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COVER NOTE

From: Secretary-General of the European Commission, signed by Ms Martine
DEPREZ, Director

date of receipt: 16 December 2020

To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council
of the European Union

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)**

Delegations will find attached document SEC(2020) 437 final.

Encl.: SEC(2020) 437 final



EUROPEAN COMMISSION

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REGULATORY SCRUTINY BOARD OPINION

**Proposal for a Regulation of the European Parliament and of the Council
on contestable and fair markets in the digital sector (Digital Markets Act)**

{COM(2020) 842}

{SWD(2020) 363}

{SWD(2020) 364}



Brussels,
RSB

Opinion

Title: Impact assessment / Digital Markets Act

Overall 2nd opinion: POSITIVE WITH RESERVATIONS

(A) Policy context

Many digital markets see a strong concentration trend towards a few players. Some large online platforms have emerged as gatekeepers of the digital economy sectors. They control a significant portion of transactions between consumers and businesses. This can make it difficult for existing or new market operators to compete. This can translate into higher prices for consumers or lower prices for producers, lower quality, or less choice and innovation. Existing EU competition rules do not seem to provide the most effective and efficient way to tackle some of these existing or emerging market failures.

This initiative is part of the Commission's overall digital strategy announced in its Communication 'Shaping Europe's digital future'. Its aim is to tackle existing and emerging market failures through regulatory measures and through a market investigation regime.

(B) Summary of findings

The Board notes that the report has been substantially redrafted. It now integrates the problem description and policy options into a single approach.

However, the report still contains significant shortcomings:

- (1) The report does not fully justify the selection of the core platform services to be covered by the initiative.**
- (2) The report does not sufficiently define some of the measures included under the different policy options. The scoring of options is not always clear.**

(C) What to improve

- (1) The report should make clearer how the problem drivers may lead to the identified negative outcomes. It should consider the negative consequences of curtailing the size advantages following from network economies and economies of scale for consumers. It should better distinguish problems relating to size advantages from the monopolisation of**

data and the imposition of market rules like exclusive dealings. The report should better justify the identification and selection of the core platform services. It should present evidence of what determines persistent misuse of gatekeepers' power vis-à-vis dependent business users and customers. It should more convincingly demonstrate for each of the selected core platform services that the identified weak contestability has negative effects in terms of higher mark-ups, lower quality of service, or reduced innovation. The report should better justify why other platform services, such as content streaming providers, would not meet the selection criteria.

(3) The report should better define and justify the measures covered under the options. It should demonstrate why the proposed set of cumulative quantitative thresholds (under the 'non-dynamic' and 'semi-flexible' options) can be considered as a robust and reliable trigger across all selected core platform services for the (quasi-automatic) designation of gatekeepers and the imposition of obligations. It should better explain why a market investigation is not deemed necessary or proportionate in these situations.

(4) From a future proofing perspective, the report should explain why the possibility of updating the list of core platform services following a market investigation was discarded for the 'semi-flexible' option, while maintained as a key element for the 'fully flexible' option. As regards the 'fully flexible' option, it is not clear why certain beneficial guidance elements (including indicative quantitative thresholds), which could have provided further legal clarity, have not been considered in the design of this option.

(5) The report should clarify the distinction between the 'semi-flexible' and 'fully flexible' options in terms of the obligations that can be added following a market investigation. It should also explain, where the market investigation powers and process deviate from the envisaged model and rules under Regulation 1/2003.

(6) The report should improve the comparison of options in terms of effectiveness and benefits (including in summary table 5) given that the 'fully flexible' option seems to score best in minimising false negatives/positives and future proofing. The report should clarify the relative weight given to the different assessment criteria (e.g. legal certainty vs. flexibility vs. speed). It should better substantiate the assumption that the 'fully flexible' option would lead to a higher number of large platforms being covered, and why the decisions taken under this option would be 'arbitrary' (given that they would be based on market investigation).

(7) The report should better explain the limitations of the methodology used. When presenting evidence the report should differentiate more clearly between cases which are still being investigated or pending and the established case law.

The Board notes the estimated costs and benefits of the preferred options in this initiative, as summarised in the attached quantification tables.

(D) Conclusion

The DG may proceed with the initiative.

The DG must revise the report in accordance with the Board's findings before launching the interservice consultation.

Full title	Digital Market Act
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Reference number	PLAN/2020/7913; PLAN/2020/7452
Submitted to RSB on	6 December 2020
Date of RSB meeting	Written procedure

ANNEX: QUANTIFICATION TABLES EXTRACTED FROM THE DRAFT IMPACT ASSESSMENT REPORT

The following tables contain information on the costs and benefits of the initiative on which the Board has given its opinion, as presented above.

If the draft report has been revised in line with the Board's recommendations, the content of these tables may be different from those in the final version of the impact assessment report, as published by the Commission.

1.1. OVERVIEW OF BENEFITS FOR THE PREFERRED OPTION

I. Overview of Benefits – Preferred Option 2		
Description	Amount	Comments
Internal market fragmentation (see also Annex 5.5 on cost of non-Europe)	EUR 92.8 billion	It is expected that there will be a substantial decrease in internal market fragmentation, as EU Member States will not need to introduce national legislations. The effect of market contestability on the internal single market is proxied by an increase in online cross-border trade and the indirect/spill-over effect in terms of employment, economic growth, innovation and consumer surplus (see below). If we assume that by preserving the internal market in the platform space cross-border trade projections by 2025 could be maintained, this would lead to EUR 92.8 billion. ¹
Impact on economic growth	EUR 12 billion - EUR 23 billion	<u>Input-output micro-econometric modelling:</u> Higher investment in R&D in the ICT sector in EU27 leads to an overall increase in the EU27 income between 0.09% to 0.17% of 2014 EU GDP, this is between EUR 12 billion and EUR 23 billion. Both impacts on growth and employment (below) are very conservative estimates because they result exclusively from an increase in R&D investment. However, market contestability and more fair competition are expected to produce important spillover effects that result in higher innovation, increase in market size, increase of entrepreneurship within and beyond the platform economy and growth in other traditional sectors. Online cross-border trade is expected to be highly impacted by this virtuous dynamic. Therefore, this estimation is not taking into account further rounds of direct and indirect effects with positive loops in the long-term.

¹ Cross-border e-commerce in Europe was worth EUR 143 billion in 2019, with 59% of this market being generated by online marketplaces. This is projected to increase to 65% in 2025 ([Ecommerce News Europe \(2020\)](#)).

I. Overview of Benefits – Preferred Option 2

Description	Amount	Comments
Employment	600 000 jobs preserved (conservative scenario) – b/n 136,387 and 294,236 jobs created (optimistic scenario)	The preferred option would either preserve the current level of employment in the sector or lead to its increase ² thanks to the increase in R&D spending (input-output microeconomic modelling)
Innovation	EUR 221 billion and EUR 323 billion over 10 years	Financial resources that could be invested in R&D are diverted to mergers and acquisitions (M&A), which results in higher market concentration instead of improvements in the quality and quantity of products and services for consumers. This pattern of innovation dedicated to competing 'for the market' has a detrimental effect on consumer choice and surplus. In addition, the positive impact on innovation stemming from higher market contestability is not limited only to diversion of money from M&A to R&D. Other expected indirect effects include an increase in entrepreneurship and creation of new products and solutions meeting consumers' needs rather than focused on exploiting a gatekeeping position. This may have a multiplicative effect increasing the size of the European single market, and hence, GDP and online cross-border trade (see other impacts in this table).
Investment in R&D	EUR 12 billion– EUR 23 billion	Higher investment in R&D in the ICT sector in EU27 leads to an overall increase in the EU27 income between 0.09% to 0.17% of 2014 EU GDP, ³ i.e. between EUR 12 billion and EUR 23 billion (input-output modelling).

² The data used in the input-output modelling come from three sources: (a) The 2014 world input-output table (WIOT) publicly available from the World Input-Output Database (WIOD, www.wiod.org), (b) Employment (number of persons engaged) and compensation of employees obtained from the Socio-Economic Accounts (SEAs) of WIOD, and (c) private R&D investments in information and communication (and its subitems represented by NACE Rev.2's Section J's divisions and/or groups), which were downloaded from Eurostat (rd_e_fundgerd.www.wiod.org), (b) Employment (number of persons engaged) and compensation of employees obtained from the Socio-Economic Accounts (SEAs) of WIOD, and (c) private R&D investments in information and communication (and its subitems represented by NACE Rev.2's Section J's divisions and/or groups), which were downloaded from Eurostat (rd_e_fundgerd.www.wiod.org), (b) Employment (number of persons engaged) and compensation of employees obtained from the Socio-Economic Accounts (SEAs) of WIOD, and (c) private R&D investments in information and communication (and its subitems represented by NACE Rev.2's Section J's divisions and/or groups), which were downloaded from Eurostat (rd_e_fundgerd.www.wiod.org), (b) Employment (number of persons engaged) and compensation of employees obtained from the Socio-Economic Accounts (SEAs) of WIOD, and (c) private R&D investments in information and communication (and its subitems represented by NACE Rev.2's Section J's divisions and/or groups), which were downloaded from Eurostat (rd_e_fundgerd.www.wiod.org).

³ The most recent available input-output matrix is for 2014, yet the matrix does not change significantly across time.

I. Overview of Benefits – Preferred Option 2

Description	Amount	Comments
Competition	Fall in HHI index 0.25 (user shares) and 0.11 (revenue shares)	It is expected that competition will improve substantially due among other to a substantial decrease in barriers to entry. Conservative estimate is no increase in the HHI Index, while upper bound means a fall in HHI index on for the user shares by 0.25 points and 0.11 for the revenue shares.
Online cross-border trade	EUR 450 billion to EUR 1.76 trillion after 10 years	Assuming the internal market fragmentation is fully addressed, the online cross-border trade would increase between EUR 450 billion to EUR 1.76 trillion after 10 years. Although it is hard to forecast with precision the increase in online cross-border trade, the impacts have been proxied by similar trends in offline cross-border trade resulting from market integration. The opportunity costs estimated here are very conservative as the assumed trends were linear and conservative growth rates. The fast change in the platform economy and interlinks with the rest of the economy suggests that online cross-border trade could see an important exponential growth if enhanced by market contestability, fair competition and virtuous patterns of innovation.
Consumer surplus	EUR 13 billion	The higher level of competition may result in lower prices as companies could decrease spending on advertising and lower costs; such savings could be passed onto consumers (especially where (price) competition increases). Consumer surplus of EUR 13 billion is based on the assumption that competitive asymmetry between gatekeepers and alternative platforms would be addressed (see Annex 4).

1.2. COST COMPARISON FOR THE DIFFERENT OPTIONS

2. Cost comparison				
	Option 1	Option 2	Option 3	
<i>Carrier</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>
European Commission	<p>Regulatory costs of implementation, supervision, information gathering.</p> <p>Associated burden is estimated based on experience from other sectors where regulation requires the preparation of guidelines, designation of actors with market power and enforcement of conditions aimed at supporting contestability and avoiding foreclosure, i.e. telecoms regulation and competition law.</p> <p>It is assumed that</p>	<p>In addition to costs identified under Option 1, further data requests, implementation, assessment and enforcement/supervision costs are to be foreseen.</p> <p>Further implementation costs would stem from the regulator specifying the obligations imposed to a given gatekeeper.</p> <p>Further assessment costs would stem from the need to conduct market investigations to designate gatekeepers and assess new practices.</p>	<p>In addition to costs identified under Option 2, further costs would be incurred in similar tasks in relation to other digital services, including implementation, assessment, enforcement/supervision costs, and assessments of fairness.</p>	<p>Annual costs: €18.2m</p> <p>This is based on 90 FTEs (€11.7m).</p> <p>Additional costs (i.e. around €6.5m) are necessary in relation to the support of experts, provision of training, development of required IT systems, expenditure with missions and organisation of meetings.</p>
	<p>Annual costs: between €6.4m (sub-option A) and €10.5m (sub-option B).</p> <p>This is based on 30 FTEs in case of sub-option A (with a cost of €3.9m) and 50 FTEs in case of sub-option B (with a cost of €6.5m).</p> <p>Additional costs (between €2.5m and €4m) are necessary in relation to the support of experts, provision of training, development of required IT</p>	<p>Annual costs: €16.7m.</p> <p>This is based on 80 FTEs under both sub-options (€10.3m).</p> <p>Additional costs (i.e. around €6.4m) are necessary in relation to the support of experts, provision of training, development of required IT systems, expenditure with missions and organisation of meetings.</p>	<p>Annual costs: €18.2m</p> <p>This is based on 90 FTEs (€11.7m).</p> <p>Additional costs (i.e. around €6.5m) are necessary in relation to the support of experts, provision of training, development of required IT systems, expenditure with missions and organisation of meetings.</p>	

This opinion concerns a draft impact assessment which may differ from the final version.

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2. Cost comparison

		Option 1			Option 2			Option 3		
<i>Carrier</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>
	the Commission would engage in preparing and processing information requests as well as the preparation of guidelines, designation of gatekeepers and enforcement of the obligations	systems, expenditure with missions and organisation of meetings.								
National authorities	Responses to consultations held by the EU regulator to integrate national expertise before taking a decision (e.g. on guidelines non-compliance, fines).	Annual costs: €4.3m based on 2.5 FTE for 27 Member States	In addition to costs under Option 1, Option 2 would imply costs for national regulators to study Commission's proposed draft decisions on further tailoring of obligations.	Annual costs: €6m based on 3.5 FTE for 27 Member States	In addition to Option 2, Option 3 would not imply any additional costs for national regulators.	Annual costs: €6m based on 3.5 FTE for 27 Member States				
Gatekeepers	Compliance costs incurred in order to prepare for compliance with rules, set compliance officers, and respond to requests for information. Number of information	Annual costs: between €9.87m and €21.15m for a total number of gatekeepers in scope between 7 (under sub-option A) and 15 (under sub-option B)	Similar compliance costs per platform as per Option 1. On the one hand, the possibility of a dialogue would reduce the compliance costs. On the other hand, the need to reply to request for information in the context of market	Annual costs: between €21.15m and €28.2m for a total number of gatekeepers in scope between 15 (under sub-option A) and 20 (under sub-option B)	Similar compliance costs per platform as per Option 1. On the one hand, the possibility of a dialogue would reduce the compliance costs. On the other hand, the need to reply to request for information in the context of market	Annual costs: between €21.15m and €28.2m for a total number of gatekeepers in scope between 15 (under sub-option A) and 20 (under sub-option B)	Similar compliance costs per platform as per Option 1. On the one hand, the possibility of a dialogue would reduce the compliance costs. On the other hand, the need to reply to request for information in the context of market	Annual costs: around €35.25m based on 25 gatekeepers.		

2. Cost comparison

		Option 1			Option 2			Option 3		
<i>Carrier</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>
	<p>requests would depend on the complexity of the case. Estimate assumes that 20 FTEs are involved in data gathering, monitoring and enforcement activities per gatekeeper platform.</p> <p>This scenario does not consider possible synergies with already existing internal organisation/service for complying with other legislation, e.g. service ensuring COMP law compliance.</p>	investigations would imply some extra costs.	investigations would imply some extra costs.	investigations would imply some extra costs.						
Competitors, start-ups, business users	Monitoring of unfair conduct as well as new rules' implementation and supervision of compliance would imply some burden in the form of e.g. responses to	Net additional resource requirements likely to be very limited	Monitoring new forms of unfair practices would create additional costs for market players as compared with Option 1. However, in order to ensure proportionality information requests	Monitoring new forms of unfair practices would create additional costs for market players as compared with Option 1. However, in order to ensure proportionality information requests	Net additional resource requirements likely to be very limited	Monitoring new digital markets would create additional costs for market players as compared with Option 1. However, in order to ensure proportionality information requests would take into	Net additional resource requirements likely to be very limited	Monitoring new digital markets would create additional costs for market players as compared with Option 1. However, in order to ensure proportionality information requests would take into	Net additional resource requirements likely to be very limited	

2. Cost comparison

2. Cost comparison					
Option 1		Option 2		Option 3	
<i>Carrier</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost quantification</i>
	<p>information requests. However, in order to ensure proportionality information requests would take into consideration the size of the enterprise to which they are sent.</p> <p>The resources devoted to these requests might be counteracted by reductions in legal resource required to address unfair contractual conditions, with a substantial portion of the burden previously taken by small firms in this area now addressed through tailored action at EU level.</p> <p>Responses to public consultations - questions targeting consumers would be less complex and</p>	<p>would take into consideration the size of the enterprise to which they are sent.</p> <p>The resources devoted to these requests might be counteracted by reductions in legal resource required to address unfair contractual conditions, with a substantial portion of the burden previously taken by small firms in this area now addressed through tailored action at EU level.</p>	<p>would take into consideration the size of the enterprise to which they are sent.</p> <p>The resources devoted to these requests might be counteracted by reductions in legal resource required to address unfair contractual conditions, with a substantial portion of the burden previously taken by small firms in this area now addressed through tailored action at EU level.</p>	<p>consideration the size of the enterprise to which they are sent.</p> <p>The resources devoted to these requests might be counteracted by reductions in legal resource required to address unfair contractual conditions, with a substantial portion of the burden previously taken by small firms in this area now addressed through tailored action at EU level.</p>	
Consumers		<p>Additional information gathering from consumers may be needed to inform specification/tailoring of</p>		<p>Additional information gathering from consumers may be needed to inform about other digital services.</p>	

2. Cost comparison						
Option 1		Option 2		Option 3		
<i>Carrier</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>	<i>Cost qualification</i>
	shorter. Possibly higher search costs	remedies. Higher search costs		Higher search costs		
Total costs:	EUR 20.57m – 35.95m		EUR 43.85m – 50.9m		EUR 59.45m	

