Digital markets act

This briefing provides an initial analysis of the strengths and weaknesses of the European Commission’s impact assessment (IA) accompanying the above-mentioned proposal, submitted on 15 December 2020 and referred to the Committee on Internal Market and Consumer Protection (IMCO) of the European Parliament. The proposal is part of the digital services act package, which includes the digital services act itself.

In her political priorities for the European Commission, President Ursula von der Leyen committed to upgrade the liability and safety rules for digital platforms, services and products, and complete the digital single market. The 2020 Commission work programme also included a commitment to establish an ex-ante competition tool to make Europe fit for the digital age.

Even before that, the Juncker Commission had been looking into the role of competition policy in a fast-changing environment. As part of this process, Commissioner Margrethe Vestager engaged a group of experts ‘to explore how competition policy should evolve to continue to promote pro-consumer innovation in the digital age’. The resultant expert report underscored the opportunities and challenges of markets in the digital sector. It highlighted in particular how digitisation is leading to a concentration of power in a few very large digital firms.

More specifically, with regard to large platforms, the report pointed out how ‘the specificities of competition in the digital world ... make market power “sticky”, and there is legitimate fear that the market power they have acquired will be hard to challenge. Furthermore, they have been able to build, on top of their core competencies, entire ecosystems which make it hard for new entrants to compete on the merit and which, many observers feel, face little competitive pressure’.

In its communication ‘Shaping Europe’s digital future’, the Commission sets as one of its objectives ‘a frictionless single market, where companies of all sizes and in any sector can compete on equal terms, and can develop, market and use digital technologies, products and services at a scale that boosts their productivity and global competitiveness, and consumers can be confident that their rights are respected’. Among the key actions envisaged in the communication was a digital services act package to ‘further explore ... ex ante rules to ensure that markets characterised by large platforms with significant network effects acting as gatekeepers, remain fair and contestable for innovators, businesses, and new market entrants’.

In June 2020 the European Parliament called for an assessment of ‘the possibility of imposing ex ante regulatory obligations where competition law is not enough to ensure contestability in these markets, therefore avoiding competitors’ foreclosure and ensuring that emerging bottlenecks are not perpetuated by the monopolisation of future innovation’. Later in the year it welcomed the Commission’s commitment to submit a proposal for a digital services act package (‘DSA’) and stated its position that such a proposal should include ‘ex ante rules on systemic operators with a gatekeeper role’. It considered ‘that by reducing barriers to market entry and by regulating systemic operators, an internal market instrument imposing ex ante regulatory remedies on those systemic operators with significant market power has the potential to open up markets to new entrants,'
including SMEs, entrepreneurs, and start-ups, thereby promoting consumer choice and driving innovation beyond what can be achieved by competition law enforcement alone. The European Parliament also called upon the Commission to propose measures to address ‘imbalances in market power, in particular through the interoperability, interconnectivity and portability of data’.

Problem definition

The IA discusses the nature of the problem, clearly identifying, and substantiating with references to relevant literature, three problem clusters to which digital markets are particularly vulnerable:

- weak contestability of, and competition in, platform markets, or risk thereof – the IA cites evidence of a trend of growing market concentration with ‘the top seven of the large platforms [accounting] for 69 % of the total €6 trillion valuation of the platform economy’ (IA, p. 9);
- unfair gatekeeper practices vis-à-vis business users – the strong market positions and economic power of gatekeepers enable them to ‘create ecosystems for which they set the rules by which other economic players should abide[, and] if set in an unfair manner, these rules can be detrimental to business users, and limit small and medium-sized enterprises’ (SMEs) online visibility and associated sales’ (IA, p. 10);
- legal uncertainty for market players – ‘there is an increasing regulatory fragmentation of the online platform space in the EU [and] coordination among national legislators may be insufficient, leading to potentially heterogeneous responses across the EU’ (IA, p. 14).

The IA notes how the Covid-19 crisis has dramatically increased the importance of e-commerce and trading via digital platforms in the EU’s economy and how this has accelerated the dependency of users and businesses on the services provided by a few gatekeepers.

The IA dedicates a separate section to explore the size of the problem, quoting relevant statistics from specialised literature in the sector and the external study supporting the IA. The IA also discusses the problem drivers, grouping them into two ‘overarching categories’: gatekeeper related market failures and fragmented regulation and oversight.

As laid down in the Commission’s Better Regulation Guidelines and in Tool 14 of the Commission’s Better Regulation Toolbox, the IA also explores how the problem is likely to evolve without EU intervention. It notes that ‘concentration and mark-ups in most digital markets have been increasing over the last years, and there is no indication that this trend will be inverted during the next years’. It observes furthermore that data is ‘becoming more and more important, exacerbating the market failures associated with the control of data’. (IA p. 26) The IA looks at the stock price development of five major big tech companies between 2014 and 2018 and compares them with the S&P 500 index for the same period. The figures for the S&P 500 grew by 60 % to 70 % but were consistently outperformed by the five big tech companies. The IA concludes that without EU intervention ‘the economic drivers are likely to increase, exacerbating the observed problems’. (IA p. 27) Also, in the absence of EU intervention, it is likely that more action will be taken at Member State level to address market failures and unfair business practices leading to the likelihood of greater fragmentation.

The evolution of the problem without EU intervention is also discussed at some length in the description of the baseline option and in Annex 5.5 – ‘Cost of No-Europe’. In particular, in discussing the baseline option, the IA examines how the current EU competition law framework (under Articles 101 and 102 of the Treaty on the Functioning of the European Union, the relevant secondary legislation and soft law instruments, and the ongoing reviews thereof) and other sector-specific EU rules (such as the Platform-to-Business (P2B) Regulation, the GDPR and EU consumer legislation) do not address gatekeeper-related market failures in digital platform markets adequately.
Subsidiarity / proportionality

The IA includes a distinct section on subsidiarity in its Chapter 3 – ‘Why should the EU act?’. There it explains the necessity and added value of EU action, stating that ‘intervention at the EU level is ... more efficient, insofar as it introduces a common set of rules across Member States to address in a consistent manner the same unfair business practices carried out by large digital gatekeepers across the Union’. (IA, p. 29) Likewise, addressing market failures at EU level would improve the functioning of the internal market ‘through clear behavioural rules that give all stakeholders legal clarity and through an EU-wide intervention framework allowing to address market failures in a timely and effective manner’. (IA, p. 29)

Proportionality and subsidiarity are also among the criteria used in the comparison of the options for the selection of the preferred policy option.

The deadline for the submission of reasoned opinions by national parliaments on whether the proposal complies with the principle of subsidiarity was 7 April 2021. No national parliament had issued a reasoned opinion by that date.

Objectives of the initiative

The IA clearly identifies general and specific objectives. The general objective is to ‘ensure the proper functioning of the internal market by promoting effective competition in digital markets, in particular a fair and contestable online platform environment’ (IA, p. 29). The specific objectives are (i) to address market failures to ensure contestable and competitive digital markets for increased innovation and consumer choice, (ii) to address gatekeepers’ unfair conduct, and (iii) to enhance coherence and legal certainty to preserve the internal market. As laid down in Tool 16 of the Commission’s Better Regulation Toolbox, the specific objectives relate directly to the causes of the problem, creating an unbroken intervention logic between the problem and its drivers and the policy options.

As recommended in the Commission’s Better Regulation Guidelines and in Tool 16 of the Better Regulation Toolbox, the IA sets operational objectives after having identified the preferred option and within the context of the discussion on monitoring and evaluation. These operational objectives correspond to the three specific objectives and for each of them the IA identifies potential measuring indicators.

The objectives appear to be measurable, achievable and relevant, while the proposal provides an evaluation timeframe with regard to the application and possible revision of its provisions.

Range of options considered

Before presenting the options, the IA discusses in some detail the main parameters that determine the range of available policy options: (i) the scope of the intervention, namely the dual condition of the existence of (a) gatekeepers in (b) core platform services and the thresholds to qualify as such (ii) the range of unfair practices to be covered and the corresponding obligations applicable to gatekeepers’ core platform services, (iii) the architecture of the instrument, notably the speed and the degree of flexibility it would offer, and (iv) the enforcement framework necessary and available.

For each of these parameters the IA deliberates the different degrees to which these parameters might feature in the range of retained options. It also discusses the trade-offs between these parameters in order to balance them out to achieve credible and meaningful options.

From the matrix of available combinations the IA identifies three policy options it considers plausible, in addition to the baseline (status quo).

Option 1 is the non-dynamic option providing a high degree of legal certainty for market operators.

- Scope: a closed list of core platform services set out in the proposal. Providers of core platform services fall within the scope of the proposal if they are designated as
gatekeepers. This designation is based on pre-defined quantitative thresholds such as turnover and number of end users and business users. In this respect the option is divided into two sub-options: **sub-option 1A** envisages a high threshold implying that five to seven providers would surpass that threshold and be designated as gatekeepers; **sub-option 1B** envisages a low threshold implying that 10 to 15 providers would surpass the threshold and be designated as gatekeepers.

- **Obligations**: a closed list of obligations that the designated gatekeepers would have to comply with is defined in the rules themselves.
- **Architecture of the instrument**: the whole set of obligations would be immediately applicable and gatekeepers would not have the opportunity to engage in dialogue with the regulator about the measures they intend to take or have taken in order to comply with these obligations.
- **Enforcement framework**: implementation, supervision and enforcement would be carried out at EU level by the Commission as the competent regulatory body. The Commission would enjoy clearly-defined and circumscribed procedural powers.

**Option 2** is the semi-dynamic option, combining immediately applicable obligations with some degree of flexibility.

- **Scope**: a closed list of core platform services; the designation of providers of core platform services as gatekeepers is based on a combination of pre-defined quantitative thresholds and qualitative criteria that are assessed on a case-by-case basis in the context of a market investigation. Even this option is divided into two sub-options: **sub-option 2A** poses a high threshold implying the designation of five to seven gatekeepers; **sub-option 2B** sets a low threshold implying the designation of 10 to 15 gatekeepers.
- **Obligations**: a closed list of obligations, defined in the rules themselves, which the designated gatekeepers would have to comply with. The list of obligations would however be subject to update whenever new unfair practices are identified following a market investigation. Furthermore, for some obligations, this option would give the gatekeeper the possibility to discuss with the Commission the measures it intends to take or has taken to ensure their effectiveness.
- **Architecture of the instrument**: there would be the possibility for the Commission to carry out a market investigation in order to (a) designate on a case-by-case basis a provider of core platform services that meet the qualitative and quantitative conditions to be considered as a gatekeeper, (b) identify possible new unfair practices and update the list of such unfair practices and corresponding obligations, or (c) determine whether a gatekeeper has systematically infringed the set obligations.
- **Enforcement framework**: same as Option 1.

**Option 3** is a fully dynamic option based exclusively on qualitative scoping thresholds.

- **Scope**: a closed list of core platform services, to which more could be added if a market investigation shows that such an addition is needed; the designation of providers of core platform services as gatekeepers is based solely on case-by-case qualitative assessments and no quantitative thresholds are set.
- **Obligations**: a closed list of obligations, defined in the rules themselves, that the designated gatekeepers would have to comply with. As in Option 2, the list of obligations would be subject to update whenever new unfair practices are identified following a market investigation. Option 3 would, however, entail the highest degree of flexibility by allowing gatekeepers the possibility to discuss with the Commission, in respect of all the obligations defined in the rules, the measures they intend to take or have taken to ensure their effectiveness.
• Architecture of the instrument: in this respect the most salient differences from Option 2 would be that the Commission would be able to determine which providers should be considered as gatekeepers on the basis solely of qualitative criteria with no recourse to quantitative thresholds, and that it would also be able to update the list of core platform services to the scope of the rules.
• Enforcement framework: same as Options 1 and 2.

Although the presentation of the options could have been organised in a more efficient and clear manner, to facilitate understanding by non-expert readers, as required in the Commission’s Better Regulation Guidelines, the IA does offer a balanced presentation of what appear to be realistic alternatives. As recommended in the Commission’s Better Regulation Guidelines and in Tool 12 of the Better Regulation Toolbox, the IA also gives account of a number options that were discarded at an early stage and explains why these options – including options considered pursuable at inception impact assessment stage – were not retained for in-depth analysis.

The preferred option is Option 2, with the IA leaving the choice between Sub-option 2A and Sub-option 2B to a political decision. The IA nevertheless equips the political decision-maker with the pros and cons of the two sub-options, making clear the trade-off to be made between the speed of the regulatory intervention and the scope of the target platforms. A high threshold for designation as gatekeeper, as envisaged in sub-option 2A, would mean that fewer platforms would be designated as gatekeepers solely by virtue of the fact that they surpass the quantitative threshold, and more would have to be designated as such by a market investigation. Consequently, regulatory intervention to tackle unfair practices by those gatekeepers would be slower. A low threshold, as envisaged in sub-option 2B, would mean that more platforms would be automatically designated as gatekeepers, but with the risk of catching platforms that qualitatively would not qualify as gatekeepers.

Assessment of impacts

The IA assesses the impact of the options on the internal market, on growth and productivity, on competition and innovation, on international trade, on employment, on gatekeepers, on SMEs in their role both as competitors and business users, on consumers and on regulatory authorities. In the process that leads to the selection of option 2 as the preferred option the IA compares the effectiveness and efficiency of the options in achieving the general and the specific objectives and also analyses and compares the subsidiarity and proportionality of the options and their coherence with the digital strategy, the digital services act proposal and other regulatory instruments, such as, in particular, fundamental rights and data protection rules.

Annex 3 to the IA complements the body of the IA with a structured analysis of who is affected by the digital markets act and how.

The assessment of impacts and the comparison of the options is in many aspects a qualitative exercise, with a quantitative method used in comparing the efficiency of the options. The efficiency comparison is based on a benefit estimate for the preferred option and on a cost comparison between the options. The IA explains that, because of a lack of reliable data, 'estimates of cost and benefits are only provided for the preferred option, which serves as a reference for the magnitude of the remaining options' (IA, p. 104). This seems to imply therefore that this quantitative exercise was conducted, at least in part, after the preferred option was identified.

As required in the Commission’s Better Regulation Guidelines the IA presents the results of its comparison of options in an accessible manner; it provides a summary table, clearly flowing from the analysis and comparison made previously, showing how Option 2 is the preferred option especially in virtue of its effectiveness and contained compliance costs.
SMEs / Competitiveness

In line with the requirements of the Better Regulation Guidelines, the IA considers and reports specifically upon SMEs as a category of stakeholders. The IA remarks that 'SMEs would not be targeted by the list of obligations as they are very unlikely to qualify as gatekeepers. On the contrary, the adoption of rules levelling the playing field would allow SMEs (including business users competing with gatekeepers) to grow throughout the internal market'. It continues that 'all three options foresee a comprehensive form of regulatory oversight and SMEs would benefit from a more innovative and competitive business environment incentivising them to seize the digital single market opportunities and grow' (IA, p. 90). The IA does not quantify the impact of the options on SMEs, with the lack of reliable data cited in the IA possibly playing a part in this.

Simplification and other regulatory implications

As part of its assessment of impacts the IA analyses and compares the coherence of the options with several other EU regulatory instruments, outlining in particular the complementarity of the options with the proposal for a digital services act. The IA also considers whether the current competition law framework or other existing regulatory acts could address the problems identified, as suggested by some stakeholders. The IA argues that 'in markets characterised by powerful network effects and economies of scope, competition law interventions may mean not only delays in the interventions but also that irreparable effects such as tipping may no longer be reversible' (IA, p. 33). In general, it concludes that the existing regulatory framework cannot address these problems and that 'in the absence of further EU legislation, and subject to enforcement of the existing legal framework, legal fragmentation is likely to further increase as Member States are likely to continue to adopt horizontal or sector specific national measures against gatekeepers' (IA, p. 36).

In its analysis the IA also assesses the impacts of the three options on regulatory authorities, and specifically the enforcement costs to be incurred by the Commission and the administrative burden on national authorities. Annex 3 to the IA gives a qualitative and quantitative overview of the costs. The IA outlines how the additional resource-related costs and administrative burden for the Commission and national authorities 'would be largely outbalanced by reducing the impact of practices which severely undermine the trading conditions for millions of business users and further entrench gatekeepers' incontestable positions'. (IA, p. 96) Thus, for example, according to the estimates of the IA, the preferred option would impose annual costs of €16.7 million on the Commission and €6 million on national authorities, but increase economic growth in the EU by between €12 billion and €23 billion.

Monitoring and evaluation

The IA outlines the particular importance of monitoring and evaluation for the proposal: 'Given the dynamic nature of online platforms, monitoring and evaluation of impacts needs to constitute an important part of the proposal' (IA, p. 120). Indeed, in this proposal monitoring is not just a means to measure whether the operational objectives are being achieved, but is itself an essential part of the process to achieve those objectives. The IA explains therefore how the monitoring is divided into two parts: (i) regular and continuous monitoring of scope-related issues and of unfair practices and monitoring as a trigger for the launch of market investigations, and (ii) monitoring of the effectiveness and efficiency of the proposal, using the pre-defined indicators identified in the IA, to establish whether additional rules are required in order to ensure that digital markets across the EU are contestable and fair. For the latter purpose the proposal lays down an obligation for the Commission to carry out an evaluation every three years and to report on the results to the European Parliament, the Council and the Economic and Social Committee. Member States are required to provide the Commission with all necessary information to carry out its duties according to the proposal, in particular its evaluation commitments.
Stakeholder consultation

The IA identifies the stakeholders affected by the problems and by the retained policy options, and stakeholder views are integrated throughout the text of the IA. Annex 2 to the IA presents a synopsis report of stakeholder consultation activities as required by the Better Regulation Guidelines.

The IA gathers stakeholder feedback from the consultation activities performed in the context of the two inception impact assessments upon which the IA follows-up (see endnote 21). The IA explains that these consultations, which between them drew 158 responses, were conducted separately, but 'were aimed at complimentary solutions' (IA, Annex 2, p. 15).

The open public consultation in the context of the digital services act package was open over a period of 14 weeks between 2 June 2020 and 8 September 2020, receiving 2,863 contributions with wide representation in terms of category and geography. Of all the contributions received, 66% were from EU citizens, 8% from non-EU citizens, 7.4% from companies and business organisations, 6% from business associations, 5.6% from non-governmental organisations, 2.2% from public authorities, 1.2% from academic and research institutions, 0.9% from trade unions, 0.4% from consumer and environmental organisations, 1.9% from other categories of stakeholder and several contributions from international organisations. In terms of geographic distribution, the country best represented was Germany with 28% of responses, with the United Kingdom at 21%, and France at 14%. The open public consultation in the context of the new competition tool was open between 3 June 2020 and 8 September 2020 and received 188 responses from 18 Member States. These open public consultations sought stakeholders’ views on the problems they face under the current regime and on the appropriate responses to tackle them, though not on the specific options presented in the IA. The two consultation frameworks also included targeted consultation activities and account was also taken of a number of spontaneous submissions received by the Commission.

The IA highlights the concerns of categories of stakeholders with the status quo and their general views on how these concerns should be tackled, with the majority agreeing on the need to consider dedicated ex-ante rules to address the negative effects on competition of the gatekeeper power of large platforms. The IA is transparent on the categories of stakeholders that disagree in general with the imposition of new ex-ante rules.

Supporting data and analytical methods used

The IA banks on a wealth of available research, both qualitative and quantitative, on the topic at hand and uses these numerous sources to underpin the discussion. These sources include specialised literature, EU and national competition case law, and reports and studies on digital platform markets by parliamentary bodies, competition authorities and other entities at EU, national or international level. Notable among these sources is the US House of Representatives majority staff report on competition in digital markets, which among other things was able to use the testimony of the chief executive officers of some of the biggest digital platform gatekeepers in existence.

These external sources are complemented by the aforementioned IA support study. The IA also makes reference to a study, prepared at the request of the IMCO committee and published in 2019, that takes stock of legislative measures initiated or enacted in support of the digital single market and what remains to be done.

Annex 4 to the IA gives details of the analytical methods used in the quantitative assessments, namely (i) the input-output (I-O) model and (ii) a partial equilibrium approach model developed by researchers from the Commission’s Joint Research Centre and which is a modified version of Duch-Brown et al. (2015). The assessments and assumptions made appear to be reasonable, and limitations, uncertainties and unavailability of data are recognised.
Follow-up to the opinion of the Commission Regulatory Scrutiny Board

The Commission’s Regulatory Scrutiny Board (RSB) initially issued a negative opinion on a draft version of the IA on 6 November 2020. Following the submission of a revised version, the RSB issued a positive opinion with reservations on 10 December 2020. In its second opinion, the RSB noted that the IA has been substantially redrafted to integrate the problem description and policy options into a single approach, but noted that the IA still contained ‘significant shortcomings’ that needed to be addressed. Among the points to be improved the RSB noted that the IA should (i) clarify how the problem drivers may lead to the negative outcomes identified; (ii) better justify the selection of the core platform services; (iii) better define and explain the options and the distinctions between them; (iv) improve the comparison of the options, and (v) better explain the limitations of the methodology used. The final IA report seems to address the comments made by the RSB, and describes how it does so in its Annex 1.

Coherence between the Commission’s legislative proposal and the IA

Essentially, the proposal appears to correspond to the preferred policy option indicated in the IA.

The IA identifies three problem clusters to which digital markets are particularly vulnerable, and outlines how the current EU regulatory framework does not adequately address gatekeeper-related market failures in digital platform markets. The IA banks on a wealth of available research to underpin the discussion, and appears to provide a suitable basis to support policymaking. For the purpose of determining the policy options the IA enters into a somewhat detailed and complex discussion on the main parameters that determine the range of available policy options, the degree to which each of these parameters might feature in the range of retained options and the trade-offs between these parameters in order to achieve credible and meaningful options. Although the presentation of the options is suboptimal in terms of efficiency and clarity, the IA does offer a balanced presentation of what appear to be realistic alternatives. Although the IA identifies Option 2 as the preferred option it leaves the choice of the threshold for the designation of providers of core platform services as gatekeepers to a political decision, clarifying to the political decision-makers the trade-off to be made between the speed of the regulatory intervention and the scope of the target platforms. The IA considers a range of impacts in assessing and comparing the retained options. This assessment and comparison is in many respects a qualitative exercise. A quantitative methodology is used to compare the efficiency of the options, but is conditioned by a lack of reliable data, which the IA acknowledges openly.
ENDNOTES


6 Ibid., p. 125.

7 Ibid., p. 70.


9 Ibid., p. 10.


12 Resolution of 20 October 2020 with recommendations to the Commission on a digital services act: Adapting commercial and civil law rules for commercial entities operating online, European Parliament.


14 Alphabet (Google’s parent company), Apple, Amazon, Facebook and Netflix.

15 S&P 500 is considered as one of the most representative stock market indices. It measures the stock performance of 500 large companies listed on the stock exchange in the US.

16 Regulation (EU) 2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

17 Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

18 Core platform services are defined in Article 2 (2) of the proposal as: (a) online intermediation services, (b) online search engines, (c) online social networking services, (d) video-sharing platform services, (e) number-independent interpersonal communication services, (f) operating systems, (g) cloud computing services, and (h) advertising services including advertising intermediation services supplied by a provider of any of the services in points (a) to (g).

19 The architecture of the instrument concerns the speed and the degree of flexibility of the intervention. Very roughly, a higher speed of application would entail little flexibility, while higher flexibility would be to the detriment of the speed of application. When it comes to speed, the choice is between (a) a model of immediately applicable obligations, (b) a model where a degree of appreciation is necessary, and (c) a fully flexible model, where obligations or remedies are only imposed subsequent to an investigation carried out by an authority. Flexibility can vary depending on (a) the method chosen for the designation of a gatekeeper, e.g. by using only qualitative thresholds, or by updating the thresholds in light of market developments, (b) how the list of obligations is set e.g. the list of practices could be left fully open, subject to an update, or selected after a market investigation or an analysis from a pre-determined list of practices, and (c) how the list of core services that fall within the scope of the intervention is determined at any given time.

20 Qualitative criteria would include whether the provider of core platform services has a significant impact on the internal market, how important the core platform services it operates are as a gateway for business users to consumers, and whether the provider enjoys or is expected to enjoy an entrenched and durable position in its operations.

21 The IA follows up on two separate inception impact assessments: the Inception impact assessment on a digital services act package – Ex ante regulatory instrument of very large online platforms acting as gatekeepers and the Inception impact assessment on a new competition tool.

This briefing, prepared for the Committee on Internal Market and Consumer Protection (IMCO), analyses whether the principal criteria laid down in the Commission's own Better Regulation Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal.