

INCEPTION IMPACT ASSESSMENT			
TITLE OF THE INITIATIVE	Digital Services Act package: <i>Ex ante</i> regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union's internal market		
LEAD DG – RESPONSIBLE UNIT – AP NUMBER	DG CNECT/F.2 DG GROW/E.4	DATE OF ROADMAP	02/06/2020
LIKELY TYPE OF INITIATIVE	Legislative		
INDICATIVE PLANNING	Q4/2020		
ADDITIONAL INFORMATION			

A. Context, Problem definition and Subsidiarity Check

Context
<p>There is wide consensus concerning the benefits for consumers and innovation, and a wide-range of efficiencies, brought about by online platforms in the European Union's internal market. Online platforms facilitate cross-border trading within and outside the Union and open entirely new business opportunities to a variety of European businesses and traders by facilitating their expansion and access to new markets. However, whereas over 10 000 such online platforms operate in Europe's digital economy, most of which are SMEs, a small number of large online platforms captures the biggest shares of the value. This mainly follows from the development of large online platforms operating as gatekeepers between businesses and citizens, benefitting from strong network effects. Furthermore, some of these large online platforms exercise control over whole platform ecosystems that are essentially impossible to contest by existing or new market operators, irrespective of how innovative and efficient they may be.</p> <p>Against this background, the Platform-to-Business Regulation (EU) 2019/1150¹, which entered into force in June 2019 and will apply as of 12 July 2020, was conceived as a first step to establish a fair and transparent business environment around online platforms ('online intermediation services'). The Platform-to-Business Regulation has created horizontal standards for transparency and offers redress for SMEs that may be using these platforms' services.</p> <p>Yet, beyond this, the current regulatory framework at EU level does not yet specifically address the economic power that large online platforms acting as gatekeepers hold. Some Member States, such as Germany and France have initiated 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.</p> <p>In this light, the Communication on Shaping Europe's Digital Future² considered that, '<i>based on the single market logic, additional rules may be needed to ensure contestability, fairness and innovation and the possibility of market entry, as well as public interests that go beyond competition or economic considerations</i>'. It announced that the Commission would further '<i>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 gate-keepers, remain fair and contestable for innovators, businesses, and new market entrants</i>'.</p> <p>This Inception Impact Assessment sets out the preliminary problem analysis and initial range of possible options to regulate large online platforms benefiting from significant network effects and acting as gate-keepers, with the goal of ensuring that markets impacted by such platforms remain fair and contestable, as well as to provide improved regulatory oversight over the relevant platforms.</p> <p>The issues covered in this Inception Impact Assessment are complementary to related measures the Commission is exploring. To ensure consistency and avoid possible overlaps, the impact assessment of the two following initiatives will be conducted in parallel:</p> <ul style="list-style-type: none"> Concerning the responsibilities of online platforms on the safety of their users (e.g. business users; consumers) and their fundamental rights, a separate Inception Impact Assessment lists potential options, which might follow in the package of measures under the Digital Services Act planned for end 2020 (Lead

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R1150>

² https://ec.europa.eu/info/publications/communication-shaping-europes-digital-future_en

DG: DG CNECT).

- Concerning the [announced](#)³ evaluation and potential review of the fitness of EU competition rules for the digital age, a separate [Inception Impact Assessment](#) lists potential options on a new competition tool that would complement the existing EU competition law framework. The aim of such a tool would be to address certain structural competition problems that the existing competition framework cannot tackle (e.g. monopolisation strategies by non-dominant companies with market power) or cannot address in the most effective manner (e.g. parallel leveraging strategies by dominant companies into multiple adjacent markets). (Lead DG: DG COMP). To ensure consistency and avoid possible overlaps, notably in the identification of policy options to be pursued, the open public consultations and the impact assessment of the present initiative and the DG COMP-led initiative will be conducted in parallel.

Problem the initiative aims to tackle

Large online platforms are able to control increasingly important platform ecosystems in the digital economy. Typically, they feature an ability to connect many businesses with many consumers through their services that, in turn, allows them to leverage their advantages, such as their access to large amounts of data⁴, from one area of their activity to improve or develop new services in adjacent markets. These large online platforms also increasingly bundle a broad range of platform and other digital services into a seamless, data-driven offer. These features of the digital economy have also been prominently highlighted in several reports on the digital and platform economy in recent years. The source of the economic power of large online platforms does not stop there, since it also includes other factors such as ability to (i) accumulate large quantities of data, (ii) easily access different technical assets, (iii) easily expand into new markets and leverage their advantage from their services, (iv) take over competitors or (v) benefit from their financial clout. Similar reflections on the need to regulate large online platforms benefiting from significant network effects and acting as gatekeepers are ongoing in major jurisdictions outside the EU such as [Japan](#)⁵, [Australia](#)⁶ and the [US](#)⁷.

This leads to several consequences within the European Union's internal market. While certain of the features described above may bring advantages to both business users and consumers, their unfettered application is likely to hamper the development of a fully functioning digital single market:

- Traditional businesses are increasingly dependent on a limited number of large online platforms. This leads to imbalances in the bargaining power between large online platforms on the one hand and their users and rivals on the other, a trend which is expected to increase in the future.
- Many innovative digital firms and start-ups find it difficult to bring innovative solutions, including innovative alternatives to these large online platforms, to the consumer, in particular in view of the existence of an increasing number of 'online platform ecosystems' that these large online platforms operate. This raises a risk of reduced competition and dynamism and consequently reduced choice for consumers and business users in the long-run and their ability to take full advantage of the digital single market.
- An ability of a small number of large online platforms to comparatively easily enter adjacent markets, since they benefit from the use of data gathered from one area of their activity to improve or develop new services in these adjacent markets, increases a risk of these adjacent market also tipping in favour of these platforms to the detriment of innovation and consumer choice.

A small number of large online platforms increasingly determines the parameters for future innovations, consumer choice and competition. Consequently, Europe's estimated 10 000 online platforms are potentially hampered in scaling broadly and thereby contributing to the EU's technological sovereignty, as they are increasingly faced with incontestable online platform ecosystems. This leads to a risk of reduced benefits from social gains deriving from innovation. These outcomes of platform dynamics may result in **large-scale unfair trading practices** and potentially **reduce the social gain from innovation**. Their impact is compounded by the opacity and complexity of the large online platform ecosystems, and the significant information advantage such platforms have over regulators.

Beyond tackling the issues above, it is also important that the EU's innovators can thrive and contribute to the economic recovery at the exit of the COVID-19 crisis. The measures by the public authorities to confine the COVID-19 pandemic weakened large parts of the EU economy and further increased the dependency of smaller businesses relying on established online platform ecosystems to reach out to business users and consumers. A fair trading and transparent business environment online will therefore be important in supporting European businesses, heavily impacted by the confinement measures to tackle the COVID-19 pandemic, to recover and expand their business online.

³ https://ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-future-feb2020_en_4.pdf

⁴ For the purpose of the present Inception Impact Assessment the notion of data should be understood in a wide sense, which means that it encompasses many different forms of data (e.g. image posted by user of a social platform; users' search activity) and the variety of its uses (e.g. anonymized individual data; aggregated data).

⁵ <https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191031.html>.

⁶ <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>.

⁷ <https://www.ftc.gov/policy/hearings-competition-consumer-protection>.

Subsidiarity check (and legal basis)

The legal basis of this initiative is likely to be Article 114 TFEU, possibly to be complemented by other legal bases, depending on the exact type of measures to be proposed, following the impact assessment.

The intrinsic and systemic cross-border nature of the services provided by the large online platforms implies that no Member State alone can reach the objectives effectively. Large online platforms benefiting from significant economies of scale and acting as gatekeepers may be legally established in one Member State, but provide their services to almost the entire EU population.

The objectives of the initiative can be better reached at Union level to avoid a further fragmentation of the single market into 27 different, potentially contradictory frameworks - including the resulting jurisdictional issues - and provide for more effective and coherent implementation and enforcement. Individual national solutions are likely to lead to conflicting outcomes where they are applied by online platforms operating at a pan-European scale, whereas a multiplication of national rules in addition makes it disproportionately difficult for start-up platforms to scale-up and compete.

B. Objectives and Policy options

The overarching **policy objective** of this 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.

To this end, the impact assessment will examine different policy options for the effective *ex ante* regulatory framework that ensures that online platform ecosystems controlled by large online platforms that benefit from significant network effects remain fair and contestable, in particular in situations where such platforms may act as gatekeepers. The initiative would aim to establish 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.

Within this context, the Commission would in the **baseline scenario** focus essentially on the application and enforcement of the current regulatory instruments applicable to online platforms – such as the Platform-to-Business Regulation, competition law instruments and consumer and personal data protection rules. The Commission would also continue to monitor the platform economy, including through the [Observatory on the Online Platform Economy](#)⁸.

Against this baseline scenario, the Commission will consider at least the following series of initial **policy options**:

1. Revise the horizontal framework set in the Platform-to-Business Regulation (EU) 2019/1150

Building, *inter alia*, on the insights from the Observatory for the Online Platform Economy and further evidence collection, and acting upon the review clause in Article 18(2) of the Platform-to-Business Regulation, further horizontal rules could be established for all online intermediation services that are currently falling within the scope of the Platform-to-Business Regulation, through its revision. This could cover prescriptive rules on different specific practices that are currently addressed by transparency obligations in the Platform-to-Business Regulation as well as on new, emerging practices (e.g. certain forms of 'self-preferencing', data access policies and unfair contractual provisions). A revised Platform-to-Business Regulation could also reinforce the existing oversight, enforcement and transparency requirements. This revision would build on new or emerging issues identified in on-going fact-findings, as well as on the information, to the extent already available, gathered from the transparency provisions introduced by the Platform-to-Business Regulation (e.g. on data access transparency; on the effectiveness of the dispute resolution mechanisms). This revision of the Platform-to-Business Regulation would not seek to review the current provisions of the Platform-to-Business Regulation, but relate to certain targeted horizontally applicable additional provisions in view of the specific issues identified.

2. Adopt a horizontal framework empowering regulators to collect information from large online platforms acting as gatekeepers

Under this option further horizontal rules could be envisaged with a purpose to enable collection of information from large online platforms acting as gatekeepers by a dedicated regulatory body at the EU level to gain, for example, further insights into their business practices and their impact on these platforms' users and consumers. These rules would not only envisage further transparency (option 1), but would enable targeted collection of information by a dedicated regulatory body at EU level.

While these horizontal rules would enable information gathering, they would not imply any power to impose substantive behavioural and/or structural remedies on the large online platforms that would fall within the scope of such rules. This would not exclude, however, enforcement powers in order to address the risk of refusal to provide

⁸ <https://ec.europa.eu/digital-single-market/en/eu-observatory-online-platform-economy>.

the requested data by the large online platforms acting as gatekeepers.

3. Adopt a new and flexible *ex ante* regulatory framework for large online platforms acting as gatekeepers

This option would provide a new *ex ante* regulatory framework, which would apply to large online platforms that benefit from significant network effects and act as gatekeepers supervised and enforced through an enabled regulatory function at EU level. The new framework would complement the horizontally applicable provisions of the Platform-to-Business Regulation (EU) 2019/1150, which would continue to apply to all online intermediation services. The more limited subset of large online platforms subject to the additional *ex ante* framework would be identified on the basis of a set of clear criteria, such as significant network effects, the size of the user base and/or an ability to leverage data across markets. The relevance of using one or several of these criteria will be further explored in the impact assessment. Finally, this option would also explore possibilities for supervision and enforcement at EU level.

This option would include two sub-options:

3a. Prohibition or restriction of certain unfair trading practices by large online platforms acting as gatekeepers (“*blacklisted*” practices)

An *ex ante* regulatory tool applicable to large online platforms with a gatekeeping role would establish clear obligations that these platforms would be required to comply with and establish prohibited or restricted unfair trading practices (“*blacklisted*” practices). Such a set of clearly defined and predetermined obligations and prohibited practices would aim at ensuring open and fair trading online, especially when these practices are potentially market-distorting or entrenching economic power of the large online platforms (e.g. certain forms of self-preferencing; acceptance of supplementary commercial conditions that by their nature have no connection with the underlying contractual relationship).

This option will explore both principles-based prohibitions that apply regardless of the sector in which the online platforms concerned intermediate (e.g. a horizontal prohibition of intra-platform ‘self-preferencing’), as well as more issue-specific substantive rules on emerging problems associated only with certain actors, e.g. relating to operating systems, algorithmic transparency, or issues relating to online advertising services.

3b. Adoption of tailor-made remedies addressed to large online platforms acting as gatekeepers on a case-by-case basis where necessary and justified

Besides establishing obligations and prohibiting certain unfair trading practices (“*blacklisted*” practices) as envisaged under sub-option 3a, a *new ex ante* regulatory framework would also include an ability to impose, where considered necessary and justified following a prior assessment, tailor-made remedies envisaged by such framework covering the specific issue(s) and individual large online platform companies at stake, and applied on a flexible, case-by-case basis. Examples of such remedies that would be adopted and enforced by a competent regulatory body (in principle acting at the EU level) could include platform-specific non-personal data access obligations, specific requirements regarding personal data portability, or interoperability requirements. While recognising the many differences, experience from the targeted and tailor-made *ex ante* regulation of telecommunications services can serve as an inspiration in this regard, given the similarities deriving from network control and network effects. This second pillar of an *ex ante* regulatory framework for large online platforms acting as gatekeepers would address the diversity and fast evolution of specific phenomena in the online platform economy.

The different policy options are not mutually exclusive and the impact assessment could assess them as both alternatives and/or complements.

The Commission will ensure a joint analysis of the results of the impact assessment led by DG COMP and referred to above under the “Context” section with a view to exploring synergies and ensuring consistency on the policy options pursued, in particular as regards possible remedies and enforcement.

Likely economic impacts

The initiative would have positive impact on businesses (including SMEs) as, by providing for legal certainty, less regulatory fragmentation and increased level playing field, will allow these innovative SMEs to grow and develop their own products or services and innovate. Consumers and business users would continue to benefit from a large choice of products and services in a digital environment, while increased competition brought by alternative online platforms would lead to better innovation outcomes. Consequently, this would lead to an increase in overall consumer welfare, as well as an increase in the fairness and competitiveness of the EU economy. The initiative will look at the overall effects that such regulation of large online platforms benefiting from strong network effects and acting as gatekeepers may have on consumers.

By setting the right fair trading conditions and thereby facilitating an equality of innovation opportunities, especially around cutting-edge technologies, it is expected that the existing and/or emerging online platform services will be subject to increased competition and contestability. This would have a positive impact on innovation and research,

<p>technological development and growth of the digital economy.</p> <p>The initiative is expected to limit the negative effects of strong network effects accompanied by significant imbalances in commercial relationships identified in the digital economy. If not addressed, issues related to the economic power of large online platforms benefiting from strong network effects and acting as gatekeepers would continue strengthening platforms' already strong gatekeeper position and risks keeping innovative market operators from expanding or entering the market in the first place.</p> <p>The possible (positive) impact of the initiative on innovation and entrepreneurship is particularly relevant in this regard. EU action in this field could contribute to the creation of level playing field for platforms of all sizes.</p>
<p>Likely social impacts</p> <p>By ensuring the contestability of the online platforms ecosystem, the proposal would safeguard long-term consumer and business users' interests and consumer welfare.</p>
<p>Likely environmental impacts</p> <p>The possible impact of the policy options on the environment will be assessed in the Impact Assessment. Given the variety of sectors where online platforms are active (e.g. tourism activities, sales of goods, transport), the environmental implications are also likely to be very diverse.</p>
<p>Likely impacts on fundamental rights</p> <p>The impact assessment for any initiative addressing the market power of large online platforms with gatekeeping role would need to closely assess possible impacts on the fundamental right to freely conduct a business, as protected by Article 16 of the Charter of Fundamental Rights of the European Union (the 'Charter'). The option retained should not go beyond what is necessary and proportionate to restore the effective functioning of the markets in question, to achieve an optimal balance between the possibly conflicting rights to freely conduct a business enjoyed by large online platforms with gatekeeping role on the one hand, and their users on the other. Furthermore, the impact assessment for any initiative on economic power of large online platforms with gatekeeping role should also duly take into account the impact on the right to protection of personal data (Article 8 of the Charter) and the right to privacy (Article 7 of the Charter). Finally, the options will also have to take into account the rights of defence and the right to judicial review of the companies subject to individual measures.</p>
<p>Likely impacts on simplification and/or administrative burden</p> <p>The impact assessment will have due regard for the comparative impact/benefit of the various policy options outlined above, in terms of administrative burden for companies and cost of oversight for regulatory authorities.</p>
<p style="text-align: center;">D. Data Collection and Better Regulation Instruments</p>
<p>Impact assessment</p> <p>An impact assessment is being prepared to support the preparation of this initiative and to inform the Commission's decision.</p>
<p>Data collection</p> <p>This initiative builds on evidence gathered through more than four years of analysis conducted within the European Commission on the economic environment of online platforms. The 2016 public consultation on platforms, the evidence-base underpinning the Platform-to-Business Regulation as well as first experiences with the implementation of the latter Regulation all contribute to the analysis underpinning the present initiative. The Commission will moreover ensure that it takes into account all relevant external data that is available, including dozens of recent reports on platform power by regulators as well as by academic experts.</p> <p>In addition, the Commission is procuring a dedicated, independent study supporting the Impact Assessment. The Commission's Joint Research Centre will in parallel conduct economic analyses of the various policy options explored in this Impact Assessment under its continuous cooperation with the Commission on the topic of online platforms.</p> <p>Finally, the Observatory on the Online Platform Economy has for the past year been analysing the existing research on the topic, and is continuing to carry out its own research in this field with the help of an external study supporting the work of the Observatory.</p>
<p>Consultation strategy</p> <p>The Commission intends to launch an online public consultation on a broad range of online platforms related issues, including the economic power of large online platforms, with gatekeeping role. The objective of the public consultation is to gather stakeholder's views on existing and emerging issues concerning the economic power of large online platform, with gatekeeping role, gather evidence and data underpinning the problems identified and collected informed view of the possible policy options and their impact.</p> <p>In addition, the publication of the Observatory expert group interim reports on data practices, differentiated treatment and measurement of online platform economy is envisaged for the second quarter of 2020, which should be followed by a peer review and commenting period.</p>

At the same time, a structured dialogue with Member States is on-going, notably through the e-Commerce expert group (established by Commission Decision 2005/752/EC).

Will an Implementation plan be established?

Pending further analysis of the options and their complexity in the impact assessment, an implementation plan could be developed.