

Stockholm, 26 January 2021

Introductory comments on proposals for a Digital Markets Act

The Confederation of Swedish Enterprise notes the Commission's legislative proposal, on 15 December 2020, for a Digital Markets Act ("DMA"). Our introductory comments on the DMA proposal are as follow:

- We welcome a horizontal regulatory framework to achieve EU common rules in the digital sector where services are by essence of cross-border nature
- We support the DMA to include platforms that are not established in the EU but are offering services that reach the internal market.
- The business community's need for - as far as possible - proportionate, principle-based and technology-neutral legislation is only partially met. This is essential for creating sufficient legal predictability, a robust investment climate and for encouraging innovation.
- The gatekeeper definition must be limited to those companies with the greatest market reach and the ability to exercise that power in the digital markets. The requirements on these companies should also be proportionate, in order to achieve the desired effect on the most problematic behaviours.
- It is impossible to overstate the business community's need for a thorough impact assessment.
- Any data-sharing requirements must be consistent with the GDPR, the protection of copyright and the protection of trade secrets.
- Any restriction, such as a ban of the application of leverage strategies and MFN clauses, must be future proof, technology-neutral and provide for legal certainty.

The positions set out in the comments above are developed below.

The obligations of the DMA will only apply to the providers of those digital services that are designated to act as gatekeepers between business users and end users and have a consolidated and permanent position ("gatekeepers").

EU common rules in the digital sector, which seek to avoid regulatory fragmentation and ensure competitive and fair markets, are very welcome. This particularly applies to services offered by platforms with a gatekeeper function and operating in several Member States.

The Confederation of Swedish Enterprise supports the scope (article 1) of the regulation to apply to core platform services provided or offered by gatekeepers to business users established in the Union or end users established or located in the Union, irrespective of the place of establishment or residence of the gatekeepers.

However, the business community needs proportionate, principle-based and technology-neutral legislation as far as possible. This should provide sufficient predictability, a robust

investment climate and offer encouragement to innovate. This is only partly addressed by the current proposal.

The gatekeeper definition

Given the far-reaching nature of the requirements proposed for gatekeepers, it is important therefore that the gatekeeper definition is limited to those companies with the greatest market reach and the ability to exercise that power in the digital markets. The requirements on these companies should also be proportionate, in order to achieve the desired effect on the most problematic behaviours. They should not destroy the platforms' overall business models and the value of the opportunities and incentives for innovation that they bring.

A provider of core platform services that meets a three criteria test (article 2) shall be designated a gatekeeper. The criteria should be supplemented by delegated acts that specify the methodology for determining whether the thresholds have been achieved. While not taking a definitive position on the proposed thresholds in article 2, we welcome that the delegated acts can be adapted regularly to developments in market conditions and technology. We also welcome the fact that the proposed threshold values can be adjusted to reflect market and technical developments.

However, the business community cannot overstress the importance of conducting a thorough impact assessment ahead of the regulatory work. Although the DMA is likely to cover only a limited number of the existing large digital platforms, the rate of technical advance in virtually all sectors may mean that services not currently intended to be covered by current regulatory proposals may fall into its scope in the future. One example is the automotive sector, where development is increasingly moving towards a global ecosystem where the increased digitization/electrification/automation and the pursuit of increased collaborative economies lead to products and services that are expected to become dependent on, among other things, vehicle-generated data. Another example is such data sharing providers that must comply with a set of requirements within the Commission's proposal for a European Data Governance Act.

Access to data

Among the requirements proposed for addressing the structural competition issues that EU competition rules cannot counter or are unable to deal with effectively, is increased access to data. Through collecting large amounts of data about their users and customers, large digital platforms can gather valuable insights and competitive advantages.¹ All this information is not only valuable for the supplier of the platform, it is arguably more valuable still to those companies that sell their products via the platform.

Indeed, many business users have a desire to have access to more data than they currently have.

¹ Examples of the data generated by digital platforms include information on their company users (such as their registration number and country of business), information on customers (such as names, age, gender, contact information, IP address or email), information on individual transactions between individuals and companies (such as what was purchased, the price paid, the payment method used, reviews and what other goods the customer looked at before making the purchase), statistical insights into all the collected transactions that take place on the platform (such as the number of transactions, price changes, total sales value and user traffic), and information on customer behaviours on the platform (such as clicks, web-browsing history and other products the customer may have purchased on the platform).

The platforms justify their restrictive data sharing policies through - among other measures - protection of the customer's integrity, compliance with data protection rules, lack of competence, commercial considerations and data interoperability issues.

Forcing platforms to share data, alongside the strong protection for personal data, gives rise to a number of complex issues and potential red lines. In those cases where the data to be shared contains personal data, the General Data Protection Regulation, GDPR, may create barriers to sharing. In such situations, anonymization may offer a solution, but such a measure is both time consuming, risky and costly. The protection of copyright and the protection of trade secrets may also need to be considered when data is to be or must be shared. These protections can affect who can do what with this data and thus who must consent to any sharing.

If platforms are forced to share their collected data, the competitive advantage they obtain from generating this data for their own use is also reduced. The Confederation believes that new regulations should primarily protect freedom of contract and voluntary sharing of data from private actors, which can be done via legal guidance and access to efficient technical systems for sharing. Forced data sharing can undermine the incentives gatekeepers have to carry out data collection; this does not necessarily benefit digital development.

The Confederation of Swedish Enterprise believes, however, that the dominant position of gatekeepers, their pervasive influence and their ability to unilaterally dictate the terms of any agreement with their business users suggests that it is unlikely that the various actors will agree on voluntary data sharing. It is important to ensure that gatekeepers act fairly in the market and provide sufficient encouragement to innovative new players. Therefore, requiring gatekeepers to make data generated by business users and their customers on the platform available to the user in question seem justified. However, any requirements to make such data available must be compatible with any other applicable legislation previously mentioned.

Leverage strategies and MFN clauses

The DMA sets out to supplement existing competition law by addressing those unfair practices that either fall outside its current scope or do not allow for sufficiently efficient handling. This is important, as intervention under competition law can only take place ex-post, from case to case, and usually only after a lengthy investigation and not infrequently, which is an even lengthier court process.

The proposal to ban the application of leverage strategies and Most-Favorable Nation (MFN) clauses is based on the experience gained from previous competition law interventions, and on the results of several expert reports on the application of competition law in digital markets.

The Confederation of Swedish Enterprise agree that gatekeepers should be prevented from using strategies that allow gatekeepers to leverage their strength in one market in order to drive growth in another. The Confederation also agree that gatekeepers should be prohibited from applying MFN clauses in contracts with its business users, as these clauses prevent business users from marketing their goods and services through different offers on different markets or platforms.

However, such strategies and clauses can take different forms in different markets and on different platforms.

Leverage strategies can, for example, mean that platforms link the use of one of their services with the use of another. Alternatively, they may use the data generated from their platform to access neighboring markets, or may use the platforms to direct their users to their own offerings ahead of competitors, or that the platform deliberately impairs its competitors' offerings. MFN clauses can be applied both directly and indirectly to its business users.

The Confederation therefore sees challenges in designing the sanctions in such a way that it is evident what the DMA will entail for both the gatekeepers covered and its users. The actors that the DMA intends to regulate are few, but they are diverse and deploy radically completely different business models. They are also active in a range of markets, although to an extent they are competitors.

The starting point, however, must be that there needs to be a clear imbalance between the rights and obligations from gatekeepers to business users, and that the advantages that the gatekeepers derive from the business users is disproportionate to the service they offer them. The competitive dynamics in the market must also be reduced due to the actions of the gatekeeper.

The proposals in Articles 5 and 6 of the DMA means that the sanctions can be applied to gatekeepers, without having to show that they violate EU or national competition laws. It is necessary for any restriction, such as the ban of leverage strategies or MFN clauses, to be technology-neutral and provide for legal certainty. In order for the DMA to be able to apply over time, it is also necessary that the sanctions are formulated generally, rather than aimed at one or a few specific companies.

