EUROPEAN COMMISSION

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Dear President,

The Commission would like to thank the Sénat for its Opinion on the 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 final}.

This proposal, adopted as part of the Digital Services Act package, represents an element of a broader set of ambitious measures announced by President von der Leyen in her Political Guidelines. In this context, the package aims to show that the European Union leads the way on the digital agenda, setting global standards.

Central to the ambition of the Digital Services Act package is ensuring a borderless, strong and deep Single Market for digital services that will foster a sustainable growth of European companies and where citizens have genuine choice and control over the content that they share and receive online.

The Commission is pleased to have this opportunity to provide a number of clarifications regarding its proposal for a Digital Markets Act and hopes that these will respond to the suggestions made by the Sénat. The Commission broadly shares the objectives of the Sénat regarding (i) the importance of ensuring that the Digital Markets Act is future proof, (ii) comprehensively preventing circumvention by gatekeepers of the obligations under the Digital Markets Act, including through ´dark patterns´, and (iii) ensuring effective EU-wide enforcement. In response to the specific questions raised in the Opinion, the Commission would like to refer to the attached annex.

Discussions between the co-legislators, the European Parliament and the Council and the Commission concerning the proposal are now well underway and the Commission remains hopeful that an agreement will be reached in the near future.

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The Commission stands ready to provide further clarifications, where helpful, and looks forward to continuing the political dialogue with the Sénat in the future.

Yours faithfully,

Maroš Šefčovič
Vice-President

Thierry Breton
Member of the Commission

Annex

The Commission has carefully considered each of the suggestions of the Sénat and is pleased to offer the following clarifications.

Fairness and contestability issues

The Commission welcomes the support of the Sénat for the Digital Markets Act proposal, noting that our two institutions share the same problem analysis.

Core platform services and future-proofing the Digital Markets Act

The list of core platform services comprises a wide range of the most important ´multi-sided´ digital services that currently have the ability to act as a gateway between business users and end users. The list includes everything ranging from online marketplaces through cloud computing services to online advertising services. It is in the context of these services that the Commission has found existing or emerging issues of contestability and fairness in its Impact Assessment underpinning the proposal for a Digital Markets Act. It should be noted in this regard that online messaging services are already included in this list as number-independent interpersonal communications services, and so are certain navigation services in the form of online intermediation services.

The Commission however shares the Sénat´s analysis that the digital sector develops rapidly, and it has therefore incorporated future-proofing tools in its proposal. First, as mentioned above, the list of core platform services is relatively broad and allows to capture the most important gateways that exist today – including those where contestability and fairness issues are less prevalent but more likely to emerge in the near future. Second, the proposal foresees that the Commission can open a market investigation into new services with a view to proposing an amended list of core platform services, which would include both a proposal to add core platform services, but also to remove some of the existing ones. Moreover, Member States will be able to request that a market investigation into designating gatekeepers is opened by the Commission, and will be supporting the Commission in a number of its investigatory tasks, such as inspections or interviews – which is responding also to the Sénat´s comment that the Digital Markets Act should build on the experience of the Member States´ enforcement authorities.

Designation

Gatekeepers will be designated using a combination of quantitative and qualitative thresholds. These reflect the power that a gatekeeper can exert, deriving from its large user base, high turnover or market capitalisation and stability. Such a position of power could indeed be reinforced in case a single undertaking acts as a gatekeeper over multiple gateways or multiple digital services. This is why the Commission´s proposal for example prohibits the combination of personal data across different services, and why,

more broadly, many of the obligations and prohibitions in the proposal extend beyond the specific core platform service for which the undertaking has been designated as a gatekeeper. At the same time, a single core platform service can be used to engage in unfair and contestability-limiting behaviour, and it can be leveraged into adjacent areas. It is vital, precisely because of the fast-changing nature of the digital sector, to which the Sénat also refers to, that the Digital Markets Act has an optimal ex-ante, preventive effect. Limiting its application to ecosystems would reduce its preventive effect and risk locking the digital sector into the incumbent ecosystems – notwithstanding its positive effects.

As regards the procedure for designating gatekeepers, we understand that the Sénat believes the way proposed by the Commission would be effective, however, would like to shorten the applicable deadlines, insert the methodology in an annex to the Digital Markets Act and apply the fining regime to any failure by potential gatekeepers to provide the information required.

The Commission supports the objective of providing potential gatekeepers with the optimal legal certainty and notes that several tools can be used to achieve this, including the use of delegated acts, possibly combined with non-binding guidelines. The Commission agrees in this respect that it is important to retain the possibility of delegated acts, which is necessary to be able to regularly adjust the methodology to market and technological developments. This includes the possible need to index the market capitalisation threshold.

As regards the applicable deadlines, the Commission believes they should reflect a careful balance between speed and robustness of decision-making, ensuring the legal soundness of the decisions adopted as well as process leading to them. On the one hand, they should exclude any unreasonable delay and ensure all potential gatekeepers are treated equal. The generally applicable deadlines that were retained are already appropriately strict, giving potential gatekeepers enough time to assess the applicability of the Digital Markets Act to, potentially, a variety of services in their undertaking, to compile the relevant data for different metrics and to submit the data together with the supporting methodologies. On the other hand, the deadlines are at the lower end of what will be feasible for any regulator, no matter how well staffed, to process a variety of simultaneous notifications for a variety of core platform services, to assess possible rebuttals and to proceed with the relevant notifications. The Commission indeed believes its proposal strikes that balance well.

As regards the fining regime, Article 26(2)(a) provides the ability for the Commission to impose a fine not exceeding one percent of the undertaking´s annual turnover for any failure to provide the information required for the designation, including a failure to respect the applicable deadlines.

<u>Obligations and prohibitions</u>

The obligations and prohibitions should result in a cumulative, positive effect on contestability and fairness in the online platform economy. This should in turn foster

innovation and consumer choice. The individual obligations and prohibitions target the specific problems as detailed in the Impact Assessment underpinning the Commission´s proposal. Their precise nature gives them their crucial self-executing, ex-ante effect.

Nevertheless, the Commission´s proposal incorporates a possibility for updating the existing obligations and prohibitions by delegated acts, to ensure they achieve their intended effect and capture all of the behaviour they are intended to capture. That is to say, all behaviour that affects contestability and fairness ´in the same way´ as what is covered by the prohibitions and obligations. The empowerment is thereby also limited to the present scope of the proposed Digital Markets Act and the principles that have led to the inclusion of the existing obligations in the Digital Markets Act in the first place. At the same time, the Digital Markets Act does not preclude that in other circumstances the list of obligations and prohibitions can be amended through a new legislative process.

The Commission notes that the targeted changes to the obligations and prohibitions proposed by the Committee pursue the same objective of ensuring this positive effect on contestability and fairness, and to prevent any circumvention. In this respect, the Commission confirms that the anti-circumvention provision included in its proposal should cover any relevant behaviour, including the use of ´dark patterns´ and other behavioural techniques.

As regards interoperability, the Digital Markets Act provides portability of personal and non-personal data on both sides of the relevant core platforms services, access and interoperability for alternative software application stores and interoperability for ancillary services, among several other obligations. Articles 6(1)(h) and (i) in this regard already impose the standard of ´effective´ interoperability, as the Sénat suggest, and, indeed, gatekeepers will have to deploy all necessary technical measures including continuous and real-time (API) access.

<u>Systematic non-compliance</u>

The Commission takes note of the Sénat's suggestion to lower the threshold for systemic non-compliance from three to two infringements. The threshold relates to a presumption of systematic non-compliance, with the possible consequence for gatekeepers that structural remedies are imposed if no lighter alternative is available. The severity of the possible measure is indeed coupled with a minimum threshold beyond which systematic behaviour can be presumed. In this regard, all infringements by the same undertaking count toward the threshold, regardless of whether they concern an infringement of any of the obligations or a procedural infringement, and regardless of the specific gatekeeper core platform service in respect of which the infringement was made.

<u>Interim measures – standard of proof</u>

The proposed Digital Markets Act employs the standard for interim measures set in the Treaty, as interpreted by the Court, and more widely used in EU competition law. It does not seem appropriate to lower this standard in the context of the Digital Markets Act, given especially that its targeted prohibitions and obligations will apply immediately

after designation. From that moment on, gatekeepers will have to comply with these clearly defined and directly applicable obligations and prohibitions by implementing the necessary measures that will ensure effective compliance. The Commission will then have the power under Article 7(2) of the proposed Digital Markets Act to order, following a regulatory dialogue, specific measures if those implemented or proposed by the gatekeeper do not ensure effective compliance with the obligations laid down in Article 6 of the proposal. Alternatively, the Commission will also be able to immediately launch a non-compliance procedure should the designated gatekeeper not be implementing any compliance measures in the first place. Private enforcement of the obligations and prohibitions will of course be possible as well. Article 22 of the proposed Digital Markets Act therefore comes in at a later stage, once proceedings into possible non-compliance have been opened and once all of the aforementioned avenues have failed to prevent an infringement.

Enforcement

The Sénat supports centralised, EU-wide enforcement by the Commission. The Commission, in turn, agrees that its ultimate enforcement actions should build on the expertise of Member States´ authorities. It foresees an involvement of the relevant competent authorities both ´upstream´ and ´downstream´, that is to say both in the information gathering and exchange as well as through the Digital Markets Advisory Committee. This is in line with the objective to close cooperation and coordination, as expressed in Article 1(7) of the proposed Digital Markets Act. The requirement that at least three Member States have to make a request to open a market investigation pursuant to Article 15 is nonetheless important in light of the cross-border nature of gatekeepers.

User involvement

Both the collection of complaints and the testing of possible measures with stakeholders are key elements of any effective enforcement system. In this regard, Article 7 of the proposed Digital Markets Act already foresees the publication of preliminary findings on the compliance by gatekeepers, and any concerned third parties can submit complaints. The Commission is open to clarify these elements together with the co-legislators.
