

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

Vodafone welcomes the publication of the European Commission roadmap/Inception Impact Assessment: *Ex ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union's internal market*. We agree with the problems identified by the Commission in the IIA that the current regulatory framework at EU level does not yet specifically address the economic power that large online platforms acting as gatekeepers hold. This has led to a situation where certain gatekeeper platforms are inhibiting the ability of European companies and start-ups to deploy products and services to consumers in Europe and beyond. Concentration in key online intermediation markets has been growing at an unprecedented scale.

Vodafone plans to submit detailed comments to the public consultation on ex ante regulation. Our starting position is that the time is right for a targeted and robust model of intervention. Concerns have arisen about the ability of *ex post* competition law enforcement to address issues in relation to dominant digital gatekeeper platforms, in particular when defining digital markets and dominance and assessing certain types of conduct in relation to data funded, multi sided markets. In addition, competition law enforcement often takes too long, meaning that irreversible foreclosure has taken place before any remedies are implemented. Remedies also tend to be specific to individual cases and difficult to apply more generally. We believe that EU should take the lead in addressing the regulatory challenges of digital markets and that competition law and ex ante regulation both need to evolve to address these challenges.

On the possible options outlined in the IIA to regulate large online platforms benefiting from significant network effects and acting as gatekeepers, overall Vodafone considers that the proposals in relation to potential ex ante regulation and a new competition tool need to be considered in the round and not in isolation. In our view, the primary focus should be on the proposal for ex ante regulation. We consider that, if based on a competition law analysis to identify (i) the types of concerns which arise in relation to the behaviour of particular types of gatekeeper platforms and (ii) in each case the potential types of remedies required, such regulation would be the most effective way to address the concerns which arise – and will arise - in the digital economy. The approach to this regulation will strongly influence how any new competition tool should be designed, and whether it is needed at all.

In light of this, we set out below some preliminary comments and questions, as means to highlight areas of concern that we feel are either missing or not sufficiently addressed at this stage in the legislative process

1. The first option proposed is additional, horizontal obligations under the P2B regulation. This regulation has not yet come into force and is due to for review in 2022, following a thorough process set out in Article 18 In addition, this proposal was rejected during the discussions in relation to the P2B regulation given the disproportionate impact of horizontal regulations.
2. Does DG Connect consider the use of a blacklist of prohibited practices as flexible enough to address new issues, given this is a rapidly changing environment characterised by platforms which rely on different technologies and deploy different business models and

behaviours? How might this be kept updated over time to ensure that new business models and practices are accounted for? Would the Commission support a dynamic/living blacklist of prohibited practices for this purpose? How would such a blacklist differentiate between different types of platforms (even amongst the platforms which are in principle within scope of the proposed regulation), which is essential to avoid overregulation. Vodafone does not consider that a blacklist approach would be sufficiently flexible.

3. The third option (a new and flexible ex ante regulatory framework for large online platforms acting as gatekeepers) is one we would support. When defining platforms which act as gatekeepers and benefit from significant network effects, we believe the use of criteria such as user numbers is too blunt a tool for economic regulation. We would instead recommend a test designed to address the specific harms identified in relation to gatekeepers acting within a digital ecosystem (as recommended in the [report](#) by De Streef/Alexiadis).
4. If there is to be a new ex ante framework targeted towards platforms defined as gatekeepers, within a digital ecosystem, will this designation be done by DG Comp, also setting remedies and then enforced at a national level?
5. If interoperability is being considered as a remedy, what thought has been given as to how this will interact with sector specific requirements, such as Article 60 of the Communications Code?