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EBF response to European Commission Inception Impact Assessment on an ex-ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union's internal market

1. Introduction

The European Banking Federation (EBF) welcomes the European Commission's initiative to address the issues with regard to large online platforms with significant network effects acting as gate-keepers and welcomes the opportunity to respond to the published Inception Impact Assessment (IIA) on a possible ex-ante regulatory instrument.

We support the Commission's assessment of both the positive aspects and the challenges presented by online platforms. There is a wide recognition that online platforms have been instrumental to the growth of digital markets and have helped spur both efficiency gains and innovation across the wider economy, including supporting SME engagement in the digital economy.

At the same time, the nature of online platforms and the consequences of their growth and position in the modern digital economy has resulted in increasing concerns over how to ensure that digital markets remain conducive to fair competition and continue to generate the same opportunities and incentives for innovation in the future. We agree with the Commission that several platforms have developed particularly crucial roles, with the potential for their actions and decisions to have outsized effects on the European digital economy and to set "the parameters for future innovations, consumer choice and competition" across the Single Market.

We would therefore like to highlight in this response two particularly pressing issues, related to the role of data held by large online platforms and of technical infrastructure operated or controlled by large online platforms in the digital economy. These will also be expanded upon together with other points in our response to the Commission's consultation on the Digital Services Act Package.

2. Data gatekeepers

There is widespread consensus that data has become a strategic asset in the digital economy. Access to and re-use of data is considered a crucial step towards a competitive EU data economy which will benefit both consumers and EU firms. This is recognized by the European Commission's Data Strategy which notes that "*Data is the lifeblood of economic development: it is the basis for many new products and services, driving productivity and resource efficiency gains across all sectors of the economy, allowing for*

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more personalised products and services and enabling better policy making and upgrading government services.”

The competitiveness of firms thus increasingly depends on timely access to relevant data, yet the current data sharing framework puts certain players at a disadvantage (e.g. PSD2 regime) **while others act as data gatekeepers – as in the case of large online platforms.**

For example, BigTech firms have started to leverage control over the customer interaction and extensive data to enter new sectors, including financial services.

The Inception Impact Assessment recognizes this trend: *“An ability of a small number of large online platforms **to comparatively easily enter adjacent markets, since they benefit from the use of data gathered from one area of their activity to improve or develop new services in these adjacent markets, increases a risk of these adjacent markets also tipping in favour of these platforms to the detriment of innovation and consumer choice.**”*

Addressing concentrated data collection through new measures therefore presents an opportunity to improve both traditional competition “for the market”, for example between similar platform services, as well as to ensure that data remains in the consumers control and is used to support competition and innovation in adjacent markets, by increasing the availability of a key input for innovative data-driven services and thereby helping to limit anti-competitive leveraging or envelopment strategies

3. Access to Technical Infrastructure

As a result of the ongoing digitalization of the economy and the changes in how customers engage with a wide variety of markets, access to digital or technical infrastructure outside of the traditional financial sector is increasingly important for the provision of financial services. These infrastructures include devices and their associated functionality, such as biometric authentication or communication protocols like Bluetooth and near field communication (NFC), as well as app stores and pre-installed apps on devices.

However, this infrastructure is not always available on an equal basis to all market participants, with elements controlled by some market players and/or technical providers. This control may result in some infrastructures being completely unavailable, while in other cases access may be restricted with particular terms and conditions

For example, lack of access to communication protocols, such as NFC, in some mobile environments significantly limits the opportunity to offer third party mobile payment services, with the potential for a subsequent knock-on effect on the provision of other digital financial services.

It must also be considered that technical infrastructure providers can use their gatekeeping role to their advantage if they combine the technology provision with the supply of financial services.

4. Observations on Policy Options

We agree that clear obligations and prohibited practices for these larger online platforms with economic power can provide European consumers and business users with more

choice and access to innovative solutions. In this regard, the implementation of new ex ante rules needs to be workable and sufficiently future-proof so as to be able to address effectively issues that are currently present in digital markets with large online platforms, as well as new issues that could arise in the future as digital markets continue to grow and evolve. To that end, the scoping decision, and the delimitation of the perimeter of the ex ante rule are critical in the policy making process.

In particular, there should be flexibility to apply measures to all large platforms with significant gatekeeper roles, whether these take the form of prohibitions or restrictions of certain unfair trading practices (as set out in option 3a) or are proactive or “positive” obligations, such as ensuring access to certain types of technical infrastructure or improving access to data. This would allow authorities to address issues or challenges that are common across these platforms and complement any case-by-case interventions as part of ex ante rules (option 3b) and the proposed New Competition Tool. Furthermore, given the increasing overlap between large platform ecosystems, this would also be key to ensuring that regulators do not create imbalances between platforms that provide an artificial advantage to one over another.

We would advocate the formulation of specific rules on platforms related to user data. Several concerning situations illustrate the advisability of addressing platforms’ data policies in an ex-ante approach. Common challenges across large platforms would include in particular the concentration and importance of user data, which typically serves as a barrier to multi-homing, creates lock-in effects, and facilitates leveraging or envelopment strategies as online platforms move into new markets. This set of features endangers competition in the market, not only when the platform uses its market power to benefit its own products or services to the detriment of those of competitors, but also because its dominant position may no longer be based on merit.

These issues could be addressed in part with new obligations that would be appropriate across all large platforms, including as to how user data from the different sides of a platform must be made portable.

Most EBF members ¹ would therefore support, as part of the framework on ex-ante rules, the introduction of an obligation for large platforms to provide users, both individuals and firms, with an effective mechanism for data portability. Enabling users to transfer their data from the original service provider to another firm would enhance competition and support data-driven innovation. It is important that this mechanism ensures users are able to share their data in a way that is easy, secure, in real time and on a repeated basis, through standardised interfaces such as APIs, and within the frame of user and firm data protection laws (GDPR and other national data protection laws; competition laws, intellectual property, business secrecy, etc). In addition, introducing this mechanism should not result in increased complexity or lower protection for consumers. It would need to be compliant with competition rules and be based on shared benefits in providing customers with a diverse range of products and services, as well as an enhanced, more personalized experience, in full respect of customer data protection and communication security.

¹ One EBF member—favours a voluntary approach based on partnerships and peer-to-peer contractual arrangements between interested parties; a gradual, step-by-step approach within the existing regulatory framework, both cross-sectoral and specific to banking and financial sector, with secure communication and strong authentication processes defined by the industry possibly in cooperation with other sectors.

Developing appropriate supervision for the future framework will be essential, taking into account the impact and extent of platforms' interactions with users. It is also important that competition authorities are able to weigh the value of data, data combination and the power of a platform as a gatekeeper to certain data.

Finally, the EBF welcomes a dialogue with the European Commission to understand the criteria that can help to target the important measures, covering those online platforms that have significant relevance for the market, i.e. in terms of infrastructure, and competitiveness described above.