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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) - Opinion of the European Economic and Social Committee (EESC)

Delegations will find attached a copy of the above-mentioned opinion.

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INT/928
Digital Markets Act

OPINION

European Economic and Social Committee

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 – 2020-374-COD]

Rapporteur: **Emilie PROUZET**

Referral	Council of the European Union, 10/02/2021 European Parliament, 08/02/2021
Legal basis	Article 114 of the Treaty on the Functioning of the European Union
Section responsible	Single Market, Production and Consumption
Adopted in section	31/03/2021
Adopted at plenary	27/04/2021
Plenary session No	560
Outcome of vote (for/against/abstentions)	179/9/16

1. Conclusions and high-level recommendations

1.1 Over the last ten years, issues and needs have been raised in terms of both competition and internal market rules. These have certainly increased during the COVID-19 crisis. The EESC welcomes the Proposal for a Regulation on the Digital Markets Act (DMA), which seeks to prevent gatekeepers from imposing unfair conditions on businesses and consumers and to ensure the accessibility of important digital services.

1.2 Online platforms are an ever-present phenomenon that challenges incumbents by changing how we consume and provide products and services, but also how we work and employ people. In this regard, the EESC welcomes the European Commission's holistic approach in treating all the aspects of this ecosystem. The Committee will be particularly vigilant here with regard to taxation, data governance and working conditions. On the latter point, the EESC welcomes the European Commission's consultation on improving the working conditions of platform workers and looks forward to the legislative initiative planned for the end of the year.

1.3 Achieving a level playing field for the different operators on the digital markets remains the primary objective. Europe needs a fair and contestable online platform environment in order to reach a better functioning of the internal market. The EESC believes that the DMA and the DSA[1] will together form the keystone of a framework that is to be perfected over years and applied in consistency with other key digital policies such as the e-privacy Regulation, the GDPR, the P2B Regulation and the alignment of competition rules with the digital era.

1.4 Safeguarding a fair, innovation-friendly business environment while protecting the end users remains fundamental. The draft DMA is a response to the fast and evolving digital era, providing for short deadlines and rapidly updatable procedures while safeguarding legal certainty and the right of defence. Nevertheless, the EESC believes that Article 16 on market investigation into non-compliance must be strengthened in terms of both the time lag (waiting for three acts of non-compliance within five years would cause too much damage) and penalties.

1.5 By focusing on specific services regardless of the place where the service provider is established or the law applicable to the provision of the service, the Commission effectively addresses the issue of a level playing field for European and global online operators. The EESC believes that targeting the service rather than the operator is a good solution to the difficulties encountered when trying to supervise such diverse digital players.

1.6 Unlike the DSA, the DMA does not directly require the platforms' designated gatekeepers to appoint a legal representative in the European Union. However, the evaluation and investigation procedures described below require dialogue and coordination between the core service platforms and the Commission. The EESC recommends including a reference to

[1] EESC opinion on Digital Services Act

Articles 10 and 11 of the DSA to ensure that all gatekeepers establish a legal representative in the European Union.

1.7 In addition, a top priority for the EESC is preventing multiplying national legislation from fragmenting the internal market much more. The EESC believes that action at EU level is of the utmost importance and fully supports Article 1(5) and (7).

1.8 At the same time, the EESC agrees with the DMA that Member States need to have the possibility of acting in close cooperation with Commission (by means of a decision adopted under Article 3(6), under Article 33 or in parallel, on the basis of competition rules.)

1.9 To cover cases where liability arises simultaneously from breach of the DMA and from breach of the rules under Articles 101 and 102 TFEU, it is understood that these two sets of rules can be applied simultaneously. The DMA should therefore clarify the implementation and coordination processes in the interests of legal certainty and efficiency (Article 1(6)).

1.10 The EESC believes that a detailed discussion is necessary regarding the reasons for and impact of the different approach to laying down new obligations pursuant to Article 10 and to extending practices pursuant to Article 17. At the same time, the EESC believes that the specific exceptional circumstances with regard to the six parameters used to designate gatekeepers should be defined (Article 3(6)).

1.11 The EESC therefore considers that the definitions of "core services", "end users" and "business users" should be much more specific.

1.12 The EESC believes it should be clarified that the practices referred to in Articles 5 and 6 constitute black practices. However, Article 6 on practices needs to be implemented specifically in the course of the regular dialogue between the Commission and gatekeepers.

2. Comments on scope and designation

2.1 The EESC believes that the scope of the services is very broad, although of key importance. Indeed, it is only practices directly related to these core platform services that fall within the scope and are subject to obligations. The EESC supports the legal certainty provided by revising the Regulation with any change in the scope of services.

2.2 The EESC notes that the concerns identified regarding the functioning of the core services market do not all relate to end users (see services (f), (g) and (h)) and wonders whether the impact of the DMA process within B2B core services has been sufficiently assessed, especially in the advertising ecosystem (ads market).

2.3 If a core service is proposed, it is then possible to assess whether any provider of this service has attributes that cumulatively meet the criteria for being deemed a gatekeeper for that specific service. The EESC supports this cumulative approach.

2.4 **Specific comments on the quantitative evaluation - presumed gatekeepers**

2.4.1 With regard to the first threshold, the EESC notes that the threshold refers to the total turnover of the company that owns the platform, including any business lines that are not platform business models or not online activities, not the turnover of the service.

2.4.2 The EESC supports the financial data threshold, especially the way it covers capitalisation figures to reflect platforms' ability to monetise their users and their financial capacity (including the ability to leverage access to the financial market).

2.4.3 With regard to the second threshold, the EESC recognises the relevance of the criteria relating to number of users (for the specific core platform service being analysed).

2.4.4 In the draft, the definition of end user (Article 2(16)) is close to the definition of consumer and, as is conventional, placed in opposition to the professional user. Article 3(2)(b) defines the concept of end users in terms of duration (months) and relevance (being active). The EESC believes that the definition of end users should be precise (i.e. users passing through, visiting the site, using it once a month). The same question applies to business users. For the sake of legal certainty, the EESC recommends that the concept of "end users" and "business users" be clarified or at least defined in the draft regulation.

2.5 **Specific comments on the qualitative evaluation - evaluated gatekeepers**

2.5.1 If the thresholds are not all cumulatively reached, the Commission may carry out a market investigation. This can be requested by a Member State (Article 15) and use six other parameters to determine whether the platform meets the three determining criteria (Article 3(6)).

2.5.2 The qualitative internal market assessment introduced by the European Commission echoes many parameters that are relevant in competition law and economics. Nevertheless, given the lack of precedents (no need to define a relevant market or prove dominance to establish gatekeeper status), it is unclear/untested how many/how strong the features/parameters will be.

2.5.3 If the objective is to target situations comparable to those identified in the quantitative assessment but where the thresholds have not been crossed, the EESC believes the assessment mechanism is only very limited in detail. At first glance, nothing prevents a broader interpretation of these parameters for application to a greater number of operators, as we know many business models across the economy are evolving and experimenting via digital transformation and new business models.

2.5.4 As these six parameters make it possible to designate gatekeepers, the EESC believes their specific exceptional circumstances should be defined.

3. Comments on listed practices

3.1 To understand the lists of practices set out in the DMA draft, the EESC believes it is important to look back at the work of the Commission: the practices identified in recent years, those already covered by the new P2B Regulation and those which could be covered by adapting competition law to the digital ecosystem.

3.2 The EESC believes the scope of practices should be clarified, especially if the Commission can extend it. Thus, it seems many of the practices referred to in Article 5 are part of the core service of the platform, whereas Article 6 refers to the use of such core platform services to leverage and influence market outcomes.

3.3 The EESC calls for the development of a robust certification system based on testing procedures that allow companies to affirm the reliability and security of their AI systems. Transparency, especially of the rating systems, traceability and explicability of algorithmic decision-making processes are a technical challenge that calls for the support of EU instruments such as the Horizon Europe programme[2].

3.4 Specific comments on unfair data driven practices

3.4.1 The EESC recognises the need to further improve the implementation of the General Data Protection Regulation (GDPR) by providing for the practice in Article 5(a). The EESC also encourages the Commission to regularly review the GDPR and related regulations in the light of technological developments[3].

3.4.2 With regard to the effective portability of data (Article 6(h)), the EESC points out that under the Free flow of data Regulation the cloud industry is developing a code of conduct to ensure contractual and technical transparency for ending contracts and porting data between cloud providers or back to on-premises storage. The code's effectiveness in fostering portability in the cloud market is to be evaluated soon.

3.5 Specific comments on unfair self-preferencing

3.5.1 The DMA sets out the gatekeeper's obligation to refrain from more favourable treatment even with respect to "any third party belonging to the same undertaking". This further specification is not repeated in other provisions, however, although a gatekeeper might avoid the restriction stipulated in these provisions by providing relevant data to a third party. As an example, we can refer to Article 5(a) or Article 6 (1)(a), where transfer of data to a third party (whether or not belonging to the same undertaking) is not prohibited. While Article 11 offers certain solution, we do not consider it sufficient.

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2 OJ C 47, 11.2.2020, p. 64.

3 OJ C 47, 11.2.2020, p. 64.

3.5.2 Parity clause Article 5(b: preventing business users from offering the same goods and services to consumers under different conditions through other online intermediation services or search engines than through their platform would be now forbidden for gatekeepers. The EESC believes that the phrase "... at prices or conditions that are different..." is broad and may encompass other criteria than just price that might need to be specified.

3.6 Specific comments on unfair access conditions

3.6.1 With regard to the practice in Article 5(d), the EESC notes that the P2B regulation already contains provisions on ensuring access for business users to make complaints and transparency regarding complaint handling and questions the relevance of this practice. The EESC questions why end users are not covered.

4. Comments on investigative, enforcement and monitoring powers

4.1 For the purposes of Article 3(6), greater consideration should be given to involving the authorities of the Member States concerned in decision-making. We believe that the authorities of a Member State should have the right to submit to the Commission a request to issue a decision under paragraph 6, and the Commission should have the corresponding obligation to discuss the request and, where appropriate, allow the Member State concerned to adopt preliminary measures pending the Commission's decision. For the purposes of the decision, the Commission should also request an opinion from all Member States where the potential gatekeeper operates.

4.2 The draft regulation combines self-evaluation by the platforms and evaluation by the competent authority - the European Commission. This assessment is nevertheless carried out in the first instance by the core service platform, which has to notify the Commission that these thresholds have been reached within three months (Article 3(3)). The EESC recognises and supports the fact that the DMA process makes the platforms accountable. It also notes that the draft does respect the rights of defence and appeal and the pace of digital business.

4.3 The EESC supports the DMA measures enabling the Commission to assess and monitor the growth of gatekeeper platforms, such as mergers outside the thresholds of Regulation (EU) 139/2004.

4.4 Moreover, the EESC supports the assessment carried out by the Commission of whether the current EU regime allows important acquisitions of low-turnover targets which may have an impact on competition in the EU internal market to be captured sufficiently[4]. Commissioner Vestager's proposal to start accepting referrals from national competition authorities on mergers whether or not those authorities had the power to review the case might be an option[5].

4 https://one.oecd.org/document/DAF/COMP/WD(2020)24/en/pdf.

5 https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en.

4.5 Alongside the EU Commission, the planned Digital Markets Advisory Committee also needs to be set up for maximum effectiveness. The EESC finds Article 32 very vague in this respect and believes that the committee should be entrusted with ongoing supervision and monitoring. The EESC also suggests considering whether the committee could receive complaints from consumer associations and social partners.

4.6 The EESC believes that organisations concerned with business interests, consumer protection and trade unions should be heard and their views taken into consideration, as they might be in competition cases. Article 20 of the DMA authorises the Commission to carry out interviews and take statements. The EESC suggest that their involvement and their right to be heard should be clearly stated in this article.

Brussels, 27 April 2021.

Christa Schweng
The president of the European Economic and Social Committee

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N.B.: Appendix overleaf.

APPENDIX
to the OPINION
of the European Economic and Social Committee

The following section opinion text was rejected in favour of an amendment adopted by the Assembly but obtained at least a quarter of the votes cast:

> *"2.3 If a core service is proposed, it is then possible to assess whether any provider of this service has attributes that cumulatively meet the criteria for being deemed a gatekeeper for that specific service. The EESC does not believe that this cumulative approach effectively covers the gatekeepers, but proposes that only one criterion has to be met, preferably the number of users in order to act aligned with the DSA. It also expresses concern that the procedure to identify gatekeepers can be tedious and therefore recommends a swifter process."*

Result of the vote:

For:	98
Against:	83
Abstentions:	20