

FACEBOOK

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Facebook observations to the Inception Impact Assessment on the DSA Ex- Ante Instrument of very large Online Platforms acting as Gatekeepers

1. Introduction

Facebook welcomes the opportunity to provide its insights and observations in response to the European Commission's Ex-ante "Gatekeeper" inception impact assessment (IIA). This submission presents Facebook's summary observations on selected areas of the Commission's possible proposals. Facebook looks forward to engaging with the Commission and stakeholders across the industry to further evaluate whether such proposals are needed and, if so, what form they might take. As a company, Facebook is committed to working with policymakers and regulators, to build a regulatory framework that protects and enhances consumer choice, continues to spur innovation, and provides more opportunities for consumer-driven choice.

Indeed, recognising the "*[i]nternet has entered a new phase*", Facebook understands that the oversight of technology's role in our lives also needs to evolve. It is in this context that Mark Zuckerberg, Facebook's CEO, has called for a "*more active role for governments and regulators*" so that "*by updating the rules for the internet, we can preserve what's best about it – the freedom for people to express themselves and for entrepreneurs to build new things – while also protecting society from broader harms*"¹.

Facebook continues to call for, and we are already engaging in a structured and forward-looking dialogue around regulation that we think is important for the evolution of the rulebook for the internet. We have outlined four areas; harmful content, election integrity, privacy and data portability - which we are very keen to continue to explore both in the Digital Services Act (DSA) process and beyond. In that context, we have already taken proactive steps to further understanding and discussion. A good example is our White Paper on 'Data Portability and Privacy' aimed at advancing the policy discussion on how to advance data portability in a privacy-protective way².

Facebook is a strong believer in the elimination of barriers to trade and innovation. A European Single Market that is well functioning and offering the prerequisite conditions to economic growth should be the objective of regulatory intervention. Facebook's services are a spur to the Single Market, and offer European businesses, both large and small, the ability to maximise their opportunities. Facebook believes that this is good for jobs, good for growth and good for the European Union.

¹ Mark Zuckerberg, The Washington Post, March 30, 2019.

² Charting a Way Forward on Privacy and Data Portability. White Paper from September 2019, available at: <https://about.fb.com/news/2019/09/privacy-and-data-portability/>

In light of the above, some of the policy options the Commission contemplates are a bold step as they would significantly rewrite the regulatory framework that online platforms are currently subject to. Because of that it will be imperative to base policy on solid evidence and a proper understanding of digital markets rather than broad assumptions about the economic dynamics prevailing in those markets. In light of some of the far-reaching options that are proposed, the Commission's impact assessment will have to carefully weigh the potential trade-offs of intervention and ensure that value is not destroyed to the detriment of users and innovation. These trade-offs should be thoroughly assessed and understood in markets characterised by complex interactions, strong synergies, and high levels of innovation, resulting in dynamic competition of a new kind with constant market entry. The Roadmap is a welcome opportunity to start a deeper discussion on the precise *problem definition* and *objective* of an ex ante regulatory framework, that ensures a proportionate regulatory system and well-functioning Single Market as a result.

For Facebook this short feedback paper is the start of an ongoing conversation we look forward to having with the European Commission and other EU policymakers. As our own thoughts will continue to develop, we will touch on the following themes in this submission: Section 2 will discuss the importance of a well-functioning Single Market and the role online platforms such as Facebook services have played to date. In Section 3 we will shortly comment on some of the Commission's presumptions laid out in the IIA that seem to form the intellectual basis for regulatory need. Section 4 will touch on preliminary thoughts we have on some of the contemplated policy options.

2. The Importance of the Single Market & the Role of Online Platforms

An integrated, functioning Single Market is the foundation for businesses' ability to grow and scale across the EU. Facebook is and has always been supportive of greater market integration. In fact, companies such as Facebook are an effective driver for greater deepening and broadening of the Single Market. Our services have enabled enterprises of all sizes to run affordable and efficient marketing campaigns across the EU to find new commercial opportunities, scale their business, hire more people and increase cross-border trade. This has generated international sales corresponding to an estimated EUR 208 billion in economic activity and an estimated EUR 98 billion in exports last year (58 billion worth of exports are from international sales within the EU, and EUR 40 billion are from sales outside the EU)³. Our tools also enable businesses to measure their return on investment to ensure they are getting good value, and adjust if not, which is relevant in today's context where small gains in efficiency can help businesses and entrepreneurs to stay afloat during an economic downturn. Across the EU, 25 million businesses, large and small, use our services to generate sales - the vast majority of them do so using free tools. There are many other online services European businesses can choose which reflects the vast choice of digital tools businesses looking for economic opportunity have.

Given that Facebook's business model is based on creating value for the many businesses seeking to expand their customer base across borders, Facebook supports the Commission's various efforts to make the Single Market work for businesses and entrepreneurs. Insofar as European innovators face difficulties when trying to scale their businesses cross-border there is no evidence that such difficulties are attributable to online platforms, quite the reverse. Those difficulties are likely due to factors external to online platforms such as the lack of adaptability, an environment that is not supportive of large-scale

³ Copenhagen Economics. (2020). Digital Transformation in Business. Available at: <https://www.copenhageneconomics.com/publications/publication/digital-transformation-in-business>

experimentation, and remaining barriers within the Single Market. As noted by the former Commissioner for the Internal Market Mario Monti: *“I have been in charge of the internal market so I know [...] how many violations of those rules are put in place by member states when they try to preserve the national interest and therefore to have the market less single and more fragmented.”*⁴

After decades of heightened political will, Facebook still believes that the European Union has not taken the necessary practical steps to close the gaps in the Single Market, which would be the single most important and powerful step in empowering Europe’s digital economy. A 2017 study carried out by the European Parliament Research Service concluded: *“[...] it has been estimated that the potential gain in gross domestic product (GDP) from a completed digital single market could amount to between €415 and 500 billion per year (3.0 to 3.6 % of EU GDP)”*⁵. Companies such as Facebook offer the possibility to all players in the economy to scale up, access cutting edge innovation, and maximise the opportunities that are available in the Single Market.

As noted by the recent Council Conclusions from 9th June 2020: *“[...] the platform economy is an important part of the Single Market, as it connects European companies and consumers across national borders, enables trade, entrepreneurship and new business models, as well as increases consumer choice of goods and services”*⁶. This is precisely what companies like Facebook want to support.

However, enacting a regulatory framework for only a limited number of ‘digital’ companies, where there is not sufficient evidence to support the premises on which such intervention would be based, would neither advance market integration nor make Europe a more attractive place for innovation and investment. Facebook remains supportive of any attempts to make the Single Market a reality and attempts to evidence and eliminate barriers that impede that imperative.

3. The Problem Definition is based on Assumptions that need deeper Analysis and Nuance

The potential introduction of an ex ante regulatory framework that could limit online platforms’ commercial freedom and give wide ranging enforcement powers to a dedicated regulator would be a very far-reaching step. In line with the better regulation agenda, it will require the Commission to undertake a balanced impact assessment and give proper weight to relevant evidence⁷. In Facebook’s view the IIA currently lacks the necessary analytical nuance to form the foundation for such rigorous impact assessment.

The IIA’s problem definition rests on a couple of assumptions that would benefit from a deeper analysis during the impact assessment phase. Facebook is particularly concerned about broad assumptions that seem to suggest that large online platforms are entrenched, are a blocker to innovation, and can no longer be challenged by newcomers. After having operated for 16 years in the digital space, Facebook’s experiences are certainly very different.

⁴ Don’t blame Brussels: Mario Monti weighs into clash over EU champions. Appeared in Politico on 11 February, 2020:

<https://pro.politico.eu/news/mario-monti-dont-blame-brussels-mario-monti-weighs-into-clash-over-eu-champions>

⁵ European Parliamentary Research Service. (2017). Mapping the Cost of Non-Europe, 2014-19, p. 10. Available at:

[https://www.europarl.europa.eu/RegData/etudes/STUD/2017/603239/EPRS_STU\(2017\)603239_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/603239/EPRS_STU(2017)603239_EN.pdf)

⁶ Council Conclusions from 9 June 2020 on Shaping Europe’s Digital Future, para. 47. Available at:

<https://eu2020.hr/Home/DocumentDownload/244>

⁷ European Commission, Better regulation: why and how. Available at: https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en

3.1. Innovative products are the driver for competition

Facebook operates in an environment that is a rapidly evolving, dynamic, and highly innovative in which established digital platforms, new entrants, and increasingly traditional market players, compete vigorously. Entry barriers in the digital space are low and, in the case of traditional sectors, often organizational. The ability to offer products and services that attract users is the key driver of competition. Competition on the user side is about providing the most enjoyable, useful, and meaningful experience based on an innovative idea, differentiated from existing offerings. There are no barriers to developing new ideas.

This is borne out by the many examples of successful new entrants over the last years that have been able to enter by developing an attractive offering to meet user demand. TikTok is a good example in the social media space while online video conferencing service Zoom offers valuable lessons in how fast a company can expand even in markets with many established players. By way of example, the most recent Ofcom *Online Nation* report states that:

*“some of the fastest-growing services during the coronavirus crisis are not owned by Google, Apple, Facebook, Amazon and Microsoft [...]. TikTok [...] increased its reach among adults in the UK from 5.4 million to 12.9 million between January and April 2020, while Houseparty, owned by Epic Games, increased from 175,000 to 4 million. Zoom [...] reached 13 million adult internet users in April 2020, up from 659,000 in January 2020.”*⁸

In other words, within the first *four months* of this year TikTok more than doubled its reach among adults in the UK, while the reach of Houseparty and Zoom increased almost 23- and 20-fold respectively.

3.2. Analysing sources of economic power requires greater nuance

When discussing sources of economic power, the impact assessment should strive to include a fuller picture of economic evidence and research, which we hope the Commission will subsequently be providing in the ongoing impact assessment. A good example is the notion that the ability to accumulate large quantities of data is in itself a source of economic power.

In tune with our experiences described above, the history of online services has shown that holding data is not necessary for success since many digital platforms have been able to grow without access to large amounts of data, including Facebook itself. Often these platforms have experienced rapid growth against more established players with greater initial user bases and large amounts of data. Conversely, the mere accumulation of data by itself does not guarantee continued success. There are countless examples of companies that were able to amass large amounts of data but that ultimately failed or were surpassed by challengers who quite simply offered a better, more innovative user experience: Tinder is just one example of a company that was able to break into what until then had been a very data-heavy online dating market, while Google has not been able to provide a social networking service accepted by consumers despite multiple attempts. Likewise, Facebook has introduced many products that failed to attract consumers, e.g. Facebook Gifts. All of this is to show that data by itself certainly does not guarantee success and does not shield companies from competition.

⁸ Ofcom Online Nation - 2020 Summary report, p. 6. Available at: https://www.ofcom.org.uk/__data/assets/pdf_file/0028/196408/online-nation-2020-summary.pdf

In addition, there are multiple ways in which new competitors can obtain data and there are no structural or technological barriers to such collection. For example, large data sets are available for licensing from companies such as Acxiom, CCC Marketing, Experian, Oracle Data Cloud (formerly Datalogix), Equifax, and Nielsen. It is also now easier than ever, and we continue to strive to empower consumers, to transfer data between online services because many firms offer portability services. Facebook, for example, offers tools like Download Your Information (DYI) and participates in the Data Transfer Project, a collaboration of organisations, including Apple, Google, Microsoft and Twitter, committed to building common ways for people to transfer data into and out of online services whilst balancing privacy and security⁹. Even more firms are offering similar portability services as a result of measures like the General Data Protection Regulation.

We would also like to encourage the Commission to consider the extensive research on the (in)ability of data to act as a competitive advantage. For example, researchers have found that market participants with a substantially 'greater' amount of data than a new entrant do not necessarily have a competitive advantage proportionate to the data they possess because of diminishing returns¹⁰. Similarly, the more recent UK Lear Report also noted that "*claims that data diversity enhances accuracy are not based on rigorous systematic evidence.*"¹¹ On a more general note, Facebook believes that the policy discussion would benefit from a greater focus on the processes of turning data into information of economic value rather than the pure quantity of data. After all, it is the ability to derive meaningful insights from data that generates economic value rather than the mere ability to hoard data.

The role of data acting as a potential source of economic power is just one example of where Facebook thinks the Commission should undertake a more rigorous and objective analysis in its impact assessment. More generally it will be important to also take into account relevant factors such as:

- a. Low barriers to entry and expansion in digital services.
- b. The prevalence of extensive multi-homing by consumers across online services.
- c. The positioning and activities of companies at the different online service layers. The competitive dynamics for companies operating at the applications and services layer are naturally very different from those operating more upstream and it may be prudent to assess where the persistent bottlenecks in the market are.
- d. Technological advancements such as cloud-based storage and analytical tools (which has basically given firms of *all* sizes access to powerful and inexpensive technological resources).
- e. The extent to which network effects might be localised in scope rather than generic references to global user numbers.

Overall, the reliance on network effects to substantiate economic power and dominance of platforms is not justified. Facebook invests considerable resources to keep its users engaged. It constantly innovates to provide them with control tools, for example to facilitate the management of their varied audience; it conducts continuous research to ensure the interface is easy to navigate, uncluttered, and with high value content, as well as relevant to the user; it detects users' innovative usage of the platform and builds

⁹ See Data Transfer Project at: <https://datatransferproject.dev/>

¹⁰ See Anja Lambrecht & Catherine Tucker, Can Big Data Protect a Firm from Competition?, December 2015, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2705530

¹¹ See Lear, Ex-post Assessment of Merger Control Decisions in Digital Markets for the UK Competition and Markets Authority, 9 May 2019, p. 60, para. I.43

on popular ideas. Investments like these drive economic success rather than flawed assumptions about the ability of network effects to shield digital businesses from competition. Yet, the Commission seems to discount success driven by merit.

In Facebook's opinion the dynamics outlined in this Section, i.e. innovation and low barriers to entry, have contributed to driving competition and new business opportunities. The Commission says that the estimated amount of Europe's online platforms is 10 000. While that number by itself sits uneasily with assertions of limited market contestability, it certainly gives testimony to the points raised above. If there are 10 000 existing online platforms across the EU, it would seem that pan-European market scalability is an issue. As outlined in Section 2, Facebook is convinced that increasing efforts to address barriers to growth of small businesses, and in particular digital businesses, within the Single Market would address the ability to scale across the EU at its root.

4. Preliminary Comments on the Range of Policy Options

In tune with the observations above, Facebook believes that there remains a lot to be researched and properly understood about the competitive dynamics in digital markets. Getting a better understanding of the technologies that underpin digital markets will be key to the formulation of policy that targets clearly identified problems, is proportionate, and is ultimately workable for both companies subject to it and also the companies who are earmarked as intended beneficiaries¹². We therefore support initiatives that aim at advancing knowledge among regulators and policymakers. Our company stands ready to contribute this goal and would welcome continued exchange and dialogue, also at technical expert level.

Regarding the Commission's proposal to subject 'gatekeeping' platforms to a tighter regulatory framework, Facebook would like to lay out some considerations that we believe that Commission should give careful attention to, especially when conducting the impact assessment:

4.1. Clear objective and added value

Facebook understands that the overall policy objective of the initiative is "to ensure a fair trading environment and increase the innovation potential and capacity across the online platform ecosystems in the EU's single market". While formulated in broad terms, we fully support this policy objective and would only point out that other regulatory instruments already support similar objectives.

The European Commission names two problems it wants to tackle: the entrenchment of large platforms in their core markets and the leveraging of their "advantages" into adjacent markets; and the asymmetrical balance of power between platforms and their business users. It goes without saying that already existing competition law has played an important role in preserving the competitive process across the EU through targeted and balanced enforcement practise. On the second issue, the EU has only recently passed the platform-to-business Regulation (P2B) that aims to establish a better and more transparent trading environment for platform business users.

¹² The need to "gain a better understanding of both the technologies that underpin the digital sector and the relevance of data for competition and competition enforcement" is also one of the conclusions made by the expert report 'Competition policy for the digital era' prepared for Commissioner Vestager, (April 2019, p. 127), available at: <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>

The P2B Regulation is only due to be fully applicable on 12th July 2020 and so it is impossible to infer any market impact from this legislative measure. It may be prudent to first assess the impact of what in the Commission's own words are powerful measures: *“These are the first rules of this kind anywhere in the world, and they strike the right balance between stimulating innovation while protecting our European values. They will improve the relationship between businesses and platforms, making it fairer and more transparent, and ultimately leading to great advantages for the consumers.”*¹³

For the first goal of addressing entrenchment, the Commission seems to want to take inspiration from existing frameworks such as the telecoms framework or the Payment Services Directive. The telecom regulatory framework derives its rationale from the finding of structural barriers to entry that render competition law enforcement insufficient. Neither framework is immediately applicable to the digital services space. It will be of paramount importance for the impact assessment to analyse precisely which structural problems may justify the imposition of an ex ante regulatory framework because it should be a better tool than those that already exist.

4.2. Consistency and interplay with a potential New Competition Tool (NCT)

There is currently a lack of clarity as to how the NCT might sit (if at all) next to some of the envisaged policy options. To state the obvious, large technology companies could be subject to the powers of two distinct regulatory agencies that could have powers to impose similar remedies. This not only raises risks of inconsistency of outcomes, legal uncertainty, and administrative burden (as authorities could compete to impose remedies on the basis of similar problem identifications), but also more fundamental questions as to the precise *purpose* and *competence* of the two authorities. Facebook has also submitted a response to the NCT roadmap consultation, and we would like to point to the argumentation and points raised there - Just as the two consultations reference the interplay between the two proposals, Facebook's responses are also complementary.

4.3. Scope: when is a company a ‘gatekeeper’?

It seems the European Commission is determined to make the ex-ante regulatory framework broadly applicable to “large online platforms acting as gatekeepers”. What is striking is that the Commission seems to be proposing that a company is considered a ‘gatekeeper’ (and therefore within the scope of the framework) on the basis of criteria one could summarize as relating to the ‘size’ of the company and its potential multimarket activity. The IIA refers to, for example, a company's user base as well as more vague concepts such as “an ability to leverage data across markets”¹⁴. Apart from the obvious remark that vagueness will cause legal uncertainty, the Commission's approach marks a considerable deviation from competition policy-based concepts found in other regulatory frameworks.

For example, the telecoms regulatory framework referred to by the Commission is based on evidence-based economic assessments rather than subjective criteria for identifying companies with some special status such as ‘gatekeepers’. Under the telecoms rules the regulator must first clearly define the markets which merit ex ante regulation under the so-called three-criteria test and then determine whether a given operator has ‘significant market power’ (SMP) on that market. Only after those determinations will the

¹³ European Commission. Press release on the conclusion of inter-institutional agreement from 14 February 2019: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1168

¹⁴ Page 4 of the Inception Impact Assessment (IIA).

regulator be able to impose remedies on the SMP operator operating in that clearly defined market. Importantly, these remedies must be proportionate and are subject to a high burden of proof demonstrating that a particular remedy mitigates an identified harm¹⁵. Similar to ex post competition enforcement, clearly identified markets and market power, rather than broad rulemaking as such, are the intellectual foundation for asymmetrical regulatory intervention. There are a variety of good reasons for this approach, including the ability to address structural competition problems in a targeted and proportionate manner.

As the Commission thinks through matters of scope, Facebook looks forward to continued dialogue on the advantages and disadvantages of a ‘size-based’ regulatory approach vs. a competition policy-based approach. In that context, Facebook also notes that using generic criteria to define scope will not be appropriate. A large user base, for example, is not particularly relevant unless users are locked in or such base generates an insurmountable scale advantage. Likewise, the ability to expand into new markets by ‘leveraging’ existing assets and advantages can hardly be a distinguishing factor as that is what any company does that seeks to enter a new area of activity in order to reduce cost and increase the likelihood of successful entry. This suggests that assessing ‘gatekeeping companies’ on a case-by-case basis certainly is more sensible than determining scope on the basis of broad and vague criteria.

4.4. General observations on “Dos and Don’ts”¹⁶

The IIA discusses an option to ban certain practices outright to ensure “open and fair trading online, especially when these practices are potentially market-distorting or entrenching economic power of the large online platforms”¹⁷. Given the very drastic nature of prohibiting commercial conduct, careful thought will need to be given to what practices merit prohibition. That is all the more important as the business models of the online platforms that are likely to fall under this regulation vary widely. There are platforms that offer app stores, some operate operating systems, others charge fees, and some are ad-supported – and this is just to name some obvious elements of heterogeneity. Rigid prohibitions constructed in a one-size-fits-all manner may not be the best solution for a sector characterized by dynamism and diversity.

Determining whether a given practice is user-serving and pro-competitive or whether it can act as a barrier to entry will require very careful analysis. The complexity of the issue and the certain impact on users’ experience make a ‘*Dos and Don’ts*’ approach inadequate in this space. Moreover, platforms are evolutionary in nature as technologies are often dynamic and consumer usage changes. Codifying commercial practices or product definitions will hurt innovation and the technological development of affected businesses.

In addition, we wish to point out that the experiences gathered during decades of competition law enforcement could be instructive. As a general observation, competition enforcement has shown how important it is to consider a given practice in its proper economic and legal context. With the exception of certain practices that fall foul of competition rules by their very nature (so-called ‘by object’ restrictions),

¹⁵ See the European Commission’s Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018XC0507\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018XC0507(01))

¹⁶ The European Commission uses the term “blacklisted” practices multiple times (p. 4, Inception Impact Assessment) - Facebook will not use that term and therefore we will refer to those instances as “Dos and Don’ts”

¹⁷ Page 4 of the Inception Impact Assessment (IIA).

competition authorities usually consider whether a given practise is, on balance, anti-competitive after having considered the overall economic context¹⁸. After all, no business conduct exists in a vacuum.

It goes without saying that a list of pre-determined prohibitions would not benefit from the same level of flexibility. The associated costs could be substantial if a list of banned practices would effectively prohibit pro-competitive behaviour in the form of, for example, product development and experimentation. ‘Self-preferencing’, referred to in the IIA, is a good example for conduct that does not lend itself to easy judgment because its effects on competition are context dependent. The academic expert report ‘Competition Policy for the Digital Era’ prepared for Executive Vice-President Vestager explicitly states that EU competition law “does not impose a general prohibition on self-preferencing” because it is subject to an effects test¹⁹. While it's true that the Commission’s IIA refers to “certain forms of self-preferencing” there is no explanation on what basis a regulator would make distinctions. In general, Facebook would like to highlight that ‘self-preferencing’ is often just another term for vertical integration which is pervasive across industries. There is little basis for uprooting arrangements that are found across the whole economy which makes a case-by-case approach a far more sensible course of action.

The bottom line is that competition law teaches us valuable lessons in regulatory rigour which we hope will be taken into account when designing the potential ex ante regulatory framework.

4.5. Further regulatory design issues

As we outlined above, some of the options under consideration would constitute a fundamental and potentially far-reaching change in how certain companies conduct business throughout the EU. Such change would throw up a plethora of regulatory design questions that need to be carefully considered. In this context, it is worth highlighting what the academic expert group recommended to Executive Vice-President Vestager in their report mentioned above: *“we do not envision a new type of ‘public utility regulation’ to emerge for the digital economy. The risks associated with such a regime - rigidity, lack of flexibility, and risk of capture - are too high”*²⁰.

Facebook believes that the expert group’s conclusion raises a very important point which we hope the Commission will take into account during its internal reflection process. Should the Commission decide to legislate in this area, considerable efforts will be needed to ensure the regulatory framework will be workable, effective, serve well-defined goals, and will not go beyond what is necessary.

Any regulatory initiative should strive to protect user value and innovation. This implies ensuring the protection of users’ privacy and the integrity of their personal data; protecting the integrity and safety of users on the platform; avoiding undermining the viability of successful businesses; and ensuring innovation on platforms and surrounding ecosystems is not curtailed.

With respect to more detailed regulatory design issues in addition to the ones we have already outlined in this Section, Facebook would like to raise some preliminary issues that we believe merit closer

¹⁸ European Courts have stressed the need to take into account the legal and economic context of a given practice in a variety of cases: see, e.g., Judgments of the Court of Justice of 6 September 2017 in Case C-413/14 P, Intel, p. 139, and of 6 October 2015 in Case C-23/14 Post Danmark A/S v Konkurrencerådet, (Post Danmark II), p. 30-32.

¹⁹ Expert report Competition policy for the digital era prepared for Commissioner Vestager, (April 2019, p. 7). Available at: <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>

²⁰ Expert report Competition policy for the digital era prepared for Commissioner Vestager (April 2019 p. 126.) Available at <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>

consideration. The list below is by no means exhaustive but does represent a set of issues that should not be an afterthought in the legislative drafting process:

- a. Rights of defence and recourse to an independent judicial authority are cornerstones of frameworks that have the ability to severely limit the commercial freedom of companies - especially when there are objective justifications for a given conduct. It will be of paramount importance to guarantee such safeguards.
- b. Mechanisms for regulatory error correction could play a very important role. There should be sufficient flexibility in the system to loosen regulatory burden in light of changing circumstances and when evidence shows that a given remedy has not served its intended purpose.
- c. Should the Commission not opt for a case-by-case approach, the 'list' of companies falling under the scope of the framework should be subject to periodic reviews. Reviews should equally apply to any positive or negative obligations. As explained, the digital sector is dynamic and fast-changing. That needs to be accounted for in the framework.
- d. The framework must ensure that there is no inherent bias in favour or against certain business models.
- e. The imposition of regulatory requirements should meet necessity and proportionality tests. They should be no more than necessary to address a well-defined problem and no less restrictive alternatives should be available.
- f. Consistency across the EU. EU- and national-level competences must be clearly defined. Companies operating across the EU should not face differing regulatory requirements imposed by individual regulators in EU Member States.

5. Conclusion

As the European economy will continue to go through transformation and digitisation, it is in Europe's best interest to ensure a fully integrated Single Market can serve innovators' ambitions to grow and scale across the continent and further enhance Europe's ability to compete on a global scale.

Facebook itself has called for a continued policy dialogue and possible proposals that focus on preserving innovation and protecting consumers. This, however, will require a careful analysis and examination of what is an appropriate kind of ex ante regulatory framework, with a potentially powerful new regulator. The digital economy creates a lot of value, is diverse, and highly dynamic. One-size-fits-all regulatory approaches may not be the most appropriate for such environments. After all, we are convinced that a regulatory framework that allows for as much 'permissionless innovation' as possible will be in the interest of everyone. This includes existing European companies that are digitizing, upcoming challengers, consumers directly benefiting from innovation, and investors seeking to allocate capital in Europe.

This contribution outlined our preliminary thoughts on some of the policy options laid out in the IIA. These options are nothing short of a fundamental rewrite of the regulatory rulebook for online platforms. Hence, careful consideration will need to be given to the various options to make sure regulation will end up being workable for all parties, effective in addressing clearly identified problems, and proportionate. Facebook is looking forward to continued dialogue over this important matter with the European Commission and other stakeholders.

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