 Anti-circumvention: As a matter of principle, an as previously stated, safety or privacy consideration should be addressed under art. 6, respectively art. 7. In this regard, we can see that sometimes the market contestability aim can come in tension with privacy or security issues. For

	this reason, there is the danger that one policy can be circumvented by opposing the other as a defense. For these reasons, we consider the tailoring mechanisms in art. 6 and 7 as having a prominent role to avoid circumvention. Here the proportionality in terms of policy interaction needs to be balanced by the Regulator (e.g. EC) through the regulatory dialogue and also, maybe through guidelines. DK (Comments): • Art.11 is to ensure that there are no loopholes in the obligations listed in Articles 5 and 6 and contains provisions (e.g. ban on degradation of the services) that are relevant for many of such obligations. Can the Commission explain why the anti-circumvention rule has not be placed immediately after Articles 5 and 6 in the proposal? DE (Comments): Is the first sentence of para. 1 redundant given the wording of Art. 7(1)? Why does para. 1 refer to Art. 3 instead of Art. 3(7)? We welcome that para. 1 refers to the relevant undertaking for avoiding circumvention strategies and would like to reiterate that to our mind using the concept of undertaking throughout the draft would be preferable.

	Concerning para. 2 in its second alternative ("or to comply […] in other ways"), does the gatekeeper have discretion what way to choose, even in cases where consent is explicitly required under the ePrivacy Directive or the GDPR? Could this be to the detriment of business users? What "other ways" except anonymization would COM consider as appropriate to comply with data protection rules? Art. 11 (2): Consistency with regulations in the e-privacy regulation (not yet adopted) should be ensured. Regarding para. 3 and its reference to degraded conditions/quality, how will COM perform a comparison in practice for finding such degraded conditions/quality, in particular as compliance is supposed to be implemented by design in the first place? Wouldn't this also necessitate a "regulatory dialogue"? While we welcome the objective of this provision, we were wondering whether it could be reasonable to require the degradation to be also unduly (or unnecessarily) in nature? Could COM elaborate on what it would consider unduly within the meaning of "unduly difficult" at the end of para. 3? Would changing the

	wording to “unnecessarily difficult” be preferable? ES (Comments): **Relation with fines and with existing competition instruments**: - Should the anti-circumvention prohibition be included in articles 25 and 26 or is it understood as a type of non-compliance of Articles 5 and 6? How does Article 11 connect with traditional competitions instruments such as Articles 101 and 102 TFEU to correct unlawful conducts?
	FR (Comments): 18. Does the stage of sharing the Commission's initial findings under the clarification of obligations procedure open the period for regulatory dialogue? Article 7.4 provides for the possibility that, as part of its "preliminary findings", the Commission may announce the measures it intends to take in its final decision. What are the measures referred to in this paragraph by

	the Commission since, as the text currently stands, the Commission may not, in the context of a decision taken on the basis of Article 7.2, impose precautionary measures (cf. art. 22), impose behavioural or structural remedies (cf. art. 16) or impose fines (cf. art. 26 and 27)?
	FR (Comments): 19. Is the notion of "imbalance between the rights and obligations of the parties" legally framed at European level? Should the principles of assessment applicable here for the clarification of obligations 6.1.j) and 6.1.k) not be valid for all obligations insofar as they concern the contractual relations between access controllers and the third parties concerned (whereas this is part of the principle of fairness, the guiding principle of Article 10)? Why did you choose these two obligations in particular? In the present case, new obligations enacted in accordance with the Article 17 market investigation procedure will not benefit from this assessment.
	FR (Comments): 20. The gatekeeper may request a procedure for clarifying his obligations under Article 6 "in order for the Commission to

	determine" whether the measures he intends to implement actually achieve their objective: does the Commission not fear that this procedure will have suspensive effect on the planned implementation within six months of their designation of their obligations by the gatekeeper, pending its decision to clarify them? 21. Does the Commission intend, in this context, to take a decision within six months of the opening of the procedure, as in the context of the application of Article 7.1? Should this request not be the subject of an implementing measure to specify its content in accordance with Article 36?
	FR (Comments): 22. What is the procedural form of the "reasoned request" to the Commission? Should this request not be the subject of an implementing measure to specify its content in accordance with Article 36? 23. Should the impact of the suspension on third parties not be taken into account? 27. Should the "impact of compliance with the

	specific obligation (...) on third parties" be taken into account in the third paragraph concerning provisional suspension but not in the general assessment of abolition? 24. Should it not be made clear that the two criteria mentioned: 1) exceptional circumstances beyond its control, 2) threat to the economic viability of its activities in the Union, are cumulative? Is the advisory procedure provided for under EU Regulation 182/2011 compatible with the three-month period for investigation and decision by the Commission?
	FR (Comments): 25. Why provide for an accelerated suspension mechanism when the suspension procedure provided for in 8.1 is already fast (three months)? Generally speaking, gatekeepers are not small businesses whose viability is likely to be called into question during this period. 26. What are the conditions and obligations that could be introduced to suspend in advance of the three-month period necessary for the Commission to decide on the suspension? 27. Why has the Commission not envisaged a "partial suspension" of

	obligations, which would make it possible in the medium term to meet the requirements of economic viability and the regulatory objectives of the Regulation? 33. What is the procedural form of the "reasoned request" to the Commission? Should this request not be the subject of an implementing measure to specify its content in accordance with Article 36?
	FR (Comments): 28. What is the link with Article 7.1 which provides that access gatekeepers shall implement their obligations by ensuring compliance with Regulation (EU) 2016/679, Directive 2002/58/EC and legislation on cyber security, consumer protection and product safety? In this respect, the examples provided by the Commission under Article 9 seem to be relevant under Article 7.1: - Public morality (e.g. refusing installation of software application facilitating illegal sale of drugs) - Public health (e.g. refusing installation of software application disseminating misinformation on COVID-19) - Public security (e.g. refusing to operate with alternative ID system that may allow illegal surveillance)

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	29. How does this article relate to Articles 4 and 5 of the P2B Regulation? How does this article relate to the obligations set out in the DSA?
	FR (Comments): 30. Does the exemption concern a reason for a problem of adequacy between the CGUs of the access gatekeeper's core platform services and the obligations listed in articles 5 and 6? 31. Does the exemption cover a "particular obligation" provided for in articles 5 and 6 in a generic manner or the implementation of a particular obligation with regard to a specific user business? 32. What is the procedural form of the "reasoned request" to the Commission? Should this request not be the subject of an implementing measure to specify its content in accordance with Article 36? To what extent is the three-month investigation and decision-making period compatible with "overriding reasons relating to the public interest" and to public health, safety and morals? Would a more constrained period not be justified?
	FR (Comments):

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	33. Why has the Commission limited the imperative reasons of general interest to the three reasons mentioned in Article 9.2? Should this field not be left open? Why did it add the reason of public morality, which is not present in the DSA? What does this reason include?
	FR (Comments): Would it not be appropriate to introduce a reassessment of the suspension of the obligation, as provided for in Article 8§2?
	FR (Comments): What is the procedural form of the "reasoned request" to the Commission? Should this request not be the subject of an implementing measure to specify its content in accordance with Article 36?
	FR (Comments): 34. Generally speaking, how does the Commission ensure in practice that the conditions imposed on gatekeepers under Article 11 are complied with?

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	FR (Comments): It could usefully be specified here that the concept of business is that defined by Article 2.22) which is framed by case law in competition law in particular.
	FR (Comments): The Commission encourages, where appropriate, the sharing of anonymised data with professional and commercial users. Will responsibility for data protection be shared?
	FR (Comments): The Commission may be asked to confirm whether this paragraph covers all situations in which an end-user would be led to refuse to consent (within the meaning of the GDRP), to provide personal data or that these data are combined or used, in the context of the implementation of his obligations (under Articles 5 and 6) by a gatekeeper?