CONFEDERATION OF INDUSTRY
OF THE CZECH REPUBLIC

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The Position and Comments of the Confederation of Industry of the Czech Republic (hereinafter "SP CR") on the Digital Markets Act (hereinafter "DMA") draft regulation

General opinion

The SP CR supports the goal of the European Commission, which is to promote an open and competitive Internet. The Confederation believes that the rules must facilitate further European digitization and allow small and large companies use online tools to develop their business more easily and at lower cost. When amending its regulation, the EU should ensure that the new rules do not add unnecessary costs and do not burden European businesses in such a way as to hamper their rapid growth and ability to offer services across the EU and globally.

However, we consider it essential that the new rules work in practical life and that the scope of the regulation be limited to dealing with unfair practices. This can be ensured by setting clear criteria that determine who is covered by this regulation. In that way, it will not be an obstacle to further European digitization and business development.

Legal certainty

DMA should be formulated more clearly in order to guarantee legal certainty and that the implementation of individual measures will be supported by the evidence. The methodology to determine the scope needs legal certainty and that should be set out in the DMA Annex based on objective evidence and not in the form of a delegated act of the European Commission. The regulation should clarify how the quantitative thresholds and qualitative criteria will be used to determine who is the "gatekeeper" in its sense and, given the diversity of business models in the digital sector, ensure that the qualitative criteria and quantitative thresholds are sufficiently specific.

Business models and innovations

Digital platforms often work with different business models and monetization strategies across markets, regions and sectors. Digital systems are evolving rapidly. Goals like "fair trading" and "free choice" are commendable. However, the biggest challenge is to transform them into applicable rules for platforms and product design. The new rules should therefore be based on a set of key principles that can be applied across different types of platforms, complemented by platform-based recommendations based on specific technologies.

It should be recalled that digital platforms are already regulated. The purpose of the DMA will complement the existing rules, e.g. rules for the protection of competition or the Platform to Business (P2B) Regulation,

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which has been in effect since July 2020, moreover, regulates the relations between "online brokering services" and business users and introduces several obligations in terms of transparency, ranking or business conditions. Furthermore, when preparing the individual responsibilities of gatekeeper platforms, differences in business models should be considered 'case by case' in accordance with advice from the consultation. Insufficient attention paid to differences between specific business models could have a negative impact on DMA efficiency. Commitments which the DMA adopts for "gatekeepers" are taken from specific problematic cases and generalized to all other business models, which in practice is not possible (e.g. the case of self-preferencing in internet search engines is not of the same nature as the provision of cloud services, however, the obligations that belong to this particular model are generalized to the provision of cloud services and others).

Legal basis

There are doubts as to whether the Commission should have used Article 114 of the TFEU or Article 352 of the TFEU as the legal basis for this initiative. A possible clarification of this issue would be appropriate at the earliest possible stage of the legislative process.

Comments on specific articles

Art. 1

Art. 1 (5) states that "Member States shall not impose on gatekeepers further obligations by way of laws, regulations or administrative action for the purpose of ensuring contestable and fair markets." The Draft Regulation however only applies to the gatekeepers with "significant impact in the internal market" (measured by annual turnover in the EEA, average market capitalization or equivalent fair market value).

Art. 1 (6) also reserves the possibility for Member States to apply their own competition rules. Leaving the possibility to introduce national competition laws regulating essentially the same practices as DMA can be counterproductive to achieving DMA objectives and, conversely, can exacerbate the problem of fragmentation of rules among Member States.

Art. 3

The current language used in Article 3 (1) (b), i.e. "A provider of core platform services serves as an important gateway for business users to reach end users", insufficiently explains whether the service provider should play the role of an "intermediary" between the business users and end users. In order to clarify this and prevent certain services becoming a part of the scope, although it was not the intention of the regulation proposers, it should be supplemented by a more detailed description of what it involves for a service to act as "an important gateway for business users to reach end users". The clarification should indicate that the service must allow the business user to enter the market, where the business user will meet with end users, i.e. this service is an essential intermediary that allows business users to offer their goods or services to end users. The service provider could indeed offer its services to 10,000 businesses, which in turn would collectively reach more than 45 million (end) users, but without serving as an intermediary or "gateway". For example, many businesses rely on cloud infrastructure / IT providers to build applications, platforms, or websites, but a cloud provider does not necessarily mediate business between business users and end users,

especially when the service in question is of a technical nature. In addition, the business user should be able to choose between the various cloud providers that offer these technical services.
Art. 3 (6) is unclear regarding the possibility of the Commission to grant the status of a "gatekeeper" also to an entity, which will not meet the quantitative thresholds set out in Art. 3 (2). For this reason, it is necessary to clarify how the Commission intends to identify those entities that become gatekeepers even though they did not reach the quantitative thresholds. If this part of the draft is not clarified, there is a risk of legal uncertainty for businesses, especially if the qualitative criteria under Art. 3 (1) also are not clear enough. As a result, certain services could gain the gatekeeper status, although this was not originally intended.

Art. 5 and Art. 6
Unfortunately, the status of Art. 6 is unclear: the difference between the application of separately enforceable obligations (Art. 5) and obligations that can be further specified (Art. 6) is not currently explained. There are certain obligations set out in Art. 5 and Art. 6, which will require further clarification and discussion.
The DMA draft should include a ban on such practices leading to the gatekeeper platform purposefully setting up business conditions for business users that would result in the gatekeeper platform strengthening its exclusive position in relation to those business users.

If there was a "market efficiency defence", the given gatekeeper would be able to reverse the applicability of the measures under Art. 5 or Art. 6 for a specific procedure. As part of this defence, a gatekeeper could argue that, in its particular circumstances, a specific ban or obligation would lead to a reduction in market efficiency that outweighs the potential benefits for the competitiveness of digital markets. Similarly, it should be possible for a gatekeeper to provide evidence that a specific measure under Art. 5 or Art. 6 is not relevant to the gatekeeper´s business model.

In general, the Commission should specify the obligations under Art. 6 which a given gatekeeper must meet before such obligations become binding and would pose a risk of financial fines.

Art. 7
For the avoidance of doubt, the wording in Article 7 (2) should explicitly state that in the case of the platform gatekeeper's obligations under Art. 5, it is not possible for the Commission to issue, in the form of an additional decision, additional specifications and measures to be applied by the gatekeeper platform for its compliance.

Art. 9
In Article 9 (2), we propose to add another exception under point (d) involving public interests other than those listed under points (a) to (c) of the same paragraph.

Art. 10
In accordance with Article 10 and in application of Article 37, the Commission may, by means of a delegated act, adopt additional obligations or update the obligations of the gatekeeper platforms set out in Articles 5 and Article 6 of the draft DMA. The adoption of such a delegated act is a less transparent process of adopting

legislation than the ordinary legislative procedure. Such an instrument should be used by the Commission only in narrowly defined, essentially technical parts of the regulation - i.e. not in a situation where such an act can substantially modify the scope of the obligations of the entities concerned or to create a significant and costly obligation for all entities involved. At the same time, Article 10 should, in line with its objective, ensure the relevance of the DMA in the future, allow for the lifting or reduction of the obligations set out in Articles 5 and 6, providing they are no longer justified.

Art. 17

It is proposed that the Commission, in accordance with Article 17 of the draft DMA, be able to initiate an inquiry to extend the list of core services to other services that may become relevant to the Regulation over time. It is not clear from the wording why the Commission should be able to extend Articles 5 and 6 of the Regulation by means of a delegated act and, in the case of an extension of Article 2 (2), only to propose an amendment which must go through the ordinary legislative process.

Art. 19

Requests for information required by the Commission in accordance with Article 19 (3) of the draft DMA are secured by the Commission's power to impose a fine of up to 1% of the turnover of a company that fails to fulfil its obligation to provide timely answers to the Commission. The SP CR considers it expedient to stipulate in Article 19 (3) that this period must be proportionate to the size of the undertaking, its capabilities and the circumstances in which the entity was called to provide answers.

Art. 25

While in the case of an investigation pursuant to Art. 16 of the draft DMA, the Commission undertakes to complete the investigation of systematic breaches of the obligations under Art. 5 and Art. 6 of a gatekeeper platform within 12 months, in the case of an investigation of non-compliance under Art. 25, there is no time limit for the Commission's investigation. It turns out that it is precisely the aspect of the length of the investigation before the decision is issued that is one of the most important aspects which, as a result, determine the extent of damage to other market participants and in some cases directly determine their very existence.

Art. 32

Article 32 of the draft DMA anticipates the relatively crucial importance of the Digital Markets Advisory Committee. Although this part of the draft refers to the wording of Regulation (EU) 182/2011, it is unclear specifically how the composition of this committee will be determined in the future.