ECLF
European Competition Lawyers Forum

EUROPEAN COMPETITION LAWYERS FORUM[1]

Response to the European Commission's consultation on the Digital Services Act package

8 September 2020

[1] The European Competition Lawyers Forum ("**ECLF**") is a group of the leading practitioners in competition law from firms across the European Union. This paper has been compiled by a working group of ECLF members and does not purport to reflect the views of all ECLF members or their law firms. The views set out in this working paper also do not necessarily reflect the views of each individual member of the working group or of their law firm. A list of working group members is set out at Annex 1.

Practical Considerations of the proposed "Gatekeeper" Rules in the Digital Services Act package

1. Introduction

1.1 On 2 June 2020, the European Commission (the "**Commission**") launched a public consultation seeking views on the Digital Services Act package (the "**DSA package**"). In its press release, the Commission explained that the consultation covers the following two work strands: (i) rules relating to the fundamentals of the e-Commerce Directive; and (ii) rules to address imbalances in European digital markets where a few large online platforms act as "gatekeepers" (the "**Gatekeeper Rules**").[2]

1.2 The ECLF working group welcomes the opportunity to take part in the consultation and comment on the proposed Gatekeeper Rules.[3] This paper: (i) provides general comments on the proposed regulatory intervention; (ii) discusses procedural safeguards and principles that should be incorporated to protect companies' fundamental rights; (iii) provides some specific recommendations on the implementation of the proposed Gatekeeper Rules; and (iv) offers conclusions on how best to achieve the Commission's objectives.

2. General comments on the proposed regulatory intervention

2.1 The suitability of the existing competition law enforcement regime to address abuses of market power in digital sectors has received significant attention - from the Commission as part of its consideration of competition policy in the digital era, and from national authorities including in the UK and Germany.[4] Concerns have centred around (amongst others): (i) the impact of a few platforms' dominance over the digital economy; (ii) problems associated with markets that have tipped, or are about to tip; (iii) digital 'walled gardens' and leveraging across digital ecosystems; and (iv) competitive advantages associated with data access and portability. Existing antitrust enforcement has been criticised as being too "*slow, cumbersome, and unpredictable*" for the fast-moving digital sector.[5] There is some merit to these criticisms: investigations carried out under Articles

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[2] Commission press release dated 2 June 2020, available here (last accessed on 13 July 2020 at 20:09). The ECLF notes that the Commission is obliged to "*consult widely*" before proposing legislative acts (Protocol (No 2) TFEU on the application of the principles of subsidiarity and proportionality, Article 2). The ECLF considers that the timeframe provided to respond to the inception impact assessment launched concurrently on 2 June 2020 was too short, and therefore urges the Commission to have regard in full to the responses – including this paper – received under the wider consultation.

[3] Given the divergence in views and experiences across the working group, we felt it would be more productive to respond by way of a paper than by answering the specific questions in the consultation's questionnaire. The ECLF working group would be happy to engage with the Commission if it wishes to discuss any parts of the paper in more detail.

[4] The CMA's market study final report on online platforms and digital advertising (the "**CMA Report**"), July 2020, available here. Also see: Furman et al., "Unlocking digital competition: Report of the Digital Competition Expert Panel", May 2019, available here (the "**Furman Report**"); Crémer/Montjoye/Schweitzer, "Competition policy for the digital era", March 2019 (the "**EU Special Advisors' Report**"), available here; and the recent German legislative proposal (the "**Digitilization Act**" - https://www.bmwi.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.pdf; (unofficial) English translation of key provisions found here: https://www.d-kart.de/wp-content/uploads/2020/02/GWB10-Engl-Translation-2020-02-21.pdf.

[5] The Furman Report, p.6; the CMA Report, paragraph 7.33.

101 and 102 TFEU have indeed often proven lengthy and slow-moving, lasting sometimes more than five years.[6] This creates a material risk of irreversible harm to competition and consumers before an authority takes action to address, for example, abusive conduct by a super-dominant platform. The ECLF agrees that a change in approach is necessary to remedy this issue.

2.2 However, the ECLF queries whether the introduction of *ex ante* regulation for "gatekeepers" is the right way to resolve these concerns. The Commission appears to envisage that the Gatekeeper Rules will "blacklist" certain practices for designated firms. This is a blunt instrument that fails to take account of the differences in digital platform business models, which make case-by-case examination essential. It also papers over nuances provided for in traditional competition law (including the intention behind the practice, or its likely effect on the competitive process). The ECLF considers that, as a result, there is a high risk that this type of instrument could have the undesirable effect of punishing success, limiting competition on the merits and stifling innovation. Before moving forward, the ECLF urges the Commission to consider the negative impact that a wide-ranging list of prohibited practices might have on innovation and long-term economic growth – particularly given the dynamism of the digital economy and its role as a key driver of innovation and competition in recent years.

2.3 The ECLF notes that the Commission already has a number of tools at its disposal which it has previously fought to acquire.[7] Better use of these existing tools may go far in addressing concerns about traditional competition law being fit for purpose in digital markets (see further section 5 below).

3. Protecting fundamental rights: procedural safeguards and burden of proof

3.1 To the extent the Commission considers that more effective use of existing tools will not address its concerns, the ECLF considers it critical that any new legislation respects the following principles that are necessary to ensure the protection of companies' fundamental rights:

(i) Rights of defence.[8] The Gatekeeper Rules could impact companies' rights of defence (including the interrelated right to be heard and the right to good administration). In this context, it is important that the Commission incorporates procedural safeguards necessary to enable a "gatekeeper" to defend its practices. The ECLF considers that appropriate safeguards would include a process for "gatekeepers" to receive, initially, a decision setting out the basis on which they have been designated a "gatekeeper". In addition, when a breach of the Gatekeeper Rules is suspected companies should receive a "charge"

[6] For example, the Commission opened formal proceedings against Gazprom under Article 102 in 2012, eventually adopting a commitments decision in May 2018 (Case AT.39816).

[7] Such as the Commission's powers to initiate sector inquiries.

[8] Charter of Fundamental Rights of the European Union, Article 48: "Respect for the rights of defence of anyone who has been charged shall be guaranteed"; Article 41(2): "[The right to good administration] includes: (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decisions".

statement (akin to the Statement of Objections in the EU enforcement process) which clearly sets out: (i) the basis on which the regulator considers that a "gatekeeper" has breached the Gatekeeper Rules; and (ii) the action proposed to address this – including any "tailor-made" remedies. Indeed, it would infringe companies' rights of defence if the Gatekeeper Rules were used as a shortcut to impose potentially burdensome remedies without an evidence-based finding that there had been an infringement of those rules. The undertaking concerned should be given an adequate opportunity to respond to allegations, both in writing and at an oral hearing if requested.

(ii) The rights of defence: the right to good administration.[9] Given the impetus to use the Gatekeeper Rules to facilitate speedy enforcement, the ECLF suggests the Commission consider stipulating timeframes for each stage of an investigation into compliance with the Gatekeeper Rules. This right also includes allowing companies access to file.

(iii) Burden of proof: The burden of proof should be on the regulator to establish that a firm is within the scope of the rules, and that its conduct infringes these rules.

(iv) The rule of law.[10] The ECLF considers it critical that all decisions taken by the regulator in relation to the Gatekeeper Rules are justiciable.[11] In particular, justiciable decisions should include: the designation of an undertaking as a "gatekeeper"; the designation of a practice as prohibited; findings that a platform has infringed a prohibited practice; and decisions to impose a remedy (including the scope of the remedy or magnitude of the fine imposed). Pending the outcome of the appeal, the regulator's decision should stand unless the company seeks interim measures, as lengthy appeal processes would otherwise defeat the objective of achieving fast-moving intervention.

(v) Proportionality.[12] The ECLF notes the financial and administrative burden that the Gatekeeper Rules would entail for "gatekeeper" companies.[13] Consequently, the Commission should consider in detail whether any new rule represents a proportionate response to the potential harm of the business practice it seeks to address, particularly when the Commission and Member States already have other enforcement tools at their disposal.

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[9] Charter of Fundamental Rights of the European Union, Article 41(1): "Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union".

[10] Treaty on the European Union, Article 2: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".

[11] Measures imposed could significantly impact companies' business operations so it is necessary for the rule of law that they have the opportunity to appeal such decisions.

[12] Treaty on the European Union, Article 5(4): "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties".

[13] The ECLF notes that all draft legislative acts must contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality, including some assessment of the proposal's financial impact. Protocol (No 2) TFEU on the application of the principles of subsidiarity and proportionality, Article 5.

(vi) Legal certainty.[14] The ECLF urges the Commission to ensure that any legislation is sufficiently clear and precise to allow "gatekeepers" to assess whether or not their practices fall within the scope of the rules. The ECLF also considers that any rules should be accompanied by detailed guidance on the criteria the Commission will consider, and the procedures it will follow, when applying the Gatekeeper Rules.

4. Specific recommendations on the proposed Gatekeeper Rules

Identification of "gatekeeper" platforms

4.1 The Commission's inception impact assessment (the "**Proposal**") suggested that if introduced via a new regulatory framework, the Gatekeeper Rules would apply to a "*limited subset of large online platforms*" identified on the basis of "*clear criteria*". The ECLF agrees that any such rules should only apply to a very limited subset of 'super-dominant' undertakings (referred to in this paper as "gatekeepers").

4.2 In order to respect the principles set out in Section 3, the ECLF is of the view that "gatekeeper" designation would need to incorporate the following elements:

(i) The regulator must investigate each relevant market before designating a platform *ex ante* as a "gatekeeper" in any particular market (the "**Preliminary Investigation**". In this regard the regulator might draw on the EU regulatory framework for electronic communications (the "**EU Telecommunications Framework**") whereby the national regulatory authorities can only designate an undertaking *ex ante* as having significant market power following an investigation into each relevant market. Note, however, that the ECLF considers most tech markets to be at least regional in scope (and more likely global) so (unlike in the EU Telecommunications Framework), the Preliminary Investigation should happen at EU, rather than national, level.[15] As in the EU Telecommunications Framework, the burden of proof for designating a "gatekeeper" should be on the regulator.

(ii) The regulator must specify clear criteria for designating an undertaking as a "gatekeeper" following a Preliminary Investigation. The Proposal suggests the Commission is considering criteria such as "*significant network effects, the size of the user base and/or an ability to leverage data across markets*". The ECLF notes that other commentators and reports have suggested various alternative options for designating a "gatekeeper" and urges the Commission to consider these in its assessment.[16] To maintain legal certainty, it is critical that whatever

[14] EU legislation must be certain and its application must be foreseeable. See Case C-325/85 *Ireland v Commission* [1987] ECLI:EU:C:1987:546 para 18.

[15] Moreover, given that the tools themselves would operate across the Member States, this would avoid a situation where a "gatekeeper" was subject to varying standards in different Member States.

[16] For example, the Furman Report (recently endorsed by the CMA Report) suggested the "strategic market status" test might include economic dependence, relative market power, and access to markets, whilst the German Digitalization Act identifies the following five factors as relevant to determining whether an undertaking has "paramount significance for competition across markets": a company's (i) dominant position in one or more markets; (ii) financial strength or

criteria are selected, the thresholds for designating a "gatekeeper" platform are clear and objective. As at paragraph 3.1(iv) above, the ECLF suggests that, as for the EU Telecommunications Framework, the Commission issue guidance in this regard, and that this guidance be subject to regular review.[17] In order to facilitate speedy investigation, the ECLF also considers that it is appropriate to focus on easily measurable, quantitative criteria, rather than more complex measures that would first require lengthy examination and detailed evidence gathering. In terms of the criteria suggested in the Commission's questionnaire, the ECLF has the following comments:

(a) *"Large user base"* or *"capture [of] a large share of total revenue of the market…/of a sector"*: It is not clear how "large" would be defined – e.g. in terms of volume, or proportionately in respect of the relevant market. If the market in question is clearly defined, with a proportionate threshold, the ECLF considers that either measure could be an easy and objective way to measure "gatekeeper" status.

(b) *Wide geographic coverage in the EU*: "Wide" coverage would need to be clearly defined if this criterion were applied.

(c) For the following criteria proposed by the Commission, further work would be needed to precisely define what they are measuring: (i) *"impact on a certain sector*"; (ii) "*build on and exploit strong network effects*"; (iii) "*raise barriers to entry for competitors*"; (iv) "*very few, if any, alternative services available on the market*"; and (v) "*lock-in of users / consumers*". In all cases, a detailed investigation of the market would also be required to establish if these criteria are met. A lengthy market investigation would undermine the Commission's objectives of speed and *ex ante* legal certainty.

(d) *"They leverage their assets for entering new areas of activity"*: "New areas" would need to be defined in a way that limits its application to

access to other resources; (iii) vertical integration and activities on otherwise related markets; (iv) access to data relevant for competition; and (v) the importance of its activities for third parties' access to supply and sales markets, and its related influence on third parties' business activities. Peter Alexiadis and Alexandre de Streel suggest a "three criteria test" for regulatory intervention, with the following criteria: (i) non-contestable concentrated market structure; (ii) a digital gatekeeper which is an unavoidable trading partner; and (iii) the lack of effectiveness of competition rules to address the problems identified: in the analysis of the second criterion they suggested drawing on the related concepts of "*bottleneck*" facilities and relations of "*dependency*", and explain that "*this criterion requires that the platform in question has achieved a significant level of user uptake and that the access seekers depend on the platform to reach users*" (see Alexiadis and de Streel, "Designing an EU Intervention Standard for Digital Platforms", RSCAS 2020/14, p.35-38, available here). Analogously, the ECLF also refers to the methodology of the Basel Committee on Banking Supervision (the "**BCBS**") for identifying and assessing global systemically important banks ("**G-SIBs**"). Each year the Financial Stability Board designates banks as G-SIBs using a quantitative indicator-based approach comprising five broad categories, being (i) size; (ii) interconnectedness; (iii) lack of readily available substitutes or financial institute infrastructure; (iv) global activity; and (v) complexity. The Financial Stability Board, BCBS and relevant supervisory authorities can together decide to adjust a bank's score on the basis of supplementary qualitative information; however this "supervisory judgment" process is limited to exceptional cases and is subject to international peer review.

[17] For example, the Recommendation on Relevant Markets and the SMP Guidelines. By issuing and regularly updating such guidance, the Commission will be able to ensure that the principles being applied in making this determination reflect its latest thinking, relevant case law and market developments.

markets where a company's data or assets would give it a real competitive advantage. Otherwise, this broad criterion could stifle the ability of firms to enter and innovate in new areas.

(e) *"They accumulate valuable and diverse data and information"*: The Commission would need to define what is meant by "valuable and diverse" data and information. As currently drafted, this criterion is imprecise and overly broad.

(iii) Any designation following a Preliminary Investigation must be appealable to the European courts. The ECLF considers that it is vital that any undertaking designated as a "gatekeeper" has a right to appeal to the European General Court for judicial review of this designation. Therefore, as noted in Section 3, to ensure that the Gatekeeper Rules respect the rule of law, this should be the subject of a justiciable decision that precisely defines the scope of the designation.

(iv) A mechanism should be included to keep designation as a "gatekeeper" under regular review, given the fast-moving nature of digital markets. The ECLF suggests that the regulator review each designation every five years, and that additionally the "gatekeeper" should have the right to trigger a review in exceptional circumstances where there is clear evidence of a significant change, such as upon a share or asset disposal, or a shift in market dynamics.[18]

Content of the rules: prohibited content

4.3 The Proposal indicates that the Gatekeeper Rules could include prohibited "blacklisted" practices consisting of either (i) cross-sector principles-based prohibitions (for example, a horizontal prohibition of intra-platforming 'self-preferencing'), or (ii) more issue-specific rules associated only with certain actors. The ECLF has concerns with the first approach.

4.4 In order to respect the principles set out in Section 3, the ECLF is of the view that any rules on prohibited practices would need to incorporate the following elements:

(i) Any cross-sector prohibitions must be narrow and limited to the most egregious conduct, where there is consensus that such practice amounts to a "by object" infringement. Prohibitions need to be specific to guarantee legal certainty. In addition, the ECLF considers that an *ex ante* regime must, by its nature, be limited to "by object" type rules which do not require an effects analysis (as this would otherwise slow down enforcement, defeating the purpose of the legislation). Given these parameters, the ECLF believes that there are few, if any, practices that are appropriate for a cross-sector list of "by object" prohibited practices. Self-preferencing (mentioned in the Commission's Proposal) is a good example. Although there are circumstances where this has been found to be anti-competitive, the EU Special Advisors' Report recognises that self-preferencing is

[18] The ECLF notes again the speed at which tech markets are prone to move and therefore the speed at which "gatekeeper" status can be lost – for example, consider MySpace's abrupt loss of "gatekeeper" status in 2008.

not abusive *per se* but subject to an effects test.[19] Reinforcing this view is the Commission's *Google Shopping* decision: although the Commission found that the conduct at issue was self-preferencing that breached Article 102, this finding was based on the effects of the conduct (i.e. it did not suggest that this was *per se* prohibited).[20] Indeed, Commissioner Vestager explicitly commented that this finding was fact-specific and that this type of abuse needs to be considered case-by-case.[21] All of this is inconsistent with a blanket prohibition.

(ii) Before designating prohibited practices targeted at specific issues or actors, the regulator must carry out an investigation into the relevant sector/actor. Depending on the regulator appointed and the scope of any information-sharing tools, the regulator may be able to draw on recent investigations that have been carried out in each sector. Any designation of a practice as prohibited would need to be appealable to respect the rule of law.

(iii) Prohibited practices should be kept under regular review. While broad, principle-based rules risk punishing legitimate business conduct and stifling innovation when applied on a "by object" basis (see (i) above), narrow and specific rules (as recommended by the ECLF) risk becoming obsolete quickly given the pace at which digital markets evolve. The ECLF therefore suggests that any practices included in the "blacklist" would need to be reviewed every three years, with undertakings in the relevant sector able to trigger an additional review in exceptional circumstances.

4.5 Although, for the reasons set out above, a short "blacklist" is the preferable alternative of the two options the Commission is considering, the ECLF notes that ideologically, this rigid, "blacklist" approach is at odds with the direction of travel towards effects-based competition law assessment grounded in economic principles.[22] This is another reason for the Commission to pause and consider if the Gatekeeper Rules are the right tool to bring competition law into the digital era, especially as the competition rules have demonstrated that they have the agility to be effective in a digital environment.

Tailor-made remedies

4.6 The Proposal indicates that under the Gatekeeper Rules, the regulator could have powers to impose tailor-made remedies "*where considered necessary and justified following a*

[19] EU Special Advisors' Report, p. 7 and 66.

[20] The Commission's decision is currently under appeal (General Court judgment pending).

[21] In a statement in June 2017, Commissioner Vestager commented: "*Finally, a few words on concerns that Google may have abused its dominance as a search engine to give an illegal advantage to Google products other than its comparison shopping service. We have been looking into these. And today's decision is a precedent, which can be used as a framework to analyse the legality of such conduct. At the same time, we would have to take account of the characteristics of each market and the facts in a specific case*". Statement available here (last accessed on 14 July 2020 at 09:41).

[22] For example, the ECLF observes that the hardcore restrictions (akin to "blacklisted" practices), set out in the Commission's Block Exemption Regulations have shrunk over the years. Compare, for example, the extensive list of hardcore restrictions in Commission Regulation (EC) No 1400/2002 of 31 July 2002 (the "**MV-BER**") with the much reduced list in current block exemption regulations, such as in Commission Regulation (EU) No 330/2010 (the "**VBER**").

prior assessment". The ECLF considers that this proposition is inconsistent with the nature and objective of *ex ante* rules. In order to ensure rapid enforcement of pre-defined practices, remedies should be limited to fines and/or behavioural remedies necessary to enforce compliance with the rules. For example, the ECLF notes that the CMA Report envisages enforcing its proposed code of conduct primarily through fines and orders to comply,[23] while any other "pro-competitive interventions" will require the new UK regulator to first investigate the scope and necessity of such interventions.

4.7 The ECLF therefore queries the necessity and proportionality of introducing broader remedy powers in the context of the Gatekeeper Rules. *First,* such a framework (an initial finding of dominance/super-dominance, followed by an investigation and the imposition of behavioural or structural remedies where necessary) already exists under Article 102 TFEU, making this an unnecessary and disproportionate addition to the enforcement toolbox. *Second,* if it is proposed that the "*prior assessment*" would focus on a specified market rather than a specified "gatekeeper", it is difficult to differentiate this proposal from the proposed New Competition Tool (the "**NCT**"). To the extent that the Commission does opt to introduce tailor-made remedies, the ECLF recommends that (as proposed in the CMA Report) these should only apply following an investigation into the scope and necessity of the intervention.[24] For breaches of the Gatekeeper Rules, (as above) remedies should be limited to fines and/or behavioural remedies necessary to enforce compliance.

5. Conclusion

5.1 The ECLF recognises that building into the Gatekeeper Rules the procedural safeguards necessary to protect companies' fundamental rights necessarily renders difficult the introduction of a system with an emphasis on rapid enforcement. As illustrated above, the scope of such regulation would also necessarily be extremely narrow, limiting its effectiveness in tacking concerns in online markets. Therefore, rather than seeking to introduce new regulation which risks prioritising speed over fundamental rights, the ECLF recommends that the Commission instead focus on making more effective use of its existing tools. For example, the ECLF notes that more frequent use of interim measures would enable the Commission quickly to prevent suspected harms. Similarly, imposing timetables on investigations carried out under Articles 101 and 102 TFEU, akin to those imposed under the EUMR, would also facilitate faster enforcement action.

5.2 However, if following this consultation the Commission still determines that its existing tools are insufficient to effectively regulate large platforms, given the challenges highlighted above the ECLF recommends that the Commission instead consider introducing a more nuanced enforcement tool. Moreover, if the Commission does opt to introduce the Gatekeeper Rules, the ECLF considers the introduction of the NCT in addition to this would constitute unnecessary and disproportionate regulatory overreach.

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[23] The CMA Report, paragraph 7.32 – 7.34 and footnote 450.

[24] In addition, the ECLF suggests that "gatekeepers" should have the right to challenge any remedies imposed within a period of three years, based on market evidence gained over that time and changes in market circumstances.

Annex 1: Members of the ECLF working group

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- Gibson, Dunn & Crutcher LLP: Peter Alexiadis
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