



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Response to Department of Enterprise, Trade and Employment's Call for Views

European Commission's Digital Services Act
and Digital Markets Act proposals

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1 Executive Summary

- 1 The European Commission's Digital Services Act ('DSA') and Digital Markets Act ('DMA') legislative proposals amount to a paradigm shift in the regulation of digital platforms in Europe. Overall, ComReg views these complementary pieces of proposed legislation as significantly positive for Irish consumers, businesses and the wider economy. Given our experience, our views at this stage are predominantly focussed on the DMA, though our views on both the DSA and DMA are likely to develop as the proposals are considered further.
- 2 With regard to the DMA, ComReg broadly agrees with the objectives and the approach taken to identify "Gatekeepers". At a very high level, an attractive feature of the proposal is the relatively straightforward mechanism for identifying gatekeepers.
- 3 At the same time, ComReg considers that the DMA proposal appears to draw much inspiration from antitrust enforcement. Given our experience with the use of ex ante regulation in the electronic communications sector, ComReg considers it appropriate to highlight the complexity of ex ante regulation in practice. Effective ex ante regulation requires the regulator to build detailed understanding of the business models and technicalities of the given sector. This requires a greater variety of skill sets to be held by the regulator in comparison to ex post competition law enforcement. In this case, the regulator acquiring technical expertise of data (e.g., data scientists, artificial intelligence experts) will be crucial. Moreover, in contrast to an ex post approach, ex ante regulation requires continued engagement with all stakeholders, constant monitoring, and effective redress mechanisms for resolving disputes. ComReg considers that the implementation of the finalised DMA will benefit in particular from a consideration of the optimal skills necessary to monitor compliance and a dispute resolution mechanism to ensure effective ex ante regulation.
- 4 ComReg agrees with the need for centralised enforcement in the DMA, however, we suggest that alternative institutional arrangements are considered as options to the current proposal. The proposal refers to a complement of 80 Commission staff for the central authority and we question, based on our ex-ante regulatory experience, whether this would suffice to address the complex ongoing issues sought to be addressed by the legislation. Accounting for the local knowledge and proximity of national authorities, ComReg suggests that assistance from authorities at a national level (e.g., in monitoring compliance or resolving local disputes) might enable more efficient and effective enforcement of the DMA. Further, there are other models of centralised enforcement, e.g., involving dedicated agencies, which might be explored.
- 5 ComReg would like to emphasise that the views expressed are preliminary and are likely to evolve as both proposals are considered further. Finally, these complementary legislative proposals underscore the value of strong collaboration in

Ireland between sectoral regulators and a comprehensive and coherent approach to regulation in the digital sphere.

2 Introduction

Background and Context

- 6 The Commission for Communications Regulation ('ComReg') is the statutory body responsible for the regulation of the electronic communications sector (telecommunications, radio-communications and broadcasting transmission). ComReg has a range of functions and objectives in relation to the provision of Electronic Communications Networks and Services ('ECN' and 'ECS') in accordance with European Union ('EU') and national legislation.
- 7 ComReg welcomes the Department of Enterprise, Trade and Employment's ('DETE') call for views in response to the European Commission's Digital Services Act ('DSA') and Digital Markets Act ('DMA') legislative proposals.
- 8 Together, these two proposals amount to a paradigm shift in the regulation of digital platforms in Europe. Overall, ComReg views these complementary pieces of proposed legislation as significantly positive for Irish consumers, businesses, and the wider economy.
- 9 The DMA will establish an ex ante regulatory framework for specific digital platforms designated as "Gatekeepers". These gatekeepers will be subject to a set of obligations and prohibitions which seeks to ensure contestable and fair markets in the digital sector.
- 10 The DSA will set out "*uniform rules for a safe, predictable and trusted online environment.*"¹ Online intermediaries will be required to take due diligence measures to protect users from illegal content online, while at the same time ensuring transparency on content moderation and the rights of the affected users. Additional obligations would also apply for Very Large Online Platforms ('VLOP'). These rules will better protect consumers online and foster innovation, growth, and competitiveness in the single market.
- 11 Notably, both proposals take the form of a regulation meaning that once adopted they will be directly applicable in the Member States, without the need for transposition.
- 12 These legislative proposals will have a significantly positive impact for Ireland and for the Irish economy, promoting competitive dynamics in the markets of digital gatekeepers and creating a safer digital space for Irish consumers. The digital economy is of particular importance for the Irish economy. The Digital Economy and Society Index ('DESI') 2020 report ranks Ireland as first in Europe in terms of

¹ REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, Article 1 p.43

integration of digital technology.² In the DESI 2020 report, Ireland leads Europe in all three indicators under e-commerce (i.e. SMEs selling online, e-commerce turnover and selling online cross-border). The report notes that 35% of Irish small and medium enterprises ('SMEs') sell online, compared with an EU average of 18%.³ For SMEs, 29% of total turnover comes from online sales, almost three times the EU average. With the onset of the COVID-19 pandemic, the importance of online activity has become even more crucial for businesses, suggesting that these figures may increase further over time. At the same time, Irish companies also rank relatively high in the report on the use of big data, cloud services and social media.

- 13 These proposals underline the evolving approach to digital regulation at a European level and the significance of Ireland's position in the digital landscape in Europe is noted. ComReg remains available to positively contribute to the advancement of these legislative proposals. In this regard, ComReg looks forward to the publication of a National Digital Strategy.
- 14 As an ex ante regulator, ComReg has considerable experience in monitoring ECS markets and regulating the conduct of ECS providers who hold Significant Market Power ('SMP'). ComReg has significant experience with the tools necessary to impose ex ante regulations, such as, forward looking market analyses, imposition of remedies, monitoring and enforcement. Within the ECS sector, ComReg has developed technical, legal, and economic expertise on how to weigh efficiency gains, incentives to innovate and consumer welfare, in making decisions.
- 15 In regulating the ECS sector, it is relevant to note that ComReg also operates within a network of ECS regulators from across Europe through the Board of European Regulators for Electronic Communications ('BEREC'). BEREC delivers opinions, recommendations, common positions, best practices, methodologies, and issues guidelines on a variety of topics related to regulation within the sector. The European Electronic Communications Code ('EECC') governs a decentralised model of enforcement, which is more akin to the model proposed in the DSA than in the proposed DMA.
- 16 ComReg contributed to the previous call for views organised by the then, Department of Business, Enterprise and Innovation on the European Commission's consultation on the DSA package. In our previous submission, we noted that we have been closely monitoring developments in the digital ecosystem, with a particular focus on the debate about the economic ex ante regulation of gatekeeping platforms. Given our experience in the ECS sector, our previous submission related primarily to the economic ex ante regulation of gatekeepers.
- 17 Our work in monitoring developments on these topics has continued in the intervening period. Given the need for strong collaboration in Ireland between sectoral regulators in the digital sphere, we have continued to engage with the

² https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=67086

³ <https://ec.europa.eu/digital-single-market/en/news/digital-economy-and-society-index-desi-2020> See the Ireland DESI Country Profile.

Economic Regulators Network ('ERN')⁴, in particular with colleagues from the Competition and Consumer Protection Commission ('CCPC') and the Broadcasting Authority of Ireland ('BAI') on the topics of digital regulation.

- 18 ComReg have also continued to contribute to the work of BEREC, in particular, contributing to the drafting of BEREC's Response to the European Commission's Public Consultations on the Digital Services Act Package and the New Competition Tool.⁵ Our engagement with BEREC on these matters has continued since the publication of the legislative proposals.
- 19 Some preliminary discussions with these colleagues on the proposed DSA and DMA have begun, though, our engagement will deepen over time and our views on the legislative proposals are likely to evolve accordingly.

This Submission

- 20 In this short paper, as in our previous submission, ComReg will focus predominantly on the economic ex ante regulation of gatekeepers. Therefore, the views expressed relate predominantly to the DMA. Section 3 provides some high-level and preliminary views on the proposed DMA. As previously noted, ComReg's experience with ex ante regulation in the ECS sector is of particular relevance in this context. In this section, ComReg's views relate to the substantive framework, implementation, and institutional arrangements in the proposed DMA.
- 21 Finally, Section 4 concludes and notes that, these proposals will have significant positive impacts on Ireland and the Irish economy but will require considerable preparation for their implementation.
- 22 ComReg would like to emphasise that these views are preliminary and are likely to evolve as the proposals are considered further and as engagement with our colleagues at BEREC and the ERN continue. ComReg would welcome the opportunity to engage further with DETE as ComReg's views on these important legislative proposals develop.

⁴ The Economic Regulators Network is composed of the Competition and Consumer Protection Commission ('CCPC'), Commission for Regulation of Utilities ('CRU'), Broadcasting Authority of Ireland ('BAI'), Central Bank of Ireland, National Transport Authority ('NTA') and ComReg.

⁵ https://bereg.europa.eu/eng/document_register/subject_matter/bereg/others/9411-bereg-response-to-the-public-consultation-on-the-digital-services-act-package-and-the-new-competition-tool

3 Digital Markets Act

23 Following our initial review of the DMA proposal, overall, we view this proposal as a significantly positive development which has the potential to promote competitive dynamics in digital markets. We have formed some preliminary high-level views on the proposals which are set out as follows:

- Substantive Framework
- Implementation
- Institutional arrangements

Substantive Framework

24 ComReg broadly agrees with the concerns addressed and the approach taken to identify gatekeeping platforms. As noted in our previous submission, ComReg considers that a combination of several important characteristics of digital markets (e.g., network effects, economies of scale, access to data etc.) has led to the creation of dominant platforms across a range of markets. Certain gatekeeping platforms have an ability and incentive to engage in unfair practices which limit the competition they face and expand their market power while the existing ex-post regulatory regime results in a lack of effective enforcement. This calls for an ex ante approach to promote competition in digital markets, similar to that of the ECS sector.

Objectives

25 The DMA aims at ensuring “contestable and fair markets” in the digital sector. However, it appears that the primary focus of the proposal is to promote competitive dynamics between business users and gatekeepers, thereby, ensuring fair markets. That is to say, the proposal focuses on ensuring competition works well in the markets where business users rely on the intermediary services provided by the platform (i.e., intra-platform competition). However, there appears to be less of an emphasis on promoting competition between gatekeepers and alternative digital platforms to offer these intermediary services (i.e. inter-platform competition). Although some provisions may reduce switching costs (Art 6(e)) and give business users continuous and real-time access to data ((Art 6(i)), these may not be sufficient for new competitors to arise and compete ‘for the platform’ with existing gatekeepers.

26 In addition to preventing gatekeepers from engaging in unfair practices, the wider debate about ex ante regulation of gatekeeping platforms has also included discussion about further obligations to promote inter-platform competition. Data access and interoperability between platforms have been proposed to drive dynamic inter-platform competition and innovation. For example, the Digital Markets Taskforce in the UK recently advised the UK government that the new Digital Markets Unit should have the ability to impose so-called pro-competitive

interventions to address the route of market power.⁶

- 27 Secondly, while the DMA has the objective of ensuring fair markets, ComReg observes that there is not an objective to protect end-users. However, it is noteworthy that some obligations/prohibitions included in the proposed DMA may protect end-users. For example, Article 5(a) obliges gatekeepers to refrain from combining personal data sourced from core platform services with personal data from any other services offered by the gatekeeper, unless the end-user has been presented with the specific choice and provided consent. ComReg welcomes this obligation, noting that new forms of harm, such as this, may arise in core platforms services.
- 28 Other provisions will allow end-users to uninstall pre-installed software applications (Art 6(b)) or to exercise data portability (Art 6(h)). Given these obligations, it may be worth considering if protecting end-users should be an additional objective of the DMA.

Thresholds

- 29 ComReg broadly agrees with the approach to identify gatekeeping platforms set out in the DMA. The scope of the DMA is limited to a list of 8 digital services, referred to as core platform services (e.g., online search engines, online intermediation services, operating systems). These core platform services were selected as they exhibit certain structural characteristics (e.g., extreme economies of scale and scope, important network effects, multi-sided etc.).
- 30 However, obligations are not applicable for all providers of core platform services. Rather, obligations only apply to those which are designated as a gatekeeper for one (or more) of these services. Gatekeepers are designated on the basis of a “three criteria test”, which assesses: (i) size and impact on the EU internal market (measured using revenue, market capitalisation and geographic presence); (ii) control of an important gateway for business users to reach end-users (measured by number of users); and (iii) whether the control is entrenched and durable (meet previous criteria over the previous 3 years).
- 31 ComReg observes that some parallels can be drawn between the DMA proposals and ComReg’s views as expressed in response to the then Department of Business, Enterprise and Innovation and in the BEREC response to the European Commission’s Public Consultations on the Digital Services Act Package and the New Competition Tool.
- 32 In its submission, BEREC recognised the challenges in defining clear boundaries for relevant markets in which digital platforms operate. BEREC considered that an alternative approach could be to identify specific Areas of Business according to structural/specific criteria (similar to core platform services found in the DMA

⁶ https://www.regulation.org.uk/library/2020-Digital_Taskforce_Advice.pdf

proposal). Digital Platforms within these areas of business would then be identified as holding Significant Intermediation Power (similar to Gatekeepers) where they meet relevant and easily observable thresholds (e.g. revenue, number of users), similar to the thresholds applied in the three criteria test.

- 33 The proposed DMA envisages that the European Commission would review whether gatekeepers continue to satisfy the three criteria test, at least every two years. Notably, this is shorter than the 5-year period for a market review set out in the EECC in the ECS sector. However, it is worth recognising that developments in core platform services are likely to be more dynamic than in ECS markets.
- 34 The European Commission may also conduct a market investigation to assess if other services in the digital sector should be added to the list of core platform services. ComReg considers that there is a parallel between the list of core platforms services and the approach to regulation in the ECS sector. In ECS regulation, a European Commission Recommendation identifies a list of markets susceptible to ex ante regulation. This list is regularly updated by the European Commission. In ComReg's view, just as the list of Recommended Markets is subject to regular review, the list of core platform services should be laid out in an EU-level legal act and should be subject to regular revision.

Obligations and Prohibitions

- 35 A digital platform which has been designated as a gatekeeper is subject to two lists of obligations. Firstly, a blacklist of directly applicable specific obligations/prohibitions. Secondly, a grey list which comprises more general obligations which may be further specified by the European Commission in a regulatory dialogue with the gatekeeper. Both lists apply generally to all gatekeepers, however, some obligations are very narrowly defined and may only be relevant for specific business models.
- 36 Notably, the prohibitions and obligations covered in both lists broadly correspond to unfair practices that have arisen in the context of European Commission antitrust cases, both completed and ongoing. In this sense, the proposed approach necessarily means that prohibitions and obligations are based on very specific experience on specific cases.
- 37 As a result, the obligations can quickly address known unfair practices. However, a trade-off exists between speed and flexibility in this regard. Given that obligations are, for the most part, quite specific, this also means that there is less flexibility to tailor remedies in a proportionate and effective manner depending on the circumstances. Moreover, the list of obligations may be less effective in addressing novel unfair practices which may arise in these dynamic markets. The European Commission would also have the power to add new obligations to the lists with a delegated act, following a market investigation.

Implementation

- 38 The DMA proposals appear to draw much inspiration from antitrust enforcement. For example, the regulatory dialogue under the DMA is predominantly focussed on interactions between the European Commission and the concerned gatekeeper.
- 39 Given our experience with the use of ex ante regulation in the ECS sector, ComReg considers it appropriate to highlight the complexity of ex ante regulation in practice. In contrast to an ex post approach, ex ante regulation requires continued engagement with all stakeholders, constant monitoring, and effective redress mechanisms for resolving disputes.
- 40 In highly technical environments with significant information asymmetries, a broader and continuous regulatory dialogue (e.g. via open public consultations or industry forums) with all relevant stakeholders has benefits. Continuous engagement with all stakeholders and constant monitoring of market developments would allow for a regulatory authority to develop deeper understanding of markets in order to shape effective intervention.
- 41 In addition, ComReg recognises the importance of dispute resolution mechanisms in ex ante regulation. Disputes resolution mechanisms are key to solve grievances among operators in a timely and efficient manner while protecting competition. Given the highly technical nature of digital markets and the large number of business users that rely on gatekeeping platforms (at least 10,000), it is possible that many disputes could arise between business users and gatekeepers. In ComReg's preliminary view, given the (potentially highly) technical nature of the disputes, a dedicated mechanism that is able to deal with complaints should be created in the DMA.
- 42 In our preliminary view, some of these aspects could be considered further in the DMA proposal. Given that the DMA proposal makes allowance for 80 full time employees at the appropriate central authority, ComReg would consider that enhanced resources are likely to be required in order to provide effective enforcement.

Institutional arrangements

- 43 With regard to institutional arrangements, the DMA proposal is based on centralised enforcement at the EU level by the European Commission. The role of member states and national authorities is limited. Member State representatives would participate in the Digital Markets Advisory Committee ('DMAC'), which would advise the European Commission on implementing decisions.
- 44 Given the European wide (or Global) presence of gatekeeping platforms, ComReg agrees that a central authority at a European level should lead enforcement of the DMA.

- 45 ComReg would emphasise that an ex ante regulator needs a detailed understanding of the business models and technicalities of the given sector. This approach requires a variety of skill sets to be held by the regulator. In this case, technical expertise of data (e.g., data scientists, artificial intelligence experts) will be crucial for the regulator in addition to antitrust expertise. As described above, ex ante regulation requires continued engagement with stakeholders, continual market monitoring and monitoring of compliance, in addition to a dispute resolution mechanism.
- 46 Given this, the task of monitoring all of these developments and resolving local disputes across all EU Member States would likely be very burdensome for a single central authority, in particular, given the 80 full time staff that are envisaged under the DMA.
- 47 With this in mind, ComReg considers that assistance from authorities at a national level would enable more efficient and effective enforcement of the DMA. National authorities would have detailed and grounded local knowledge that could be useful to support the central authority. Moreover, it may be more practical for business users to raise disputes locally. Given that the harm is felt in Member States rather than in Brussels, national authorities have the proximity and local knowledge to provide valuable assistance to the central authority (e.g., in monitoring compliance or resolving local disputes).
- 48 Moreover, a mechanism for co-operation and co-ordination between national authorities and the central authority would be useful to inform and support the central authority. Such a mechanism could usefully be subject to detailed consideration.
- 49 The DMA proposal is far reaching and represents a significant policy departure for Europe. The proposal currently envisages that the European Commission would act as an ex ante regulator with respect to gatekeepers. It is important to recognise that this would be an entirely new role for the Commission. In other sectors, institutional models involving, for example, dedicated agencies, with the involvement of national authorities, are employed. The institutional arrangements are a significant element of policy deserving of discussion.

4 Concluding Remarks

- 50 ComReg welcomes the opportunity to engage with DETE on the European Commission's legislative proposals on the DSA and DMA.
- 51 ComReg views these proposals as a significantly positive development. They represent an important step on the journey towards safe, fair, and contestable digital markets which protect consumers online and enable growth opportunities for SMEs.
- 52 With regard to the DMA, as described above, the unfair practices employed by gatekeepers can inhibit the level of competition, innovation, and consumer choice in digital markets. The DMA will remove barriers to entry and expansion for SMEs, levelling the playing field between SMEs and gatekeepers and providing them with the opportunity to compete and grow.
- 53 Moreover, in addition to maintaining a safe online environment and protect rights of end-users online, the DSA will also improve the conditions for innovative cross-border digital services. ComReg notes that the main role will be played by Member States' authorities with the support of a newly created European Board for Digital Services ('EBDS') and the EU Commission, with a mechanism to allow the member state that does not have jurisdiction to request the member state, where the provider is established to assess an alleged breach of the regulation. This "country of origin" principle, coupled to very ambitious timeframe for assessing suspected infringements, could significantly impact the designated Digital Service Coordinator ('DSC') and other competent authorities in Ireland.
- 54 Effective regulation under the DSA and DMA would be a positive for the Irish economy, enabling growth, innovation, and job creation. Good quality enforcement of these proposals would enable the greatest benefit to arise from these developments. ComReg remains available to positively contribute to the advancement of these legislative proposals. In this regard, ComReg looks forward to the publication of a National Digital Strategy.
- 55 As negotiations between the European Commission, the Council and the European Parliament develop in the coming months, Ireland has the opportunity to influence the direction of these proposals, to address the existing challenges posed by digital services and markets while safeguarding innovation and the benefits that this dynamic sector can deliver in Ireland. Finally, ComReg would emphasise that these complementary legislative proposals underscore the value of strong collaboration in Ireland between sectoral regulators and a comprehensive and coherent approach to regulation in the digital sphere.
- 56 ComReg would like to emphasise that the views represented in this document are preliminary. ComReg would welcome the opportunity to engage further with DETE as ComReg further assimilates these proposals and continues to engage with the ERN and BEREC.