Nordic comments to the Digital Markets Act

The Nordic confederations: Confederation of Swedish Enterprise, Confederation of Norwegian Enterprise, Confederation of Finnish Industries, and the Confederation of Danish Industry have in collaboration the following messages on the Digital Markets Act (DMA).

Key messages

- We support the proposal to supplement existing competition law with rules to ensure that competitive markets in the digital sector are more predictable and effective.
- It must be possible for companies to challenge existing players in digital markets and to create growth, both on their own merits and by offering innovative and efficient services.
- A harmonized regulatory framework should be safeguarded as much as possible. Additional national legislative initiatives covering the same competencies should be avoided, to reduce the risk of overlapping or conflicting regulation.
- Conferring on the Commission investigative, enforcement and monitoring powers, and involving Member States through the Advisory Committee on Digital Markets, will contribute to the uniform application of the law.
- The Commission should allocate the resources required to be able to exercise effective and efficient supervision of the DMA once it enters into force.
- The DMA should be very clear on who is targeted and apply to companies that have the greatest market power and the ability to exercise such power in the digital markets.
- The DMA should apply extraterritorially to digital platforms based outside of Europe but offering their services to business users and end users based within it.
- The quantitative thresholds set out in Article 3(2) contribute to predictability and legal certainty. The threshold values should be evaluated in connection with the review of the regulation.
- The possibility of designating gatekeeper status to a company through additional criteria in Article 3(6) provide flexibility, but the criteria need to be further clarified as business need legal certainty.
- We support the proposal in Article 3(7), that the Commission shall determine the core platform services offered by the gatekeepers and which of those would be subject to the obligations in Articles 5 and 6.
- For the regulation to remain relevant over time and to continue to contribute to predictability, innovative power and a good investment climate, the rules must - as far as possible - be principle based and technology neutral.
- A regulatory dialogue - such as that proposed in Article 7 - is important. It increases legal certainty, proportionality and relevance. Any gatekeeper who is subject to a review by the Commission must therefore always be given the opportunity to comment.
- We question the possibility of suspending an individual core platform service from specific obligations on the grounds of financial considerations (Article 8).
- The conditions for exempting an individual core platform service from certain public interest obligations (Article 9) should be further clarified.

Starting point for our comments

The Nordic confederations work for strong conditions for entrepreneurship and for well-functioning markets, irrespective of whether they are digital or physical. Such markets should allow both large and small companies to compete and to grow based on their own strengths and attributes. Digital markets have certain specific characteristics; these make it more difficult to ensure, via the existing competition rules, strong market dynamics and the appropriate conditions for all market players. Therefore, a new, proportionate, regulation is required. It is important though, that any new rules are not more intrusive than necessary, and that legal certainty, predictability and strong incentives for viable entrepreneurship and innovation are preserved.

A new regulatory framework to support competition in digital markets is welcomed

The core platform services contribute positively to the data economy, through innovations and technical solutions that make it easier for numerous companies to reach new customers. However, the sustained dominant market position that many of these platform services hold risks hampering market dynamics and the capacity for other companies to innovate, become competitive and then have opportunity to grow.

Existing competition law have certain limitations. While the problems identified may be investigated as a potential breach of competition rules, there could be more effective, faster and more cost-effective solutions. The difficulty of defining the rapidly changing digital markets, often a prerequisite for applying the obligations in existing competition law, is one reason. It is also related to the fact that some of the services in question do not directly charge the consumer, instead companies rely on gaining other value such as data volumes and network effects.

We support the DMA proposal to supplement existing competition law so competitive markets in the digital sector are more predictable and effective. It must be possible for companies today and tomorrow to challenge established players on their own merit and by offering innovative, efficient services and create growth.

New rules that restrict the ability of core platform services to act freely and exploit, on a commercial basis, the many advantages of their dominant market position could ultimately risk reducing their willingness to invest in future activities. It is therefore important, that any rules introduced do not unduly undermine the business models of existing platforms or their incentives to invest and pursue innovation. At the same time, supplementing existing competition could create better conditions for more players to become genuine challengers. In the long run, it could benefit innovation, market efficiency and willingness to invest for all actors.

Harmonized rules benefit entrepreneurship and increased growth

Several Member States are considering, or have already introduced, national legislation to complement existing competition law to regulate digital markets. These initiatives are limited to the individual national territories, while platform services usually operate across borders - often at a global level. Without action at EU level, new national legislation in this area risks leading to the increased regulatory fragmentation of digital markets. A range of different regulations would increase both the administrative costs

and the legal uncertainties for companies. Against this background, we welcome EU common rules in the digital sector.

We support, that businesses are consulted before important decisions are made within the framework of the new Advisory Committee on Digital Markets, as proposed by the DMA. However, we do not consider that national competition authorities should also be given a role in the application of the DMA. The DMA should only be enforced towards gatekeepers with the greatest market power, whose digital services have a major impact. It would therefore be more efficient and appropriate for the Commission to handle the enforcement, to ensure the harmonised and effective application of the EU acquis.

At the same time, we must stress the need to allocate the resources required to be able to exercise effective and appropriate supervision of the regulation once it enters into force.

The scope should be limited to those players with the greatest market power

The DMA should apply extraterritorially to gatekeepers, whose services are provided or offered to business users established in the EU, or end users who are established or staying in the EU. This should be irrespective of where the gatekeeper is established or located and regardless of which laws otherwise apply to the provision of services.

To ensure proportionality, the scope of the regulation should be restricted to those companies with the greatest market power and the ability to exercise that power in the digital markets. In parallel, the existing competition rules also continue to apply to all players in digital markets.

The DMA sets the conditions under which providers of core platform services should be designated as gatekeepers, either on the basis of quantitative thresholds (via a rebuttable presumption) or on a case-by-case basis, in the event of a market investigation.

We caution the need to clarify what constitutes an active end-user/business user as this probably depends on the kind of platform service. We welcome the fact that the DMA proposes that delegated acts can be regularly updated to reflect the evolution of market conditions and technology.

The level of the threshold values should also be evaluated on a regular basis. Any adjustments to the levels should not be carried out through delegated acts, but rather by ordinary legislative procedure. It could therefore be further clarified that an evaluation of the thresholds should be included in the review proposed in Article 38.

The quantitative thresholds in Article 3(2) provide predictability and legal certainty for those digital services covered by the DMA. However, this implies a more rigid regulatory framework, and we do acknowledge that the possibility to designate gatekeeper status to a company through 3(6) would bring certain flexibility to the regulatory framework. At the same time, designating gatekeeper status even where a company does not meet the quantitative criteria must not occur to the detriment of investment, innovation and value creation in the long run. We therefore argue that the criteria set out in Article 3(6) need to be further clarified.

As with any legislation, the DMA must also respect the principle of proportionality. Given the far-reaching requirements proposed for gatekeepers' core platform services, Article 3(6) should not result in expanding the scope of the regulations, except at the margins.

We support the proposal in Article 3(7) that the Commission should determine the core platform services offered by the gatekeepers and those that should be covered by the obligations in Articles 5 and 6. Gatekeepers may also offer services that do not have the characteristics of core platform services; these services should therefore not fall within the scope of the DMA.

A particular focus on the obligations of the core platform services

Given the many positive effects that core platform services contribute, the requirements according to the DMA must be proportionate so that a desired effect can be achieved towards the most problematic behaviours, without destroying the opportunities and incentives for innovation and the platforms' overall business models.

Technological development is fast, and it is very difficult to predict the technology of the future. For DMA to be relevant over time and to contribute to predictability, innovative power and a good investment climate, the rules must, as far as possible, be principle-based and technology-neutral.

Article 5(a) concerns data processing regulated by the GDPR, which may give rise to competition law implications in the internal market. The European Commission has investigated on several occasions whether the collection and processing of personal data by dominant players may create barriers to entry and expansion for smaller and newly established market entrants. However, 5(a) should refer more clearly to the GDPR as a whole, as the collection and processing of personal data by gatekeepers as well as by other commercial operators should respect the personal data protection of EU citizens This means that the basic principles of appropriate[1] and necessary[2] processing, and the requirement for informed and voluntary consent, already apply. To avoid overlap or regulatory contradiction, it should be clarified as to how this article relates to the GDPR.

Article 5(b) concerns the opportunity for business users to sell the same products/services through other sales channels by other intermediaries at different prices/conditions (prohibition to apply so-called MFN clauses). Ensuring such an opportunity may help other intermediaries to compete with the core platform services through innovative, efficient or otherwise attractive services. However, it should be clarified whether the prohibition covers the use of both narrow and broad MFN clauses. In addition, it should also be clarified whether, and under which circumstances, the prohibition also covers indirect prohibitions (for example, reduced visibility or increased intermediation costs) for business users to sell the same products/services through several intermediaries.

Article 6(1)(d) prohibits gatekeepers from treating their own services and products more favourably than similar services or products from third parties. Gatekeepers must also apply fair and non-discriminatory conditions for how available services and products are ranked. To promote competition in digital markets, it is reasonable that end users are given the opportunity to choose freely between different service providers. Prohibition of discriminatory terms does not imply a ban on connecting different services to create benefit for users. A prerequisite, however, is that users can disable such connections. In

[1] This principle means that personal data may only be collected for specific, explicit and legitimate purposes and that any further processing may not be carried out in a way incompatible with those purposes.

[2] The data must not exceed what is required for the purposes for which they were collected or be kept any longer than is necessary for the purposes of processing.

addition, when connecting services, there must be a choice between different service providers, where the gatekeeper's service is not pre-installed as the preferred option.

Article 6(1)(i) proposes that commercial users should have access to aggregated and specific data generated by the gatekeeper based on the commercial user's use of their service. The core platform services gain - through the collection of large amounts of data[3] on their users and customers - access to valuable insights and competitive advantages. All this information is valuable to the platform provider. In addition, the information is valuable for the companies that sell their products and services via the platform.

Data sharing is fundamental to innovation and new business development related to the use of data as a resource and the data economy. We believe that as a general rule data sharing within and from the private sector should take place on a voluntary basis, and on market-based conditions respecting the freedom of contract. Developing a framework to facilitate clarification of the rights to use data and the developing of good models to further incentivise voluntary data sharing among companies and preserve fair and level market conditions is, therefore, an important milestone toward fully realising the European data economy.

Yet, the extensive influence and ability of gatekeepers to unilaterally dictate the terms of agreements in relation to their business users is conflicting with the hope that the parties will agree on voluntary data sharing.

To contribute to product development and innovation, and to counteract business users' dependence on key platform services, we support access to data by business users as intended by and in accordance with Article 6(1)(i). The fulfilment of this obligation must, however, be preceded by a thorough assessment to ensure that the measures taken are compatible with relevant legislation (data protection rules, copyright, competition law). The analysis should differ depending on the core platform services and on the application of Article 6(1)(i). It should therefore be preceded by a regulatory dialogue as proposed in Article 7.

The importance of regulatory dialogues

Many of the proposed obligations are based on settled or pending competition law cases that are assessing specific market situations and business models. In order to ensure that even the broadly drafted obligations proposed in the DMA are proportionate and relevant to the different digital services covered by the Act, regulatory dialogue as proposed in Article 7 is crucial.

The measures taken by a gatekeeper in relation to the obligations set out in Articles 5 and 6 should be effective in achieving the objective of the respective requirements. In

[3] Examples of the data generated can be information about their company users (such as organisation number and country of business), information about customers (such as name, age, gender, contact information, IP address or e-mail), information about individual transactions between individuals and companies (such as what was purchased, price, payment method, reviews, what the customer looked for goods before the purchase), statistical information about all the transactions that take place on the platform collected (such as the number of transactions, price changes, total sales value, user traffic), and customer behaviour on the platform (such as clicks, web history, other products the customer purchased on the platform).

Whether customer data is perceived as an important input for a business user may depend on his business model and the type of service or product that is provided, *page 181 in the Swedish Competition Authority's report Competition in digital markets, February 2021.*

the event of non-compliance, it must be ensured that the penalties are proportionate to the specific circumstance and of the respective gatekeeper concerned. We therefore think that it is necessary to clarify, in Article 7, that the gatekeeper shall be given the opportunity to be heard. However, this is a dialogue, not a negotiation. It is also important to ensure a rapid and efficient process, we therefore support that the Commission within six months of the initiation of the procedure, notify parties of the decisions on the measures adopted (cf. Articles 7(2) and 18).

The regulatory dialogue can contribute to the business community's need for legally secure and flexible legislation, by adapting the obligations to a range of existing and future business models. It is also important that the dialogue between the Commission and the respective gatekeeper carefully considers how other legal frameworks covered by the respective core platform services may affect the application of the various obligations.

We question the need, in accordance with Article 8, to include an option for exempting a gatekeeper from some of the conditions that follow from Articles 5 and 6. For example, in a situation where applying these conditions would lead to the gatekeeper's financial conditions for operating within the EU being undermined. We cannot see what such circumstances are referred to here. For the purpose of ensuring a more level playing field in the market, the individual conditions must - following a regulatory dialogue - be adapted to the respective gatekeeper's business model so that they can be implemented effectively and without unduly undermining their business model or leading to harm to consumers or business users. This Article therefore seems superfluous and accepting the economic burden as an argument for suspension of obligations could challenge the intention of the DMA.

Article 9 lays down the conditions under which a temporary derogation from the obligations of an individual core platform service may be granted in the public interest. Any such derogation must be justified on grounds of public morality; public health or public security in 9(2)(a) to (c)). Recital 60 states that these public interests may be affected when the cost to society of implementing a particular obligation would, under certain exceptional cases, be too high and therefore disproportionate. However, it is unclear how this article could be applied in practice. Thus, we consider that the conditions for exempting an individual core platform service from certain obligations on the grounds of public interest should be further clarified.

To ensure competitive digital markets and to contribute to innovation, efficiency and willingness to invest, requires a regulatory framework that produces clear and predictable results.