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EBF key messages

Digital Services Act consultation

Accompanying the EBF's online contribution to the European Commission's (EC) consultation on the Digital Services Act, we would like to present the respective key messages prior to the publication of the EC legislative proposal on the Digital Services Act.

1) The EBF supports an ex ante regulatory approach to large online platforms, securing fair competition in a digitally transformed market.

The competitiveness of firms increasingly depends on timely access to relevant digital infrastructure, consumer gateways, data and markets, yet the current framework, including for data sharing, puts certain players at a disadvantage (e.g. PSD2 regime) while large online platforms act as gatekeepers. Should large platforms' market powers, resulting from their gatekeeper role, not be properly addressed, we will observe further weakening of the competitive process, since the abilities of firms to compete with gatekeepers are significantly undermined. In most extreme cases, such as a denial of access to digital infrastructure, they would be effectively prevented from competing at all. Should this process continue, this would further endanger the capacity of European firms depending on these platforms to compete in an international context.

European banks experience a range of issues related to the provision of digital financial services, including the imposition of unlevelled trading conditions by large online platform companies. The latter exercise a market power due to control over markets and assets for financial services, including consumer gateways, technologies and data. These factors lead to a direct disadvantage for financial service competitors and a detrimental concentration of market share in the hand of the large online platforms. However, not all digital platforms necessarily have market power that allows them to distort fair competition. We support a targeted regulatory action accordingly, limiting measures to these platforms that have the power to influence the market in a substantial manner. Making this important distinction between large online platforms and other innovators organized under a platform business model allows for a fostering environment for innovation while protecting fair market operations.

Consequently, the EBF agrees with the criteria proposed by the EC for determination of gatekeeper roles of large platforms. These cannot be static, and various dynamics should be considered by the regulator:

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- a) Vertical integration with upstream and/or downstream companies, which can lead to a discrimination in favour of large online platforms' own upstream/downstream businesses in their core platforms;
- b) Control of key consumer gateways, operating systems and infrastructures;
- c) Refusal by large platforms to grant access to data and leveraging data superiority to monopolize adjacent markets. In turn, usability of such data for non-platform actors carries more costs;
- f) Cross-subsidization, providing products or services below cost – or at zero price – to one side of the market;
- g) Tying or bundling of platforms' new services with their dominant products and services;
- f) Identification of start-ups with significant potential by large platforms, and use of deep financial resources to acquire and absorb them, in order to reduce potential competition with a core platform.

A two-step approach combining both quantitative and qualitative criteria would be an effective way to accurately identify large online platforms' gatekeeper role. The first step would identify platform firms above a minimum size, for example indicated by the number of users or customers above a given threshold. A second step would then identify any gatekeeping role(s) and the related structural competition problems. This would entail an analysis of the relevant market structure and the factors noted above.

2) The EBF agrees that the regulatory approach should include clear obligations and prohibited practices for large online platforms.

Clear obligations and prohibited practices for large online platforms with economic power can provide European consumers and business users with more choice and access to innovative solutions.

New ex ante rules need 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.

A regulatory ex ante approach under the Digital Services Act should combine obligations and prohibitions. The latter should be introduced to:

- a) Resolve obstacles to digital neutrality: prohibit discrimination in access to and treatment by large online platforms' digital infrastructures.
- b) Prevent discriminatory practices:
 - Pricing discrimination for specific segments or customer profiles, and especially against competing providers;
 - Using the information generated by platform users in the benefit of the platform owner and against competitors;
 - Exclusionary conducts: inducements when ranking products, including the provider's own products;

- Conflict of interests in the individual use of algorithms, search engines and comparison rules, favouring the company in detriment of consumers, i.e. by promoting the sale of the more expensive products, rather than those that the consumer needs.
- Use of customer experience tools to manipulate customer behaviour, such as facilitating choices that are not the most suitable for them, including accepting terms and conditions without a proper revision (to avoid being constantly asked the same questions before using a service).
- Use of a “favoured nation clause”, i.e. regulatory arbitrage.

When considering options to codify prohibitions, the regulatory framework should allow for the necessary flexibility to effectively address not only detrimental practices observed today, but also future practices with equal deleterious effects. Exhaustive blacklists may prove to be too rigid in nature, ultimately becoming too narrowly defined for a fast-developing market.

3) The EBF advocates the formulation of specific rules on platforms related to user data, including an obligation to provide users – both individuals and firms – with an effective mechanism for data portability.

Platforms' data sharing policies should be addressed in an ex-ante approach. Common challenges across large platforms 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, particularly where the platform uses its market power to benefit its own products or services to the detriment of those of competitors.

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, also in line with GDPR.

Most EBF members¹ call for the introduction of an obligation for large platforms to provide users, both individuals and firms, with an effective mechanism for data portability as part of the framework on ex-ante rules.

This mechanism should make standardized transfers available for personal and non-personal data – provided to or generated through the use of the large online platform – alike, allowing business and individual users to share data directly with any other service provider. The mechanism needs to allow for easy, secure and real-time data transfers, designed to be repeatable. Application programming interfaces (APIs) would be an effective way for such implementation. In effect, such mechanisms would improve data handling under Article 20 GDPR, allowing individuals to exercise their right to portability.

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.

4) The EBF sees a need for enhanced data sharing by large online platforms with the public authorities.

Large online platforms should be subject to enhanced data sharing obligations. Besides obligations vis-a-vis users (see key message 3)) this should include supervisory purposes concerning professional users of the platform, the platform's own obligations under ex ante regulation and specific requests of law enforcement authority or the judiciary.

5) The EBF supports the possibility of regulatory intervention against specific large online platform companies, when necessary with case by case adapted remedies.

While generalized prohibitions and obligations under an ex ante regulatory approach will be able to effectively address many of the underlying issues common to gatekeeping platforms, there are likely to be idiosyncratic issues that are driven by the dynamics of a specific market or gatekeeper role and are therefore relevant for a particular platform or subset of platforms. Flexibility to intervene on a case by case basis would allow for these issues to be resolved in a targeted way, without needing to resort to inappropriately broad measures that apply to all gatekeeping platforms or leaving them unaddressed.

This type of intervention would need a suitably robust and objective framework to determine when intervention is warranted. Required time for significant market changes needs to be considered carefully. Nevertheless, the approach could build on existing frameworks used in regulated industries, such as telecoms, while ensuring that it is tailored to the particular necessities of gatekeeping platforms - including recognizing the need to move quickly in circumstances where markets are at risk of tipping, and the need to have the scope to intervene both in core or original markets where a platform has a gatekeeping position, and in adjacent or target markets, where the platform may be executing a leveraging or envelopment strategy.

To ensure that the relevant authority has the scope to take action in the most efficient and targeted way, the range of potential remedies should be relatively broad, including the possibility of both behavioural and structural remedies.

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About the EBF

The European Banking Federation is the voice of the European banking sector, bringing together 32 national banking associations in Europe that together represent a significant majority of all banking assets in Europe, with 3,500 banks - large and small, wholesale and retail, local and international – while employing approximately two million people. EBF members represent banks that make available loans to the European economy in excess of €20 trillion and that reliably handle more than 400 million payment transactions per day. Launched in 1960, the EBF is committed to a single market for financial services in the European Union and to supporting policies that foster economic growth.