



29. June 2020

**Inception Impact Assessment for Digital Services Act package: *Ex ante* regulatory instrument for large online platforms with significant network effects acting as gate-keepers**

The Danish Government appreciates the opportunity to comment on the Commission's Inception Impact Assessment on an *Ex ante* regulatory instrument for large online platforms with significant network effects acting as gatekeepers.

The Danish Government welcomes the Commission's decision to launch an impact assessment and a thorough public hearing. Since these are complicated topics, it is important to understand, in as much detail as possible, the problems that the proposed instruments aim to address.

In general, the Danish Government supports the Commission's focus on avoiding regulatory fragmentation and agree that there is a need for action to safeguard an effectively functioning digital single market where companies can compete and flourish. It is important to avoid a situation with multiple national initiatives aiming to address the powers of the same large platforms. The Danish Government believes that a European approach will be the most efficient way to ensure legal certainty and predictability for companies across Europe and will create the greatest benefits for European companies and consumers.

Overall, the Danish Government supports the consideration of *both* a revised horizontal framework *and* the consideration of addressing the specific issues related to the extremely large digital platforms. It is important to ensure that the large number of smaller platforms are not regulated (excessively) since this may hinder their ability to compete.

However, the Danish Government highlights the need to prevent overlaps between traditional competition enforcement, any *ex ante* regulatory framework and the New Competition Tool. This seems especially important if the *ex ante* regulatory framework is set to include a possibility to adopt tailor-made remedies on a case-by-case basis (option 3b). If not, there is a risk that some companies will face multiple regulatory regimes that has the same aim of securing a well-functioning internal market. This may limit the incentives to invest and innovate.

Therefore, the Commission should make it clear in the impact assessment *if* there are overlaps and *where* these overlaps exist. The Commission should also put forward suggestions on how to solve those overlaps and be

willing to abandon one or more of the initiatives. In this regard, the Danish Government highlights the need for careful coordination between the impact assessments led by DG GROW, DG CNECT and DG COMP.

### **Policy option 1 and 2**

When considering to revise the horizontal framework set in the Platform-to-Business Regulation (policy option 1), the Danish Government encourages the Commission to include all the experience and knowledge generated in the member states from the enforcement of the rules that enter into force in July. Some of the issues relating to e.g. the imbalances in the bargaining power between large online platforms on the one hand and their users on the other may be addressed by the Platform-to-Business Regulation.

At the same time, the Danish Government welcomes a continued focus on the trading practices by digital platforms and urges the Commission to consider e.g. the need to grant companies the rights to data generated by their activities on digital platforms. While digital platforms open up many new markets and opportunities for European companies, the trading practices of platforms or the inability to get access to data can hinder the companies' ability to grow.

In terms of adopting a horizontal framework empowering regulators to collect information from large online platforms (policy option 2), the Danish Government encourages the Commission to make it clear how these powers differ from what some national competition authorities have available when enforcing the Platform-to-Business regulation.

### **Policy option 3**

The Danish Government supports the need for addressing the powers of large digital platforms acting as gatekeepers, since these platforms play a major role in determining the functionality of the Single Market and the success of European companies.

Establishing a European ex ante regulatory framework has the benefit of an immediate effect, since the framework would replace some of the long and resource-heavy competition cases. It would also allow for regulation of platforms that may not be considered dominant under competition law. At the same time, it allows for a targeted intervention against the biggest platforms that consumers and companies rely on - without imposing burdensome obligations on smaller platforms thus making it harder for them to compete.

However, the Danish Government wishes to highlight that such ex ante framework may not be as flexible as the competition law making it difficult

to reflect new developments. Furthermore, an ex ante regulatory framework will probably have to be drafted in quite some detail in order to address the specific problems identified, especially if a blacklist is created. This may be difficult to achieve when the framework targets different kinds of platforms and needs to be able to stay relevant over time.

The creation of a black list may create legal certainty and make the enforcement more efficient. However, the introduction of a list of prohibited practices would also represent a substantial shift in the current competition law framework, which characterized by the lack of any “per se” rule. Even in case of practices perceived as anti-competitive, undertakings have always had the possibility to rebut the presumption of illegality. The Danish Government thus encourages the Commission to consider whether the same possibility will be accorded also in the case of the proposed ex ante regulation. We further wish to underline that such new legislative intervention may lead to a situation where the framework is not future-proof and may create an incentive for circumvention.

The Danish Government encourages the Commission to consider these arguments carefully and look forward to additional information from the Commission.

In addition, the Danish Government encourages the Commission to ensure that it is as easy as possible for companies to assess whether they will be subject to the new regulatory framework. This means that it must be easy for companies to determine whether they can be labeled as gatekeepers. One important step in this regard is to ensure that the gatekeeper platforms are identified based on a set of clear criteria.

At the same time, the Danish Government encourages the Commission to ensure that companies can foresee which type of regulatory requirements they will be subject to – now and in the future. If not, there is a risk of damaging the incentives to invest and innovate.

We hope these comments will be useful for your further work. The Danish Ministry of Industry, Business and Financial Affairs would be at your disposal to further elaboration or any follow-up questions you may have.