**Impact Assessment Quality Checklist for Regulatory Scrutiny Board Opinion**

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<th>Title:</th>
<th>Digital Markets Act</th>
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**Policy context**

In many digital markets, there is a trend towards concentration of a few players. Some large online platforms have emerged as gatekeepers of the digital economy. They control a significant portion of transactions between consumers and businesses. This can make it difficult for existing or new market operators to compete. This can translate into higher prices for consumers or lower prices for producers, lower quality, or less choice and innovation. The existing EU competition rules seem not the most effective and efficient way to tackle some of these existing or emerging market failures.

This initiative is part of the Commission’s overall digital strategy announced in its Communication ‘Shaping Europe’s digital future’. Its aim is to tackle existing and emerging market failures through regulatory measures and through a market investigation regime.

**Main issues for discussion**

1. **Why is the initiative limited to digital markets? Are the problem drivers more acute for digital markets, and the proposed instruments less needed for non-digital markets?** Which gatekeepers does this initiative target? (boxes 1, 2 and 5)

2. **How far are the “market features” part of the problem drivers?** Could the identified types of behaviour presented in figure 3 (p21) be the basis for a more integrated problem description for both pillars of the impact assessment? To what extent are issues like common shareholding and tacit collusion particularly pertinent in digital markets? (box 2)

3. **How and based on which evidence will the precise content of the policy options be fixed?** How are unfair practices (pillar 1) more easily identified and countermeasures specified ex ante? To what extent is pillar 2 an alternative to normal regulation to tackle market failures? How would the design of remedies take into account wider societal objectives? (box 5)

4. **What risks are attached to the retained policy options?** Would some of them risk reducing the benefits of the platforms for consumers or sellers? What do

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1 The Board’s assessment is based on the application of the Commission’s guidelines, the evidence base, the scope and depth of the analysis and whether it is proportionate in relation to the type of initiative and likely impacts, as well as the quality of the analysis, the appropriateness of the applied tools/methodology and the reliability of the data used.
1. Context and scope

- The introduction should explain more in detail the parallel initiative – the digital services act, how it relates to this initiative, whether there are any overlaps and whether it will tackle some of the market features identified. It should also explain how it relates to the Vertical block exemption regulation for the vertically integrated markets (p. 4).

- The report should explain why it leaves out business-to-consumer issues, especially while addressing ‘consumer lock-in’ from a business perspective.

- Most respondents to the consultation on the new competition tool and the academic advisors indicated that it should not be limited to the markets/sectors affected by digitisation. They argued that inter alia structural problems can occur in most sectors and that there is no clear boundary between digital and digitised markets. Stakeholders cited in particular transport, automotive, pharmaceuticals and telecoms sectors (see also §102, 106, 108 and 191 of the report and p.19 of the summary of the public consultation). The context description should therefore better justify why the scope of the initiative is restricted to digital markets and how and why the exact scope of digital markets is defined (including by providing a clearer definition of the types of markets concerned (p. 4)).

- The report should illustrate the context by providing concrete examples.

2. Problem definition and use of evaluation

- The report does not present an integrated problem description between the two pillars of the initiative. It could possibly build on the identified types of behaviour in figure 3 (p21), which represent examples of market failure that cover both pillars.

- The report distinguishes between “market features” and problem drivers. The problem analysis should clarify that the market features can lead to market concentration with negative consequences for efficiency and fairness in both non-digital and digital markets. It should better explain what is specific about digital markets. It should explain why the market features, which figure as problem drivers in digital markets, are not to be understood as problem drivers in other markets.

- The report should expand on the issues arising from multi-sided markets for competition policy. It should explain why it does not give more prominence to this feature. The Digital Service initiative considers it as the defining feature of the online platform business model.

- The report should provide evidence on how market features affect digital market outcomes. Why are switching costs a particular problem of digital markets? How would switching costs be lower without them? The report should present market features and problem drivers in a way that links better to the policy options.

- The problem description should explain more precisely which types of platforms cause the observed problems. The different types of platforms that seem to be included in this
initiative (§157) represent very different market situations and possible problems. For example: while there is strong competition in audio and video streaming and in cloud services, Apple has a monopoly in granting access to applications in IOS. The evidence for including certain platforms (or not) in this initiative should be presented in the impact assessment.

- The report should show more convincingly that the problems caused by gatekeepers are of a different type and scale than those caused by other platforms. The arguments presented in this impact assessment are very similar to those that were presented in the impact assessment for the platforms-to-business Regulation.

- The report should indicate what the stakeholders think about the problems and their drivers. The report should present stakeholder views in the problems section, and highlight the differences of views between stakeholder groups. It should include relevant minority views and arguments, such as from the concerned platforms.

- The report should better take into account the benefits of big platforms for sellers and consumers (e.g. making it possible for SMEs to gain access to a wider set of consumers; reduce information and switching costs for consumers; provide a safer operating system with fewer viruses;...).

- The report should clarify how market fragmentation occurs. The report currently considers the fragmentation of the internal market to be a consequence of the regulatory gap (§122, §129). However, the problem tree (figure 4, p. 32) links fragmentation only to the regulatory aspect and not to foreclosing parts of the internal market or to lower competition in certain Member States, while considering fragmentation a mere problem driver and not a problem in and of itself.

- The report should explain whether specific measures have already been taken in some markets (i.e. sector-specific ex ante competition rules), how successful they were and what problems they encountered. It should also explain how non-EU countries address or intend to address the identified problems and whether the EU can draw lessons from there.

- The report should present more convincing evidence on the problems supporting pillar 2 actions. To justify such possibly far reaching new competition powers, more evidence about the scale of the problems that cannot be tackled by ex-ante regulation and current competition instruments is needed. For instance, the report should provide concrete evidence of digital markets “leading to sudden and radical decreases in competition”. It should demonstrate why issues like common shareholding, tacit collusion and anti-competitive monopolisation are particularly pertinent in digital markets requiring action now and why it is less a problem in other concentrated sectors.

- The report should describe better how indicators could be used to measure problem drivers. Market shares, market capitalisation, revenue figures etc can all speak for an anti-competitive situation in some settings and not in others. What are crucial indicators of the digital market situation?

- In section 2.2.2, the report should be more nuanced about the use of stock prices as a proxy for profitability. As these companies are listed on the stock markets, their actual profits should be known, too. The graphs do not clarify from what point the profits become abnormal as to attract competitors. There are also other stocks that do not belong to the targeted platforms that had a similar evolution of their stock price (e.g Tesla). The
report should be clear about how these developments fit with the story.

- Figure 2 and §51 argue that revenue by employee is an indicator for profitability. Without information about the costs of the digital services, revenues are uninformative on profitability and may conceal losses. The big differences between the presented platforms signal that revenues are a bad proxy for profits. This is likely because some of these companies have significant other costs besides staff costs. For example, for Netflix, the main cost factor is likely producing content.

- Section 2.4 (size of the problem) shows rather the size of the market than the size of the problem (unless it is meant as an indication of the potential size of the problem).

3. Subsidiarity and EU value added

- The report should explain what Member States are currently doing or preparing in this area. It refers to the risk of regulatory fragmentation; it would be informative to describe Member States’ known intentions and actions. Also for the policy options, the report should clarify and justify the role of the national authorities (given that the policy options involve “coordination costs of national authorities and EU regulators”, §287).

4. Objectives and intervention logic

- The specific objectives for the two pillars of the initiative are not integrated and should be reviewed in the light of the above comments on a more integrated problem analysis. As they currently stand, the objectives of promoting contestable markets by preventing the emergence of market failures (objective 4) and by addressing existing market failures (objective 5) seem to be sub-objectives of objective 3 (promoting contestable platform markets).

- It is unclear to which problem or driver the objective of creating legal certainty relates.

5. Baseline and options

- Based on a more precise problem description, the report should include a clear definition of which types of platforms it includes in the options. It should explain how the definition of ‘very large online platforms acting as gatekeepers’ aligns or differs from the suggested definition of ‘very large platforms’ in the parallel initiative on digital services in the single market, and why.

- The “high level options” (section 5.1) mainly relate to the choice of the legislative delivery instrument (one or two). This issue should be assessed at the end of the impact assessment and should not bear on the policy options – which are about content and available policy choices.

- The baseline scenario, which includes important updates of the vertical and horizontal competition guidelines possibly together with a revision of the market definition notice, seems to be dismissed to quickly as these instruments are likely to cover many of the issues identified in this impact assessment and could form a credible alternative (possibly
together with variants from pillar 1).

- The report should provide a more detailed description of the policy options. It should not leave any policy choices open for after the impact assessment. All policy choices should be based on evidence that is presented in the impact assessment.

- The current options description leaves many questions open as to the actual implementation of the policy options. The report generally remains imprecise when referring to possible measures (e.g. §165, 167, 168, 175, 176 referring to “examples” of rules or “possible rules”). It should more clearly indicate what will be fixed in this initiative and what will be left to implementing regulation. For pillar 1, the report should assess sub-options that address critical questions such as the nature and level of the thresholds or the choice as to whether certain items should feature on the blacklist or on the greylist. Relevant implementing choices should be assessed.

- The report should better explain the difference between ex ante measures for pillar I measures and the new analytical approach for pillar II. If pillar I measures do not need a case-by-case analysis (and an analytical approach), why is the report not more specific on how the thresholds are defined, and what the blacklist and greylist will include?

- The report should better explain the link between the Commission as the “competent regulatory body” (§ 171) in charge of obligations under the blacklist and “the competent regulator” (§177 f.) – national or European - for the enforcement of the greylist. Is this system compatible with the “P2B Regulation” which applies to all search engines (§ 158)? Could the regulatory role be executed by the Board that is included in the preferred option for the digital services act?

- Option 1A includes an obligation for gatekeepers to provide information to the Commission (§172). How can the Commission determine if a platform is a gatekeeper if it only has to provide data once it is a gatekeeper?

- Policy option 1B includes policy option 1A and builds up from there. The policy measures included in option 1A are therefore set for all policy options and the report considers no alternatives to these measures. The report needs to better justify the choice of these policy measures and explain why they need to be included in all the policy options, and why no alternatives are considered.

- Also for pillar 2, the option description remains vague. For options 2A and 2B, the report should explain the “legal test” and define the “appropriate and proportionate remedies” (§186). The option description should be complete (for the moment some options are further explained in the impact analysis, while this should be done in the options section).

- Under option 2B, the Commission would be allowed to impose remedies on a market when it finds emerging or existing market failure according to a (legal) test still to be specified. This is normally the role of EU legislation (when there is internal market risk) or national regulation. Why would competition policy need to take over? Is there a failure in the legislative process? When correcting market failures through legislation, the Commission needs to analyse the impact of the envisaged measures on other societal objectives and take into account trade-offs in the impact assessment. Will the process under pillar 2 provide similar guarantees when determining the appropriate remedies? Could better future proofing pillar 1 be an alternative?

- Although the interaction between both sets of policy options (pillars 1 and 2) is touched
upon in section 8.3, the description of the policy options should clarify how the policy options of pillar 1 would interact with those of pillar 2. For example, the policy options under pillar 2 may also apply to markets where platforms are already present. How would the policy options under both pillars then work together? Could one come on top of the other? How would possible remedies following a market investigation relate to the greylist? In §329 the report mentions that “the practical modalities to formalise the feedback mechanism between the two pillars will be developed in either the legislative proposal or the guidance documents related thereto”; the impact assessment should already analyse the options for this mechanism.

- The report should also explain why it could not present pillar 1 as a stand-alone option (possibly together with new horizontal, vertical and market definition guidelines and strengthened enforcement).

- Given the Commission’s commitment to respond to European Parliament’s legislative initiative resolutions, the report should explain to what extent the options align or deviate (and if so, why) to the EP’s own initiative reports referred to on p2.

- The report should discuss what stakeholders thought about the policy options and whether they proposed any alternative approaches (e.g. some stakeholders preferred “more flexible approaches” over having a blacklist; others may have proposed more options for the treatment of data and for portability).

- The report should also look into possible policy options considered by non-EU countries and whether the EU initiative should coordinate with non-EU countries (see also §236).

- If option D falls outside the scope of the impact assessment (§307), it should be presented as a discarded policy option and not be part of the assessed options.

### 6. Impacts

- The vague description of the policy options stands in the way of a useful discussion and precise estimation of impacts, including compliance costs. The impact analysis is very general and applies for many different policy options. In particular, the absence of an indication of options on what will be included in the blacklist and in the greylist could have an impact on resulting costs but this is not reflected in the report (see also box 5). Also for pillar 2, in the absence of precise policy options, the impact analysis can only provide a general description of the effects of better enforcement; the report should be more option-specific.

- The report should strive to quantify costs for complying with information requests for businesses. This is in particular the case for SMEs for which the report considers the benefit of having a level playing field, without considering the costs of replying to market enquiries (p. 64). As for the costs for the regulatory authorities (§232 and 233), the report states that the enforcement cost will be smaller than the benefits. However, the report should at least provide cost estimates to support this statement. For consumer benefits stemming from the market investigation regime, the report uses exclusively UK data (p. 20 of the annexes).

- The report should have a closer look at risks associated with the policy options. Section 6.1.11 (§234-237) should further elaborate the possible risks for international trade and policy (as most of the regulated platforms would not be from the EU). The report should
also look into possible negative side effects (e.g. risk of overregulation). It appears that many stakeholders were against the new competition tool (see summary of the consultation p.16-18), so their views should be reflected and addressed in the report.

- The impact analysis should include the potential negative consequences of competition policy action. It should consider that smaller intermediaries could reduce the competition intensity between suppliers. It should check whether consumers may suffer higher search and switching costs due to the need for multi-homing. The impact analysis should point out the risk of higher prices because reduced scale and network economies increase costs. The impact analysis should provide more information on how multi-sided market structure determines consumer surplus.

- In the analysis of the impacts on growth of pillar 1 measures, it is said that these would remove the ‘chilling impact on sales’ (§202). However, it has not been shown in the problem description that this impact exists. Do unfair business practices reduce overall sales, or do they just displace sales towards the gatekeepers, in which case there is no impact on growth? Could it even be that the creation of a platform has generated sales, which could be reduced by putting restrictions on the platform?

- In some places, the report is overly optimistic on the possible impact of the measures. Stating that option 1B ‘would provide an adequate solution to the problems identified in the platform economy and would free its growth potential’ (§204) seems overly optimistic. Putting in place these obligations and limitations is unlikely to fundamentally change the features of digital markets that heavily reward network effects.

- The analysis of the impacts on consumers is unbalanced. It does not sufficiently take into account that platforms bring many benefits to consumers, often at zero cost. This is mentioned, but not taken into account in the analysis.

- The analysis of the impacts of the measures of pillar 2 can be summarised as ‘more competition is better’. This analysis does not sufficiently take into account the specificities of digital markets, where there are often considerable benefits for consumers and sellers thanks to the concentration in the market.

- Whenever the report provides data or evidence, it should indicate the source and provide the reference (e.g. §202, 209, 219).

### 7. Comparison of options and proportionality

- The effectiveness analysis for pillar 1 should discuss the delivery on the specific objectives, as is done for pillar 2.

- The report should explain the estimates for administrative and compliance costs and consumer benefit in §288. It should provide the reference and explain the methodology and the underlying assumptions (possibly in an annex).

- The scoring on efficiency should include a separate score for comparing costs. Showing only scores for the cost-benefit estimate (which is not very precise nor based on strong evidence) hides the differences in costs and mainly repeats the effectiveness scores.

- Section 7.1.2 should justify why option 1B is considered more efficient than option 1A (in section 7.1.6 it obtains a “+4” against a “+4” for option 1A). How do the costs and
benefits compare between both options?

- Similarly, for pillar 2, the report should justify the assertion that the benefits of option II.B “would more than compensate the possible higher administrative costs to businesses associated to Option II.B” (§310).

- It is not clear why option 1B is more proportional than option 1A. The scores seem merely to reflect the effectiveness scores.

- It is also not clear why option II.C is as coherent as option II.D, as the latter is clearly more coherent from a horizontal competition policy perspective while equally coherent on the other dimensions?

- The report should further develop the possible interaction with sectoral regulations (§292+312).

- §299-302 mainly describe the policy options rather than compare their impacts. The description of the policy options should be part of the options section of the report.

8. Future monitoring and evaluation

- For pillar 1, the report should specify the data sources. It should indicate whether the data is already available or whether indicators must be developed first (§334).

- For pillar 2, the report should avoid the potential confusion between the ex post evaluation of specific market investigations and an evaluation in the better regulation terminology. It should explain how the information from these case studies would be integrated into a better regulation evaluation.

- The purpose of the last paragraph of the report (§344) is not clear.

9. Consultation, information base and methodology

- The report should clarify which positions pertain to which groups of stakeholders in order to allow understanding their different positions.

- The report should consistently quote any additional sources of information used to triangulate data.

- The report should explain the origin of the data and the methodology used to arrive at the estimates in annex 3 (e.g. the main text — in sections 6.1.8 and 6.2.5 — is unsure about the impact on employment while the table clearly indicates job gains). It is not clear whether these estimates can all be deduced from the input-output modelling explained in annex 4. The report should make explicit to which extent the modelling includes the market features, or abstracts from them.
10. Presentation

- To increase the ease of reading, the report should use footnotes instead of endnotes.

- The report should define all key concepts used (‘gatekeepers’, p 11; ‘portability’, p. 18; ‘A/B testing’, p. 21).

- When referring to other studies, the report should summarise the results it refers to (e.g. by listing the seven categories of behavioural patterns identified in the study referred to on p. 21, footnote 108).

- The report should consistently reference sources (for example when mentioning the ICN Report, p. 7).

- The report should avoid repetitions (e.g. the context explanation in § 156 should be moved to the relevant part).

- In § 87, the report could clarify the statement that the platform recommends the content provider charging a lower royalty. It this meant to be lower or higher? Clarify who is supposed to pay the royalty.