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Response by Freshfields Bruckhaus Deringer LLP to the Questionnaire for Public Consultation on an Ex-ante Regulatory Instrument

1. Introduction

1.1 Within the context of the Digital Services Act Package (***DSA***), on 2 June 2020, the European Commission (the ***Commission***) launched a public consultation on a proposed *ex ante* regulatory instrument for large online platforms with significant network effects acting as gate-keepers (***LOPs***) in the European Union's internal market (***Ex-ante Regulatory Instrument***)[1], on which the present paper is focused.

1.2 In the Inception Impact Assessment (***IIA***) concerning the Ex-ante Regulatory Instrument, the Commission clarifies that the initiative is aimed at establishing "*clear obligations and prohibited practices for these large online platforms with economic power, application of which may provide European consumers and business users more choice and access to innovative solutions. This also includes an objective of making online platform ecosystems and online activities more open, fair, predictable and accessible, increasing the social gain from innovation, and/or levelling the playing field between the platforms, on the one hand, as well as actual and/or potential competitors, on the other.*" [2]

1.3 To achieve such goals, the Commission is considering at least the following initial policy options:

(1) revise the horizontal framework set in the Platform-to-Business Regulation (EU) 2019/1150 (***P2B Regulation***);

(2) adopt a horizontal framework empowering regulators to collect information from LOPs;

(3) adopt a new and flexible *ex ante* regulatory framework for large online platforms acting as gatekeepers. This option includes two sub-options:

(a) prohibition or restriction of certain unfair trading practices by large online platforms acting as gatekeepers ('blacklisted' practices);

(b) adoption of tailor-made remedies addressed to LOPs on a case-by-case basis where necessary and justified[3].

1.4 This document presents a response to the proposals contained in the IIA. The questionnaire, with its very many questions, is rather focused on factual observations in certain industries that are more appropriately answered by companies which operate on the markets which could be potentially considered by the European Commission under the Ex-ante Regulatory Instrument. We therefore consider it more useful to provide our feed-back and commentary in the form of one coherent document centred around the issues raised in the IIA. Given that there are still so many uncertainties around the shape of the future Ex-ante Regulatory

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1 Available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers.

2 Commission, Ex-ante Regulatory Instrument IIA, 2 June 2020, Section B.

3 *Idem*

Instrument[4] Freshfields would welcome the opportunity of a further public consultation once the contours of the future Ex-ante Regulatory Instrument are more developed.[5]

1.5 The following sections set out a number of preliminary considerations and issues that we believe the Commission should carefully consider in designing the Ex-ante Regulatory Instrument, should it decide to go ahead with its proposal.

2. The perceived enforcement gap and the lack of a proper need for regulatory intervention

2.1 As seen above, by means of a potential Ex-ante Regulatory Instrument, the Commission aims at addressing a perceived enforcement gap with reference to a number of potential issues involving LOPs.

2.2 Anticipating our conclusions, we are not persuaded that any such perceived enforcement gap would necessarily require the adoption of a new regulatory instrument. Indeed, we believe that the tools already available (or that may be rendered more promptly available) to the Commission are appropriate and effective to validly address the issues that the Commission intends to tackle. Indeed, our view is that improving the use of the tools that already exist would represent a more effective and efficient way of taking into account the peculiarities of the digital sector and of LOPs in particular. Indeed, most of the perceived enforcement gap does not appear to us to derive from any deficiency in legislation but largely from the objective tension between running sufficiently fast investigations (capable of addressing harmful behaviours in an effective and timely manner); and the need to "get it right" (adapting to the specific circumstances of each case having undertaken a thorough fact-finding exercise). While this may, in some cases, be challenging in practice it is ultimately likely to lead to more secure and robust outcomes.

2.3 On balance, however, we believe that improving the existing tools and enforcement practices would be more efficient and effective through, for example:

i. enhanced, faster and more targeted competition law enforcement actions (especially pursuant to Art. 102 of the TFEU) that could address most of the concerns related to LOPs' market power;[6]

ii. an increased (while proportionate) recourse to the use of interim measures, which in the experience of France and Belgium has proven to be effective when appropriately focussed at the outset, together with the creation of specialised teams.[7] These two actions could achieve more timely intervention in a fast-moving context like that of the digital sector where appropriate;

iii. an increased (while proportionate) recourse to the use of existing consumer protection laws and unfair trade practices laws, which are capable of addressing most of the information asymmetries existing in the digital sector and driving consumer behaviour;

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4 Including as a result of communications made by representatives of the European Commission after 2 June 2020.

5 Similarly, for example, to what the situation is in relation to the White Paper on foreign subsidies [cit.]

6 We refer the Commission to section 5(a) of our response to the Questionnaire for Public Consultation on a New Competition Tool, in which we explain that there has been no enforcement gap identified that cannot be remedied by application of Articles 101 and 102 TFEU.

7 We refer, for example, to the "Digital Markets Unit" proposed by the Furman Report, which would be given the remit of using tools and frameworks that will support greater competition and consumer choice in digital markets.

iv. in conjunction with iii., an enhanced cooperation among national authorities in the field of consumer protection law and enforcement through a more pronounced coordination by the Commission, which could allow an effective, stronger and quicker response to unfair trading practices with a supranational relevance;

v. addressing issues related to imbalances in bargaining power, for example through an instrument similar to the prohibition of "abuses of economic dependence", which is already present in several EU Member States, the establishment of appropriate legal thresholds for intervention and remedies and coordination by the Commission as appropriate to address supranational issues;

vi. a potential review of the merger control thresholds, similarly to what has been the German and Austrian experience, might prevent the main concerns related to the acquisition of innovative start-ups not being reviewable by the Commission (although we note that, in practice, the evidence that there is any real enforcement gap in this respect is sparse and the vast majority of transactions that are capable of affecting competition throughout the EU are capable of review by the Commission under the existing provisions in the EUMR allocating jurisdiction)[8].

2.4 We consider that the potential adoption of an Ex-ante Regulatory Instrument will in fact largely duplicate, and at least pose considerable issues of coordination with the Commission's existing tools, as well as with the potential New Competition Tool (***NCT***), for which the Commission has launched on 2 June 2020 a separate consultation (should the NCT be eventually adopted). We have commented on the risks of divergent approaches being adopted under the Ex-ante Regulatory Instrument and the NCT and the adverse consequences for legal certainty and innovation in Europe, in our response to that consultation.

2.5 In summary, in our view, the case for the adoption of an Ex-ante Regulatory Instrument has not yet been clearly made. The goals that the Commission intends to achieve by such means could be achieved through more efficient and effective, and at the same time less intrusive, intervention by means of an enhancement of the enforcement practices allowed by the current toolbox and/or a (limited) extension of the scope of application of certain currently available tools.

3. Requirements for any potential regulatory intervention

3.1 To the extent the Commission however considers that a more effective use of existing tools will not address its concerns, we strongly believe that any Ex-ante Regulatory Instrument should:

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[8] We note, however, that: (a) the Crémer Report (Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition policy for the digital era*, 4 April 2019, https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.) considered that "deal value" thresholds such as those introduced in Germany and Austria have not yet been verified and there are challenges replicating these at EU level; and (b) the Furman Report (Jason Furman, Diane Coyle, Amelia Fletcher, Derek McAuley, Philip Marsden, *Unlocking digital competition: Report of the Digital Competition Expert Panel*, March 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.) notes that the UK Competition and Markets Authority's "share of supply" test can sufficiently capture non-horizontal mergers. Further, insights from the US Hard-Scott-Rodino (Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390) experience should be sought. Therefore, we consider that any change(s) to merger control thresholds should only occur after a separate consultation of possible options.

i. have a scope limited to what is directly necessary for achieving the goals identified by the Commission, with a prior consensus being reached on the extent of any real enforcement gap(s);

ii. be proportionate, not going beyond what is strictly necessary to deal with any real enforcement gaps so identified by the Commission, and without imposing unnecessary regulatory burdens and red tape on the undertakings involved;

iii. ensure legal certainty, in particular with reference to the delimitation of:

a. the scope of application of the new regulation, clearly defining objective and measurable criteria through which to identify LOPs within its scope (and those falling outside).[9]

- this would require that LOPs are easy to identify, without needing to replicate a dominance analysis (that would defy the whole logic of any ex-ante regulation), while ensuring that only true and structural gatekeepers, identified on the basis of objective criteria, should fall within the scope of the regulation;
- this would also require ensuring that emerging platforms or platforms that have large operations, but that by no means can wield sustainable market power, do not fall into the scope of application of the regulation with the consequence that they may be affected by unnecessary regulatory burdens that could impact negatively the development of their businesses and ultimately the competitive offerings they provide to the benefit of European consumers;
- Limit the application of any regulation only to those activities in which an LOP truly has "gatekeeper" status, with the LOP free to continue to be in a position to compete and innovate in other areas of activity on a level playing field.

b. its objective scope of application, *e.g.* by accurately identifying and limiting blacklisted practices to those that are not capable of any efficiency justification, if any;

iv. ensure flexibility, in order to take into account the different business models through which the various LOPs operate, as well as the fast-moving reality of the digital sector. This would suggest keeping any rigid black listed practices to the minimum while setting out principles that the relevant enforcer will have to apply when investigating certain LOPs' behaviours;

v. avoid fragmentation at national level, either through a 'one-stop shop' enforcement approach (i.e. only by the Commission) or, more realistically through a tightly coordinated approach across EU, similarly to what already occurs within the ECN context, in order not to force companies to comply with a multitude of regimes each with different approaches or outcomes (as has been seen recently, for example, in the online accommodation booking sector);

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9 We note for example that the IIA refers to criteria such as "*significant network effects, the size of the user base and/or an ability to leverage data across markets*". We consider that it will be important, for example, to first define the appropriate market and set out clear parameters within which the size of user base and significance of network effects would be measured. We expect that as a result of the consultation, the Commission will have a sufficient amounts of inputs to try to keep the identification of LOPs based only on meaningful and objective criteria.

vi. ensure the exercise of the rights of defence, procedural safeguards and due process, in particular providing for: (a) the ability for a company to appeal its designation as an LOP and for such designation to be kept under review in light of the fast-changing digital environment; (b) an opportunity for a LOP to respond to the objections of the Commission to its practices and propose a remedy to address the Commission's concerns should those concerns be evidenced and justified (with the burden of proof being on the Commission to prove that the conduct infringes the rules of the Ex Ante Regulatory Instrument); (c) clear legal tests and criteria to which any enforcement action will be subject and (d) prompt and effective judicial review of the remedies/decision adopted by the Commission.

4. Characteristics of a potential Ex-ante Regulatory Instrument

4.1 Should the Commission consider it necessary to adopt an Ex-ante Regulatory Instrument, notwithstanding our comments above regarding the lack of any clear evidence that any legislative intervention is required, we would respectfully suggest not proceeding with option (1) and option (3)(b) as envisaged in the IIA.

4.2 In particular, with reference to option (1), the extension of the P2B Regulation's objective scope of application would not be appropriate given the lack of any experience related to the P2B's enforcement, due to its extremely recent entry into force. In addition, the potential adoption of provisions applicable horizontally, even assuming they might address the Commission's concerns about LOPs, would risk the imposition of an unnecessary regulatory burden on smaller platforms or platforms without true gatekeeper status, potentially hindering their development and ability to compete.

4.3 Regarding option (3)(b), we consider that, although the case-by-case approach it implies would certainly ensure flexibility, it would probably have a very limited added value in light of the existing competition law (art. 102, *in primis*, but also the NCT, should the Commission decide to go ahead with its related proposal), with which it might significantly overlap, blurring the distinction between legislation and law enforcement and posing a concrete risk of over-legislation, lack of legal certainty and confusion. In addition, it is unclear that option (3)(b) would address any difficulties the Commission considers it currently faces in the context of enforcement actions under Art. 102 TFEU. It is not clear that the difficulties referred to by the Commission are the result of any defect in existing legislation rather than case management. The matters referred to by the Commission, such as the length of proceedings and the effectiveness of pro-competitive interventions appear to us to relate more to *how* the existing competition tools are used in practice rather than the legal regime itself. Rather, we consider that more effective case management, focussed investigations and more targeted consideration of appropriate remedies could all be achieved under existing competition law without requiring new legislation.

4.4 Option (2) of the IIA, instead, does not seem sufficient by itself to achieve the ambitious goals set by the Commission, although a necessary and proportionate collection of data from online platforms can certainly improve the efficiency of enforcement proceedings by speeding them up and saving costs for both the involved undertakings and the Commission, in light of the comprehensive knowledge it may provide to the Commission on the digital sector and

functioning of online platforms.[10] For this reason, we consider that proportionate use of option (2) might represent a valuable complementary tool as described below.

4.5 In light of the foregoing, should the Commission consider it necessary to adopt an Ex-ante Regulatory Instrument, we would suggest exploring an approach that, to a certain extent, mirrors the one characterizing the Vertical Block Exemption Regulation, similar to option (3)(a), potentially complemented with a proportionate use of option (2) as envisaged in the IIA.

Process for defining LOPs

4.6 We consider that, given its inherent complexity, the identification of LOPs subject to any Ex-ante Regulatory Instrument must be on the basis of objective criteria and subject to periodic review (i.e. annual or bi-annual). We believe that this approach could provide a balance between the opposing needs of legal certainty and flexibility.

4.7 There are certain experiences that may be relevant in this regard, especially in the telecommunication sector, which has certain key features in common with the digital sector (*e.g.* network effects and a limited number of significant undertakings). In particular, under the EU regulatory framework for electronic communications, after a public consultation that also involves national regulators, the Commission adopts a Recommendation identifying products and service markets in the context of the electronic communication sector which have characteristics which justify the imposition of addition regulatory obligations. Market reviews are periodically undertaken and only those undertakings established as having "significant market power" or SMP are subject to further regulation and then only to the extent necessary to address such SMP. In this way, the same undertaking may be regulated with SMP obligations in one part of its business and free to compete strongly on a level playing field in other parts of its business in which it does not have SMP. A similar approach might well apply to the digital sector for the purposes of defining the scope of application of the Ex-ante Regulatory Instrument. Differently from the electronic communication sector, the identification of the LOPs should then be made by the Commission, as a decentralized approach would in all likelihood conflict with both the supranational scope of the digital sector, avoiding a risk of fragmentation at national level, but also would better reflect the fact that in the digital market products are designed to work across national borders, often across the globe.

4.8 In that context, the currently proposed criteria for the identification of LOPs subject to regulation are vague and unclear. Without revision and clarification, they are not well suited to identify LOPs with true gatekeeper status. For example: (a) in relation to a "large user base" it is not clear how "large" would be defined or that a large user base by itself is a useful criterion; (b) "impact on a certain sector" is likewise a vague concept of unclear application; (c) "raises barriers to entry" or "very few, if any, alternative services available on the market" are concepts which illustrate that a thorough and wide-ranging assessment of market conditions is required before any assessment of LOP status could be made (and would require regular revision in the light of developing market conditions); and (d) "they leverage their assets for entering new areas of activity" is again a vague concept which is likely to capture pro-competitive and benign activities as well as potentially harmful developments.

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[10] We note that in order for the Commission to comprehensive understanding of the functioning of digital markets, it will also be necessary for it to collect data from online platforms that are not characterised as LOPs. The Commission should consider how this ought to be done without placing too high a burden on those smaller online platforms.

4.9 It is clear from the above that a detailed assessment would be required of various complex matters before any LOP designation could be made. In that light, it is not clear that such assessment would necessarily be quicker than existing processes under competition law.

"Blacklisted" practices

4.10 As envisaged in option (3)(a) of the IIA, a potential Ex-ante Regulatory Instrument might set out a list of clear 'blacklisted' practices that are forbidden only to the extent they are put in place by LOPs.

4.11 The diversity of LOPs to which the Ex-ante Regulatory Instrument would apply necessitates that any such "blacklist" must be: (a) limited to practices that are accepted as having only detrimental effects (i.e. equivalent to "by object" infringements in competition law); and (b) specifically and clearly defined in order to guarantee legal certainty. Any other approach would risk the effect of restricting competition on the merits and disincentivising LOPs from delivering valuable innovation to consumers, replicating the well-known "straight-jacket effect" that lead to the abolition of the block exemption system in place applicable in European competition law to certain sectors in the previous century and that would be exacerbated in a fast-moving, highly innovative, sector.

4.12 This could be complemented with a fall-back provision that contains enforcement principles and related rationales that could be enforced by the relevant agency following an adversarial investigation process, with appropriate due process for putting the Commission's objections to an investigated undertaking which must have an adequate opportunity to respond.

4.13 In addition, whether in relation to the black listed practices or the enforcement principles:

(i) in order to avoid prohibiting a given practice that may be beneficial, or at least not unfair or market-distorting in light of its specific context, the burden should be on the Commission to evidence that the practice ought to be prohibited in the specific context;

(ii) to respect the rights of defence, the LOP involved should also be given the opportunity to respond to the Commission's assessment and demonstrate that a given practice, in light of its particular context, does not generate detrimental effects; and

(iii) to ensure flexibility, it would be appropriate to provide for periodic review of the blacklisted practices and/or of the enforcement principles. This review might be based on the outcome of information gathering from online platforms similar to that envisaged for the creation of the *ad hoc* list of LOPs discussed above. This process would allow the potential Ex-ante Regulatory Instrument to adapt to the fast-moving reality of the digital sector.

4.14 Furthermore, although nothing is said in this regard in the IIA, as set out in section 3 above, it would be necessary to grant to the LOPs full procedural safeguards as well as independent judicial review with reference to any measure adopted pursuant to the potential Ex-ante Regulatory Instrument. In particular, we believe that the adoption of guidelines setting out the details of the procedure to be followed will significantly contribute to increased legal certainty and a full exercise of the right of defence.

4.15 Finally, it will be crucial to ensure coordination between the Ex-ante Regulatory Instrument and the currently available competition tools, including the NCT with which there seems to be significant overlaps, should the latter be eventually adopted by the Commission. The same applies to the need for coordination between the regulator(s) that will enforce the potential the Ex-ante Regulatory Instrument and other regulators and enforcers both at the EU and national

level. It will be key to provide for a clear definition of their respective competences to avoid duplication and potentially conflicting or inconsistent decision-making.

5. Conclusion

5.1 In conclusion, we consider that any perceived enforcement gap that has led the Commission to propose the adoption of an Ex-ante Regulatory Instrument may be more effectively and efficiently dealt with by an enhancement of existing enforcement tools and practices.

5.2 However, should the Commission nevertheless proceed with the proposed Ex-ante Regulatory Instrument, taking into account the initial options described in the IAA, we would favour a well-reasoned and evidenced adoption of option (3)(a), potentially complemented with option (2), to the extent it is shaped granting certain requirements, as better described above.

5.3 In any case, it should be noted that a potential Ex-ante Regulatory Instrument seems to better address certain of the issues identified by the Commission compared to the potential shortcomings attributable to the NCT[11], although, the latter is currently envisaged as having a different and wider scope of application.

5.4 We look forward to the opportunity to provide additional feedback once the Commission has further developed its proposal for any Ex Ante Regulatory Instrument and more concrete details are provided, should it consider that such an instrument is still necessary after considering feedback of interested parties.

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[11] For a description of the shortcomings related to the potential adoption of the NCT, please refer to the feedback submitted by Freshfields Bruckhaus Deringer LLP within the context of the Commission's public consultation on a proposed New Competition Tool.