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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) - General approach - <i>Statement by the Luxembourg delegation</i> - <i>Statement by the German delegation</i>

Delegations will find attached:

- a statement by the Luxembourg delegation
- a statement by the German delegation

on abovementioned subject with a view to the Competitiveness Council meeting on
25 November 2021.

**PROPOSAL FOR A REGULATION ON CONTESTABLE AND FAIR MARKETS IN
DIGITAL SECTOR (DIGITAL MARKET ACT) – GENERAL APPROACH**

Statement by Luxembourg on the Digital Services Act and the Digital Markets Act

The DSA and DMA proposals aim to create a fully operational internal market for both professional users and consumers by establishing a harmonised legal framework to make the online environment safer and to ensure fair competition across the Union.

Luxembourg strongly supports the objective of introducing a clear and coherent framework to address the current legal fragmentation which is the result of diverging national legislation in the areas covered by the DSA and the DMA. Luxembourg can therefore support the compromise package negotiated by the Council and proposed by the Slovenian Presidency, which contains all the elements necessary to reach a quality agreement with the European Parliament.

As the negotiations proceed, Luxembourg will pay close attention to ensuring that the benefits of maximum harmonisation, accompanied, as appropriate, by mutual recognition, are maintained or even strengthened in the texts and that no new derogations, ‘gold-plating’ options, or any other flexibility for national legislators are introduced. We will also insist on maintaining the level of ambition of the European Commission’s proposals as far as the conditions for a safe online environment and fair and competitive access to the market are concerned.

The Digital Services Act

To develop a high level of online security we must take a European approach. Luxembourg is committed to the principles established by the e-Commerce Directive, in particular the principle of the country of origin. This principle is essential to the good functioning of the internal market which guarantees that businesses do not have to adapt to fit 27 different national legislations. This would be an impossible task for small businesses and a major deterrent with regard to cross-border sales. The general approach proposed by the Slovenian Presidency respects this approach and must be maintained.

Along the same lines, in terms of *enforcement*, Luxembourg insists on coherence and uniformity in the application of the rules in order to ensure legal certainty for all stakeholders. Harmonisation is essential, not only for the substantive rules themselves but also as regards the interpretation and application thereof. Digital services are cross-border by nature. It would therefore be counterproductive if 27 authorities were responsible for applying the DSA rules simultaneously in any given case. Luxembourg is pleased that in general the country in which the intermediary is established remains responsible for the *enforcement* of the harmonised rules of the DSA, in particular thanks to closer cooperation with the other Member States and the Commission – apart from when it comes to the very big players.

Indeed, due to their pan-European nature, Luxembourg welcomes the exclusive powers given to the European Commission with regard to cross-border systemic issues in connection with very large online platforms (VLOPs), as proposed in the Slovenian Presidency's compromise text. This solution is in keeping with the idea of uniform application in the same way as the *enforcement* mechanism based on the country of establishment is. This system also reflects the approach taken in the DMA where the Commission has exclusive executive powers against the big digital gatekeepers.

Lastly, Luxembourg strongly supports the horizontal nature of the DSA, which applies to all types of intermediary as well as all types of illicit content, unless there are more specific rules at EU level. We caution against the temptation to overload the DSA by trying to resolve all the problems linked to digital services since there are already many sectorial initiatives that are either in place or being developed¹. The DSA does not exist in a legal vacuum and many European laws, some of which have been adopted recently, also apply to online intermediaries. Luxembourg will continue to argue in favour of resisting the temptation to import issues from other policy areas into the DSA in order to keep the practical rules and to maximise the chances of its being adopted swiftly by the co-legislators.

The Digital Markets Act

Luxembourg fully supports the objectives of the DMA which aim to create a level playing field by banning unfair behaviour by the dominant digital platforms. Small and medium platforms should be able to compete with the big gatekeepers in order to offer their services on a cross-border basis and to benefit fully from the internal market. European consumers will be the winners, with a selection of offers with better conditions.

The general approach proposed by the Slovenian Presidency keeps these objectives and respects the objective of harmonisation, in particular by clarifying and limiting Member States' discretion to legislate at national level. Only a common European approach can tackle the powers of gatekeepers across the single market. Luxembourg will pay close attention to ensuring that these objectives are not diluted, in particular the horizontal provisions which clarify that the DMA has primacy over national law (see Article 1(5)).

¹ The Regulation on terrorist content online, the Directive on copyright, the Audiovisual Media Services Directive, and the proposal for a Regulation on general product safety – to cite but a few.

Statement for the minutes by the Caretaker Government of the Federal Republic of Germany on the Regulation on contestable and fair markets in the digital sector (Digital Markets Act)

English-language version

Germany supports the Presidency's proposal with the aim of reaching a common position in the Competitiveness Council on 25 November 2021. However, certain steps will be necessary during the upcoming negotiations with the European Parliament in order to secure the objective of an effective set of rules and their effective implementation. We would like to highlight the following points once again:

1. The appropriate involvement of national competition authorities is an important prerequisite for the effective implementation of the Digital Markets Act (DMA). The Presidency's text contains marked improvements in that regard, which should not be diluted during subsequent negotiations. This also includes allowing national competition authorities to continue to apply national competition law subject to the conditions set out in Article 1(6) of the DMA. Weakening this competence, for instance by a Commission veto, as called for by the IMCO, would be unacceptable to the German Federal Government.
2. The group of individuals and entities concerned by the DMA should be sufficiently specific, and limited to the largest gatekeepers. This should be reflected in the Annex on the methodology for identifying active users for core platform services. We are not convinced by the extremely far-reaching definition of active users of intermediation platforms, according to which any mere visitor to a platform is already assessed as an active user. This approach does not adequately take into account the different business models of intermediation platforms. Fine-tuning on this point will be necessary in the forthcoming trilogues, especially in the light of transaction-based platforms.

3. For merger control, we need a solution to the issue of how to deal with ‘killer acquisitions’, with which companies strategically buy up potential competitors. Moreover, the merger control system for killer acquisitions should also be made more stringent (evidence requirements, standard of review). The European Parliament has taken up this issue in its proposed amendments, but what is needed is a differentiated solution.
4. We are in favour of the high level of ambition with regard to the obligations set out in Articles 5 and 6. Nevertheless, we do see a need for further improvements in certain aspects. Like other Member States, we support an extension of the scope of Article 6(1)(k) to search engines and social networks; however, an extended Article 6(1)(k) must be designed in a proportionate manner. We also think it advisable to extend the ban on more favourable treatment in ranking services laid down in Article 6(1)(d). In addition, it should be made clear that Article 5(e) applies to in-app purchase systems as well as payment services.

We trust that these aspects will be seriously and carefully considered and incorporated in the forthcoming discussions with a view to the upcoming negotiations with the European Parliament.