EETT

HELLENIC TELECOMMUNICATIONS & POST COMMISSION

EETT POSITION PAPER ON THE EUROPEAN COMMISSION'S DMA PROPOSAL

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EXECUTIVE SUMMARY

The European Commission´s legislative proposal for a Digital Markets Act (DMA), which was released for consultation in December 2020, provides a strong foundation upon which the European Union will be developing a unique regulatory framework to deal with many of the concerns generated by digital platforms operating on a pan-European basis. The EETT, through this White Paper, seeks to contribute to the debate about the future shape of the DMA in terms of its analytical coherence and its institutional implications.

From an analytical perspective, the EETT is of the view that a material improvement to the workings of the DMA could come about if the legislation were to include a dispute resolution mechanism which could in effect bridge the gap between the binary and narrowly framed regulatory obligations contained in Articles 5 and 6 of the DMA Proposal and the need for a flexible, robust mechanism which will provide greater legal certainty to market players. It would also provide the basis upon which market intelligence can be developed in order to facilitate the most efficient use of the amendment/upgrading mechanism available under Article 7 of the DMA Proposal.

From an institutional perspective, the EETT believes that the DMA Proposal would benefit significantly from the active involvement of National Regulatory Authorities in the processes of information-gathering, remedy refinement and the monitoring of effective compliance. Their expertise in the forging and implementation of the sorts of complex behavioral remedies that will be required under the legislation and their existing expertise derived from their existing jurisdictional powers in electronic communications mean that they are ideally placed to assist the Commission in the performance of many of its tasks envisaged under the DMA Proposal. The role of National Regulatory Authorities in assisting the Commission under the dispute settlement regime proposed above would constitute a particular and highly relevant function that could supplement and reinforce the Commission´s envisaged powers.

1. INTRODUCTION

As a result of a series of studies, analyses and papers published over the course of 2019-2020 all around the world, an international consensus emerged that the public policy concerns that have arisen in connection with digital platforms either required a fundamental re-assessment of how competition policy should deal with such concerns or the creation of a *sui generis* regulatory regime that would address many of the competitive concerns and market failures that have already been identified, leaving a minor role to be played by competition enforcement in the future. The European Union (“*EU*”) was at the heart of that global consensus.

To this end, the European Commission ("*the Commission*") tabled a legislative proposal on 15 December 2020 for public consultation on a new Digital Markets Act ("*the DMA Proposal*"),[1] whose goal is to promote fairness and to increase contestability in the EU digital economy.[2] In doing so, the policy drivers are to promote innovation in digital services, improve the quality of such services and the fairness of prices, and to improve the choices available to business users and end-users.[3] Based on experiences gained in addressing the abusive commercial practices of large digital platforms and in identifying the range of market failures that might arise from the particular industry dynamics which characterize particular types of digital platforms, the Commission has created a regulatory regime with respect to large digital platforms. While that regime is inspired to a large extent by the recognition that competition policy should be the focal point for the analysis of potential theories of harm, the shortcomings of competition policy are sought to be overcome by a regulatory model which is very much inspired in the EU by the experiences of telecommunications sector regulation and by the recognition that the executive power under the DMA regime need to be focused on the EU-wide impact of digital platforms.

In this White Paper, the EETT outlines its understanding of the key analytical and institutional issues raised by the DMA Proposal and some of the ways in which the focus of that legislation can be improved as it moves through its various phases before the European Council and the Parliament.

2. ANALYTICAL FRAMEWORK

The DMA Proposal is constructed in a manner which reflects in large part the fact that it is contained in a Regulation, which means that its defining principles need to be clear and unambiguous, so that they can be applied directly throughout the EU, without the need for national implementing legislation. At the same time, procedural elements can be left open for a period of time and supplemented in due course by secondary legislation introduced at EU level. In its original form, the DMA Proposal can be characterised by the following guiding principles:

1. The overriding policy basis of the legislation is to: (i) ensure that digital markets are **contestable**; (ii) guarantee a level of **fairness** in so-called B2B (*i.e.*, busines to business) relationships in the digital world; and (iii) strengthen the digital **internal market**. In pursuing these aims, the Commission is clearly pursuing a regulatory agenda.

2. Based on the understanding that they have unique economic characteristics whose cumulative effect lends itself to certain anti-competitive characteristics, a series of eight "**core platform services**" (including online search engines, social networks and

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[1] Proposal of the Commission of 15 December 2020 for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), CON (2020) 842 (the "*DMA Proposal*").

[2] *DMA Proposal*, Recital 57, Articles 7(6) and 10(2).

[3] *DMA Proposal*, Article 2(1).

intermediation services) are identified in Article 2 of the DMA Proposal as being the subject of regulatory obligations. According to a market investigation mechanism (see Articles 14-17 of the DMA Proposal), the number of such core platform services may expand in the future through the passage of amending legislation.

3. Regulatory obligations are imposed only on those parties which can be classified as "**gatekeepers**" in relation to those identified core platform services (Articles 3 & 4). Such a classification is based on three sets of quantitative and qualitative criteria designed to determine whether such gatekeepers have: (i) a significant impact on the EU internal market; (ii) control an important gateway for businesses to reach end-users; and (iii) an entrenched and durable market position.

4. A digital platform designated as a gatekeeper is then subject to **a series of 18 obligations**[4] that take the form of binary obligations (7 in total) which are mandatory (Article 5), while the remaining 11 obligations also apply but will require greater specification by the Commission (Article 6) to take into account different business models and possible permutations of the obligations in specific digital platform contexts. Unlike the regulatory model proposed recently in the UK, however, obligations imposed by the Commission on digital gatekeepers are not individualised according to the identity of each gatekeeper. The regulatory obligations that are prescribed are intended to cover those situations where competition law cannot act or is likely to act in an ineffective manner.[5] The genesis of those obligations can be found in the different theories of harm developed by the Commission in the various Google competition cases and in a series of competition investigations being run at present by the Commission in relation to various practices of, among others, Amazon, Facebook and Apple (and further investigations into the practices of Google). The Commission has also proposed that it should have a broad **anti-circumvention power**, pursuant to which it is able to ensure that a gatekeeper is not able to avoid its obligations under Articles 5 and 6 through techniques not foreseen when such obligations have been imposed (whether by actions of a "*contractual, commercial, technical or any other nature*" - Article 11). Finally, gatekeepers will also be obliged to notify the Commission of acquisitions in the digital space, even where they do not trigger national merger filing obligations (Article 12).

5. Where there is shown to be no effective compliance with the regulatory obligations imposed under Article 6 of the DMA, the Commission may trigger a **market review mechanism** under Article 7 of the DMA Proposal which can lead to the adoption by the Commission of a decision which expands the scope of regulatory obligations

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[4] Although the EETT understands that proposed amendments being introduced into European Parliament will have the effect of extending the number of mandatory obligations imposed under Article 5, including the transfer of some obligations originally foreseen in Article 6.

[5] *DMA Proposal*, Recitals 9 and 10.

imposed on the gatekeeper in question. This mechanism provides the Commission with the opportunity to improve, modify or amend existing measures, although the adoption of a decision will involve the Commission engaging in a fact-finding exercise which results in the adoption of a final decision.

EETT Comments:

The EETT fully supports the Commission´s desire to establish a new regulatory standard of intervention which focuses on the identification of digital "gatekeepers" in relation to a series of "core platform services". Moreover, we believe that the creation of a regulatory regime inspired by a competition law standard is something with which all National Regulatory Authorities operating in the electronic communications sector are well acquainted with.[6]

The challenges placed on the principle of legal certainty

However, we believe that the regulatory model proposed can be further improved by being made more robust in a number of material respects, especially in terms of the practical application and adaptation of regulatory obligations under the DMA Proposal. In particular:

(i) The dividing line between clear-cut regulatory obligations imposed under Article 5 and the regulatory obligations that require further elaboration under Article 6 may prove to be difficult to manage in practice, insofar as the level of detail required for Article 6 obligations might result in significant delays in implementation, on the one hand, while also being more vulnerable to legal challenge as not being sufficiently specific on its face to result in enforceable legal obligations under a Regulation.

(ii) Even where regulatory obligations are clearly drafted, experience suggests that concepts such as "non-discrimination" are notoriously difficult to apply uniformly in each factual situation (yet alone where technologically complex digital platforms are in operation), and therefore require some mechanism which would provide the Commission with sufficient flexibility to adapt to shifts in technology and business practices without departing from the general principles set forth in Articles 5 and 6 of the DMA Proposal.

(iii) The Article 7 market review procedure can be equated in some respects to the procedure otherwise followed by the Commission in a competition law investigation. As such, it is always at risk of being a necessarily long and time-consuming process which is vulnerable to being taken advantage of by large digital gatekeepers who might be tempted to inject unnecessary delay to the implementation process.

(iv) The anti-circumvention provision found in Article 11, precisely because it is drawn so broadly, arguably leaves itself vulnerable to legal challenge on the ground of legal

[6] For example, the EU regulatory framework for electronic communications is premised on the understanding that the concept of Significant Market Power (SMP) is the prevailing standard of review for asymmetric regulation. The adoption of the SMP standard is, in turn, inspired by the EU competition law standard of "dominance", which is applied with particular sectoral nuance in the regulatory context.

uncertainty, whether by regulated digital gatekeepers or the beneficiaries of regulatory obligations.

(v) The scope of the regulatory obligations that can be identified in Articles 5 and 6 of the DMA Proposal are all derived from theories of harm developed under the Commission´s case practice under competition policy. Accordingly, the justifications for the types of regulatory obligations imposed under these Articles of the DMA Proposal might be compromised if subsequent appeals before the European Courts overturn Commission Decisions brought against various digital platforms under competition rules. This generates even greater pressure on the regulatory obligations imposed under these Articles to have a clear regulatory character.

The need for a robust dispute settlement mechanism

The EETT takes the view that the potential areas of concern in the DMA Proposal listed above might be capable of being addressed in large measure through the introduction of one fundamental amendment, namely, the creation of a **dispute settlement mechanism.** While the decision-making power of dispute resolution panel would rest exclusively with the Commission, such a body should also be assisted and advised by specialists drawn largely from National Regulatory Authorities such as the EETT.

The key to such a dispute settlement mechanism being successful, in our view, lies in the fact that National Regulatory Authorities (NRAs) such as the EETT have longstanding expertise in the application of remedies which are clearly regulatory in nature (*e.g*., access relationships in general, transparency requirements, the prohibition of self-preferencing strategies, interoperability obligations, data portability requirements, data access requirements, and the need for structural separation between key commercial functions of a regulated undertaking). By contrast, National Competition Authorities are less experienced and arguably ill-equipped in applying such remedies.

National Regulatory Authorities have been experienced, at least since 2003, in running dispute settlement procedures under the EU regulatory framework for electronic communications.[7] The results of those dispute settlement procedures allow regulators to develop a greater understanding of the nuances of regulatory obligations in relatively short periods of time (*i.e*., usually a period of only 4 months), thereby ensuring that regulated operators are not in a position to delay enforcement through strategic legal challenges and delays in implementation. Moreover, the practical knowledge developed over a series of dispute settlements can inform the sort of market review that would otherwise need to be conducted by the Commission over a much longer timeframe in order to complete the sort of analysis that might be necessary to broaden the scope of the obligations contained in the DMA or to restrict or refine their scope under the procedure foreseen under Article 7, depending *inter alia* on the outcome of certain market developments and also legal challenges before the European Courts.

The EETT believes that creating a "bridge" between (of necessity) narrowly-framed, binding legal obligations in a Regulation and the possibility for the amendment and further elaboration of obligations under the DMA lies most comfortably in the hands of a dispute settlement mechanism

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[7] Dispute settlement powers are also widely used in the energy sector under the prevailing regulatory framework in place, especially as regards the settlement of cross-border disputes.

being established. Such a mechanism would also be helpful in overcoming any tendency to individualise regulatory obligations, which would be tantamount in many respects to adopting a decision under a competition infringement action. It would also sit comfortably with the EETT`s recommendations for the improvement of the institutional framework put forward under the Proposal (see discussion below).

3. INSTITUTIONAL GOVERNANCE

At the heart of the DMA Proposal lies the Commission's view of the manner in which the legislation should be applied and the institutional arrangements that should give effect to that process. In a nutshell:

1. The institutional model for the enforcement of the DMA Proposal is a centralised one, with power vesting exclusively in the Commission to conduct the various analytical steps outlined above. In doing so, the Commission adopts a relatively adversarial position *vis a vi*s the regulated gatekeepers, having power to fine them for infringements of their obligations and even to impose more far-reaching remedies (including structural remedies) where non-compliance with existing obligations is found to be systematic (Article 16).
2. Outside the DMA Proposal, Member States are only permitted to impose obligations on digital platforms where they are pursuing other legitimate public policy goals or exercising national competition law powers, and only insofar as those powers do not contradict EU competition rules prescribes that the intervention fact that the Member States are only permitted to impose additional obligations to those listed in the *DMA Proposal* where they pursue other "*legitimate interests*" such as consumer protection or fair competition rules, or are based on national competition rules (where this is permissible under EU competition law).[8] Moreover, unlike competition law, there is no possibility for a digital gatekeeper to rely on an "efficiency" defense to circumvent the imposition of obligations under the *DMA Proposal*.[9]
3. Finally, the Commission has a range of procedural powers under the DMA Proposal, pursuant to which it can request information, conduct on-the-spot searches, impose interim measures, monitor compliance and impose fines for non-compliance (refer to Chapter V of DMA Proposal).

EETT Comments:

With a view to achieving a harmonised approach on a pan-European scale, which is in any event the key functional level of competition in which the most important digital platforms exercise their influence, the EETT concurs that the primary executive functions that need to be performed under the DMA Proposal should rest fundamentally in the hands of the Commission. To this end, the

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[8] *DMA Proposal*, Article 1(6).

[9] Narrow exceptions to the applicability of the mandated obligations are only envisaged in the *DMA Proposal* under the two narrow exceptions contained in Article 8 (likely to affect the viability of the gatekeeper's EU operations) and Article 9 (protection of one of the public interests of morality, health and security).

EETT also fully supports the Commission´s desire to have an arsenal of procedural powers which would allow it to perform its functions under the DMA Proposal most effectively. In this regard also, the EETT is of the view that the broad fining power enjoyed by the Commission under the DMA Proposal is necessary to generate a sufficient deterrent effect on those digital gatekeepers that seek to undermine or delay effective enforcement.

Nevertheless, the EETT considers that the Commission would greatly benefit from the involvement of NRAs such as the EETT in certain key aspects of effective implementation of the legislation, especially given the level of technical and operational support that would be required to fully implement and administer the regulatory regime foreseen under the DMA Proposal. In the view of the EETT, the Commission's efficiency would only benefit if it were to share the burden of administering that regulatory regime, even when allowing for its exclusive competence to exercise executive action. Accordingly, when re-considering the institutional framework for the governance of the DMA Proposal during the legislative process that is due to unfold over the next nine months, we take the view that the following considerations should be taken into account:

(i) Although the Commission has earmarked 80, personnel to be dedicated to the task of addressing digital platform issues, that figure compares unfavorably to the resources dedicated by other Authorities that are responsible for digital-specific market issues which embrace all aspects of the technology development/fact-finding/case analysis/monitoring/enforcement spectrum that is involved in decision-making in this area. A dedicated group of 80 personnel seems more than adequate if its tasks are confined to the executive decision-making function and the prosecution of the infringement of regulatory obligations, while delegating authority or sharing responsibility for powers related to fact-finding and remedy monitoring of remedies to other, better-placed bodies. Allowing NRAs to play an important role in these ancillary aspects of regulatory policy merely reinforces the commitment of such bodies to supporting the European dimension of the policy issues, while also allowing the Commission to take advantage of the valuable and highly analogous experiences gained at national level, taking into account that the theories of harm associated with digital gatekeepers may vary across EU Member States in accordance with local market conditions. By contrast, National Competition Authorities are not well placed to perform this regulatory function, given the qualities that would be required of any participating national body (see below). In our view, the fact that the so-called "*P2B*" legislation is administered by national bodies, coupled with the fact that so-called "Over the Top" (OTT) providers of telecommunications services include large digital platforms which fall within the scope of the Electronic Communications Code that is administered by NRAs, only enhances the strength of the proposition that greater Member State involvement should be at the heart of the DMA Proposal.

(ii) Given the inspiration that has been drawn under the DMA Proposal from regulatory principles that have been applied for many years in the electronic communications sector, the EETT believes that the Commission should be wary about the potential efficacy in practice of regulatory obligations being imposed without the need for a significant amount of follow-up action, monitoring and dispute settlement. The experience of NRAs in the electronic communications

sector has been characterized by detailed investigative procedures, complex fact-finding and work-intensive verification. Given the particular importance attached *inter alia* to interoperability concerns, the sharing of resources, access to key resources, the importance of transparency measures, self-preferencing theories of harm, the portability of data, the ring-fencing of competitive functions through structural and other operational safeguards – all of which are issues that have been applied for decades by NRAs such as the EETT in the electronic communications sector – it seems to be a sensible solution to include the national members of BEREC from sharing the operational burden under the DMA Proposal. Given the fact that NRAs such as the EETT regulate the very sector of the economy which provides the broadband infrastructure for digital platforms (including certain aspects of the business of OTT providers), such bodies have a better view of the implications of certain commercial practices and technological developments on the competitive delivery of digital services. By comparison, competition bodies are less well placed to address such issues at the stage of remedy formulation and implementation, given the inherent limits on their powers in this respect.

The application of a number of remedies by regulators set forth under the *DMA Proposal* can certainly benefit from the experience gained by NRAs in the electronic communications sector in enforcing a range of remedies under the *European Electronic Communications Code*, including but not limited to those relating to transparency measures, an expansive view of discrimination which embraces instances of self-preferencing, portability requirements and interoperability obligations. While the remedies implemented under the *Code* and its predecessors since 2002 may not have like-for-like parallels in the digital platform context, the philosophy behind the remedies set forth under the *Code* essentially follows very similar policy directions. Moreover, practice has demonstrated that the level of detail required to implement such remedies and the follow-up measures that need to be introduced to ensure effective enforcement, are particularly important in ensuring the effectiveness of the regulatory process.

The range of *ex ante* remedies which we have listed above arguably provide a much more tangible set of potentially effective remedies than anything that is currently available under EU competition rules. Not only do Competition Authorities not have the capacity to monitor the effective enforcement of behavioral remedies, but the level of granularity that such remedies would require is not be compatible with the traditional exercise of *ex post* competition powers. Competition decisions are, by definition, declaratory in nature and not realistically amenable to modification, amendment or updating (even allowing for the flexibility afforded to the Commission when exercising its settlement powers under Article 9 of *Regulation 1/2003*)[10] or National Competition Authorities acting under equivalent national

[10] In the short term, the task of ensuring that behavioural remedies are working effectively is a task that is often outsourced to a so-called “Monitoring Trustee”. Beyond the short term, trust is usually placed in the beneficiaries of behavioural remedies enforcing their rights by recourse to arbitration or some other form of dispute settlement mechanism that has been built into the Commitments offered to settle a

legislation. Moreover, *ex post* competition remedies are crafted where defences based on efficiency arguments are considered to be overridden by the anti-competitive nature of the problematic commercial practice under review, whereas *ex ante* remedies usually work on the presumption that the structure of competition is such that the anti-competitive implications of a commercial practice are inevitable, or at the very least highly likely to materialize.[11] As noted earlier, the DMA Proposal is crafted in such a way that efficiency defenses by designated digital gatekeepers have no role to play under the regulatory regime being proposed.

As proposed above, the expertise which NRAs can contribute can arguably best be channeled through, *inter alia*, the active involvement of their experts in a dispute settlement regime, the aim of which would be to fine tune remedies. To this end, the EETT notes positively that the European Parliament´s Committee on the Internal Market and Consumer Protection proposed on 31 May 2021 that a "*European High-Level Group of Digital Regulators*" be formed to assist the Commission in its deliberations under the DMA Proposal, including by means of "*advice, opinions, analysis and expertise in monitoring compliance*" with the DMA Proposal.[12] The EETT commends this approach and suggests that future refinements to the language of the legislation specify the importance of such a body reflecting the sort of regulatory expertise necessary to ensure effective decision-making. For the reasons explained above, the EETT believes that NRAs in the electronic communications sector should have a critical role to play when acting in such a capacity. Some of the relevant regulatory expertise that can also be harnessed in a dispute settlement procedure no doubt also rests with the various data protection authorities, which will no doubt be called upon to determine the validity of defenses raised by digital gatekeepers to the effect that the fulfilment of their regulatory obligations under the DMA Proposal are constrained by data protection obligations or data security concerns.

(iii) As a practical matter, it is worth noting that the drive towards deregulation in the electronic communications sector, as exemplified in the adoption of the *European Electronic Communications Code* and the latest version of the *Relevant Markets Recommendation,* means that NRAs in the sector have arguably the availability, the capacity and the expertise, which has been developed over a number of decades to formulate and implement remedies. A cost/benefit analysis would therefore suggest that it would be more beneficial to deploy those resources into areas where

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competition law action. In this respect, there is a strong analogy with the dispute settlement procedure being proposed by the EETT as an integral part of the DMA Proposal.

[11] In this sense, the imposition of *ex ante* regulatory obligations proceeds on the basis that certain practices are likely to be *per se* anti-competitive or anti-competitive "by object", in the manner understood under the competition law jurisprudence and practice of Article 101(1) TFEU.

[12] Refer to European Parliament document of 31/05/2021, http://www.at4am.ep.parl.union.eu, especially as regards the new proposed Article 31a to the DMA Proposal.

there is greater demand for the particular skills of such institutions. As suggested above, recourse to such national expertise would be essential, for example, if a dispute settlement function would be included within the Commission´s executive powers under the DMA Proposal. Insofar as the involvement of NRA expertise into the Commission's decision-making process is desirable, this process could be facilitated through BEREC as a single point of contact with the Commission, especially given that body`s long track record of acting as an institutional filter for the input of NRA observations into the rule-making process under the procedural framework which applies in the electronic communications sector.

A final institutional issue that needs to be addressed by the Commission under the DMA Proposal is the need for greater guidance on the residual role of competition policy in relation to digital platforms, above and beyond the regulatory intervention already being envisaged under the DMA Proposal. While the Commission is permitted to exercise its competition powers where appropriate (especially given that gatekeepers are not necessarily "dominant" firms within the meaning of Article 102 TFEU), the likelihood of that occurring in the foreseeable future must be very limited once the current series of pending cases being investigated by the Commission have been resolved, given the fact that the problematic practices caught by Articles 5 and 6 of the DMA Proposal reflect competition law theories of harm. Seen in this light, and given the importance of the EU-wide integrity of the DMA Proposal being maintained, it seems clear that the Commission anticipates that the role of competition policy at national level should be very limited.