

EUROPEAN ECONOMIC AREA

STANDING COMMITTEE OF THE EFTA STATES

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SUBCOMMITTEE II ON THE FREE MOVEMENT OF CAPITAL AND SERVICES

EEA EFTA Comment

on the Commission 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](#)

1. EXECUTIVE SUMMARY

- *The EEA Agreement extends the Single Market to the EEA EFTA States (Iceland, Liechtenstein and Norway). Continued incorporation of relevant EU legislation into the Agreement ensures legal homogeneity throughout the EEA.*
- *The EEA EFTA States welcome the proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act, DMA). As some large platforms currently act as gatekeepers in digital markets, the EEA EFTA States fully support the overall objective of the proposal to harmonise rules in support of contestable and fair digital markets in the EEA.*
- *Concerning the designation of gatekeepers, the EEA EFTA States are of the view that the thresholds put forward by the Commission would best serve the proposal's objectives, while not imposing an unnecessary regulatory burden on smaller platforms.*
- *The EEA EFTA States acknowledge that digital gatekeepers and platforms differ substantially in their characteristics and business models. Therefore, as Articles 5 and 6 apply to all gatekeepers, caution should be shown if the lists of obligations were to be extended during the EU legislative process.*

- *The EEA EFTA States welcome the proposed obligation to facilitate vertical interoperability. However, the EEA EFTA States believe that further measures to fully achieve contestable and fair markets should be explored, in particular horizontal interoperability allowing competing platforms access to interfaces of gatekeeper platforms.*
- *The EEA EFTA States believe that relevant authorities in the Member States should be effectively involved in the monitoring and enforcement of the DMA. Therefore, in addition to the proposed Digital Markets Advisory Committee, the EEA EFTA States suggest establishing an Advisory Board in which relevant national authorities participate. This should be an arena for effective coordination between national authorities and the Commission.*

2. GENERAL REMARKS

1. The EEA EFTA States welcome the proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act, DMA). The EEA EFTA States recognise the importance of digital platforms as providers of innovative and efficient digital services to consumers and businesses.
2. Due to the fact that some of these large digital platforms currently act as gatekeepers in digital markets, the EEA EFTA States fully support the overall objective of the DMA proposal to harmonise rules in support of contestable and fair digital markets in the EEA. The EEA EFTA States consider that ex ante regulation is necessary, and therefore support the Commission's general approach.
3. In addition to facilitating contestable and fair digital markets, EU law should support openness at all levels of the internet value chain. The Open Internet Regulation (Regulation (EU) 2015/2120) safeguards open internet access at the underlying network layer. In a similar way, the DMA should also aim to facilitate openness at the application layer and ensure equal access to and distribution of information, content and services offered via platforms acting as gatekeepers.
4. As efficient regulation of gatekeepers is almost impossible to achieve at national level, the EEA EFTA States support the regulation of digital markets at EU level. Nevertheless, regarding monitoring and enforcement, the involvement of the Member States is essential. The EEA EFTA States propose to include effective cooperation mechanisms between the Commission and national authorities, such as national competition authorities (NCAs), national regulatory authorities (NRAs), data protection authorities (DPAs) and consumer protection authorities (CPAs).

3. SPECIFIC REMARKS

5. Concerning the designation of gatekeepers, the EEA EFTA States are of the view that the thresholds in Article 3(2) of the Commission's proposal are appropriate. Thresholds set at this level would best serve the proposal's objectives of promoting contestable and fair digital markets, while not imposing an unnecessary regulatory burden on smaller platforms.

6. The EEA EFTA States welcome the inclusion of clear-cut obligations that gatekeepers must comply with up front. The obligations listed in Articles 5 and 6 appear balanced, proportionate and reasonable. Furthermore, the obligations related to use of and access to data are of crucial importance to create a more level playing field between gatekeepers and inter alia publishers. The obligations related to data are also of vital importance for innovation and development of services offered by other market players.
7. The EEA EFTA States acknowledge that digital gatekeepers and platforms differ substantially in their characteristics and business models. Furthermore, it is important to keep in mind that the same type of conduct can have both pro- or anticompetitive effects depending on the market and the specific services offered by the gatekeepers. As Articles 5 and 6 apply to all gatekeepers, caution should be shown if the lists of obligations were to be extended during the EU legislative process. The focus should be on defining the obligations as accurately as possible.
8. Regarding the exemptions from the obligations set out in Article 9, the EEA EFTA States welcome the possibility for exemptions on grounds of public morality, public health and public security. It should, however, be considered whether the criteria for exemptions in the proposal are too narrow. In certain circumstances, it should also be possible to justify exemptions from the obligations on the grounds that this would enhance innovation. Accordingly, the EEA EFTA States suggest adding a new point (d) to Article 9 which could read: '*promotion of innovation*'. This additional basis for exemptions would be even more important if the list of obligations in Articles 5 or 6 were to be extended at any stage during the EU legislative process.
9. Consumer choice regarding all relevant aspects of core platform services is an essential prerequisite for well-functioning and innovative digital markets. The EEA EFTA States support the safeguarding of end users' freedom in Articles 5 and 6, for example when it comes to freedom to un-install any pre-installed software. In all cases, the freedom to exercise choice should not be hampered by behavioural techniques or interface designs that may have a negative impact on consumers' ability to make informed decisions.
10. The EEA EFTA States welcome the obligation to facilitate vertical interoperability proposed in Article 6(1) c and f. This ensures the business users' access to the platform's resources and contributes to intra-platform competition. However, the EEA EFTA States believe that further measures to fully achieve contestable and fair markets should be explored, in particular horizontal interoperability allowing competing platforms access to interfaces of gatekeeper platforms. This might contribute to inter-platform interoperability, enabling the establishment and development of competitors in parallel with the gatekeepers in the market. EEA EFTA States recognise that exploring horizontal interoperability as a tool would entail a comprehensive and time-consuming assessment. Starting such an assessment should be considered as soon as possible and in time for the review process proposed in Article 38.
11. The proposed DMA regulation is based on centralised supervision carried out by the Commission. The EEA EFTA States believe that relevant authorities in the Member States, such as NCAs, NRAs, DPAs and CPAs, should be effectively involved in the monitoring and enforcement of the DMA. These authorities are closer to the market, which constitutes an important asset given the high numbers of disputes that can be

expected under the new regulation. Therefore, in addition to the Digital Markets Advisory Committee set out in Article 32, the EEA EFTA States suggest establishing an Advisory Board in which relevant national authorities participate. This should be an arena for effective coordination between national authorities and the Commission.

12. The EEA EFTA States consider that it should be possible to resolve many disputes at the national level. The threshold to file a complaint to a national authority would likely be lower than the threshold to file a complaint to the Commission.
13. The EEA EFTA States support the introduction of a new point in Article 32 on '*cooperation and coordination*' setting out the principles and rules for how the Commission and relevant national authorities shall cooperate and coordinate in their enforcement actions. They also believe it is important to ensure capability to exchange necessary information and coordinate enforcement actions between the Commission and the relevant national authorities.
14. As the EEA Agreement extends the Single Market to the EEA EFTA States (Iceland, Liechtenstein and Norway), they remain dedicated to continuing as constructive partners in the ongoing legislative process regarding the Digital Markets Act. Continued incorporation of relevant EU legislation into the Agreement ensures legal homogeneity throughout the EEA.