September 8, 2020

CNECT-CONSULTATION-DSA@ec.europa.eu

European Commission
Directorate General for Competition
1049 Brussels
Belgium

SUBJECT: Comments on European Commission’s Consultation on Proposed Digital Services Act

Dear Sir/Madam:

On behalf of the American Bar Association Antitrust Law Section, I am pleased to submit the attached comments in response to the request for comments on the European Commission’s Consultation on Proposed Digital Services Act.

Please note that these views are being presented only on behalf of the Antitrust Law Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

If you have any questions after reviewing this report, I will be happy to provide further comments.

Sincerely,

Gary P. Zanfagna
Chair, Antitrust Law Section

Attachment
September 8, 2020

The views stated in this submission are presented on behalf of the Antitrust Law Section; they have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association as a whole.

The Antitrust Section of the American Bar Association (the Section) respectfully submits these comments in response to the European Commission’s (Commission’s) public consultation regarding the proposed Digital Services Act (DSA) providing “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.” The Section is available to provide additional comments or to provide assistance in any other way that the Commission may deem appropriate.

The Antitrust Law Section is the world’s largest community of competition, consumer protection, and data privacy professionals. Section members, numbering over 7,600, come from all over the world and include attorneys and economists from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors and law students. The Section provides a broad variety of programs and publications concerning all facets of antitrust/competition, consumer protection, and privacy. Numerous Section members have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section’s scope of expertise.

These comments reflect the Section’s collective experience and expertise with respect to the application of antitrust law and economics in the United States, the European Union, and other jurisdictions, as well as with international best practices. The Section offers these comments to share our experience and provide suggestions to evaluate the effectiveness of the proposed ex ante rules. As further explained below, the Section believes that the goals of the DSA would be better served by providing relevant guidance on enforcement rules under Article 102 of the Treaty on the Functioning of the European Union (TFEU). While regulation can provide greater certainty to market participants and reduce barriers to entry in some cases, the ex-ante regulation may be less flexible than case-by-case enforcement. Ex ante regulation can also inadvertently prevent legitimate competition and chill procompetitive investment. If the Commission nonetheless decides to draft proposed legislation creating a new regulatory regime for gatekeeper platforms,

1 Digital Services Act package: open public consultation, [https://ec.europa.eu/eusurvey/runner/Digital_Services_Act (DSA Consultation)].
2 Past comments can be accessed on the Section’s website at [https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/].
we urge the Commission to take certain points into consideration to maintain flexibility to address these complex and dynamic markets.

I. Methodological Note

The Section respectfully cautions the Commission against overreliance on online surveys such as the Consultation survey. As explained by the U.S. Federal Judiciary’s Reference Manual on Scientific Evidence, “participants are very likely to self-select on the basis of the nature of the topic. These self-selected surveys resemble reader polls published in magazines and do not meet standard criteria for legitimate surveys admissible in [U.S.] courts.” Surveys such as the Consultation must be organized carefully and given appropriate weight that recognizes their strengths and weaknesses.

Furthermore, according to the U.S. Federal Judiciary’s Reference Manual on Scientific Evidence survey questions should be framed in a manner that is clear, precise, and unbiased. The Section respectfully notes its concerns that some of the questions in this survey may unintentionally be leading in that they assume certain facts such as “large online platforms” acting as “gatekeepers” whose activities require regulation. These questions include:

III. What issues derive from the gatekeeper power of digital platforms? -- Main features of gatekeeper online platform companies and the main criteria for assessing their economic power

1. Which characteristics are relevant in determining the gatekeeper role of large online platform companies?

III. What issues derive from the gatekeeper power of digital platforms? -- Emerging issues

10. In your view, what practices related to the use and sharing of data in the platforms’ environment are raising particular challenges?

14. Which issues specific to the media sector (if any) would, in your view, need to be addressed in light of the gatekeeper role of large online platforms? If available, please provide additional references, data and facts.

III. What issues derive from the gatekeeper power of digital platforms? -- Regulation of large online platform companies acting as gatekeepers

16. Should such rules have an objective to tackle both negative societal and negative economic effects deriving from the gatekeeper role of these very large online platforms?

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4 Id. at 387.
17. Specifically, what could be effective measures related to data held by very large online platform companies with a gatekeeper role beyond those laid down in the General Data Protection Regulation in order to promote competition and innovation as well as a high standard of personal data protection and consumer welfare?

18. What could be effective measures concerning large online platform companies with a gatekeeper role in order to promote media pluralism, while respecting the subsidiarity principle?

22. Which, if any, of the following requirements and tools could facilitate regulatory oversight over very large online platform companies (multiple answers possible).

25. Taking into consideration the parallel consultation on a proposal for a New Competition Tool focusing on addressing structural competition problems that prevent markets from functioning properly and tilt the level playing field in favour of only a few market players. Please rate the suitability of each option below to address market issues arising in online platforms ecosystems.

In assessing the responses, therefore, the Commission should ensure that it does not build these assumptions into the final conclusions and is mindful of the definition of a “gatekeeper” as outlined below.

II. Cautious Assessment Needed for New Ex-Ante Regulation

Insofar as the DSA seeks to address actual or potential harms arising from the operation of online platforms by imposing new ex-ante rules, the Section urges caution and a thorough assessment as to whether ex ante regulation would be preferable to an ex post enforcement regime. Particularly with regard to competitive concerns, the Section believes that existing EU antitrust principles may be sufficient to address any such concerns.

To the extent that online platforms become so strong that they acquire a “gatekeeper” position, they are likely to hold a dominant position. As such, they will be subject to Article 102 TFEU, and the EU Commission and Member State authorities have the necessary powers and expertise to successfully enforce EU antitrust rules against those platforms. Caution should be taken in adopting a new regulatory regime that would prohibit certain practices that might constitute abuses of dominant positions under the EU antitrust rules. While clarity on enforcement rules may be welcomed by companies, ex-ante regulation that is too rigid may jeopardize efficiencies and other procompetitive benefits of platforms by imposing burdens and regulations that lack the flexibility of existing competition and consumer protection laws.

The basis for economic regulation rests on the need to correct a market failure in a particular industry.\(^5\) Moreover, even if a market failure is identified through careful study, careful

attention needs to be given as to whether a proposed regulatory solution sufficiently corrects it and has an overall positive effect as determined by a rigorous economic cost-benefit analysis, including consideration of potential unintended consequences. With regard to online platforms, the Section notes that numerous companies are already working on private ordering solutions to address perceived concerns. A thorough analysis of whether these types of efforts at industry self-regulation could be sufficient to address the concerns that animate the proposal of the DSA would seem warranted prior to adoption and implementation.

In addition, it is important to keep in mind that online intermediation services connect businesses and consumers and must balance the needs of these disparate groups. In other words, it is important to consider the demand interdependencies of the two sides of a platform (i.e., “indirect network effects”) when analyzing the effects of contemplated regulation. These network effects may act as a safeguard against harmful activities of a platform in relation to either side of that platform. Network effects inherent to platforms imply that actions that would harm one side of a platform, such as price increases, can also reduce platform attractiveness to the other side of the platform if the actions cause participation on the harmed side of the platform to drop. Similarly, regulatory changes on one side of a platform will impact market participants on the other side of a platform, and thus the “net” effect on all groups engaging with the platform should be considered. For example, compliance with new regulations is likely to result in increased costs for online platforms, some of which are likely to be passed on to businesses and consumers using these services. This may in turn result in fewer consumers and businesses using these platforms. Any assessment of potential ex-ante regulation must assess the impact on all sides of the relevant platform markets.

As such, online platforms remain equally subject to the well-established competition laws. Indeed, if anything, the online nature of the service increases transparency into some aspects of platform operators’ practices, which, in turn, increases the ability of market participants and competition authorities to detect anticompetitive behavior. The fact that some providers may offer less generous terms of access than others does not necessarily imply a market failure. Instead, it could be part of a competitive dynamic in which providers compete by offering differentiated services to each group of platform participants.

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6 Id. See also Harold Demsetz, Information and Efficiency: Another Viewpoint, 12 J. L. & Econ. 1, 1-22 (1969).
7 For example, Airbnb self-regulates by limiting hosts to a “one host, one home” policy in various places such as New York City and San Francisco, a policy that is designed to mitigate the problems of landlords creating housing shortages by using homes as de facto hotels. A number of digital-education companies, including Google and Apple, signed a student privacy pledge organized by a trade association. Google, Facebook, Twitter, and Microsoft joined together to create the Data Transfer Project (subsequently joined by Apple and others), which has created a data portability platform to improve the ability for consumers to easily move between digital providers. Google recently stopped its First Click Free policy in response to publisher concerns. Twitter, Google, and Facebook all made voluntary changes to their policies to increase transparency around political ads.
8 “Network effects” broadly refer to the effect additional users have on the value of a particular good or service. “Direct” network effects refer to increases in the value of a good or service arising from increased users of that good or service, such as the telephone and instant messenger services. “Indirect” network effects occur when the value obtained by one kind of customer increases with measures of the other kind of customer, such as when video game developers value video game consoles more when they have more game users while game users value consoles that have more games. David S. Evans, The Antitrust Economics of Multi-Sided Platform Markets, 20 Yale J. on Reg. 325, 332 (2003).
Furthermore, regulatory intervention that applies only to certain types of competitors limits dimensions of competition and runs the risk of adversely affecting emerging business models that deliver attractive offerings to consumers. At the same time, firms employing other business models will face less competitive pressure from online intermediation services, potentially dampening their own competitive vigor.

Lastly, we note the risk that regulation could in some cases advantage large incumbents at the expense of smaller competitors and potential new entrants. For example, a significant increase in costs and complexity in managing online platform compliance with regulations could increase entry barriers and entrench incumbents. Large incumbents can often absorb regulatory compliance costs more effectively than new entrants. In this way, regulation could protect incumbents and thereby tend to decrease competition.

III. Key Considerations If New Ex-Ante Regulation Is Proposed

If the Commission nonetheless decides to draft proposed legislation creating a new regulatory regime for “gatekeeper” platforms, we urge the Commission to take the following points into account. These points are intended to ensure that any such regulation maintains the flexibility afforded by proven aspects of the competition enforcement rules. Particular care must also be taken to ensure that the Commission conducts a thorough analysis to balance the error / cost assessment in weighing the potential advantages of ex-ante regulation in correcting true market failures against the risk of inadvertently chilling competition and innovation.

A. Determining “Gatekeepers”

The approach to determining which “gatekeepers” will be subject to the new regime should capture only platforms that can be expected to effectively hold a dominant position. Given the difficulty of identifying a single set of criteria that would apply across multiple business sectors, the proposed legislation may include criteria (inspired by the definition of dominance for antitrust purposes) that would provide guidance but not be determinative, with the gatekeeper determination being made by the relevant regulator after a process in which the relevant platforms would be able to participate, with fully adequate rights of defense.

For example, one of the potential factors to identify a “gatekeeper” platform is substantial market power. The Section respectfully points out that reliance on market shares alone (even within properly defined markets) may invite errors when attempting to identify substantial market power. According to modern industrial organization principles, regardless of a firm’s market share in a particular market, if a small price increase would meaningfully decrease the quantity of the relevant product demanded (i.e., demand is “highly elastic”), the firm cannot be said to exercise substantial power over price (i.e., have substantial market power). Market shares are especially misleading when it comes to multi-sided platforms, particularly those involving a zero-monetary-priced good. In such cases a platform may have a high share due to its non-monetary price, but

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this is only possible to the extent that the platform is able to successfully compete with rivals for the monetized opportunities on the paid side of the platform. The trend in the United States has thus been to move away from relying primarily on market shares to determine whether a firm has substantial market power sufficient to raise competitive concerns. The 2010 Horizontal Merger Guidelines promulgated by the U.S. Department of Justice (USDOJ) and the U.S. Federal Trade Commission (USFTC) make clear that the agencies no longer rely solely or primarily on market shares to predict whether a firm possesses durable market power or is likely to be able to sustain significant non-transitory price increases.

Additionally, the economic literature cautions against antitrust enforcement actions applied to platforms based solely on their relative size and user base. Network effects, innate in platforms, have been an important consideration when analyzing potential market power. Recent academic work, however, suggests that network effects are not always a guarantor of substantial market power, as had been initially feared by antitrust authorities. First, the literature suggests that, due to the rapid changes in technology, and the fact that platform businesses rely less on any one type of hardware for adoption, users may have low switching costs in a given case. Moreover, the instability of network effects may lead users to choose multiple platforms instead of relying only on a single platform. For example, it is common for riders and drivers to use both Uber and Lyft. Such “multihoming” increases competitive pressures on platforms. Finally, platform congestion may lead users to switch to other less congested platforms, where available and feasible, thereby potentially providing an opportunity for new entry.

B. Prohibited or Restricted Practices

The Section advises caution if the Commission attempts to render a definite list of prohibited or restricted practices. Although such an approach could in theory enhance legal certainty, it would likely give rise to unintended consequences, including chilling legitimate competition and investment if applied to all gatekeeper platforms without regard to competitive conditions in the markets in which those gatekeeper platforms are active. The use of ex-ante cross-sector regulation to create a definite list of prohibited or restricted practices can be particularly problematic in the context of technology markets. As the U.S. Federal Trade Commission has noted in a study about U.S. broadband connectivity competition policy, “[p]olicy makers should be wary of enacting regulation solely to prevent prospective harm to consumer

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11 Id.
14 Tucker, supra note 16, at 73-78.
15 Id.
16 Id.
17 Id.
18 Fed. Trade Comm’n, Broadband Connectivity Competition Policy Staff Report 9 (2007) (advising that “[i]n evaluating whether new proscriptions are necessary, we advise proceeding with caution before enacting broad, ex ante restrictions in an unsettled, dynamic environment”).
welfare, particularly given the indeterminate effects that potential conduct by broadband providers may have on such welfare.” And even if a market imperfection is identified after careful study, careful attention needs to be given as to whether a proposed regulatory solution sufficiently corrects it and has an overall positive effect as determined by a rigorous economic cost-benefit analysis, including consideration of potential unintended consequences. In this case, a careful cost-benefit analysis must still be conducted before concluding that an ex-ante condemnation of broad categories of practices is preferable to an ex-post enforcement regime that can better account for the “circumstances, details, and logic of a restraint.” While ex ante regulation can be used in some cases to prevent prospective harm to consumer welfare, this comes with a commensurate risk where the future impact on dynamic markets can be uncertain. Any regulation should therefore be targeted narrowly to address clear market failures and maintain flexibility in administration over time to address market changes and remedy any unintended consequences.

Absent evidence of a clear market failure best resolved (from a cost-benefit perspective) through ex-ante prohibitions, the scope of any prohibitions or restrictions should be decided by the relevant regulator after consideration of the circumstances to which they will apply. For example, the consultation is concerned in part with setting “effective measures related to data held by very large online platform companies with a gatekeeper role,” and the European Parliament has specifically recommended that the DSA’s ex-ante regulations address concerns about the “use of data for making market entry by third parties more difficult.” While advocates of regulation have cited regulation as a means of preventing the abuse of data as a barrier to entry, online platforms’ use of data also has the potential for valuable consumer benefits – “chief among them free user services ... improved quality, and a rapid increase in innovation.” For example, data can be used to deliver relevant search results, recommend relevant products and articles, personalize online services, and enable providers to provide products and services for free by employing user data to monetize their services effectively. As with any other attempts at economic regulation, a failure to seriously consider whether a market failure exists and whether a cost-benefit analysis justifies ex-ante regulation as opposed to ex-post regulation to resolve that market failure can lead to unintended decreases in consumer welfare, including reduced product quality, limited inter-firm competition, and less innovation. Such a risk could be especially detrimental here, given the proven benefits of data usage. Where a dominant platform may be viewed as abusing its dominant position through the use of data, the full context and overall competitive effect can be better weighed in the enforcement context.

19 Id. at 11.
21 DSA Consultation, supra note 1.
25 Id. at 15 (“restricting the ability of online providers to collect and utilize data from users to target ads would inhibit competition for users and lead to higher quality-adjusted prices for online services”).
Furthermore, although consumers indicate that data privacy is a preeminent concern, marketplace behavior indicates that their stated concerns may overstate their actual preferences regarding how companies use and treat their data.\textsuperscript{26} Regulatory responses unduly deferring to stated consumer preferences (versus actual preferences) therefore run the risk of overly restricting the beneficial uses of consumer data for little offsetting benefit. And certain types of ex-ante regulations, such as the forced sharing of data, may have the unintended effect of not only skewing competitive incentives, but also generating further privacy concerns as consumers may not have consented to their data being used in this way.\textsuperscript{27} Therefore, the Section urges caution in instituting such ex-ante regulations without first thoroughly identifying the market failure to be corrected, and assessing with a rigorous cost-benefit analysis whether an ex-post regime would be preferable.

Further, to the extent the Commission proposes to develop a list of prohibited or restricted practices, at the very least, this should be done based on further fact finding and tailored as far as possible to relevant markets and sectors, since different guidance may be appropriate in different markets depending on market conditions.

Finally, the Section also notes its concern that granting any new regulator investigative and remedial powers risks blurring the lines between the powers of the new regulator(s) and that of the Directorate-General for Competition (DG COMP) (including potentially any additional powers considered for DG COMP under the Commission’s new competition tool consultation).

\textbf{C. Procedural Safeguards}

Any proposed legislation creating a new regulator for “gatekeeper” platforms should include clear procedures, including clear designations as to the regulator or regulators that will be responsible for gatekeeper platforms in different sectors, adequate investigation and enforcement powers, and robust protection of companies’ rights of defense. The International Competition Network (ICN) and the Organisation for Economic Co-operation (OECD) have developed a body of work outlining some of the core features of fundamental due process. Those core features include:

1. Legal representation for parties under investigation, including allowing the participation of local and foreign counsel of the parties’ choosing;
2. Notifying the parties of the legal and factual bases of an investigation and sharing the evidence on which the agency relies (including any exculpatory evidence);
3. Direct and meaningful engagement between the parties and the agency’s investigative staff and decision-makers;
4. Ability to present a defense to decision-makers;
5. Protection of confidential information; and

\textsuperscript{26} Id. at 15-16.
\textsuperscript{27} Sokol & Comerford, supra note 26 at 1158-59; see also Darren S. Tucker & Hill B. Wellford, \textit{Big Mistakes Regarding Big Data}, Antitrust Source 11 (Dec. 2014).
6. Ensuring checks and balances on decision-making (including meaningful access to independent courts).  

Furthermore:

Providing fundamental due process can provide substantial benefits to agencies, including: allowing them to efficiently reach duly informed and vetted decisions; creating credibility with stakeholders and the public; facilitating reliable deterrence; and avoiding cooperation gaps in parallel investigations due to asymmetric information, which can contribute to different analysis and conflicting outcomes.  

For example, Regulation 1/2003 on the implementation of the rules on competition set forth in Articles 101 and 102 of the TFEU provides that the European Commission may base its decisions only on allegations upon which the parties have been able to comment (Article 27(1)), and the parties concerned have a right of access to the Commission’s file, subject to the legitimate interest of undertakings in protecting their business secrets (Article 27(2)). The procedural protections under Regulation 1/2003 and guidance and rules thereunder should be referred to in order to establish similar procedural protections with any proposed legislation, including provisions for judicial review and mechanisms for cooperation between the new regulators and competition enforcement authorities.

IV. Conclusion

The Section appreciates the opportunity provided by the Commission to comment on the Digital Services Act Package. We would be pleased to respond to any questions the Commission may have regarding these comments, or to provide additional comments or information that may be of assistance to the EC.


29 Id. at 3.