



Council of the European Union
General Secretariat

**Interinstitutional files:
2020/0374(COD)**

Brussels, 07 September 2021

WK 10408/2021 INIT

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CONTRIBUTION

From:	General Secretariat of the Council
To:	Working Party on Competition
Subject:	Joint NL-DE-FR paper on Strengthening the Digital Markets Act and its enforcement

Delegations will find attached a Joint NL-DE-FR paper on Strengthening the Digital Markets Act and its enforcement.

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Strengthening the Digital Markets Act and Its Enforcement

When the Commission published a Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) in December 2020, the Dutch, French and German Governments welcomed the Commission's initiative. Since then, we, the Friends of an Effective DMA, have fully supported the proposal's goals to ensure a fair and contestable Single Market for digital services where companies and innovation can thrive and where users have genuine choices and control. To this end, we have engaged constructively in the negotiations. In May, we published a common position paper with several proposals to strengthen the Digital Markets Act and its enforcement. Now, we have jointly developed amendments based on two of these proposals: the introduction of a tailor-made remediation provision and the reinforcement of the role of national authorities in the enforcement of DMA.

Tailor-made remediation

In our paper we have called for more future-proofness and tailor-made remediation to cope with the reality of digital markets. Digital markets and gatekeepers' strategies therein change rapidly. This requires dynamic and agile regulation that can adapt to these circumstances, specifically because preventing damage is much easier in these markets than attempting to reverse it. Furthermore, while we welcome the speed that the self-executing obligations in articles 5 and 6 of the DMA provide, for some gatekeepers' practises more may be needed. However, due to the heterogeneity of gatekeepers and the markets in which they operate, adding further intervention possibilities to the lists in these articles might not be proportional and could risk harming innovation. We want a regulation that is both future-proof and allowing, if necessary, for a dedicated remediation tailored to the specific business model of each gatekeeper. In that way, DMA regulation should neither be too weak nor too heavy-handed. To this end, we have developed an instrument with which additional obligations could be imposed on gatekeepers.

Under our approach (Annex 1), the Commission could impose proportional and necessary measures to safeguard contestability and fairness in digital markets, following a market investigation. To maximise speed and legal certainty within this mechanism, the decision of the Commission would be based on a pre-defined list consisting of a limitative set of principle-based measures it could choose from: access to platforms, data-related interventions, fair commercial relations and end-users and business-users open choices. These measures would then be tailored to what is needed for a specific gatekeeper. Obligations would only be imposed if the preliminary results of the market investigation showed that the existing obligations in articles 5 or 6 are not sufficient to ensure fairness and market contestability in the precise case under investigation and that competition law alone is insufficient to adequately and timely address the identified practices.

Role of national authorities

The DMA serves the purpose of contributing to the proper functioning of the internal market by laying down harmonised rules ensuring contestable and fair markets in the digital sector. Centralizing certain powers at EU level, such as gatekeepers' designation or regulatory dialogue with gatekeepers improves effectiveness and prevents fragmentation. However, enforcing the DMA will need substantial dedicated staff with expertise to match the resources of the gatekeepers. National competition authorities should therefore be able to properly support the Commission and contribute with their capacities in the DMA enforcement, within a referral system similar to the one currently already in use in merger control. Since the DMA complements European and national competition law, which continues to apply alongside the DMA, this better involvement of national competition authorities within the DMA enforcement would also help to keep and create synergies in enforcement. For a coherent application of both legal regimes, close coordination and cooperation between the European Commission and in particular national competition authorities is indeed essential.

Under our approach (Annex 2), the Commission should remain primarily responsible for the enforcement of DMA. However, national competition authorities may complement these enforcement actions. For this purpose, national competition authorities may make use of the relevant investigative and monitoring powers on their own initiative. Upon referral by the Commission, they shall also be entitled to enforce the obligations of DMA. The Commission and national competition authorities should closely cooperate and coordinate their actions via the European Competition Network. This ensures that the DMA can be swiftly and effectively enforced, the workload is optimally allocated at European and national levels, and that Commission and national competition authorities have adequate leeway to set own enforcement priorities. At the same time, this approach guarantees that the DMA is coherently enforced across the entire Single Market as the initiation of proceedings by the Commission shall relieve the national competition authorities of their competence under this Regulation.

We look forward to presenting and discussing our proposals in detail. We are convinced that the amendments are urgently needed to ensure that the Digital Markets Act can be fully effective. We will advocate for our proposals jointly with full force in the ongoing negotiations with the aim to conclude these in the beginning of 2022.

Annex 1

Proposal for an amendment improving flexibility in the DMA

Amendment proposal

Article 16a

Market investigation into tailor-made remedies to safeguard markets' contestability and fairness

1. The Commission may carry out a market investigation with the purpose of examining whether any tailor-made remedies pursuant to paragraph 2 should be imposed to a gatekeeper in order to ensure that the gatekeeper's core platform services markets are and remain contestable and fair. The Commission shall conclude its investigation by adopting a decision within twelve months from the opening of the market investigation.
2. When the market investigation pursuant to paragraph 1 shows that the obligations laid down in Articles 5 and 6 are not sufficient to prevent a gatekeeper from adopting practices that limit the contestability of core platform services or are unfair under the meaning of article 10(2) and that European competition law alone is insufficient to adequately and timely address the identified practices, the Commission may impose, by a decision adopted in accordance with the advisory procedure referred to in Article 32(4), any tailor-made implementation of the principle-based obligations described in paragraph 4, which is proportionate and necessary to ensure the objectives of the Regulation.
3. In its market investigation procedure, the Commission shall take due account of any relevant information made by concerned third parties such as business users or end users.
4. When adopting its decision pursuant to paragraph 2, the Commission shall implement measures deemed appropriate and necessary. These measures may concern:
 - (a) access to platforms (including interoperability obligations, obligations to give access to essential API's and obligations to use common standards),
 - (b) data-related interventions (including data mobility obligations, obligations to provide access to essential data and data silos),
 - (c) fair commercial relations (including non-discrimination obligations, bans on distortionary self-preferencing and obligations to make use of fair contractual terms),
 - (d) end-users and business users open choices (including obligations to proactively offer options to users, regulation of defaults and design of choice architecture).¹
5. The Commission shall communicate its objections to the concerned gatekeeper within six months from the opening of the investigation. In its objections, the Commission shall explain whether it preliminarily considers that the conditions of paragraphs 1 and 2 are met and which remedy or remedies it preliminarily considers necessary and proportionate.

¹ For those obligations stating that a gatekeeper has to provide access to its infrastructure or to essential inputs, it should be included in the recitals that such access always has to be provided under FRAND conditions.

6. The Commission may at any time during the market investigation extend its duration where the extension is justified on objective grounds and proportionate. The extension may apply to the deadline by which the Commission has to issue its objections, or to the deadline for adoption of the final decision. The total duration of any extension or extensions pursuant to this paragraph shall not exceed six months.

Annex 2

Proposal for complementary national enforcement

Amendment Proposal

Chapter X (new)

Cooperation and coordination with national competition authorities

Article X1

Role of national competition authorities

1. The Commission and national competition authorities shall work in close coordination and cooperation in their enforcement actions.
2. The Commission is primarily responsible for the enforcement of the present Regulation. National competition authorities as referred to in Article 2 of Directive (EU) 2019/1 may complement these enforcement actions. For this purpose, a national competition authority:
 - may make use of the investigative and monitoring² powers referred to in Articles 19, 20, 21 and 24 of Chapter V of the present regulation on their own initiative, in accordance with provisions of Article X.2.2.
 - Upon referral by the Commission, shall be entitled to apply Articles 16a, 22, 23, 24a, 25, 26 and 27.
3. Where a national competition authority considers that it is well placed to apply Articles 16a, 22, 23, 24a, 25, 26 or 27, it shall submit a request to the Commission and inform the other national competition authorities accordingly.
4. Where the Commission considers that a national competition authority would be well placed to apply Articles 16a, 22, 23, 24a, 25, 26 or 27, it may ask the relevant national competition authority to initiate proceedings. National competition authorities retain full discretion in deciding whether or not to initiate proceedings.
5. Following a reasoned request pursuant to paragraph 3 or 4, the Commission shall refer the case to the national competition authority by decision if the requirements of paragraph 6 are met. The decision shall be notified without delay to the undertakings concerned. The Commission shall also inform the other national competition authorities. The decision whether

² Monitoring measures of national competition authorities may include all necessary actions to scrutinise whether a gatekeeper does comply with the obligations laid down in Article 5, the obligations laid down in Article 6 as specified by the Commission and the decisions taken by the Commission pursuant to Articles 7 and 16 as well as the decisions taken by the Commission or an NCA according to Articles 22 and 23.

or not to refer the case shall be taken within [42 working days] starting from the receipt of the request by the Commission. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to refer the case in accordance with the submission made by the national competition authority.

6. Before referring a case, the Commission shall assess whether a national competition authority is well placed to apply Articles 16a, 22, 23, 24a, 25, 26 or 27. This assessment shall take into account, inter alia, the need for swift and efficient enforcement of this Regulation, the optimal allocation of the workload at European and national levels with respect to resource constraints and priorities, the characteristics of the case concerned such as parties and local nexus as well as prior experiences and investigative efforts of the national competition authority with a view to the case.
7. Where a case has been referred to a national competition authority pursuant to this Article, the national competition authority shall have the power:
 - to adopt decisions pursuant to Article 16a;
 - to order interim measures pursuant to Article 22;
 - to accept commitments pursuant to Article 23;
 - to examine third parties claims reporting pursuant to Article 24a;
 - to adopt non-compliance decisions pursuant Article 25;
 - to impose fines and periodic penalty payments pursuant to Articles 26 and 27.
8. The initiation by the Commission of proceedings or market investigations for the adoption of a decision under Chapter V of the present regulation shall relieve the national competition authorities of their competence under this Regulation with regard to the relevant facts. If a national competition authority is already acting on this basis, the Commission shall only initiate proceedings after consulting with this authority.
9. Subject to the relevant conditions set forth in articles 16a, 22, 23, 25, 26 or 27, following the procedure stipulated in an implementing act, the Commission may decide to extend the territorial scope of a decision adopted by a national competition authority pursuant to paragraph 7 to the whole European Union Internal Market. The decision shall be taken in accordance with the advisory procedure referred to in Article 32(4).

Article X2

Cooperation network

1. In order to ensure an effective and consistent application of the DMA and competition law the Commission and the national competition authorities shall cooperate with each other through the European Competition Network (ECN).
2. The national competition authorities shall, when applying the relevant monitoring and investigative powers referred to in Articles 19, 20, 21 and 24 of chapter V of this Regulation, inform the Commission in writing before or without delay after commencing the first formal investigative measure. This information shall also be made available to the other competition authorities. National competition authorities shall take into account other national competition authorities investigative proceedings on a same gatekeeper's practise at the same time to ensure an efficient enforcement of the present regulation

3. No later than 30 days before the adoption of a decision, accepting commitments or ordering measures pursuant to the powers referred to in article X1.7, the national competition authorities shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information shall also be made available to the competition authorities of the other Member States. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case. The information supplied to the Commission shall be made available to the competition authorities of the other Member States.

Article X3

Digital Markets Advisory Group

1. The competent authorities of the Member States shall form together a Digital Markets Advisory Group that provides the Commission with expertise for the purpose of enforcing this Regulation.
2. The national competent authorities referred to in paragraph 1 of this Article are:
 - a. the competition authorities referred to in Article 2 of Directive (EU) 2019/1;
 - b. the authorities referred to in Article 5 of Directive (EU) 2018/1972;
 - c. the supervisory authorities referred to in Article 51 of Regulation (EU) 2016/679.

Member States may additionally designate other competent authorities within the meaning of paragraph 1 of this Article, in particular on the basis of their task of enforcing national competition rules prohibiting unfair unilateral practices other than those prohibited by Article 102 TFEU or on the basis of their expertise in the field of economic regulation in the digital field.

3. The Digital Markets Advisory Group shall have the following tasks:
 - Promote the exchange of information and best practices between national competent authorities and the Commission;
 - Make recommendations to the Commission on the need to conduct market investigations under Article 14;
 - Make recommendations to the Commission on the need to open proceedings under Article 18;
 - Provide the Commission with relevant information on the behaviour of gatekeepers, technical advice, opinions, analysis and expertise in the conduct of market investigations under Article 14, including Article 16a;
 - Provide the Commission with relevant information on the behaviour of gatekeepers, technical advice, opinions, analysis and expertise prior the adoption of a specification decision under Article 7;
 - Examine report from third parties under Article 24a and make recommendations to the Commission on the need to initiate proceedings under Article 18 or market investigations under Article 14;
 - Provide the Commission with advice and expertise in the preparation of implementing acts under Article 36, delegated act under Article 37 and legislative proposals and policy initiatives, including under Article 38;

- Provide the Council of the European Union and the European Parliament, at their request or on its own initiative, with technical advice, opinions or analyses within its competences.

Amendment to Article 36 (Implementing provisions)

Add the following to paragraph 1 (h) of this Article:

(h) the practical arrangements for the cooperation and coordination between the Commission and Member States provided for in Article 1(7), **including the practical arrangements of the cooperation network provided for in Article [X2] and the Digital Markets Advisory Group [X3];**

(ha) the procedure to extend the territorial scope of the content of a decision adopted by a national competition authority.

Amendment to Article 34 (publication of decisions)

(1) The Commission shall publish the decisions which it takes pursuant to Articles 3, 7, 8, 9, 15, 16, 17, 18, 22, 23 (1), 25, 26, 27 **and X.1.5.**

Other articles of the DMA should be modified accordingly:

Article 1(7) should be completed as follows: *“National authorities shall not take decisions which would run counter to a decision adopted by the Commission under this Regulation. The Commission and Member States shall work in close cooperation and coordination in their enforcement actions **on the basis of the principles and rules established in Articles XXX**”*

Article 24(2) on Monitoring of obligations and measures shall be completed as follows: *“The actions pursuant to paragraph 1 may include the appointment of independent external experts and auditors, **including from national competition authorities**, to assist the Commission to monitor the obligations and measures and to provide specific expertise or knowledge to the Commission.”*

Article 31 of the regulation shall be modified as follows: *“The information collected pursuant to Articles 3, 12, 13, 19, 20 and 21 shall be used only for the purposes of this Regulation **and competition law enforcement.**”*