Session 4: Market Power: Natural Monopoly and Standards Businesses

In our last session, we discussed the antitrust/competition policy approach to market power. In this session, we will look at situations where antitrust proper may not work very well given that the underlying production technology may give rise to just a few producers or even one. This is the case of natural monopoly and is historically the domain of regulated industries laws, such as those operating in railroads, telecommunications, electricity and natural gas. We continue to have statutes and regulations in those areas, but over the last twenty years, standard setting and platforms have become an important part of the regulatory conversation. Our reading will start with DVD patent pools and then we will look at the issue of network neutrality. The third reading sets out a series of actions by the European Commission regarding Amazon. Finally, the fourth reading is a short description of the Digital Market Act, a new statute passed in Europe to regulate Big Tech gatekeepers.

DVD Joint Licensing of Patents Request Letter

July 29, 1998

Honorable Joel I. Klein, Esq.,
Assistant Attorney General,
Antitrust Division,
United States Department of Justice,
10th Street and Constitution Avenue, N.W.,
Washington, D.C. 20530.
Re: Request for Business Review Letter Regarding the Licensing of Patents Essential to DVD-Video and DVD-ROM

Dear Mr. Klein:

On behalf of Koninklijke Philips Electronics, N.V. ("Philips"), Sony Corporation of Japan ("Sony"), and Pioneer Electronic Corporation of Japan ("Pioneer") (and their affiliates which are involved in the patent licensing program described below) we submit this request for a Business Review pursuant to 28 C.F.R. § 50.6 regarding the proposed arrangement under which certain patents essential to the manufacture and use of DVD-Video and DVD-ROM will be licensed on reasonable and non-discriminating terms (the "Proposed Licensing Program").

DVD (or Digital Versatile Discs) refers to a high density CD-sized optical disc in which signals are encoded and stored in digital form and are then read and reproduced by players using an optical read out beam. Relying on basic CD technology, the DVD discs and players allow for an increase of approximately sixty times the storage capacity of a typical CD or CD-ROM. DVD-Video and DVD-ROM are two formats relating to high density optical discs which have been described by Philips, Sony, Pioneer and several other companies in the DVD-Specification for Read Only Disc version 1.0 dated August 1996 and in several updates thereto (a copy of the specification is set forth in Exhibit A hereto).

A single DVD format for video and ROM was defined in an open process by participating companies over the course of several years at the request of various industries—particularly the computer industry—which asserted that multiple DVD formats would delay introduction of this new and beneficial product, increase costs, and much like the incompatible BETA and VHS formats, result in losses to consumers who purchased products based on a format which quickly became obsolete. In defining the DVD-Video and DVD-ROM formats, input was solicited and received from a variety of industries and an even wider variety of companies throughout the world.

As the format was developed and refined, it became clear that numerous independent companies had been granted patents which were relevant to DVD-Video and DVD-ROM. The three companies submitting this request actively sought to join the licensing of their patents with the patents of other companies which also claimed to have patents which are essential to DVD-Video and DVD-ROM. To date, those efforts have not resulted in any other companies joining the Proposed Licensing Program. Philips, Sony and Pioneer, however, remain willing to include others having essential patents in the licensing program described below.

The companies submitting this request firmly believe that, in the near future, DVD products will be widely marketed by a wide variety of companies. We are also convinced that, once these products are manufactured and distributed in volume, there will be great consumer demand for them. We anticipate that the producers and sellers of DVD discs and players will largely be the companies that currently manufacture and sell CDs and the equipment that plays CDs and CD ROMs. Thus, prospective licensees include manufacturers of consumer audio equipment and computer disc drives. Typically, licensees to manufacture DVD discs will be replicators, as is the case with CDs. In sum, the DVD licenses will be offered to the same classes of sophisticated licensees as are CD licenses, and there is every reason to expect that the transfer of this valuable DVD technology will have the same beneficial effects upon the relevant industries that CD licenses had upon the recorded music industry 15 years ago.

In one respect, licensors of DVD technology face risks and uncertainties that were not faced 15 years ago by the creators of CD technology. During the past year, several different formats have been announced that will compete with various applications of DVD for the favor of consumers. For example, Circuit City and others have developed Digital Video Express (DIVX), a pay-per-play system that allows consumers who have purchased a DIVX-compliant player to purchase a disc at a lower price and to play that disc for a limited period of time without having to return the disc when finished. The disc may later be "re-activated" for additional plays upon payment of additional fees. Various companies have announced that they will offer DIVX discs, including Twentieth Century Fox, the Walt Disney Company, Paramount Pictures, Universal Studios and Dream Works. It is our understanding that DIVX discs will not play on non-DIVX DVD players. In addition, NEC, one of Japan's largest electronics manufacturers, has announced its intention to introduce Multimedia Video File (MMDF), an optical disc format which is expected to compete directly with certain applications of DVD technology. Other new announced products include TeraStor's Near Field Recording (NFR) technology and Advanced Storage Magneto-Optical (ASMO). In short, this is an area in which several well-financed suppliers are prepared to compete aggressively with DVD products. Obviously, there also will be competition among those selling DVD products.

Offering a patent license for all essential patents of the three companies under the Proposed Licensing Program will provide several pro-competitive benefits, including (1) reducing the uncertainty of the availability of patent licenses so that those who require a license to manufacture or use a DVD-Video or DVD-ROM product are aware that a license from the three companies easily can be obtained; (2) reducing the royalties that likely would be payable if the three companies licensed their essential patents on their own; (3) reducing the cost for each prospective licensee of determining on its own the identities of owners of essential patents and the entities from which licenses which must be obtained; (4) reducing other transaction costs of licensees having to negotiate and execute separate licenses; (5) reducing the transaction costs of essential patent holders offering separate licenses thereby allowing for a reduction in the price of the license; and (6) offering the same royalty rate and other conditions to all interested licensees so that no entity manufacturing or selling a DVD-Video or DVD-ROM product will have a price advantage over any other such entity as a result of entering into a license for the essential patents of Philips, Sony and Pioneer.

The Proposed Licensing Program will be structured to avoid any countervailing aspects that may be deemed anticompetitive. For example, each patent holder will retain the right to license its patents outside the Proposed Licensing Program under whatever terms and conditions it reaches with any prospective licensee, and each prospective licensee will be informed in writing of its option to negotiate such an individual license under reasonable terms and conditions. The Philips personnel who are responsible for the Proposed Licensing Program will play no role in the marketing of DVD products. An independent expert in the art has been retained to insure that the portfolio of patents that will be licensed under the Program includes only those patents which are essential to DVD-Video and DVD-ROM products. Although Philips, Sony and Pioneer have not been successful in having other companies join their licensing program, they remain willing to include any others having essential patents who wish to join. There will be no royalty payable by the licensee unless a licensed patent would be infringed but for the license, information which the licensee may be required to disclose to monitor infringement and royalty payments will not be disclosed to any of the licensors, but only to a third party expert retained by the licensors, patents included in the licenses will be specifically identified in appendices to the license, and Philips, Sony and Pioneer will commit to licensing to any licensee any essential patent rights they may acquire subsequent to the date specified in the license.

Set forth below is a fuller description of the proposed licensing terms and the agreements among the licensors.

The Proposed Patent License

Two licenses (Appended hereto as Exhibits B and C) will be offered, both in substantially the same form. One is for DVD players, the other for DVD discs. A three page "Agreement" sets forth a few basic terms of the license and also specifically incorporates the "Conditions" of the license which are appended to the Agreement.

On the first page of the Agreement, it is specifically noted that Philips, Sony and Pioneer are each willing to license their respective patent rights for optical disc or player manufacturing whether within or outside the standard DVD specifications on reasonable terms and conditions. Thus, any prospective licensee who is dissatisfied with the terms of the Proposed Licensing Program is assured of this alternative.

Article 2 of the Conditions sets forth the terms of the license grant, and provides for a license under Licensed Patents which are defined in Article 1.07 as all patent rights pertinent to DVD discs or players which Philips has acquired the right to license, which have or are entitled to a priority date prior to January 1, 1997, and which are essential to DVD discs or players. Article 1.07 goes on to define as "essential" those patents which are necessary as a practical matter for compliance with the DVD-Video or DVD-ROM specifications. The license, therefore, includes not only all patents technically necessary to manufacture a product to the standard specifications, but also those which a typical licensee is likely to require. For example, it may be theoretically possible to design around a particular patent at significant additional cost (and without additional benefit), but few, if any, licensees who pay the standard royalty rate for other essential patents would want such patent excluded from the license. Indeed, it is fair to say that most, if not all, licensees would want such patents included.

Article 2.07 describes the method by which patents are selected for the portfolio license. The prospective licensee is specifically informed that Philips has appointed an independent patent expert to evaluate the patents of the three licensors for "essentiality" and that the portfolio included in the license may be amended from time to time based on the results of that evaluation.

In Article 2.03, each licensor agrees to grant a license to each licensee under any essential patent which Philips, Sony or Pioneer acquire the right to license in the future. Thus, to the extent any of the licensors are issued essential patents in the future or other companies join the proposed licensing program, all licensees are guaranteed a license under any such essential patent.

Articles 2.05 and 2.06 set forth the terms of the licensees' grant of patent rights. For the identical term of the license granted by Philips, Sony and Pioneer, the licensee agrees to grant to the licensors and other licensees (who also agree to the terms of the grant back) a royalty bearing license on essential patents. Thus, the scope of the grant back is virtually identical to the scope of the license itself. The grant back would not create any disincentive to innovate as it specifically allows the licensee to charge a royalty for its grant of a license and would only prevent a particular patent holder from deciding to use its after-acquired patent position to completely block others from competing in a business in which they already have invested substantial resources.

Article 4 sets forth the royalty payments to be made by licensees. The license provides for a $10,000 payment upon execution of the license ($5,000 of which may be credited to royalty payments) and a running royalty of $.05 per disc or 3.5% of the net selling price of a player, with a minimum player payment of $7.00 until January 1, 2000 and a minimum of $5.00 thereafter.[2]

[2] Widespread public reports have suggested that the typical disc will retail for approximately $20-25. The per disc royalty thus amounts to approximately .22% of the retail price of discs, although the royalty typically will be

Article 4 makes plain that no royalties are due unless "a Licensed Patent is utilized" and, therefore, there are no royalty paying obligations regardless of whether the 10-year license is in effect if the licensee has adopted new or different technology that does not utilize any of the patents in the portfolio.

Articles 4.09 and 4.10 provide that licensees must maintain and furnish certain information relevant to issues of infringement and appropriate royalty payments, but specify that such information shall be provided to independent experts rather than to any licensor itself.

The licenses provide for "most favorable nations" terms under which each licensee is assured of receiving the most favorable royalty rate granted any other portfolio licensee under the conditions specified in Article 5. Thus, no similarly situated licensee is given a competitive advantage by the license over any other such licensee.

Article 10.05 gives each licensor the right to withdraw its own patents from the portfolio license with respect to any licensee which both (1) brings a lawsuit against the licensor for infringement of an essential DVD patent and (2) refuses to license such patents to the licensor on fair and reasonable terms. This provision is necessary to prevent portfolio licensees from taking unreasonable and unfair advantage of the fact that each portfolio licensor already has agreed to license its patent on the open, fair and non-discriminatory terms provided in the portfolio license at royalty rates that are likely considerably lower than what would be payable if patents were licensed individually outside the portfolio license.

Without the provisions of Article 10.05, a portfolio licensee could, while enjoying the considerable benefits of the portfolio license, attempt to extract unreasonable terms for licensing its patents as a result of already being licensed under the portfolio license. Article 10.05 merely "evens the playing field," returns the parties to the bargaining position each would have been in but for the portfolio license, and creates no competitive issues. This is particularly so in light of each portfolio licensors' undertaking to license its patents outside the portfolio license. Thus, a licensee who subjects itself to the provision of Article 10.05 by filing suit and refusing to grant a license on fair and reasonable terms is not denied the right to a license for essential patents, just to a license for essential patents on the favorable terms of the portfolio license.

Finally, Article 11.04 provides that any disputes involving the license shall be submitted to arbitration in New York and resolved under New York law. This provides for a certain and cost effective method to resolve disputes.

Agreement Among Licensors

The agreements among Philips, Sony and Pioneer relating to the Proposed Licensing Program are set forth in two bilateral Agreements and Amendment No. 1 thereto, one between Sony and Philips and one identical agreement between Pioneer and Philips. The Agreements and Amendments are appended hereto as Exhibit D.

The Agreements basically set forth the terms under which Philips shall license the three companies' essential patents and set out many of the same terms which are incorporated

payable by the disc replicator.

in the licenses itself and are discussed above. The Agreements make plain that the Proposed Licensing Program does not in any way impede the companies' ability to license their patents on their own under any conditions they may negotiate.

Article 2.01 of the Agreement provides that Philips shall offer the portfolio license to "all interested third parties." Article 5 of Amendment No. 1 further specifies that Philips shall grant licenses "to all interested parties and shall not discriminate against or among potential licensees" although Philips is entitled to seek financial guarantees on royalty payments when required. The Agreements also set out various terms for the collection and distribution of royalties. Although Article 4.03 provides that each party may consult with the others in the event of a good faith belief that an act of infringement has occurred, Article 4.04 provides that each party retains the right to enforce its patents as it sees fit.

Article 7 of Amendment No. 1 sets forth the details of the procedure by which Philips shall retain an independent expert to assure that all patents in the portfolio are essential, and provides the procedure under which patents may be added to the Proposed Licensing Program.

Conclusion

It is anticipated that DVD-Video and DVD-ROM applications will gain widespread acceptance among consumers in the United States and throughout the world. Intellectual property rights granted by the United States and other sovereign nations to numerous unrelated entities could seriously delay if not block the introduction of this new and significant technology. The Proposed Licensing Program described above eliminates one potential impediment to the implementation of DVD-Video and DVD-ROM by allowing all essential patents of Philips, Sony and Pioneer to be offered in a single, non-discriminatory, fair and cost effective licensing program. The Proposed Licensing Program has been carefully crafted in an effort to avoid any competition concerns which may arise from the combining of patents belonging to independent entities within a single license. We respectfully submit that the Proposed Licensing Program has successfully addressed any competition concerns, and that the pro-competitive aspects of the program far outweigh any potential competition issues which may remain.

We will be available at your convenience to provide any further information you may require. We very much appreciate the Division's attention to this matter.

Respectfully,

Garrard R. Beeney

for Koninklijke Philips Electronics, N.V.; Sony Corporation of Japan and Pioneer Electronic Corporation of Japan

DVD Business Review Letter Response

December 16, 1998

VIA FAX
Garrard R. Beeney, Esq.
Sullivan & Cromwell

125 Broad Street
New York, New York 10004-2498

Dear Mr. Beeney:

This letter is in response to your request on behalf of Koninklijke Philips Electronics, N.V. ("Philips"), Sony Corporation of Japan ("Sony") and Pioneer Electronic Corporation of Japan ("Pioneer") for the issuance of a business review letter pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. ¶ 50.6. You have requested a statement of the Department of Justice's antitrust enforcement intentions with respect to a proposed arrangement pursuant to which Philips will assemble and offer a package license under the patents of Philips, Sony and Pioneer (collectively, the "Licensors") that are "essential," as defined below, to manufacturing Digital Versatile Discs (DVDs) and players in compliance with the DVD-ROM and DVD-Video formats, and will distribute royalty income among the Licensors.

I. The DVD-ROM and DVD-Video Formats

The Standard Specifications for the DVD-ROM and DVD-Video formats describe the physical and technical parameters for DVDs for read-only-memory and video applications, respectively, and "rules, conditions and mechanisms" for player units for the two formats.[1] In either format, the DVD offers storage capacity more than seven times that of a compact disc; a single-layer, single-sided DVD, for example, can store 4.7 billion bytes (4.38 GB) of information including audio, video, text, and data. Employing compression technology, a DVD-Video disc can hold a 135-minute feature film on a single side.

The Licensors, along with a number of other producers of consumer electronics hardware, software, or both, established the Standard Specifications.[3] These Standard Specifications appear to implicate the intellectual property rights of numerous firms.

II. The Proposed Arrangement

The proposed arrangement is embodied in two pairs of licenses: two separate but substantially identical licenses to Philips from Sony and Pioneer (the "DVD-Video and DVD-ROM Agreement"); and a pair of standard licenses from Philips to DVD makers (the "Disc License") and player manufacturers (the "Player License"). Through these two sets of licenses, Philips aggregates the Licensors' patents and will disseminate them to users of the DVD-ROM and DVD-Video formats.

---

[1] DVD Specifications for Read-Only Disc (the "Standard Specifications"), Part 3: Video Specifications, Version 1.1 (December 1997), § 3.3.1. You have attached the Standard Specifications as Exhibit A to your letter. DVD-Video, which is described in Part 3 of the Standard Specifications, appears to be a subunit of the DVD-ROM format. The DVD-Video specifications indicate that DVD-Video discs shall comply with Parts 1 and 2 of the Standard Specifications, which describe the disc's physical and file-system characteristics, respectively. Id., § 1.1.

[3] In addition to the Licensors, the publishers of the DVD-ROM Specifications are: Hitachi, Ltd.; Matsushita Electric Industrial Co., Ltd.; Mitsubishi Electric Corporation; Thomson Multimedia; Time Warner Inc.; Toshiba Corp.; and Victor Company of Japan, Ltd. While your letter includes information concerning the process by which these formats were established, you have not requested, and this letter does not offer, an opinion on any competitive issues presented by the development of these formats or any other DVD-related format.

A. The patents to be licensed

Under the proposed arrangement, Philips is licensing from the other Licensors those patents that: (i) they owned or controlled as of specific dates in 1997; (ii) are entitled to a priority date before December 31, 1996;[7] and (iii) are "essential," which is defined as "necessary (as a practical matter) for compliance with the DVD Video or DVD-ROM Standard Specifications."[8] In turn, Philips will sublicense those patents, along with its own patents that meet the same criteria, in the Portfolio Licenses for use in making discs or players, respectively, that comply with either of those formats.

Initially, each Licensor has designated its "essential" patents for inclusion in the Portfolio Licenses; there are 115 patents in all for the manufacture of DVD players, and 95 for the manufacture of the discs themselves. However, the Licensors have retained a patent expert to review the designated United States patents and make an independent determination as to their "essentiality." His determination, reflecting his "best independent judgment," is to be based on information he obtains from the Licensors, others in the industry, and the advice of technical experts he may retain. The review, which is already underway, will not entail an examination of validity. Should the expert determine that a patent initially designated as "essential" is not, Philips will exclude it from the Portfolio Licenses. However, licensees that have already taken the Disc or Player License shall have the option to retain their licenses to the newly excluded patent.

While one of the license documents indicates that the patent expert is to be "appointed" by Philips, the letters that the Licensors will send to the expert state that all of them are retaining him. Further, the letters state that the expert's conclusions will have no bearing on either his compensation or any Licensor's future retention of him or his law firm.

As noted above, the DVD-Video and DVD-ROM Agreements ensure only that the Licensors' "essential" patents with filing dates before December 31, 1996, and which were owned or controlled by the Licensors as of November 24, 1997 (or, in Pioneer's case, October 1, 1997) will be part of the Portfolio Licenses. You have stated to us that, as of December 1, 1998, no Licensor has indicated that it owns or controls an "essential" patent that falls outside these bounds. Should such a patent emerge, however, the DVD-Video and DVD-ROM Agreements commit the Licensors to licensing it, "at fair and reasonable conditions," to any licensee under the Portfolio Licenses, either through Philips or individually.

[7] DVD-Video and DVD-ROM Agreement, Arts. 1.06-1.07. You have confirmed that the term "priority date" means, for any given patent in the Portfolio License, the first date on which the application for that patent, or for a patent on the same invention in an another country, was filed. See 35 U.S.C. § 119.

[8] We understand this definition to encompass patents which are technically essential—*i.e.*, inevitably infringed by compliance with the specifications—and those for which existing alternatives are economically unfeasible. As discussed below, a less concrete definition of the term "as a practical matter" could give rise to difficult competitive issues. Neither Sony's and Pioneer's licenses to Philips nor the Portfolio Licenses convey rights to patents that are "essential" by virtue of the DVD formats' incorporation of MPEG-2 video compression technology.

B. The joint licensing arrangement

1. The licenses from Sony and Pioneer to Philips

Sony and Pioneer have granted Philips nonexclusive, sublicensable licenses on their "essential" patents to enable Philips to grant licenses "to all interested parties . . . to manufacture, have made, have manufactured components of, use and sell or otherwise dispose of" discs and players that conform to the Standard Specifications. The licenses obligate Philips to grant licenses on the "essential" patents for use in conformity with the specifications nondiscriminatorally to all interested third-parties. All three Licensors, however, remain free to license their "essential" patents independently of the Portfolio Licenses, including for uses outside the DVD-ROM and DVD-Video formats.

The licenses from Sony and Pioneer also establish the Portfolio Licenses' royalty rates. The Player License per-unit royalty is to be 3.5% of the net selling price for each player sold, subject to a minimum fee of $7 per unit, which drops to $5 as of January 1, 2000. The Disc License royalty is to be $.042 per disc sold. In addition, each Portfolio License requires a $10,000 initial payment, half of which is creditable against the per-unit royalties. Philips' licenses from Sony and Pioneer separately set the latter two firms' share of these royalties, again on a per-unit basis. The allocation of royalties among the Licensors is not a function of the number of patents contributed to the pool. To ensure the receipt of their agreed royalties, Sony's and Pioneer's independent auditors may audit Philips' books and records up to once a year.

While each of the Licensors retains sole discretion to pursue infringers, the licenses from Sony and Pioneer require each Licensor to notify the others before initiating any enforcement action and provide for sharing of joint infringement litigation expenses.

2. The Portfolio Licenses

As authorized by its licenses from Sony and Pioneer, Philips' licenses to disc and player manufacturers will be for use in conformity with the Standard Specifications. However, the Portfolio Licenses will notify potential licensees that all the Licensors are "willing to license their respective patent rights for optical disc manufacturing, whether within or outside of the DVD-Video and DVD-ROM Standard Specifications . . . on reasonable terms and conditions." They will warn potential licensees that licenses from other intellectual property owners may be necessary for compliance with the formats. A "Most Favourable Conditions" clause will entitle the licensee to the benefit of any lower royalty rate Philips grants to another licensee under "otherwise similar and substantially the same conditions."

Each Portfolio License will have a term of ten years from the license's effective date, subject to termination for a limited number of reasons.[37] To verify royalties owed and paid, Philips may appoint an independent accountant to audit its licensees' books and records up to once a year and may require licensees to provide the accountant with additional information for that purpose. The Portfolio Licenses also require licensees to provide, on

---

[37] Philips or its licensee may terminate the license on 30 days' notice for the other party's default. Philips also may terminate for licensee bankruptcy, failure to pay royalties, and without notice in response to a licensee's lawsuit against any Licensor for infringement of an "essential" patent that licensee owns or controls, after the licensee has refused that Licensor's request for a license.

request, information for review by a patent expert to determine whether a particular product infringes any of the licensed patents and, thus, triggers royalty obligations. The licensees' obligation to provide information to the independent accountant and patent expert extends only to the information necessary to determine the amount of royalties owed or whether they are owed at all.

One of the grounds on which Philips may terminate a license relates to the licensees' grantback obligation: Portfolio licensees must grant the Licensors and fellow licensees a license, "on reasonable, non-discriminatory conditions comparable to those set forth herein," on any patents they own or control that are "essential" to either disc or player manufacture in conformity with the Standard Specifications. As noted above, this obligation is reinforced by Philips' right to terminate without notice the license of any licensee that, after having refused to grant a Licensor a license on an "essential" patent it owns, sues that Licensor for infringement of that patent.

III. Analysis

As with any aggregation of patent rights for the purpose of joint package licensing, commonly known as a patent pool, an antitrust analysis of this proposed licensing program must examine both the pool's expected competitive benefits and its potential competitive hazards. In particular, one expects that a patent pool "may provide competitive benefits by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation."[44] At the same time, "some patent pools can restrict competition, whether among intellectual property rights within the pool or downstream products incorporating the pooled patents or in innovation among parties to the pool."[45] Accordingly, the following analysis addresses (i) whether the proposed licensing program is likely to integrate complementary patent rights and (ii), if so, whether the resulting competitive benefits are likely to be outweighed by competitive harm posed by other aspects of the program.

A fundamental premise of the following analysis is that the patents to be licensed are valid. This is a legitimate presumption with any patent. On the other hand, persuasive evidence to the contrary would undermine virtually any licensing arrangement: "A licensing scheme premised on invalid or expired intellectual property rights will not withstand antitrust scrutiny."[47] Unaccompanied by legitimate intellectual property rights, restrictions on licensors or licensees are highly likely to be anticompetitive. None of the information that you have provided us warrants abandonment of the presumption of validity as to any of the patents to be licensed. Should the Department subsequently receive information that undercuts this presumption, its enforcement intentions as to the proposed arrangement might be very different.

[44] Department of Justice-Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property* ("*IP Guidelines*"), § 5.5.

[45] Letter from Joel I. Klein to Gerrard [*sic*] R. Beeney, Esq., June 26, 1997 ("MPEG-2 Business Review Letter"), 9 (citing *IP Guidelines*, § 5.5).

[47] MPEG-2 Business Review Letter, 9 (citing *United States v. Pilkington plc*, 1994 Trade Cas. (CCH) ¶ 70,842 (D. Ariz. 1994)).

A. Integration of Complementary Patent Rights

If the Licensors owned patent rights that could be licensed and used in competition with each other, they might have an economic incentive to utilize a patent pool to eliminate competition among them. A pool that served that purpose "would raise serious competitive concerns."[49] In combining such substitute patents, the pool could serve as a price-fixing mechanism, ultimately raising the price of products and services that utilize the pooled patents. If, on the other hand, the pool were to bring together complementary patent rights, it could be "an efficient and procompetitive method of disseminating those rights to would-be users."[50] By reducing what would otherwise be three licensing transactions to one, the pool would reduce transactions costs for Licensors and licensees alike. By ensuring that each Licensor's patents will not be blocked by those of the other two, the pool would enhance the value of all three Licensors' patents.

One way to ensure that the proposed pool will integrate only complementary patent rights is to limit the pool to patents that are essential to compliance with the Standard Specifications. Essential patents by definition have no substitutes; one needs licenses to each of them in order to comply with the standard. At the same time, they are complementary to each other; a license to one essential patent is more valuable if the licensee also has licenses to use other essential patents.

A broader inclusion criterion than essentiality carries with it two anticompetitive risks, both arising from the possibility that there may be substitutes for patents included in the pool. Consider, for example, a situation where there are several patented methods for placing DVD-ROMs into packaging—each a useful complement to DVD-ROM manufacturing technology, but not essential to the standard. A DVD-ROM maker needs to license only one of them; they are substitutes for each other. Inclusion in the pool of two or more of those patents would risk turning the pool into a price-fixing mechanism. Inclusion in the pool of one of the patents, which the pool would convey along with the essential patents, could in certain cases unreasonably foreclose the competing patents from use by manufacturers; because the manufacturers would obtain a license to the one patent with the pool, they might choose not to license any of the competing patents, even if they otherwise would regard the competitive patents as superior. Limiting a pool to essential patents ensures that neither of these concerns will arise; rivalry is foreclosed neither among patents within the pool nor between patents in the pool and patents outside it.

If our understanding of the criterion "necessary (as a practical matter)" is correct, then it appears that the Licensors intend to license through the pool only complementary patents for which there are no substitutes for the purposes of compliance with the Standard Specifications. Some uncertainty arises from this definition's imprecision: Unlike the MPEG-2 pool, which required actual technical essentiality for eligibility, this pool introduces the concept of necessity "as a practical matter." On its face, this latter standard is inherently more susceptible to subjective interpretation. An excessively liberal interpretation of it could lead to the inclusion of patent rights for which there were viable substitutes. In that event, the pool could injure competition by foreclosing such substitutes.

---

[49] MPEG-2 Business Review Letter, 9.

[50] *Id.*

Based on what you have told us, however, the definition of "necessary (as a practical matter)" that the expert will be employing is sufficiently clear and demanding that the portfolio is unlikely to contain patents for which there are economically viable substitutes. Thus, so long as the patent expert applies this criterion scrupulously and independently, it is reasonable to expect that the Portfolio will combine complementary patent rights while not limiting competition between them and other patent rights for purposes of the licensed applications.

The structure of this pool, however, creates some concern about the expert's ability to apply this criterion entirely independent of the Licensors. While you have stated that the patent expert will be "independent" and demonstrated that his independence is a term of the licenses from Sony and Pioneer to Philips, the expert is being retained directly by the Licensors, who have an incentive to combine in the pool any of their competing DVD-related patents and to foreclose others' competing patents.[56] Without more, there would be justifiable skepticism that this structure would ensure a disinterested review of the "essentiality" of the patent rights put forward.

However, in furtherance of the provision for independence in the licenses from Sony and Pioneer to Philips, each Licensor has assured the U.S. expert in writing that the expert's compensation and future retention will not be affected by his determinations as to essentiality; the same assurance will go to the Japanese patent expert as well. These assurances, of course, are no guarantee. Their continuing fulfillment is necessary to the expert's independence and, consequently, to the likelihood that the portfolio will contain only complementary patents without foreclosing competition. Whether they will be sufficient as well as necessary remains to be seen.

Although the patent-expert mechanism is flawed, the Department is willing to base its present enforcement intentions on your representation that the combination of the Licensors' contractual commitment to independence and their written assurances to the expert will insulate him from their interests sufficiently to ensure that the Portfolio Licenses will contain only those patent rights of the Licensors that all DVD-Video and DVD-ROM licensees will need. In that case, the proposed arrangement would serve the procompetitive purpose of combining complementary technologies into a package that will be likely to lower costs to makers of DVD-Video and DVD-ROM discs and players. If, nevertheless, these assurances prove insufficient either to ensure the expert's ability to function independently and objectively or to ensure that the pool will contain only essential patents, the Department's enforcement intentions as to the proposed arrangement might be very different.

B. Foreclosure of Competition in Related Markets

As mentioned above, the Licensors are competitors in markets vertically related to the licensed technology—not only in "downstream" markets such as the manufacture of DVD

[56] Because the royalty allocation is unaffected by each Licensor's share of the patents in the Portfolio License, the Licensors have no financial incentive to exclude each other's non-essential patents. In the MPEG-2 pool, in contrast, the joint licensor, which retained the expert, was an entity separate from the patent owners with no intellectual property of its own at stake. Moreover, the pool members themselves had a strong incentive to exclude non-essential patents, since their share of the royalties was a direct function of the number of essential patents they held.

discs and players, but also in the creation of content, such as feature-length films, that is incorporated in DVD discs. Consequently, the question arises whether this pool is likely to impede competition in any of those markets, not only between any given Licensor and licensees, but also among the Licensors themselves.

Based upon what you have told us, the proposed licensing program does not appear to have any such anticompetitive potential in the markets in which the licensed technology will be used. First, the agreed royalty is sufficiently small relative to the total costs of manufacture that it is unlikely to enable collusion among sellers of DVD players or discs. Second, the proposed program should enhance rather than limit access to the Licensors' "essential" patents. Because Philips must license on a non-discriminatory basis to all interested parties, it cannot impose disadvantageous terms on competitors, let alone refuse to license them altogether. Should the agreed pool royalty prove economically unrealistic, each Licensor's ability to grant licenses on its own to users of the Standard Specifications provides a backstop. Third, the extent of Philips' ability to audit licensees, through independent accountants, is unlikely to afford it anticompetitive access to competitively sensitive proprietary information, such as cost data. Sony's and Pioneer's similarly limited right to an annual audit of Philips' conduct as joint licensor should not create any greater likelihood of collusion. Nor does there seem to be any facet of the proposed program that would facilitate collusion or dampen competition among the Licensors in the creation of content for software.

C. Effect on Innovation

Because only already-filed "essential" patents and patent applications are required for inclusion in the Portfolio, the program does not discourage the Licensors from continuing research and development that may relate to the standard. Further, the Licensors are free to license their "essential" patents for purposes that compete with the DVD-Video and DVD-ROM standards.

Ordinarily, patent license grantback provisions might be expected to raise the question whether, by reducing licensees' incentives to innovate, they threaten competitive harm that outweighs their procompetitive effects. Here, however, the proposed grantback provisions are so narrow that they are unlikely to raise significant issues. Their scope is commensurate with that of the Licenses: They cover only "essential" patents. A licensee's non-"essential" improvements remain its own and may be licensed or not, as the licensee wishes. Thus, the grantback obligation seems unlikely to apply to further innovation within the DVD-ROM and DVD-Video formats. Instead, it is far more likely to force cross-licenses, on "reasonable, non-discriminatory conditions comparable to those" of the Portfolio Licenses, from owners of already extant "essential" patents. In requiring licensees to offer the Licensors and fellow licensees access, on reasonable terms, to whatever "essential" patents they own or control, the Portfolio Licenses ensure that no licensee may take advantage of the benefits of the pool while exploiting its own market power over users of the Standard Specifications. The grantback provision is likely simply to bring other "essential" patents into the Portfolio, thereby limiting holdouts' ability to exact a supracompetitive toll from Portfolio licensees and further lowering licensees' costs in assembling the patent rights essential to their compliance with the Standard Specifications. While easing, though not altogether eliminating, the holdout problem, the grantback should not create any disincentive among licensees to innovate.

In the current circumstances, the proposed ten-year term of the license does not pose significant concerns. The Portfolio Licenses authorize only a limited field of use for the licensed technology—the manufacture and sale of products that comply with the Standard Specifications; they do not limit licensees' other options. Licensees may seek presently unknown methods of complying with these standards, or they may support altogether different product standards. The absence of any renewal clause puts potential licensees on notice that they will be facing a new market-based negotiation for access to the technology on the expiration of the Portfolio Licenses ten years hence. The uncertainty of market conditions at that time makes it impossible to speculate on the degree of power, if any, the Licensors will hold over any future technology licensing market.

IV. Conclusion

Based on the information and assurances that you have provided us, it appears that the proposed arrangement is likely to combine complementary patent rights, thereby lowering the costs of manufacturers that need access to them in order to produce discs and players in conformity with the DVD-Video and DVD-ROM formats. Your assurances and information indicate that the proposed arrangement is not likely to impede competition, either in the licensing or development of technology for use in making DVDs, players, or products that conform to alternative formats, or in the markets in which DVDs and players compete.

For these reasons, the Department is not presently inclined to initiate antitrust enforcement action against the conduct you have described. This letter, however, expresses the Department's current enforcement intention. In accordance with our normal practices, the Department reserves the right to bring an enforcement action in the future if the actual operation of the proposed conduct proves to be anticompetitive in purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. ¶ 50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data will be made publicly available within 30 days of the date of this letter, unless you request that part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,

/ s / Joel I. Klein

NEWS from the Federal Communications Commission

Media Contact:
Mark Wigfield, (202) 418-0253
mark.wigfield@fcc.gov

For Immediate Release

FCC ACTS TO RESTORE INTERNET FREEDOM

Reverses Title II Framework, Increases Transparency to Protect Consumers, Spur Investment, Innovation, and Competition

WASHINGTON, December 14, 2017—The Federal Communications Commission today voted to restore the longstanding, bipartisan light-touch regulatory framework that has fostered rapid Internet growth, openness, and freedom for nearly 20 years.

Following detailed legal and economic analysis, as well as extensive examination of comments from consumers and stakeholders, the Commission reversed the FCC's 2015 heavy-handed utility-style regulation of broadband Internet access service, which imposed substantial costs on the entire Internet ecosystem.

In place of that heavy-handed framework, the FCC is returning to the traditional light-touch framework that was in place until 2015. Moreover, the FCC today also adopted robust transparency requirements that will empower consumers as well as facilitate effective government oversight of broadband providers' conduct. In particular, the FCC's action today has restored the jurisdiction of the Federal Trade Commission to act when broadband providers engage in anticompetitive, unfair, or deceptive acts or practices.

The framework adopted by the Commission today will protect consumers at far less cost to investment than the prior rigid and wide-ranging utility rules. And restoring a favorable climate for network investment is key to closing the digital divide, spurring competition and innovation that benefits consumers. The Declaratory Ruling, Report and Order, and Order adopted by the Commission takes the following steps to achieve these goals:

Declaratory Ruling

- Restores the classification of broadband Internet access service as an "information service" under Title I of the Communications Act—the classification affirmed by the Supreme Court in the 2005 *Brand X* case.
- Reinstates the classification of mobile broadband Internet access service as a private mobile service.
- Finds that the regulatory uncertainty created by utility-style Title II regulation has reduced Internet service provider (ISP) investment in networks, as well as hampered innovation, particularly among small ISPs serving rural consumers.
- Finds that public policy, in addition to legal analysis, supports the information service classification, because it is more likely to encourage broadband investment and innovation, thereby furthering the goal of closing the digital divide and benefitting the entire Internet ecosystem.

- Restores broadband consumer protection authority to the Federal Trade Commission (FTC), enabling it to apply its extensive expertise to provide uniform online protections against unfair, deceptive, and anticompetitive practices.

Report and Order

- Requires that ISPs disclose information about their practices to consumers, entrepreneurs, and the Commission, including any blocking, throttling, paid prioritization, or affiliated prioritization.
- Finds that transparency, combined with market forces as well as antitrust and consumer protection laws, achieve benefits comparable to those of the 2015 "bright line" rules at lower cost.
- Eliminates the vague and expansive Internet Conduct Standard, under which the FCC could micromanage innovative business models.

Order

- Finds that the public interest is not served by adding to the already-voluminous record in this proceeding additional materials, including confidential materials submitted in other proceedings.

The item takes effect upon approval by the Office of Management and Budget of the new transparency rule that requires the collection of additional information from industry.

Action by the Commission December 14, 2017 by Declaratory Ruling, Report and Order, and Order (FCC 17-166). Chairman Pai, Commissioners O'Rielly and Carr approving. Commissioners Clyburn and Rosenworcel dissenting. Chairman Pai, Commissioners Clyburn, O'Rielly, Carr and Rosenworcel issuing separate statements.

WC Docket No. 17-108

###

Office of Media Relations: (202) 418-0500
ASL Videophone: (844) 432-2275
TTY: (888) 835-5322
Twitter: @FCC
www.fcc.gov/office-media-relations

FCC OFFICE OF THE CHAIRWOMAN

FACT SHEET: *FCC Chairwoman Rosenworcel Proposes to Restore Net Neutrality Rules*

Proposes to Re-Establish FCC's Authority Over Broadband Providers Under Title II

"In the wake of the pandemic and the generational investment in internet access, we have a window to update our policies to make sure that the internet is not only open, but fast and fair, safe and secure. I am committed to seizing this opportunity. Now is the time for our rules of the road for internet service providers to reflect the reality that internet access is a necessity for daily life. Let's get to it."
– FCC Chairwoman Jessica Rosenworcel.

<u>FACT SHEET</u>

<u>Overview</u>

The internet is too important to our society and economy not to have effective oversight. However, in 2018, the FCC abdicated its authority over broadband and repealed net neutrality. Today, FCC Chairwoman Jessica Rosenworcel shared with her colleagues a proposal that would begin the process of re-establishing the FCC's oversight over broadband and restoring uniform, nationwide net neutrality rules, which would allow the FCC to protect internet openness and consumers, defend national security, and advance public safety.

<u>What is being proposed</u>

The Chairwoman is proposing the FCC take the first procedural steps toward reaffirming rules that would treat broadband internet service as an essential service for American life. As work, healthcare, education, commerce, and so much more have moved online, no American household or business should need to function without reliable internet service. This was especially true during the pandemic. Such rules would affirm—under Title II of the Communications Act—that broadband service is on par with water, power, and phone service; that is: essential.

The proposed rules would return fixed and mobile broadband service to its status as an essential "telecommunications" service. The proposal will be made public and will allow for public input. The proposal seeks to largely return to the successful rules the Commission adopted in 2015.

<u>How It Helps Consumers</u>

- **Openness –** Establish basic rules for Internet Service Providers that prevent them from blocking legal content, throttling your speeds, and creating fast lanes that favor those who can pay for access.
- **Security** – Reclassify broadband internet access to give the FCC and its national security partners the tools needed to defend our networks from potential security threats.
- **Safety –** Allow the FCC to enhance the resiliency of broadband networks and bolster efforts to require providers to notify the FCC and consumers of internet outages.
- **Nationwide Standard** – Establish a uniform national standard rather than a patchwork of state-by-state approaches, benefiting consumers and Internet Service Providers.

Facts

- Since the adoption of a policy statement in 2005 affirming net neutrality principles until 2018, it was the clear policy of the FCC across administrations that it would enforce open Internet standards.
- Without this authority, no federal agency can effectively monitor or help with broadband outages that threaten jobs, health, education, and safety.
- Open internet policies protect Americans' freedom and their speech, only enshrining limits on broadband companies' ability to limit consumer and business activities.
- The rulemaking specifically proposes to forbear from 26 provisions of Title II and more than 700 Commission rules that might pose a threat to network investment or are unnecessarily burdensome. Accordingly, policies like rate regulation and network unbundling would be strictly prohibited.

Background

- 2004: President Bush's first FCC Chair challenged the broadband network industry to preserve "Internet Freedoms."
- 2005: FCC issues Policy Statement affirming open internet principles.
- 2008: President Bush's second FCC Chair tried to enforce these principles when Comcast "unduly squelche(d) the dynamic benefits of an open and accessible Internet."
- 2010: The D.C. Circuit vacated the Comcast enforcement action, saying the FCC lacked legal jurisdiction.
- 2010: FCC adopts compromise net neutrality rules "rooted in ideas first articulated" by the prior Chairs.
- 2014: D.C. Circuit overturns the 2010 rules in *Verizon v. FCC* on grounds that the rules were only grounded in authority granted by Section 706 of the Act and not also Title II.
- 2015: FCC adopts rules enshrining the open internet principles under Title II.
- 2016: D.C. Circuit affirms the 2015 rules in their entirety.
- 2018: After a change in administration, FCC abdicates open internet rules and authority over the internet entirely.
- 2019: D.C. Circuit allows abdication to move forward but overturns the FCC's attempted preemption of state open internet rules, and criticizes its treatment issues including public safety.
- 2020: California's net neutrality law goes into effect, and along with other state laws and orders, broadband providers must comply with a patchwork of state regulations.
- 2023: Chairwoman Jessica Rosenworcel proposes to reclassify broadband under Title II and reintroduce uniform, nationwide open internet rules.

Process

The Chairwoman shared with her colleagues a Notice of Proposed Rulemaking. If adopted by a vote of the full Commission at its monthly meeting on October 19, 2023, the agency will begin a new rulemaking to take public comment and reply comments on the proposal. Any person or organization can file comments and see others' comments at https://www.fcc.gov/ecfs. After a review of that public record, the Chairwoman can decide whether and how to proceed, including adopting final rules which would also require a majority vote of the bipartisan FCC.

###

Released: September 26, 2023

Media Contact: MediaRelations@fcc.gov

REMARKS OF
CHAIRWOMAN JESSICA ROSENWORCEL
THE NATIONAL PRESS CLUB
WASHINGTON, DC
SEPTEMBER 26, 2023

It was more than three years ago when the COVID virus reached our shores and upended daily life. Do you remember those early days? It was bewildering. We were told to stay home, hunker down, and move life online. So I grabbed what I thought was important at work and moved my office to my dining room table. At home, I kept changing the location of the Wi-Fi router, feverishly trying to identify the sweet spot where the signal would reach everyone in my family. We had two parents, two kids, a too-crowded house, and all of us on the internet, all the time. It was a lot. And we were lucky.

Because so many others were digitally disconnected. We had people sitting in cars in parking lots to catch a free wireless signal for work and health care appointments. We had kids lingering outside of fast food restaurants with laptops just to go online for class. We had cities and towns fearful they would never thrive without new efforts to extend broadband to their residents and businesses.

As a Nation, we responded to this crisis in an extraordinary way. We made a historic commitment to broadband for all. Congress invested tens of billions of dollars into building out our internet networks and making access more affordable and equitable, culminating in the investment of $65 billion in the Bipartisan Infrastructure Law. The Federal Communications Commission is a part of this big effort to close the digital divide, with our initiative mapping where broadband is and is not in every community and our work helping 21 million households get online and stay online through the Affordable Connectivity Program.

But the pandemic did something else. It made it crystal clear that broadband is no longer nice-to-have; it's need-to-have for everyone, everywhere. It is not a luxury. It is a necessity. It is essential infrastructure for modern life. No one without it has a fair shot at 21st century success. We need broadband to reach 100 percent of us—and we need it fast, open, and fair.

Yet even as our society has reconfigured itself to do so much online, our institutions have failed to keep pace. Today, there is no expert agency ensuring that the internet is fast, open, and fair.

Since the birth of the modern internet, the FCC had played that role. It makes sense. These are principles that have deep origins in communications law and history. After all, back in the era when communications meant telephony, every call went through, and your phone company could not cut off your call or edit the content of your conversation.

Now fast forward to the present. Communications means a lot more than just phone calls. It means access to the internet because broadband is the most important infrastructure of our time. But as a result of the previous FCC's decision to abdicate authority, the agency charged with overseeing communications has limited ability to oversee these indispensable networks and make sure that for every consumer internet access is fast, open, and fair.

That's not right.

Because for everyone, everywhere to enjoy the full benefits of the internet age, internet access should be more than just accessible and affordable. The internet also needs to be open—and that is what I want to focus on today.

The internet's open design is revolutionary. It means creating without permission, building community beyond geography, organizing without physical constraints, consuming content you want when and where you want it, and cultivating ideas not just around the corner but around the world.

I believe it is essential that we sustain this foundation of openness—and that is why, for as long as I have served on the FCC, I have supported net neutrality.

At this point, I think it is worth acknowledging that net neutrality is one of the most widely discussed telecommunications issues of the internet age. But the debate around it has routinely yielded more heat than light. So I am going to keep my comments on this topic to the point and focused on the facts.

It starts with a little history. Roll back before the pandemic. Before the smartphone era. Before the Washington football team was called the Commanders.

Let's start in 2005. That was when the FCC adopted its first open internet policy statement built on the policies that had long been in communications law and history. The agency made clear that when it came to net neutrality, consumers should expect that their broadband providers would not block, throttle, or engage in paid prioritization of lawful internet traffic. In other words, your broadband provider had no business cutting off access to websites, slowing down internet services, and censoring online speech. Your broadband provider was not allowed to play favorites, like steering you fast to some online sites and services because they got a payout, and consigning you to a bumpy and slow road to reach all others. As a consumer, you could go where you want and do what you want on the internet without your broadband provider getting in the way and making choices for you.

After ten years of policymaking and three rounds of litigation, in 2015 the FCC finally adopted net neutrality protections that were upheld by the courts. The FCC had produced open internet policies that passed judicial muster. We had clear rules of the road—and those rules were popular. Eighty percent of Americans support open internet policies.

This appeared to be the end of the net neutrality saga.

But no. Because in 2017 the last administration took it up again and did something different. It announced that it would break with over a decade of consistent FCC policy and repeal the FCC's open internet rules. The public backlash was overwhelming. People lit up our phone lines, clogged our e-mail in-boxes, and jammed our online comment system to express their disapproval.

Despite overwhelming opposition from the public, the FCC repealed net neutrality. In fact, the FCC's actions were so extreme that the United States Senate voted to restore the agency's open internet protections.

I believe this repeal of net neutrality put the agency on the wrong side of history, the wrong side of the law, and the wrong side of the public. It was not good then, but it makes even less sense now. It determined that this infrastructure—which the pandemic proved so essential for modern life—needs no oversight. I think that's wrong.

So today we begin a process to make this right. This afternoon, I am sharing with my colleagues a rulemaking that proposes to restore net neutrality.

This is a first step. When we vote on this rulemaking, we will invite public comment about how restoring net neutrality rules can help ensure internet access is fast, open, and fair. We will seek to develop an updated record on the best way to restore a uniform, national open internet standard.

I recognize the fact that we are kicking off this rulemaking to explore how to reestablish net neutrality rules will be the headline here. But, while I have your attention, there is more I want to share today.

The repeal of net neutrality rules was problematic not only because it wiped away enforceable, bright-line rules to prevent blocking, throttling, and paid prioritization. It was problematic because when the agency reversed the decision to oversee broadband internet access as a "telecommunications service" under Title II of the Communications Act it had a lot of downstream consequences—and we should talk about them.

I recognize that last sentence may have no meaning to most outside of Washington. So let me unpack it. Title II is the part of the law that gives the FCC clear authority to serve as a watchdog over the communications marketplace and look out for the public interest. Title II took on special importance in the net neutrality debate because the courts have ruled that the FCC has clear authority to enforce open internet policies *if* broadband internet is classified as a Title II service.

Providing a strong foundation for net neutrality rules is a good reason to support classifying broadband internet as a Title II service. But again, there are downstream consequences that flow from the agency retreating from Title II. They need attention.

Let me explain.

Back to the pandemic. It made clear that broadband is essential infrastructure for modern life. Access to the internet is now access to everything. And common sense tells us the Nation's leading communications watchdog should have the muscle it needs to protect consumers and make sure their internet access is fast, open, and fair.

Common sense also tells us a thing or two about the state of competition in the broadband marketplace. I am a big believer in the power of competitive markets to drive innovation, investment, and consumer benefits. But I also know the high cost of entry makes competition a challenge in many places. That is why almost half of us lack high-speed service with 100 megabit-per-second download speeds or can only get it from a single provider. In fact, only one-fifth of the country has more than two choices at this speed. So if your broadband provider mucks up your traffic, messing around with your ability to go where you want and do what you want online, you can't just pick up and choose another provider. That provider may be the only game in town. You need a referee on the field looking out for the public interest—and ensuring your access is fast, open, and fair.

On issue after issue, reclassifying broadband as a Title II service would help the FCC serve the public interest more efficiently and effectively.

Start with public safety. In its remand of the FCC's decision to roll back net neutrality, the court found the agency's "disregard of its duty to analyze the impact of the public safety renders its decision arbitrary and capricious." I agree.

The record before the court demonstrated that when firefighters in Santa Clara, California were responding to wildfires they discovered that the wireless connectivity on one of their command vehicles was being throttled. As a result of Title II repeal, the FCC lacked the authority to intervene.

Title II would also bolster our authority to require internet service providers to address internet outages. This really hit home for me when I visited Detroit last year. I heard about Hope Village, a neighborhood of about 6,700 people that suffered through a 45-day internet outage during the pandemic and had little recourse. Because remember, when the FCC backed away from overseeing broadband, the only mandatory outage reporting system we can have in place is focused on long distance voice outages. Let me submit to you in a modern economy—and during the pandemic—collecting only data about when the voice system goes down does not cut it.

Look at national security. The FCC has taken a series of bipartisan actions to reduce our dependence on insecure telecommunications equipment and keep potentially-hostile actors from connecting to our networks. This is good. But it is not enough to keep our adversaries at bay. Today when we strip away authorization to provide service in the United States from state-affiliated companies who may wish to do us harm, we take away what is known as their Section 214 authority. But remember, thanks to the retreat from Title II in the last administration, that authority does not cover broadband. This is a national security loophole that needs to be addressed.

Look at cybersecurity. The FCC is actively involved in federal interagency cybersecurity planning, coordination, and response activities. You want the expert agency with network experience sitting at that table. But without reclassification, the FCC has limited authority to incorporate updated cybersecurity standards into our network policies.

Look at network resilience and reliability. We want to make sure our communications networks hold up during emergency situations like natural disasters. Title II could help us to better monitor the degradation of service in times of emergency, with the kind of required outage reporting I mentioned earlier.

Look at privacy. The law requires telecommunications providers to protect the confidentiality of the proprietary information of their customers. That means that these providers cannot sell your location data, among other sensitive information. Those privacy protections currently extend to phone service customers but not broadband subscribers, because Title II does not cover the latter. Does that really make sense? Do we want our broadband providers selling off where we go and what we do online? Scraping our service for a payday from new artificial intelligence models? Doing any of this without our permission?

Look at broadband deployment. As a Nation we are committed, post-pandemic, to building broadband for all. So keep in mind that when you construct these facilities, utility poles are really important. Title II gives cable and phone companies rights to attach their facilities to utility poles when they deploy service. But when the FCC rolled back its open internet rules, it eliminated the pole attachment rights of broadband-only providers. If you want build out and competition, this is not good. It needs to be fixed.

Look at robotexts. Along with robocalls, they are a big source of consumer complaints to the FCC. One thing we have learned about the bad actors behind this junk is that they are constantly evolving their techniques to reach us with their scams and fraud. Title II authority would give us the maximum flexibility to counter this threat—and evolve our approaches as technology changes.

To be clear, the FCC is actively engaged on all of these issues. But at times it can require duct tape and bailing wire to jerry-rig the justifications to make sure our actions are on solid legal footing. It doesn't always work. And it renders unnecessarily vulnerable some of our most important security efforts. Reclassification of broadband as a Title II service would make FCC work more efficient and effective—and consumers more confident their internet access is fast, open, and fair.

On top of this, restoring our open internet policies will mean that a uniform legal framework applies to the whole country. Because if you think that nothing has happened since the FCC retreated from net neutrality and are asking yourself what is the big deal, think again. Then look harder. Because when the FCC stepped back from having these policies in place, the court said states could step in. So when Washington withdrew, California rode in with its own regime. Other states, too. They put net neutrality rules in state law, executive orders, and contracting policies. So in effect, we have open internet policies that providers are abiding by right now—they are just coming from Sacramento and places like it. But when you are dealing with the most essential infrastructure in the digital age, we benefit from one national policy. All of this means we are not choosing between net neutrality rules and no rules. We are discussing one national standard or a patchwork of state regulations.

Having gone through this drill before, I know that a small, but vocal chorus of naysayers is surely already raising their objections.

They say Title II is heavy-handed. And if we were seeking comment on applying Title II to broadband in its entirety, they might have a point. But instead, we are proposing a light touch. Back in 2015, when the FCC last had net neutrality rules upheld by the courts, the FCC chose to forbear from 27 provisions of Title II of the Communications Act and over 700 agency regulations for broadband and broadband providers. We are sticking with that approach.

They say this is a stalking horse for rate regulation. Nope. No how, no way. We know competition is the best way to bring down rates for consumers. And approaches like the Affordable Connectivity Program are the best bet for making sure service is affordable for all.

They say nothing bad has happened. Again, states stepped into the void created by the FCC retreating from net neutrality. I think it is time for Washington to step back in with a national policy to make sure internet access is fast, open, and fair.

So what happens next? On Thursday, I will release the full text of this rulemaking. It seeks comment on putting back in place policies to prevent your broadband provider from engaging in blocking, throttling, and paid prioritization along with a general conduct rule that prohibits your broadband provider from unreasonably interfering or unreasonably disadvantaging consumers from going where they want and doing what they want online. For consumers, this means internet openness, security, safety—and one nationwide net neutrality standard they can count on. Three weeks later, on October 19, I will ask my colleagues to vote. And, if we get at least three votes to kick off this rulemaking, I promise you I will do a lot of listening. We all need to have an open mind and would all benefit from a fresh record on this subject.

As we move forward, I also would like to make a plea. I have every expectation that this process will get messy at times. I have seen the agency bring up net neutrality before and believe peaceful protests are a sign of a healthy democracy. What I worry about is when things get ugly. In the past, when this subject came up, we saw death threats against Chairman Pai and his family. That is completely unacceptable, and I am grateful to law enforcement for bringing the individual behind these threats to justice. We had a fake bomb threat called in to disrupt a vote at the agency. We had protesters blocking Chairman Wheeler in his driveway and keeping him from his car. We saw a dark effort to tear down a pro-net neutrality nominee for the agency.

I recognize that those who go to these extremes are not listening to or reading these remarks. But those of you who are set the tone for this debate. So make some noise. Raise a ruckus. But keep it in the lines.

Above all, keep speaking up. We are here now because so many people let the agency know this issue matters. We are here now because the COVID pandemic taught us—with painful clarity—just how important broadband access is in modern life. In the United States, we have made a historic commitment to ensure high-speed internet access reaches all. We have invested in this infrastructure like never before. Now let's make sure it is fast, open, and fair for consumers everywhere.

Thank you.

Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon

Brussels, 17 July 2019

The European Commission has opened a formal antitrust investigation to assess whether Amazon's use of sensitive data from independent retailers who sell on its marketplace is in breach of EU competition rules.

Commissioner Margrethe **Vestager**, in charge of competition policy, said: *"European consumers are increasingly shopping online. E-commerce has boosted retail competition and brought more choice and better prices. We need to ensure that large online platforms don't eliminate these benefits through anti-competitive behaviour. I have therefore decided to take a very close look at Amazon's business practices and its dual role as marketplace and retailer, to assess its compliance with EU competition rules."*

Amazon has a dual role as a platform: (i) it sells products on its website as a retailer; and (ii) it provides a marketplace where independent sellers can sell products directly to consumers.

When providing a marketplace for independent sellers, Amazon continuously collects data about the activity on its platform. Based on the Commission's preliminary fact-finding, Amazon appears to use competitively sensitive information – about marketplace sellers, their products and transactions on the marketplace.

As part of its in-depth investigation the Commission will look into:

- the **standard agreements between Amazon and marketplace sellers**, which allow Amazon's retail business to analyse and use third party seller data. In particular, the Commission will focus on whether and how the use of accumulated marketplace seller data by Amazon as a retailer affects competition.
- the role of data in the **selection of the winners of the "Buy Box"** andthe impact of Amazon's potential use of competitively sensitive marketplace seller information on that selection. The "Buy Box" is displayed prominently on Amazon and allows customers to add items from a specific retailer directly into their shopping carts. Winning the "Buy Box" seems key for marketplace sellers as a vast majority of transactions are done through it.

If proven, the practices under investigation may breach EU competition rules on anticompetitive agreements between companies (Article 101 of the Treaty on the Functioning of the European Union (TFEU)) and/or on the abuse of a dominant position (Articles 102 TFEU).

The Commission will now carry out its in-depth investigation as a matter of priority. The opening of a formal investigation does not prejudge its outcome.

Background

Article 101 of the TFEU prohibits anticompetitive agreements and decisions of associations of undertakings that prevent, restrict or distort competition within the EU's Single Market. Article 102 of the TFEU prohibits the abuse of a dominant position. The implementation of these provisions is defined in the Antitrust Regulation (Council Regulation No 1/2003), which can also be applied by the national competition authorities.

Article 11(6) of the Antitrust Regulation provides that the opening of proceedings by the Commission relieves the competition authorities of the Member States of their competence to apply EU competition rules to the practices concerned. Article 16(1) further provides that national courts must avoid adopting decisions that would conflict with a decision contemplated by the Commission in proceedings it has initiated.

The Commission has informed Amazon and the competition authorities of the Member States that it has opened proceedings in this case.

There is no legal deadline for bringing an antitrust investigation to an end. The duration of an antitrust investigation depends on a number of factors, including the complexity of the case, the extent to which the undertakings concerned cooperate with the Commission and the exercise of the rights of defence.

More information on the investigation will be available on the Commission's competition website, in the public case register under case number AT.40462.

IP/19/4291

Press contacts:

Lucia CAUDET (+32 2 295 61 82)
Maria TSONI (+32 2 299 05 26)

General public inquiries: Europe Direct by phone 00 800 67 89 10 11 or by email

Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices

Brussels, 10 November 2020

The European Commission has informed Amazon of its preliminary view that it has breached EU antitrust rules by distorting competition in online retail markets. The Commission takes issue with Amazon systematically relying on non-public business data of independent sellers who sell on its marketplace, to the benefit of Amazon's own retail business, which directly competes with those third party sellers.

The Commission also opened a second formal antitrust investigation into the possible preferential treatment of Amazon's own retail offers and those of marketplace sellers that use Amazon's logistics and delivery services.

Executive Vice-President Margrethe **Vestager**, in charge of competition policy, said: "*We must ensure that dual role platforms with market power, such as Amazon, do not distort competition. Data on the activity of third party sellers should not be used to the benefit of Amazon when it acts as a competitor to these sellers. The conditions of competition on the Amazon platform must also be fair. Its rules should not artificially favour Amazon's own retail offers or advantage the offers of retailers using Amazon's logistics and delivery services. With e-commerce booming, and Amazon being the leading e-commerce platform, a fair and undistorted access to consumers online is important for all sellers.*"

Statement of Objections on Amazon's use of marketplace seller data

Amazon has a dual role as a platform: (i) it provides a marketplace where independent sellers can sell products directly to consumers; and (ii) it sells products as a retailer on the same marketplace, in competition with those sellers.

As a marketplace service provider, Amazon has access to non-public business data of third party sellers such as the number of ordered and shipped units of products, the sellers' revenues on the marketplace, the number of visits to sellers' offers, data relating to shipping, to sellers' past performance, and other consumer claims on products, including the activated guarantees.

The Commission's preliminary findings show that very large quantities of non-public seller data are available to employees of Amazon's retail business and flow directly into the automated systems of that business, which aggregate these data and use them to calibrate Amazon's retail offers and strategic business decisions to the detriment of the other marketplace sellers. For example, it allows Amazon to focus its offers in the best-selling products across product categories and to adjust its offers in view of non-public data of competing sellers.

The Commission's preliminary view, outlined in its Statement of Objections, is that the use of non-public marketplace seller data allows Amazon to avoid the normal risks of retail competition and to leverage its dominance in the market for the provision of marketplace services in France and Germany- the biggest markets for Amazon in the EU. If confirmed, this would infringe Article 102 of the Treaty on the Functioning of the European Union (TFEU) that prohibits the abuse of a dominant market position.

The sending of a Statement of Objections does not prejudge the outcome of an investigation.

Investigation into Amazon practices regarding its "Buy Box" and Prime label

In addition, the Commission opened a second antitrust investigation into Amazon's business practices that might artificially favour its own retail offers and offers of marketplace sellers that use Amazon's logistics and delivery services (the so-called "fulfilment by Amazon or FBA sellers").

In particular, the Commission will investigate whether the criteria that Amazon sets to select the winner of the "Buy Box" and to enable sellers to offer products to Prime users, under Amazon's Prime loyalty programme, lead to preferential treatment of Amazon's retail business or of the sellers that use Amazon's logistics and delivery services.

The "Buy Box" is displayed prominently on Amazon's websites and allows customers to add items from a specific retailer directly into their shopping carts. Winning the "Buy Box" (i.e. being chosen as the offer that features in this box) is crucial to marketplace sellers as the Buy Box prominently shows the offer of one single seller for a chosen product on Amazon's marketplaces, and generates the vast majority of all sales. The other aspect of the investigation focusses on the possibility for marketplace sellers to effectively reach Prime users. Reaching these consumers is important to sellers because the number of Prime users is continuously growing and because they tend to generate more sales on Amazon's marketplaces than non-Prime users.

If proven, the practice under investigation may breach Article 102 of the Treaty on the Functioning of the European Union (TFEU) that prohibits the abuse of a dominant market position.

The Commission will now carry out its in-depth investigation as a matter of priority. The opening of a formal investigation does not prejudge its outcome.

Background and procedure

Article 102 of the TFEU prohibits the abuse of a dominant position. The implementation of these provisions is defined in the Antitrust Regulation (Council Regulation No 1/2003), which can also be applied by the national competition authorities.

The Commission opened the in-depth investigation into Amazon's use of marketplace seller data on 17 July 2019.

A Statement of Objections is a formal step in Commission investigations into suspected violations of EU antitrust rules. The Commission informs the parties concerned in writing of the objections raised against them. The addressees can examine the documents in the Commission's investigation file, reply in writing and request an oral hearing to present their comments on the case before representatives of the Commission and national competition authorities. Sending a Statement of Objections and opening of a formal antitrust investigation does not prejudge the outcome of the investigations.

More information on the investigation is available on the Commission's competition website, in the public case register under case number AT.40462.

The Commission has informed Amazon and the competition authorities of the Member States that it has opened a second in-depth investigation into Amazon's business practices.

This investigation will cover the European Economic Area, with the exception of Italy. The Italian Competition Authority started to investigate partially similar concerns last year, with a particular focus on the Italian market. The Commission will continue the close cooperation with the Italian Competition Authority throughout the investigation.

More information on the investigation will be available on the Commission's competition website, in the public case register under case number AT.40703.

There is no legal deadlines for bringing an antitrust investigation to an end. The duration of an antitrust investigation depends on a number of factors, including the complexity of the case, the extent to which the undertakings concerned cooperate with the Commission and the exercise of the rights of defence.

IP/20/2077

Press contacts:

Arianna PODESTA (+32 2 298 70 24)
Maria TSONI (+32 2 299 05 26)

General public inquiries: Europe Direct by phone 00 800 67 89 10 11 or by email

On 10/11/2020, the Commission decided to initiate antitrust proceedings in case AT.40703 - Amazon Buy Box within the meaning of Article 11(6) of Council Regulation No 1/2003 and Article 2(1) of Commission Regulation No 773/2004.

The proceedings were opened with a view to adopting a decision in application of Chapter III of Council Regulation No 1/2003 and concern the conditions and criteria that govern the selection mechanism of the Buy Box that prominently shows the offer of one single seller for a chosen product on Amazon's websites, with the possibility for consumers to directly purchase that product, as well as the conditions and criteria that govern the eligibility of third party sellers to offer products under the Prime label to users of Amazon's Prime programme. Infringements, within the meaning of Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement, insofar as they may lead to a distortion of competition in favour of Amazon' retail business and/or third party sellers which make use of the "Fulfilment by Amazon" service, were allegedly committed by **Amazon.com, Inc.; Amazon Services Europe SARL; Amazon EU SARL; Amazon Europe Core SARL** and all legal entities directly or indirectly controlled by them. The investigation shall cover the European Economic Area with the exception of Italy.

The initiation of proceedings does not signify that the Commission has made a definitive finding of an infringement but merely signifies that the Commission will deal with the case as a matter of priority.

Antitrust: Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime

Brussels, 20 December 2022

The European Commission has made commitments offered by Amazon legally binding under EU antitrust rules. Amazon's commitments address the Commission's competition concerns over Amazon's **use of non-public marketplace seller data** and over a possible bias in granting to sellers access to its **Buy Box** and its **Prime programme**.

The Commission's concerns

In July 2019, the Commission opened a formal investigation into Amazon's **use of non-public data** of its marketplace sellers. On 10 November 2020, the Commission adopted a Statement of Objections in which it preliminarily found Amazon dominant on the French and German markets, for the provision of online marketplace services to third-party sellers. It also found that that Amazon's reliance on marketplace sellers' non-public business data to calibrate its retail decisions, distorted fair competition on its platform and prevented effective competition.

In parallel, on 10 November 2020, the Commission opened a second investigation to assess whether the criteria that Amazon sets to select the winner of the **Buy Box** and to enable sellers to offer products under its **Prime Programme**, lead to preferential treatment of Amazon's retail business or of the sellers that use Amazon's logistics and delivery services.

In the second investigation, the Commission preliminarily concluded that Amazon abused its dominance on the French, German and Spanish markets for the provision of online marketplace services to third-party sellers.

It also preliminarily concluded that Amazon's rules and criteria for the Buy Box and Prime unduly favour its own retail business, as well as marketplace sellers that use Amazon's logistics and delivery services.

The commitments

To address the Commission's competition concerns in relation to both investigations, Amazon initially offered the following commitments:

- To address the data use concern, Amazon proposed to commit:

- not to use non-public data relating to, or derived from, the independent sellers' activities on its marketplace, for its retail business. This applies to both Amazon's automated tools and employees that could cross-use the data from Amazon Marketplace, for retail decisions;
- not to use such data for the purposes of selling branded goods as well as its private label products.

- To address the Buy Box concern, Amazon proposed to commit to:

- treat all sellers equally when ranking the offers for the purposes of the selection of the Buy Box winner;
- display a second competing offer to the Buy Box winner if there is a second offer from a different seller that is sufficiently differentiated from the first one on price and/or delivery. Both offers will display the same descriptive information and provide the same purchasing experience.

- To address the Prime concerns Amazon proposed to commit to:

- set non-discriminatory conditions and criteria for the qualification of marketplace sellers and offers to Prime;
- allow Prime sellers to freely choose any carrier for their logistics and delivery services and

negotiate terms directly with the carrier of their choice;

- not use any information obtained through Prime about the terms and performance of third-party carriers, for its own logistics services.

Between 14 July 2022 and 9 September 2022, the Commission market tested Amazon's commitments and consulted all interested third parties to verify whether they would remove its competition concerns. In light of the outcome of this market test, Amazon amended the initial proposal and committed to:

- **Improve** the **presentation** of the **second competing Buy Box offer** by making it more prominent and to include a **review mechanism** in case the presentation is not attracting adequate consumer attention;
- **Increase** the **transparency** and **early information flows** to sellers and carriers about the commitments and their newly acquired rights, enabling, amongst others, early switching of sellers to independent carriers;
- Lay out the means for **independent carriers to directly contact their Amazon customers**, in line with data-protection rules, enabling them to provide equivalent delivery services to those offered by Amazon;
- **Improve carrier data protection** from use by Amazon's competing logistics services, in particular concerning cargo profile information;
- **Increase** the **powers** of the **monitoring trustee** by introducing further notification obligations;
- Introduce a **centralised complaint mechanism**, open to all sellers and carriers in case of suspected non-compliance with the commitments.
- **Increase** to **seven years**, instead of the initially proposed five years, the **duration** of the **commitments relating to Prime and the second competing Buy Box offer**.

The Commission found that Amazon's final commitments will ensure that Amazon does not use marketplace seller data for its own retail operations and that it grants non-discriminatory access to Buy Box and Prime. The Commission decided to make them legally binding on Amazon.

The offered commitments cover all Amazon's current and future marketplaces in the European Economic Area. They exclude Italy for the commitments relating to the Buy Box and Prime in view of the decision of 30 November 2021 of the Italian competition authority imposing remedies on Amazon with regard to the Italian market.

The final commitments will remain in force for seven years in relation to Prime and the display of the second competing Buy Box offer, and five years for the remaining parts of the commitments. Under supervision of the Commission, an independent trustee will be in charge of monitoring the implementation and compliance with the commitments.

If Amazon were to breach the commitments, the Commission could impose a fine of up to 10% of Amazon's total annual turnover, without having to find an infringement of EU antitrust rules or a periodic penalty payment of 5% per day of Amazon's daily turnover for every day of non-compliance.

Background

Amazon has a dual role as a platform. It runs a marketplace where independent sellers can sell products directly to consumers and at the same time, it sells products on its platform as a retailer, in competition with those independent sellers. As a result of this dual position, Amazon, has access to large data sets about the independent sellers' activities on its platform, including non-public business data.

Amazon's **Buy Box**, prominently displays the offer of one single seller and allows products to be swiftly purchased by directly clicking on a buy button. Amazon's **Prime programme**, offers premium services to customers for a fee and allows independent sellers to sell to Prime customers under certain conditions.

Article 102 of the Treaty on the Functioning of the European Union prohibits the abuse of a dominant position that may affect trade within the EU and prevent or restrict competition. The implementation of this provision is defined in the EU Antitrust Regulation (Regulation No 1/2003), which can also be applied by the national competition authorities.

Article 9 (1) of the EU Antitrust Regulation (Regulation 1/2003) allows the Commission to conclude antitrust proceedings by accepting commitments offered by a company. Such a decision does not reach a conclusion as to whether there is an infringement of EU antitrust rules but legally binds the company to respect the commitments. A policy brief on commitment decisions under Article 9 is available here.

More information, including the full text of today's Article 9 Commission decision and the full version of the commitments will be available on the Commission's competition website in the public case register under the case numbers AT.40462 and AT.40703.

IP/22/7777

Quotes:

Today's decision sets new rules for how Amazon operates its business in Europe. Amazon can no longer abuse its dual role and will have to change several business practices. They cover the use of data, the selection of sellers in the Buy Box and the conditions of access to the Amazon Prime Programme. Competing independent retailers and carriers as well as consumers will benefit from these changes opening up new opportunities and choice.
Margrethe Vestager, Executive Vice-President in charge of competition policy - 20/12/2022

Press contacts:

Arianna PODESTA (+32 2 298 70 24)
Maria TSONI (+32 2 299 05 26)

General public inquiries: Europe Direct by phone 00 800 67 89 10 11 or by email

The Digital Markets Act: ensuring fair and open digital markets

Some large online platforms act as "gatekeepers" in digital markets. The Digital Markets Act aims to ensure that these platforms behave in a fair way online. Together with the Digital Services Act, the Digital Markets Act is one of the centrepieces of the European digital strategy.

Who are the gatekeepers?

The Digital Markets Act(DMA) establishes a set of narrowly defined objective criteria for qualifying a large online platform as a so-called "gatekeeper". This allows the DMA to remain well targeted to the problem that it aims to tackle as regards large, systemic online platforms.

These criteria will be met if a company:

- has a strong economic position, significant impact on the internal market and is active in multiple EU countries
- has a strong intermediation position, meaning that it links a large user base to a large number of businesses
- has (or is about to have) an entrenched and durable position in the market, meaning that it is stable over time if the company met the two criteria above in each of the last three financial years

What are the benefits of the Digital Markets Act?

Business users who depend on gatekeepers to offer their services in the single market will have a fairer business environment.

Innovators and technology start-ups will have new opportunities to compete and innovate in the online platform environment without having to comply with unfair terms and conditions limiting their development.

Consumers will have more and better services to choose from, more opportunities to switch their provider if they wish so, direct access to services, and fairer prices.

Gatekeepers will keep all opportunities to innovate and offer new services. They will simply not be allowed to use unfair practices towards the business users and customers that depend on them to gain an undue advantage.

What does this mean for gatekeepers?

The new rules will establish obligations for gatekeepers, "do's" and "don'ts" they must comply with in their daily operations.

Examples of the "do's" - Gatekeeper platforms will have to:

- allow third parties to inter-operate with the gatekeeper's own services in certain specific situations
- allow their business users to access the data that they generate in their use of the gatekeeper's platform
- provide companies advertising on their platform with the tools and information necessary for advertisers and publishers to carry out their own independent verification of their advertisements hosted by the gatekeeper

- allow their business users to promote their offer and conclude contracts with their customers outside the gatekeeper's platform

Example of the "don'ts" - Gatekeeper platforms may no longer:

- treat services and products offered by the gatekeeper itself more favourably in ranking than similar services or products offered by third parties on the gatekeeper's platform
- prevent consumers from linking up to businesses outside their platforms
- prevent users from un-installing any pre-installed software or app if they wish so
- track end users outside of the gatekeepers' core platform service for the purpose of targeted advertising, without effective consent having been granted

How will the Commission ensure that the DMA keeps up with the fast evolving digital sector?

To ensure that the new gatekeeper rules keep up with the fast pace of digital markets, the Commission will carry out market investigations. These will allow the Commission to:

- qualify companies as gatekeepers
- update dynamically the obligations for gatekeepers when necessary
- design remedies to tackle systematic infringements of the Digital Markets Act rules

What will be the consequences of non-compliance?

Fines	of up to 10% of the company's total worldwide annual turnover, or up to 20% in the event of repeated infringements
Periodic penalty payments	of up to 5% of the average daily turnover
Remedies	In case of systematic infringements of the DMA obligations by gatekeepers, additional remedies may be imposed on the gatekeepers after a market investigation. Such remedies will need to be proportionate to the offence committed. If necessary and as a last resort option, non-financial remedies can be imposed. These can include behavioural and structural remedies, e.g. the divestiture of (parts of) a business.

What are the next steps?

The DMA started applying as of beginning of May 2023. Within two months, companies providing core platform services have to notify the Commission and provide all relevant information. The Commission will then have 45 working days to adopt a decision designating a specific gatekeeper. Designated gatekeepers will have six months after the Commission decision to ensure compliance with the obligations foreseen in the DMA.

Clear gatekeeper obligations across the EU

Until now, the way in which gatekeepers conducted their businesses has been either largely unregulated or based on sets of rules many of which pre-date the digital economy. This has been the case across the EU.

Gatekeeper-related problems were not effectively addressed by Member States or the EU in existing regulation.

Legal certainty for platforms

Until now, national legislative initiatives in EU Member States partially addressed the problems identified but also lead to increased regulatory fragmentation in the EU. This can create increased compliance costs for platforms operating cross-border.

What the new Digital Markets Act changes:

Gatekeepers know beforehand the obligations they have to respect.

Other platforms will not be subject to these rules but will be able to benefit from fairer behaviours when doing businesses with gatekeepers.

Reduced compliance costs for gatekeepers and their business users.