8 September 2020

European Commission
DG Connect, Unit F.2
DG Grow, Unit E.4
1049 Bruxelles/Brussel
Belgique/België

Re: Ex ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union's internal market

Submitted via Electronic Submission

Dear Sir,

The IBA is the world's leading organisation of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to help to shape the future of the legal profession throughout the world. Bringing together antitrust practitioners and experts among the IBA's 80,000 individual lawyers from across the world, with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis on international competition policy issues. Further information on the IBA is available at http://www.ibanet.org.

This submission is made to the Directorate General for Internal Market, Industry, Entrepreneurship and SMEs ("**DG Grow**") and the Directorate General of Communication Networks, Content and Technology of the European Commission ("**DG Connect**") on behalf of the IBA Antitrust Committee, working through its *ad hoc* Working Group on Digital Economy ("**Working Group**").

The IBA Antitrust Committee is grateful for this opportunity to comment on the proposed consultation and appreciates the willingness of DG Grow and DG Connect to consider its comments and suggestions. The IBA Antitrust Committee's comments and suggestions draw on the members' experience of competition law and practice in the European Union and Internationally.

The Officers of the IBA Antitrust Committee and the Co-Chairs of the Working Group would be delighted to discuss the following submission in more detail, should that be of interest.

Sincerely,

Thomas Janssens

Daniel G. Swanson

8 September 2020

INTERNATIONAL BAR ASSOCIATION

ANTITRUST COMMITTEE

SUBMISSION TO THE EUROPEAN COMMISSION REGARDING THE CONSULTATION ON AN *EX ANTE* REGULATORY INSTRUMENT FOR LARGE ONLINE PLATFORMS

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1. Introduction

The International Bar Association is the world's leading organisation of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to shape the future of the legal profession throughout the world.

Bringing together antitrust practitioners and experts mong the IBA's 80,000 international lawyers from across the world, with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in this area. Further information on the IBA is available at http://ibanet.org.

The Antitrust Committee of the IBA ("**IBA Antitrust Committee**") comprises international antitrust practitioners from jurisdictions throughout the world. It is cognisant of the reflection process on the role of competition and regulatory law in regulating the digital economy, which spans many jurisdictions across the globe. To facilitate its engagement on these issues, the IBA Antitrust Committee has formed an *ad hoc* Working Group drawing from different disciplines of competition law and focusing exclusively on the digital economy ("**Working Group**").

The IBA Antitrust Committee sets out below its submission in response to the European Commission's ("**Commission**") Consultation on an *Ex ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union's internal market*, which was issued on 2 June 2020 (the "**DSA Consultation**"). The IBA Antitrust Committee appreciates the opportunity to engage with the Commission on the preliminary policy proposals identified in the Commission's Inception Impact Assessment ("**IAA**") and accompanying questionnaire (the "**Questionnaire**"). In this spirit, this Submission draws on the experience of the IBA Antitrust Committee's members within the EU and other major jurisdictions that have experience with the types of issues raised by the DSA Consultation. It complements the IBA Antitrust Committee's separate response to the Commission's Consultation on a New Competition Tool ("**NCT**").

2. Executive Summary

The IBA Antitrust Committee welcomes the opportunity to reflect on whether there is a need for a new regulatory tool regarding large online platforms, and if there is such a need how such a tool should be designed. Indeed, a new regulatory tool should only be contemplated if there are gaps in existing law that result in harmful conduct taking place that is not capable of being addressed through other areas of existing law.

According to the Commission, an *ex ante* regulatory instrument is needed to address enforcement gaps, and possible regulatory fragmentation at the national level, in relation to large online platforms. The Commission is targeting "*large scale unfair trading practices*" and reduction to innovation associated with the rise of a few large online platforms, which control

entire online platform ecosystems. The policy objective of an *ex ante* regulatory instrument is to ensure a "f*air trading environment and increase the innovation potential and capacity across the online platform ecosystem in the EU's single market*."[1] The Commission has proposed four versions of an *ex ante* tool.

In brief, the IBA Antitrust Committee considers that an *ex ante* regulatory instrument may not be needed to fill a regulatory gap, given the Commission's existing regulatory tools, including newly-implemented tools that address at least some of the issues under consideration. In addition, the Commission is also undertaking a simultaneous, parallel consultation that may also deal with the same issues/objectives targeted in the DSA Consultation. In other words, given the current regulatory dynamics, the existence of a specific regulatory gap that the DSA Consultation would fill is unclear at this time.

However, if the Commission nevertheless considers that a regulatory gap exists and wishes to proceed with one (or more) of the policy options identified, the IBA Antitrust Committee has assessed each of the proposed policy options. As part of this analysis, the IBA Antitrust Committee has also considered the experiences in other jurisdictions that are considering the same/similar issues regarding large online platforms. Moreover, the IBA Antitrust Committee also urges the Commission to clarify the procedural safeguards that apply, including rights of defence, rights to confidentiality and where applicable judicial review – which must be cornerstones of any new regulatory tool.

3. Problems Targeted by the Commission

The IBA Antitrust Committee welcomes the Commission's reflections on the dynamics associated with large online platforms and its concerns that the outcome of these dynamics can lead to unfair trading practices and a reduction in innovation. The Commission's concerns are essentially three-fold:

- First, the imbalance of bargaining power between large online platforms and their users and rivals.
- Second, the difficulty start-ups encounter in bringing innovative solutions to consumers in light of online platform ecosystems.
- Third, the ability of large online platforms entering adjacent markets with ease, enabled through their data access.

The IBA Antitrust Committee appreciates the Commission's effort to obtain stakeholder views on key issues, including scope, problems, implications and definitions for addressing possible issues deriving from the economic power of large "gatekeeper" platforms.[2] However, the IIA and Questionnaire raise three foundational issues that, with respect, should be addressed

[1] Inception Impact Assessment ("**IIA**"), pp. 3-4, *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] See DSA Questionnaire, Module III Introduction, at p. 33.

before considering whether an enforcement gap exists for which a new regulatory tool is necessary.

First, in presenting the problems to be addressed, it is not entirely clear precisely what the Commission envisages that the new *ex ante* regulatory instrument is intended to do. The Commission notes certain problems that it contends are associated with the ability of large online platforms to "*control increasingly important platform ecosystems in the digital economy*."[3] Accordingly, the stated objective of the new regulatory instrument is to ensure a fairer trading environment. It is not, however, clear how this result will obtain. In particular, it is not clear whether the Commission envisages that its new regulatory tool will facilitate entry, or rather prevent existing large online platforms from exercising market power (or both).

Second, the IIA and Questionnaire also raise methodological concerns because it proceeds from the assumption that the dynamics associated with online platforms, including large online platforms, are negative – and then frames the consultation in this light. To take one example, in its Questionnaire, the Commission cites the "*winner take all*" (or almost all) dynamic of online platforms as harmful, noting: "*The concentration of economic power in the platform economy creates a small number of 'winner-takes it all/most' online platforms. The winner online platforms can also readily take over (potential) competitors and it is very difficult for an existing competitor or potential new entrant to overcome the winner's competitive edge.*"[4]

This introductory statement, which frames the Questionnaire, however, only reflects a view about the potential concerns that can arise from large online platforms. It does not take into account the potential positive effects previously noted by the Commission, including "*unparalleled efficiencies in access to cross border markets* [which] *are crucial for millions of successful firms*" and noting that "*the gateway position of online platforms enables them to organise millions of users.*"[5] Indeed, in a recent report, the OECD likewise noted the risks that can be associated with large online platforms, but it also noted some of the important competitive drivers affecting even large online platforms.[6] In particular, the OECD cited the possibility of "*network effects, scale without mass and the non-rivalrous nature of digital information are also factors that make it* easier *for entrants offering a better service to displace incumbents quickly. In other words, some of the characteristics that once helped a platform to assume a leading position in a market may eventually shift in favour of an entrant and start to work against the incumbent, turning it from the disruptor to the disrupted.*"[7] The potential

[3] IIA, pp. 3-4.
[4] *See* DSA Questionnaire, Module III Introduction, at p. 33.
[5] *See* European Commission, "Platform to Business Trading Practices", *available at* https://ec.europa.eu/digital-single-market/en/business-business-trading-practices.
[6] *See* OECD, An Introduction to Online Platforms and their Role in the Digital Transformation, p. 24 (2019), *available at* https://www.oecd-ilibrary.org/docserver/53e5f593-en.pdf?expires=1599252053&id=id&accname=guest&checksum=82664CE0935662F8686EB14C3849B0F8.
[7] Ibid.The OECD continued,

> "*Each user that leaves a platform with positive network effects makes other users more likely to leave, too. This was the case with MySpace, for example, when Facebook displaced it as the leading social media platform, as well as for Yahoo! when Google entered Internet search advertising and upended it. MySpace even had switching costs working in its favour. That did not matter, though, because when positive network effects began to work in Facebook's favour due to the superior quality of its platform, the*

positive aspects of online platforms are generally not reflected in the DSA Questionnaire, which in turn creates the possibility for bias in the responses received.

Finally, and critically, the IIA and DSA Questionnaire rely on certain terminology that are not clearly defined. The term "gatekeeper" – as a characterisation of a large online platform – is not defined, yet the existence of gatekeeper platforms is a key part of the need for a new regulatory instrument. Indeed, both the IIA and DSA Questionnaire note that the Commission intends to "*explore, in the context of the Digital Services Act package, 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."*[8] It is not clear what it means to be a "gatekeeper". The Commission notes that there are more than 10,000 platforms operating in Europe, yet it has not indicated what is meant by a "large" online platform with "significant" network effects. Indeed, as platforms operate across a large number of industries, what constitutes "large" or "significant" network effects can vary. This is critical, as the Consultation targets online platforms that serve as "gatekeepers". Without an objective definition, however, the scope of the Consultation is not clear. This also presents methodological concerns for the Consultation itself, as the DSA Questionnaire asks questions about the "main features of gatekeeper online platforms". The result is circular: the definition of "gatekeeper" is important to the DSA Questionnaire, which also seeks at the same time to define it. This presents a methodological concern that could lead to a lack of clarity as to what the scope of a new regulatory instrument should be.

Taken together, these methodological issues and absence of defined terms can create a potential negative slant and lack of clarity on key definitional matters could ultimately lead to unclear and potentially biased results.

4. Suitability of Existing Tools

The Commission notes that there are more than 10,000 platforms active in Europe, and asserts that many of them are "hampered" in terms of unfair trading conditions, entry barriers and ability to innovate.[9] The Commission considers that its current enforcement toolbox is insufficient to address concerns arising from the emergence of large online platforms "*which may act as gatekeepers*"**,** in particular in view of an increasing number of "*online platform ecosystems*" that large platforms operate. It notes that a number of jurisdictions are also considering these issues, but have taken different approaches.[10]

Before turning to each of the policy options under consideration, it is useful to consider whether and to what extent the Commission's existing tools can address the problems identified. This itself presents some complexity, as the problems cited by the Commission implicate a number of policy areas, including competition law, targeted regulation (*e.g.* the Platform-to-Business

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switching cost advantage was overwhelmed. Consequently, becoming a leading online platform – even in a winner-take-all market – does not come with a guarantee that the leading position will be maintained permanently or that it is invulnerable to competition."

[8] DSA Questionnaire, Module III Introduction, at p. 33. *See also* IIA.

[9] *See* IIA, p. 2.

[10] This statement is in the context of France and Germany initiating "*legislative changes at national level, but following different approaches, pointing to a risk of regulatory fragmentation and the need for action at the EU level to safeguard an effectively functioning digital single market*." *See* IIA, p. 1.

Regulation (EU) 2019/1150) ("P2B Regulation") and areas such as unfair trading laws, competition law, data protection laws, consumer protection laws, contract law and others. Indeed, the Commission's Directorate General for Competition is running a parallel consultation on a possible NCT – which appears to seek to address some of the same issues as the DSA Consultation. The IBA Antitrust Committee has separately responded to the Commission's Consultation on a New Competition Tool.

The IBA Antitrust Committee appreciates that the EU is a unique jurisdiction, given the interplay with national laws of the Member States and the possibility of regulatory fragmentation. However, the issues that the Commission now seeks to address are inherently cross-sectional, as they touch on a number of different areas of law, as noted above, and have the potential to reach a large number of firms – depending on the tool's ultimate scope. Considered as a whole, the Commission has significant tools at its disposal, and while the IBA Antitrust Committee does not rule out the possibility of an enforcement gap, it believes that the Commission should not create any new, overlapping regulatory obligations.

Regulatory overlaps can create legal uncertainty by blurring the lines between different areas of law, leading to confusion, risk of possible inconsistencies, as well as imposing significant burdens that the ability of firms to innovate in fast-moving industries. Regulatory overlaps can also risk reducing competition by creating new regulatory/compliance barriers that disproportionately affect smaller, newer firms that may have fewer resources to devote to compliance. In context, while the stated objective of the DSA Consultation is large online platforms, in particular those which serve as "*gatekeepers*", this term is not defined and, as a result, it is unclear which platforms the Commission intends to target. If the definition is uncertain, or unnecessarily broad, it could subject a potentially wide and diverse universe of platforms to a new layer of regulation. If that were to occur, the new regulatory instrument could have the unintended effect of tilting the playing field in favour of online platforms with greater resources to engage in compliance efforts.

In addition to potential overlaps in terms of the substantive laws, it is possible that there may be overlaps between different regulators' jurisdictions. Should the Commission proceed with one or more of the policy options under consideration, a clear procedure should be in place to ensure that firms are clear as to which regulator to approach for specific issues (*e.g*. if there are specific approvals required for certain transactions, it should be clear which regulator should give the approval).

In addition to reflecting on the Commission's existing tools, it is also essential to consider the rules that have recently gone into effect, and the consultations currently taking place. This is necessary to ensure that enforcement gaps actually exist, and that a new regulatory instrument will not overlap or be inconsistent with existing regulation – or regulatory instruments in the pipeline that would seek to target similar issues. This is the case given the various and parallel legislative proposals, like the New Competition Tool, the direction of which is not yet known, and the recent implementation of the P2B Regulation – the effects of which are not yet fully felt. It would be sensible to understand the impact of these developments and remaining regulatory gaps before pursuing further regulation.

Indeed, other jurisdictions that have considered the impact of large online platforms have typically recognised the cross-disciplinary nature of issues raised, and in many cases have adapted existing rules and enforcement priorities. To cite a few examples:

- **United Kingdom:** As a starting point, the UK Competition and Markets Authority ("**CMA**") recently concluded a Market Study into Online Platforms and Digital Advertising, issuing its Final Report in July 2020.[11] At the conclusion of a market study, the CMA has an array of options, ranging from taking no action, to making recommendations (to the government or industry), or launching a market investigation. A market investigation is a detailed examination into whether there is an adverse effect on competition in the market(s) referred and, if so, what remedial action may be appropriate, including the imposition of behavioural and structural remedies. Launching a market investigation gives the CMA the possibility to impose remedies as an outcome, and it can accept undertakings in lieu of a reference to conduct a market investigation. Clear procedures, timetables and rights of defence apply during the market study and, if applicable, market investigation.

  In connection with its recent Market study into Online Platforms and Digital Advertising, however, the CMA noted that although the statutory test for reference for a market investigation was met, "*a market investigation is not the most appropriate way forward at this time.*" Rather than launching an investigation that could have enabled it to impose structural changes on these markets, the CMA – at least for now – has opted to make policy recommendations to the government, some of which are cross-disciplinary in nature.[12] Indeed, the CMA specifically and favourably noted the UK government's announcement that it would accept the cross-disciplinary recommendations of the Furman Review, relating to competition in digital markets, which include competition and non-competition policy recommendations.[13]

- **Australia**: The Australian government recently directed the Australia Competition and Consumer Commission to conduct a Digital Platforms Inquiry ("**DPI**"). The DPI began in 2017 and the final report was published in July 2019. The DPI concluded that at least two platforms (Google and Facebook) have significant market power. The DPI also concluded that certain data and network effects exist and that the market power held by Facebook and Google may have competitive impacts on advertising, bargaining power and information asymmetries. To address these concerns, the ACCC made a number of recommendations, including the establishment of a news media bargaining code of conduct, changes to merger control laws, establishment of a dedicated Digital Platforms Branch to sit within the ACCC, a proposed new

[11] *See* CMA, Final Report of Market Study on Online Platforms and Digital Advertising, *available at* https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf

[12] See Ibid., p. 34.

[13] *See* "Unlocking digital competition, report of the Digital Competition Expert Panel" aka 'the Furman Review', *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf

prohibition on unfair trading practices[14] and proposed changes to privacy laws.[15] The DPI Final Report also reocommended that a further market study take place with respect to Ad Tech. In addition to these initiatives, the ACCC has also initiated enforcement action against online platforms under consumer laws, which fall under the ACCC's remit. Examples include the Google location and personal data cases, the Trivago algorithm case, and the Apple consumer remedy case.[16] Indeed, ACCC Chairman, Rod Sims, stated that the purpose of court proceedings in individual cases is to *"set boundaries around what can and can't be done, and over time they do shape the operating environment of the platforms…[and] how these platforms behave to make sure that the Internet is a benefit to use, not a detriment."*[17]

- **France:** France has actively enforced its competition laws, its rules against abuse of economic dependence[18,19]and data protection laws[20] in recent cases involving large online platforms. While France has proposed legislative changes, in particular with respect to competition law, including merger review involving platforms, and the use of protective measures, the general approach continues to favour a "case by case"

[14] This provision would cover situations where businesses tried to induce or force consumers into consenting to the collection and use of their data, failed to comply with reasonable data security standards, or unilaterally changed the terms on which goods and services are provided to consumers. This would make it easier to target "bad" data practices.

[15] The ACCC recommended significant changes to the *Privacy Act 1998* (Cth), which would expand the definition of personal information, increase minimum notification and consent requirements, and require erasure of this data on a consumer's request. It also recommended increasing the penalties under the *Privacy Act* to equal those available under the Australian consumer law, giving consumers a right to bring actions on their own behalf, and the introduction of a statutory tort for serious invasions of privacy.

[16] ACCC, 'Google allegedly misled consumers on collection and use of location data' (29 October 2019) https://www.accc.gov.au/media-release/google-allegedly-misled-consumers-on-collection-and-use-of-location-data.

[16] ACCC, 'Correction: ACCC alleges Google misled consumers about expanded use of personal data' (27 July 2020) https://www.accc.gov.au/media-release/accc-alleges-google-misled-consumers-about-expanded-use-of-personal-data. *Australian Competition and Consumer Commission v Trivago N.V.* [2020] FCA 16.

[17] Paul McIntyre, "ACCC v Google: All you need to know here as Rod Sims lays into alleged 'deceptive' Google on user tracking consent in Federal Court case", *Mi-3 (online)* (27 July 2020) https://www.mi-3.com.au/27-07-2020/accc-v-google?utm_medium=email&utm_campaign=Weekly%20Campaign%20-%2028%20Jul%202020%20904am&utm_content=Weekly%20Campaign%20-%2028%20Jul%202020%20904am+CID_eaca5fe95c2ea51a7cea3450d99f83de&utm_source=Weekly%20newsletter.

[18] Article L. 420-2 §2 of the French Commercial Code

[19] Decision No. 20-D-04 of March 16, 2020 regarding practices in the distribution of Apple-branded products

[20] CNIL, Deliberation of the restricted formation n°SAN-001 of January 21, 2019 pronouncing a pecuniary sanction against GOOGLE LLC. *See also* cases involving sanctions on Google in 2014 and Facebook in 2017 for similar breaches on the basis of the French Data Protection Act, *i.e.* Deliberation No 2013-420 of the restricted formation January 3, 2014 pronouncing a pecuniary sanction against Google; Deliberation of the restricted formation SAN-2017-006 of 27 April 2017 pronouncing a pecuniary sanction against Facebook. The CNIL has sanctioned Facebook for several breaches of the French Data Protection Act. According to her, Facebook proceeded to the massive combination of personal data of Internet users for the purpose of advertising targeting and traced without their knowledge the Internet users, with or without an account, on third party sites via a cookie.

approach. Support has not yet emerged for a general and permanently defined *ex ante* regulation, as it would risk being inflexible, not scalable and could subject smaller players to considerable, and potentially disproportionate, obligations.

- **Germany:** Germany has seen the need to modernise its control of abuse rules, first and foremost in the form of new and far-reaching anti-abuse rules, targeted at "companies with overwhelming importance for competition across multiple markets", but also in the form of a number of key amendments to the existing provisions for dominant companies.[21] Companies that are not only dominant on single markets, but that – especially thanks to network effects, data access, resources and strategic positioning – can also impact the business of companies in other markets are to be subject in future to much stricter standards than "normal" dominant or powerful companies in order to be able to, among other things, mitigate self-reinforcement tendencies sufficiently early. While currently there is some delay in the legislative process, the new law will most likely be implemented in 2021. Based on the existing rules, the Federal Cartel Office ("**FCO**") conducted several headline cases against platforms and their potentially abusive behaviour[22] thereby showing its willingness to make use of the existing rules while claiming that these rules are not sufficient to ensure that markets in the digital economy remain open. There is strong political support for strengthening the FCO's powers in this regard.

- **India:** The Competition Commission of India ("**CCI**") has taken enforcement actions against online platforms,[23] and has also undertaken a Market Study in e-Commerce,[24] following which it recommended voluntary, self-regulatory measures for online marketplaces. The CCI is of the view that the existing competition laws are not required to be revised from an enforcement perspective to address concerns in the digital economy. It notes that the existing laws are robust to address concerns in the digital markets and that rigorous enforcement and timely intervention are required to effectively address all concerns. The CCI has also signalled that antitrust enforcement in digital markets (including online platforms) may need to be complemented, for example, with a code of conduct that identifies certain do's and don'ts. The code of conduct would help in defining the contours of anti- competitive conduct in digital

[21] See draft bill (in German): https://www.bmwi.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.pdf ; see also press release of the German Federal Ministry for Economic Affairs and Energy on the Commission of Experts on Competition Law 4.0's final report "A New Competition Framework for the Digital Economy", https://www.bmwi.de/Redaktion/EN/Pressemitteilungen/2019/20190909-commission-of-experts-on-competition-law-40-presents-final-report-to-minister-altmaier.html

[22] See e.g. Federal Cartel Office vs. Facebook https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html; Federal Cartel Office vs. Amazon https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html;

[23] *See e.g.* Amazon/Flipkart https://www.cci.gov.in/sites/default/files/40- of-2019.pdf; MakeMyTrip https://www.cci.gov.in/sites/default/files/14of2019_0.pdf.

[24] Market Study on E-Commerce in India. https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf

markets and would ensure transparency and clarity in the functioning of the platforms. The Government of India has envisioned a multi-disciplinary approach to address concerns arising in the digital economy. New legislations/amendments are proposed under the competition laws (*introduction of code of conduct and revision of merger control thresholds*), consumer protection laws (*new e-commerce rules mandating disclosure requirements for e-commerce platforms to increase transparency*) and the data protection laws (*data portability*) to increase competition in the digital economy.

- **Japan:** June 2020, the Headquarters for Digital Market Cooperation (established in September 2019), announced a "Report on Mid-term Vision on Competition in Digital Market"[25] for public comments, which expresses their views on how to develop digital markets into dynamically competitive ones with future risks taken into consideration. This includes issues specific to digital platforms. The report appears to emphasize the development of law enforcement, namely through the strengthening of enforcement of the Antimonopoly Act and the Act on Improving Transparency and Fairness of Specified Digital Platforms. The focus appears to be mainly on the development of enforcement practice (in particular with respect to mergers), although the addition of new regulatory tools is not ruled out (and the Commission's *ex ante* proposal is noted).

- **Singapore:** the CCCS has considered how specific competition issues arising from digital markets can be tackled by existing antitrust tools. In addition, the CCCS has in recent years increasingly recognised that issues in the digital economy requires a coherent and consistent approach by different regulators, and there is often significant overlap between competition, consumer protection, and data privacy issues in the digital era.[26] In the context of digital markets, there has not been any public proposals to set up new antitrust or related tools specifically for digital markets in Singapore, and based on the CCCS's current enforcement practices and papers, the CCCS has not taken the position that there is a need to do so. In addition, it was observed that intervention by authorities may risk stifling long-term innovation and investment.[27]

5. Assessment of Policy Options

As set out in Section 4, above, the IBA Antitrust Committee believes that it is not clear that a new *ex ante* regulatory instrument is needed and that any such instrument may be premature. However, should the Commission nevertheless decide to proceed with one of the options

[25] https://search.e-gov.go.jp/servlet/PcmFileDownload?seqNo=0000204147

[26] In this regard, the CCCS has been increasing collaborating with other regulators such as the Personal Data Protection Commission ("PDPC") and Intellectual Property Office of Singapore, to ensure there is a coherent and consistent approach towards players in the digital market. In 2019, the CCCS and PDPC jointly looked into the competition, consumer protection, and personal data protection implications of a data portability requirement in Singapore, published a joint discussion paper on data portability in Singapore ("Data Portability Paper"). *Available at* https://www.cccs.gov.sg/resources/publications/occasional-research-papers/pdpc-cccs-data-portability

[27] CCCS E-commerce Paper 2015, paragraph 34.

under consideration, the IBA Antitrust Committee also respectfully provides the following comments on the specific, proposed policy options.

5.1 Option 1: Revise the Platform-to-Business Regulation (EU) 2019/1150

The first option identified by the Commission involves revising the P2B Regulation for all online intermediation services that are currently within its scope. The P2B Regulation, which took effect on 12 July 2020, is intended to create a fairer and more transparent and predictable business environment for smaller businesses and traders acting on online platforms.[28] It applies to "*online intermediation services and online search engines provided, or offered to business users and corporate website users...*"[29] It does not distinguish between "large" or "gatekeeper" platforms and other platforms.

The Commission envisages that, through Option 1, the P2B Regulation could be revised to cover "*prescriptive rules on different practices that are currently addressed by transparency obligations in* [the P2B Regulation], *as well as on new, emerging practices*."[30] Emerging practices to be caught would include self-preferencing, data access policies and unfair contractual provisions. The revisions would also reinforce oversight and transparency requirements. The characterisation of Option 1 is likely to lead to two immediate issues:

First, to the extent that Option 1 uses the P2B Regulation as a vehicle to regulate large online platforms acting as "*gatekeepers*", it is likely to be overbroad. The P2B Regulation is not limited to large online platforms, which means that the horizontal revision of the P2B Regulation would actually impose greater regulatory requirements on *all* online platforms that fall within its scope. This could comprise a significant proportion of the ~10,000 online platforms the Commission indicates are active in Europe, when the reality is that likely only a few would be considered "gatekeepers" (although this remains unclear as the term is undefined). As noted above, this could have an unintended distortive effect, as it would impose new regulatory requirements on a large number of diverse platforms – including those with fewer resources to devote to compliance. In effect, unless Option 1 is more narrowly tailored, it could lead to unintended consequences, which will create additional burdens/barriers for smaller platforms, but not for larg(er) platforms, which will likely be more readily able to comply.

Second, the Commission's effort to regulate "emerging" practices is challenging. By their nature, emerging practices are new and the impacts not yet known. By regulating emerging practices, there is a risk that the Commission could create rigidity in innovative, dynamic and diverse markets. The envisaged regulatory instrument will be less effective if it cannot keep pace with the dynamic nature of the industry.

Apart from these concerns, the IBA Antitrust Committee notes conceptual similarities between Option 1 and elements of approaches taken by the ACCC and the CMA. Specifically, Option

[28] *See* Regulation (EU) No. 2019/1150, Article 1(1) ("*The purpose of this Regulation is to contribute to the proper functioning of the internal market by laying down rules to ensure that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency, fairness and effective redress possibilities*.")
[29] Ibid. Article 1 (2).
[30] IIA, p, 3.

1 sounds somewhat similar (in particular) to the ACCC's attempt to regulate and prescribe conduct around the relationships between digital platforms and businesses using those platforms through mandatory codes of conduct, discussed above. It is also similar to the some aspects of the recently-concluded market study into Online Platforms and Digital Advertising in the UK. However, importantly, in Australia, codes of conduct are ordinarily prepared after industry-specific inquiries or market studies and substantial public consultation. Likewise, in the UK, the recommendations made by the CMA follow a detailed market study. The analogy between Australia and the UK and the Commission's Option 1 is thus limited, as the Commission has not conducted such a market study or inquiry (apart from the Commission's new sector inquiry into the Internet of Things, which could in principle touch on some relevant issues.)

5.2 Option 2: Adopt a Horizontal Framework Empowering Regulators to Collect Information from Large Online Platforms

This Option involves horizontal rules to enable the collection of information from large online platforms by a dedicated regulatory body at the EU level to gain further insights into their business practices and their impact on platform users and consumers.

Based on this description, the Commission appears to already have at its disposal similar powers pursuant to Regulation (EU) 1/2003, which empowers the Commission to conduct sector inquiries. Through Regulation (EU) 1/2003, the Commission is empowered to require the provision of evidence (including through dawn raids) from companies that are within the sector under investigation. The Commission is currently investigating the Internet of Things, but is free to decide to conduct a sector inquiry into other aspects of digital markets (including large online platforms). It is unclear what Option 2 would add, beyond possibly duplication of the Commission's powers *vis-à-vis* sector inquiries.

5.3 Option 3(a): Prohibition or restriction of certain unfair trading practices by large online platforms acting as gatekeepers

Option 3(a) involves the establishment of prohibited unfair trading practices, addressing issues such as self-preferencing or the acceptance of supplementary commercial conditions that have no connection to the underlying contractual relationship. According to the Commission, the objective of this option would be to ensure open and fair trading online. In framing prohibitions, the Commission will consider both substantive rules on emerging practices as well as principles-based prohibitions.

The IBA Antitrust Committee observes that the identification of permissible/prohibited industry practices in the forms of codes of conduct has been undertaken in different jurisdictions – namely, Australia and under consideration in India, among other places. However, the IBA Antitrust Committee has concerns with the proposal for Option 3(a) for the following reasons:

First, as discussed above, it is unclear precisely which platforms will be subject to these rules, as the definition of a "*gatekeeper*" has not been established. The adoption of a list of prohibited commercial conduct has the potential to significantly curtail a company's activity. It is important, therefore, that the Commission consider carefully the specific platforms that would be impacted before developing a list of prohibited conduct.

Second, a list of prohibited practices that forms part of a regulatory instrument risks becoming rigid and out-of-date in a fast-moving industry, such as online platforms. To the extent that the regulatory instrument has to be amended each time the conduct needs to be updated/modified, there is a real risk that by the time change takes place events have moved on and it is no longer relevant. There is a related risk that a rigid list of prohibited practices (whether substantive conduct or principles-based) could simply be circumvented, given the fast-moving nature of the markets.

At a minimum, Option 3(a) would need to clarify these key operational points and ensure that it is sufficiently flexible to ensure its effectiveness.

5.4 Option 3(b): Adoption of tailor-made remedies to address large online platforms acting as gatekeepers on a case-by-case basis where necessary and justified

Option 3(b) builds on Option 3(a) and adds the ability to impose "tailor-made remedies" imposed by a competent regulator. The Commission notes that remedies could be imposed to address personal data portability, or interoperability requirements among other issues.

However, even noting the treatment of telecommunications by analogy, it is unclear what the Commission intends *vis-à-vis* the ability to impose remedies. For instance, it is unclear whether the Commission would have the ability to tailor remedies based on conduct only (*i.e.* behavioural remedies), or whether this extends to structural remedies, like divestments. This is a significant power, and one which could overlap with the Commission's NCT. It is also unclear which regulator would be competent to impose remedies, and the criteria that would trigger the imposition of remedies.

Finally, and critically, it is unclear what rights of defence would apply to companies subject to Option 3(b), as well as their rights of judicial review. This is explored in detail in Section 6, below, but is critical to ensure that companies are given fair and proportionate treatment with sufficient certainty as to legal outcomes.

6. Procedural Safeguards Should be Assured

If the Commission decides to proceed with one of the four options under consideration, procedural safeguards, including rights of defence and judicial review should be assured. This is not addressed in any detail in the DSA Questionnaire or IIA, and is an important issue that should to be clarified.

The IBA Antitrust Committee appreciates that consideration of the DSA Consultation options are at an early, conceptual stage. However, the IBA Antitrust Committee strongly believes that the issue of whether procedural safeguards should apply is not up for debate. The policy options identified by the Commission, if pursued, may not technically result in an infringement, but they wold establish a prescriptive framework (especially under Options 1 and 3(a) and 3(b). Indeed, under Option 3(b) the enforcement agency could impose behavioural and/or structural remedies – including divestment – on individual companies, on an *ex ante* basis.

Key questions of procedural fairness (including the criteria/trigger for remedies) should be clarified, including, proportionality, regulatory certainty, rights of defence and the availability of

judicial review. This is necessary to ensure that companies that may be subject to the envisaged *ex ante* regulatory tool must be treated fairly and be able to defend themselves, have their confidential information protected, and to challenge the Commission's decisions before the Courts.

Meaningful procedural safeguards are essential to ensuring consistent, predictable, and fair-decision making. Thus, if the Commission proceeds with an option for an *ex ante* regulatory instrument, the following types of safeguards may be appropriate.

- In terms of predictability and regulatory certainty, the Commission should make clear which regulatory body will be responsible for administering it. The Commission should also make clear the definitions that underpin the scope and the reach of the tool. Given the diversity of online platforms and business models, it will be important to easily determine which companies are subject to the new tool, and which are not.

- The criteria for commencing an investigation must be clarified, and should be clear and based on objective criteria.

- The *ex ante* regulatory instrument should ensure that companies' confidential information will be kept confidential and will not be disclosed.

- Rights of defence must be a core element of the *ex ante* regulatory instrument. Rights of defence should at least include the ability of companies to understand and respond to the Commission's concerns in any enforcement context, rebut presumptions on the legality of imposing certain remedies, examine evidence in the Commission's file, and the right to judicial review on the merits of the case.

- The Commission could consider whether a defined timetable could apply (i) in the imposition of remedies under Option 3(b), and (ii) more generally given its *ex ante* nature, to preserve the rights of defence.

- Finally, and as already explained above, the IBA Antitrust Committee encourages the Commission to ensure that there are no regulatory overlaps resulting from the creation of an *ex ante* regulatory instrument. New legislation has been enacted that applies to elements of competition in the digital economy, and the Commission is currently consulting on the possibility of a New Competition Tool under EU competition law. As explained above, the IBA Antitrust Committee encourages the Commission to consider waiting determine the impact of newly-implemented legislation, as well as the results on the need for new targeted industry regulation before proceeding with the *ex ante* regulatory instrument. However, if the Commission proceeds at this time with one of the identified policy options, it should ensure that it will not result in confusion or overlap with industry regulation.

7. Conclusion

The IBA Antitrust Committee appreciates the opportunity to comment on the DSA Consultation and would be pleased to discuss these issues in greater detail with the Commission. The IBA Antitrust Committee is available to respond to any questions and any further information that would be helpful.