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COVER NOTE

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
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) 437/2.

Encl.: SEC(2020) 437/2

EUROPEAN COMMISSION

19.1.2021

SEC(2020) 437/2

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}

EUROPEAN COMMISSION
Regulatory Scrutiny Board

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

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 here 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	**Input-output micro-econometric modelling**: 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).

[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	
Carrier	*Cost qualification*	*Cost quantification*	*Cost qualification*	*Cost quantification*	*Cost qualification*	*Cost quantification*
European Commission	Regulatory costs of implementation, supervision, information gathering. 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. It is assumed that	Annual costs: between €6.4m (sub-option A) and €10.5m (sub-option B). 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). Additional costs (between €2.5m and €4m) are necessary in relation to the support of experts, provision of training, development of required IT	In addition to costs identified under Option 1, further data requests, implementation, assessment and enforcement/supervision costs are to be foreseen. Further implementation costs would stem from the regulator specifying the obligations imposed to a given gatekeeper. Further assessment costs would stem from the need to conduct market investigations to designate gatekeepers and assess new practices.	Annual costs: €16.7m. This is based on 80 FTEs under both sub-options (€10.3m). 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.	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.	Annual costs: €18.2m This is based on 90 FTEs (€11.7m). 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.

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

2. Cost comparison						
	Option 1		Option 2		Option 3	
Carrier	*Cost qualification*	*Cost quantification*	*Cost qualification*	*Cost quantification*	*Cost qualification*	*Cost quantification*
	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: around €35.25m based on 25 gatekeepers.

2. Cost comparison						
	Option 1		Option 2		Option 3	
Carrier	*Cost qualification*	*Cost quantification*	*Cost qualification*	*Cost quantification*	*Cost qualification*	*Cost quantification*
	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. 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.		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	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						
	Option 1		Option 2		Option 3	
Carrier	*Cost qualification*	*Cost quantification*	*Cost qualification*	*Cost quantification*	*Cost qualification*	*Cost quantification*
	information requests. However, in order to ensure proportionality information requests would take into consideration the size of the enterprise to which they are sent. 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.		would take into consideration the size of the enterprise to which they are sent. 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.		consideration the size of the enterprise to which they are sent. 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.	
Consumers	Responses to public consultations - questions targeting consumers would be less complex and		Additional information gathering from consumers may be needed to inform specification/tailoring of		Additional information gathering from consumers may be needed to inform about other digital services.	

2. Cost comparison						
	Option 1		Option 2		Option 3	
Carrier	*Cost qualification*	*Cost quantification*	*Cost qualification*	*Cost quantification*	*Cost qualification*	*Cost quantification*
	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**

EUROPEAN COMMISSION
Regulatory Scrutiny Board

Brussels,
RSB

Opinion

Title: Impact assessment /Digital Markets Act

Overall opinion: NEGATIVE

(A) Policy context

In many digital markets, there is a trend towards concentration of a few players. Some large online platforms have emerged as gatekeepers of the digital economy. 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 revenues for producers, lower quality, or less choice and innovation. The existing EU competition rules seem not 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 two pillars: regulatory measures and a market investigation regime.

(B) Summary of findings

The Board notes the useful additional information provided in advance of the meeting and the commitments provided on continuing to work on the finalisation of the report.

However, the Board gives a negative opinion, because the report contains the following significant shortcomings:

(1) The impact assessment is unfinished. Work on integrating the two pillars of the initiative is incomplete.

(2) The report does not sufficiently justify the restriction of its scope to digital markets. It does not justify the selection of platform services within the digital sector nor does it clarify the concept of gatekeeper platforms.

(3) The report does not provide an integrated problem definition for the initiative. It does not appropriately describe the shortcomings the initiative intends to address and does not provide a proper evidence base for them.

(4) The report does not provide policymakers with real choices on the different policy options. It does not provide a full range of options and it does not develop these in sufficient detail. It therefore cannot assess their impacts on different stakeholders.

Commission européenne, B-1049 Bruxelles - Belgium. Office: BERL 08/010. E-mail: regulatory-scrutiny-board@ec.europa.eu

(5) The report fails to assess all risks and trade-offs of the policy options. It does not clarify the extent to which the preferred option, and in particular the interaction between the regulatory measures and the market investigation regime, is coherent and futureproof.

(C) What to improve

(1) The report should provide convincing analytical arguments and evidence for limiting the scope of the market investigation instrument to digital markets, given the support from stakeholders and academic experts for a wider scope.

(2) The report should set out clear, evidence-based arguments for determining why selected core platform services within the digital sector are considered problematic and should therefore be regulated. It should also clarify and justify how it defines 'gatekeepers'. If any of these issues require a policy decision (e.g. quantitative thresholds, qualitative parameters), the report should present and discuss the relevant options, including which platforms they would cover.

(3) The problem description should provide a common and integrated analysis of the problems the initiative aims to tackle. It should better explain the distinction between existing and emerging market failures. The report should strengthen the evidence base for the problems it identifies, including by referring to concrete (enforcement) cases and examples of sudden and radical decreases in competition. It should also assess to what extent market power can limit competition in the existing core platform markets, in addition to adjacent or related markets. It should include an analysis of how weak competition affects consumer and supplier benefits.

(4) The report should further justify and specify the measures included in the different policy options. It should include alternative options where policy choices need to be made. For the regulatory pillar, the report should explain and substantiate which practices would be included in the black, white and the grey lists. For the market investigation regime, it should clarify what the 'clear legal test' would consist of. It should describe how the criteria of contestability and fairness can be made operational and inform such a legal test. It should explain how in practice market-wide remedies would work. The options section should also assess to what extent 'future proof' ex-ante rules or a market investigation regime could provide self-standing and mutually exclusive solutions to solve the identified problems.

(5) The report should include a more complete analysis of the impacts of the options. It should provide a more granular assessment of the impacts of the different practices regulated under the ex-ante rules on the different stakeholders. The report should further specify main trade-offs and how the risks presented by anti-competitive practices balance against the possible benefits for sellers on platforms and for consumers. The report should also better analyse to what extent the market investigation regime would be more effective and coherent than future regulatory intervention.

(6) The report should explain how the market investigation regime would work in relation to the regulatory regime. It should analyse how the governance of these regimes would best be organised to avoid a fragmentation of supervisory capacity and of oversight results. In addition, the report should identify and analyse possibilities for synergies with other existing and planned authorities supervising digital markets. The envisaged corrective

measures under both regimes should be explained. (7) The report should present the views of key stakeholder groups on the problems, options and analysis. It should explain to what extent and how the initiative takes into account possible objections of key stakeholder groups.

(D) Conclusion **The lead DGs must revise the report in accordance with the Board's findings and resubmit it for a final RSB opinion.**	
Full title	**Digital Markets Act**
Reference number	PLAN/2020/7913; PLAN/2020/7452
Submitted to RSB on	8 October 2020
Date of RSB meeting	4 November 2020