Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act)

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On 15 December 2020, the European Commission published the eagerly-awaited Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act) (DMA). The DMA builds upon the Platform-to-Business Regulation 2019 (see IRIS 2019-4/7), and its purpose is to target very large online platforms which act as gatekeepers between business users and end users, and which have a major impact and substantial control on the access to certain digital markets. As such, the DMA is designed to lay down harmonised rules across the European Union to ensure contestable and fair markets in the digital sector where these large gatekeepers are present. The DMA functions by providing a mechanism to designate certain very large platforms as “gatekeepers”, and once designated, these platforms are then subject to an array of significant legal obligations under the DMA.

Crucially, Article 3 of the DMA provides that certain online platforms, including online marketplaces, search engines, social media networks, and video-sharing platforms, may be designated as a gatekeeper under the DMA if certain criteria are satisfied, namely: if the platform has (a) a significant impact on the internal market; (b) operates a platform service which serves as an important gateway for business users to reach end users; and (c) enjoys an “entrenched and durable position” in its operations. Importantly, a platform will be presumed to be a gatekeeper where it achieves an annual EEA turnover equal to EUR 6.5 billion in the previous three years, or where the average market capitalisation amounted to at least EUR 65 billion in the previous year, and where it provides a platform service that has more than 45 million monthly active end users in the European Union, and more than 10 000 yearly active business users established in the European Union.

The most important aspect of the DMA is that once a platform has been designated as a gatekeeper under the DMA, it will then have numerous legal obligations under Chapter III of the DMA. These include rules relating to (a) not combining personal data sourced from their platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services; (b) allowing business users to offer the products or services through other platforms at different prices or conditions; (c) providing transparency on the pricing of advertisements; (d) using, in competition with

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business users, any data not publicly available; (e) allowing end users to un-install any pre-installed software applications; (f) the interoperability of software; (g) not treating more favourably in ranking services and products offered by the gatekeeper itself; and (h) providing the effective portability of data generated through the activity of a business user or end user. Finally, in terms of compliance with the DMA, fines of up to 10% of a gatekeeper's total worldwide annual turnover may be imposed for non-compliance with the DMA's obligations. Notably, in case of systematic infringements of DMA obligations by gatekeepers, additional remedies may be imposed, including "behavioural and structural" remedies, such as divestiture of a business, or parts of it.

The European Parliament and member states will now consider the Commission's proposal according to the ordinary legislative procedure; if adopted, the new rules under the DMA will be directly applicable across the European Union.

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, 15 December 2020

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