



EUROPEAN COMMISSION

*Brussels, 28.6.2021
C(2021) 4854 final*

Dear President,

The Commission would like to thank the Bundesrat 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 is part of a broader package of ambitious measures designed to complete the Digital Single Market, as announced by the President von der Leyen in her Political Guidelines. In this context, the package aims to make the 2020s Europe's Digital Decade and show that Europe leads the way on digital issues, setting global standards.

Central to the ambition of the Digital Markets Act is to restore and ensure fairness and contestability in digital markets. It focuses on large online platforms that serve as important digital gateways for business users to reach consumers, and seeks to ensure that gatekeepers do not engage in various unfair practices and conduct further entrenching their strong positions. In this regard, it complements the existing EU competition rules by aiming to provide for a swift solution via clear, targeted and effective obligations for gatekeeper platforms. Furthermore, the Digital Markets Act aims to provide for a stable framework for the years ahead, whilst at the same time being sufficiently future-proof.

The Commission is committed to facilitate a rapid adoption of an ambitious and effective Digital Markets Act. In this regard, the Commission particularly welcomes the Bundesrat's constructive and active engagement in the debate and its appreciation of the main features of the proposal.

Discussions between the Commission and the co-legislators, the European Parliament and the Council, concerning the proposal are now underway. The Bundesrat's Opinion has been made available to the Commission's representatives in the ongoing negotiations between the co-legislators.

In response to the more technical comments in the Opinion, the Commission would like to refer to the Annex.

*Reiner HASELOFF
President of the Bundesrat
Leipziger Straße 3 - 4
D – 10117 BERLIN*

The Commission hopes that the clarifications provided in this reply address the issues raised by the Bundesrat and looks forward to continuing the political dialogue in the future.

Yours faithfully,

*Maroš Šefčovič
Vice-President*

*Thierry Breton
Member of the Commission*

Annex

The Commission notes the Bundesrat's comments on the proposal and has carefully considered each of the issues raised. The Commission is pleased to have this opportunity to provide a number of clarifications regarding its proposal and hopes that these will address the Bundesrat's concerns.

Media plurality: The proposal for a Digital Markets Act does not hamper media pluralism in any way. To the contrary, the Commission trusts that once adopted, the modernised framework can contribute to strengthening the role of the media in the European societies. The Commission fully recognises the objectives raised by the Bundesrat in this regard.

Services in scope: Online search engines, which use browsers as a main starting point, are covered by the Commission's proposal as core platform services (Article 2(2)(b)); payment and identification services are covered as ancillary services in specifically targeted provisions (Article 5(e), Article 6(1)(f)).

Gatekeepers: The Commission agrees with the Bundesrat that the gatekeeper platforms do not exist nor operate in a legal or economic vacuum, and in this regard, rules proposed under the Digital Markets Act are designed as complementary not only to the EU competition rules, but also to other EU and national legislation.

The Commission takes note of the Bundesrat's comment regarding the introduction of penalties in case operators of a core platform service do not notify the Commission of the fact that they have reached the respective thresholds that would allow to designate them as a gatekeeper. It would like to clarify that the lack of such a notification does not prevent the Commission from designating an operator as gatekeeper (Article 3(3), second subparagraph). Moreover, pursuant to Article 26(2), the Commission may impose a periodic penalty payment for failing to provide information required for the gatekeeper assessment. The process leading to a designation of a gatekeeper platform has been carefully designed in order to ensure that it will provide legal certainty to the companies that might be covered by the scope of the regulation, also regarding the overall framework and obligations arising from the proposal.

Interoperability: The Digital Markets Act contains a number of obligations, such as on data portability in real time, effective technical access to relevant data for businesses and end users and sharing of search engine data and access to key technical features of operating systems, that will have a cumulative effect. Together, these measures will greatly improve the ability of professional users and consumers to switch services more easily and thus improve contestability.

Articles 5 and 6: In its proposal, in the trade-off between immediately applicable rules and case-by-case assessment, the Commission sets the cursor clearly on the side of the former. With respect to the obligations, a subset of them can be subject to specification as to their concrete modalities of implementation. However, the Commission follows closely the legislative developments in other jurisdictions and remains very interested in hearing about the lessons learned and results they have brought.

Access to (search data): Article 6(1)(j) explicitly states that a gatekeeper shall provide, upon request of any third party provider of online search engines, access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data in relation to both paid and free search data generated by end users. However, access to data related to other core platform services, such as search functions on trading platforms, is not covered by this provision. The Commission's proposal provides for other forms of continuous and real-time data access. Gatekeepers are obliged to provide for portability (Article 6(1)(h)) and for access (Article 6(1)(i)) to data generated through the activity of business or end users.

Suspensions/Exemptions: Pursuant to Articles 8 and 9, suspensions and exemptions from the obligations are only possible in exceptional circumstances. For instance, as recital 59 explains, a suspension from a specific obligation can only be granted in exceptional circumstances that lie beyond the control of the gatekeeper where it can show that compliance with that obligation endangers the economic viability of its Union operations.

Member State's involvement: As the proposal focuses on gatekeeper platforms with EU relevance, the Commission has proposed, after careful consideration, that the enforcement powers should be exercised at EU level. One of the main reasons why the Commission opted for this solution is that the gatekeeper platforms and the problems associated with them have a cross-border impact, and enforcement at EU level is considered essential to ensure consistent obligations for gatekeepers across the EU and an equal level of protection and opportunities for all EU businesses that depend on them. At the same time, the proposal relies on a close engagement with the Member States via the creation of a 'Digital Markets Advisory Committee' and regular exchange of information and consultation of this Committee. Furthermore, three or more Member States may also request the Commission to open a market investigation if they consider that there are reasonable grounds to suspect that a provider of a core platform service should be designated as a gatekeeper.

Implementing acts: The Commission has proposed to further elaborate certain technical aspects of the proposal via implementing acts, as the issues that are to be covered by these implementing acts were considered too detailed and therefore inappropriate to be covered by a legislative act. Their preparation will, in accordance with the text of the proposal, be transparent and involve Member States according to the established horizontal rules on developing such acts.

Acquisitions: The Commission agrees that it is necessary to ensure greater transparency with regard to acquisitions made by gatekeeper platforms, and proposes to include a notification obligation in the Digital Markets Act for that purpose. As regards the assessment of mergers and acquisitions under competition rules, the Commission has just recently published an evaluation report on the functioning of the EU Merger control and has issued Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases.