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From:	Presidency
To:	Permanent Representatives Committee
No. Cion doc.:	14172/20 + ADD 1-4 - COM(2020) 842 final
Subject:	Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) - Draft progress report

I. INTRODUCTION

1. On 15 December 2020, the Commission submitted to the European Parliament and to the Council a proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)¹.
2. The Digital Markets Act, together with the Digital Services Act², is proposed as an upgrade and complementarity to the rules governing digital services in the European Union and part of the Commission's European Digital Strategy, *Shaping Europe's Digital Future*.

¹ Document 14172/20 + ADD 1

² Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC (Document 14124/20 + COR 1 + ADD 1.

3. The aim of the proposal, based on Article 114 TFEU, is to ensure a contestable and fair digital sector in general and core platform services in particular, with a view to promoting innovation, high quality of digital products and services, fair and competitive prices, as well as a high quality and choice for business and end users in the digital sector.
4. The European Data Protection Supervisor issued its opinion on 10 February 2021³.
5. The European Economic and Social Committee issued its opinion on 27 April 2021⁴.
6. In the European Parliament, a final decision concerning the responsible committee has just been taken. The main responsible committee is the Committee on the Internal Market and Consumer Protection (IMCO). The Rapporteur is Andreas Schwab (EPP, DE). The committees on Economic Affairs (ECON) and Industry, Research and Energy (ITRE) have been given associated status, while the LIBE, JURI, CULT and TRAN committees will contribute to the legislative process with their opinions.
7. In the statement of 25 March 2021, the members of the European Council invited the co-legislators to work swiftly on the Digital Services Act and the Digital Markets Act, with a view to strengthening the Single Market for digital services by creating a safer digital space and a level playing field to foster innovation and competitiveness.

II. WORK WITHIN THE COUNCIL

8. On 16 December 2020, during the German Presidency, the Commission provided a general overview of the proposal to the Working Party on Competition. By the end of May 2021, under the Portuguese Presidency, the Working Party on Competition will have examined the proposal at 15 meetings.
9. For the purpose of discussions in the Working Party on Competition, the Portuguese Presidency has divided the proposal in nine building blocks (designation of gatekeepers, gatekeepers' obligations, implementation of obligations, future proofing, scope of Regulation and role of Member States, Commission's investigative and monitoring powers, compliance, procedural guarantees, implementing and delegated acts).

³ European Data Protection Supervisor - Opinion 02/21 of 10.02.2021

⁴ INT/928 – EESC-2021-00127-00-00-AC-TRA

10. The impact assessment accompanying this proposal was examined in detail at the meeting of the Working Party of 14 January 2021, especially focusing on aspects for which delegations requested further clarifications (notably on legal basis, gatekeeper designation, interplay between the Digital Markets Act and other legislation, obligations and regulatory costs).
11. The Working Party on Competition has completed a first full examination of the proposal on 26 April 2021, so it seems appropriate to report the progress in the discussions to the Permanent Representatives Committee (COREPER) with a view to inform the Competitiveness Council (COMPET Council) on 27 May 2021.

III. STATE OF PLAY AND MAIN ISSUES

12. Even though Member States have reserved their positions pending the ongoing discussions, the Presidency has identified a general support among the Member States for the level of ambition of the proposal, its overall objectives and the need for swift approval. In particular, the Presidency has recognised broad support for (i) the need to find a fair balance between speedy and flexible procedures, on one hand, and legal certainty of the measures, on the other; (ii) the combination of quantitative and qualitative thresholds for designating gatekeepers and (iii) the importance of effective investigative instruments, supported by effective sanctions.
13. Based on the discussions at Working Party level held so far, the Presidency identifies the following main issues from a political and legal point of view, which will require further work in the negotiations:

a) Role of Member States in the enforcement of the DMA

14. While Member States generally acknowledge that the Commission should have a central role in the implementation and enforcement of the Digital Markets Act, a majority of Member States called for further consideration of the role of Member States, including competent national authorities, for example in the opening of market investigations, market monitoring and in the decision-making procedure.
15. Several Member States have also identified the need to clarify the framework for cooperation and information sharing between the Commission and Member States, in particular in the context of the implementation of Article 1(7). This includes the envisaged role of the Digital Markets Advisory Committee, as well as the involvement of national competition authorities.

b) Delegated acts

16. According to the proposal, in specific cases (Articles 3(5) and 10) the Commission may issue delegated acts under certain circumstances (Article 37). Some Member States expressed some doubts about the scope of delegated acts envisaged in the proposal, for example to specify the methodology concerning quantitative thresholds applicable for designating gatekeepers under Article 3.
17. In addition, while recognizing the need for future proofing the rules applicable to gatekeepers under the Digital Markets Act, a significant number of Member States also expressed reservations regarding the use and scope of delegated acts for the update under Article 10 of obligations laid down in Articles 5 and 6, including in light of the rules applicable to the adoption of delegated acts.

c) Scope, legal basis and interplay of DMA with other legislation

18. The proposal provides a harmonised set of rules for gatekeepers at Union level with a view to ensure fair and contestable markets in the digital sector, thereby contributing to the well-functioning of the internal marketing by avoiding fragmentation. The Commission explained that the proposal is a complement to existing rules and, when appropriate, is without prejudice to other legislation applicable to the provision of services covered in the proposal, at EU and national level (Article 1).
19. Member States have generally acknowledged the need for harmonised rules, several Member States having suggested a clarification of the relationship between the objectives of the proposal and its legal basis.
20. Furthermore, in the interest of legal certainty and efficiency, several Member States have called for more clarity regarding the coordination between the Digital Markets Act and other EU and national rules, such as the competition rules, the General Data Protection Regulation⁵, the Regulation on Platform to Business trading practices (“P2B Regulation”)⁶ or legislation related to the intellectual property rights.

⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119, 4.5.2016, p.1-88)

⁶ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (OJ L 186, 11.7.2019, p. 57–79)

d) Designation of gatekeepers, obligations and regulatory dialogue

21. Member States generally support the key principles of the mechanism to designate gatekeepers, in particular the combination of quantitative and qualitative criteria. Some Member States have suggested amendments of some elements relating to the designation of gatekeepers (Articles 3, 4 and 15). In addition to the questions concerning the use of delegated acts under Article 3(5) mentioned above, a number of Member States have proposed changes to the criteria defining the designation procedure, for example emphasising the need to take into account conglomerate strategies as an element relevant in the assessment leading to the designation of gatekeepers.
22. Several Member States have also raised issues relating to the deadlines applicable to the market investigations concerning the gatekeeper designation.
23. While Member States showed strong support for clearly defined and enforceable obligations, some of them also called for adjustments to the scope and conditions of some of the obligations set in Articles 5 and 6, which constitute the core of the proposal. This refers in particular to obligations concerning interoperability, data portability and access to data. Some Member States also raised the need for more individualised approach with regard to the imposition of the obligations, as they have to reflect various business models of gatekeepers. In addition, several Member States asked for more clarity regarding the obligations applicable to emerging gatekeepers.
24. The obligations set in Article 6 are subject to an optional dialogue framework (Article 7) between the gatekeepers and the Commission to facilitate compliance with obligations when implementing measures by the gatekeeper may require further specification. In this respect, several Member States have called for a strengthening of their role through the Digital Markets Advisory Committee. A few Member States have proposed a possibility of gatekeepers to make use of efficiency and objective justifications for their conduct to better take into account the impact of gatekeepers' behaviour on consumers and the particular situation of each gatekeeper. Other Member States were of the opinion that such a possibility would weaken the DMA and make its enforcement more cumbersome, lengthier and less effective. In addition, some Member States have also highlighted the need to clarify the interplay between the regulatory dialogue framework and non-compliance proceedings.

25. Several Member States have also raised issues with respect to the scope of the reasoned requests for suspension of, and exemptions from, obligations foreseen in Articles 8 and 9.
26. Article 12 requires gatekeepers to inform the Commission of acquisitions of other providers of digital services, in order to inform the review of gatekeeper status and the monitoring of contestability trends. Several Member States have called for a more ambitious text in this respect, which would improve the merger control system with respect to acquisitions by gatekeepers. The Commission explained that such a goal, and in particular the need to address the issue of “killer acquisitions” in the digital sector, is addressed by the change in the Commission’s policy approach to Member State referrals under Article 22 of the EU Merger Regulation. Several Member States suggested that the information gathered through this obligation under Article 12 should feed the merger control procedures at EU and national level, and proposed a corresponding clarification in Article 31, under which the information shall be used only for the purposes of the Digital Markets Act.

e) Other issues

27. Other issues pointed out by the delegations for further discussion included, *inter alia*:
 - Whether some obligations should factor in the gatekeepers’ ecosystems;
 - Duration of market investigations and the threshold for systematic non-compliance remedies;
 - Scope and threshold for interim measures.
28. Significant progress has been achieved during the Portuguese Presidency, and delegations will continue to analyse in-depth the content of the proposal. Therefore, taking into account the complexity of the proposal, its impact on the single market and on contestable and fair markets in the digital sector, as well as its interrelation with other instruments of Union and national law, further work at technical level is required before the Council can take a political decision, for which the present report is a contribution, sign posting the key issues. The Portuguese Presidency is committed to closely work with the incoming Slovenian Presidency in order to facilitate a future compromise.

IV. CONCLUSIONS

29. COREPER is invited to take note of the progress report presented by the Portuguese Presidency in view of the COMPET Council on 27 May 2021.
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