TIM Position Paper on the Digital Services Act and New Competition Tool

European Commission Consultations – 8 September 2020

TIM welcomes the EU Commission's consultations on the Digital Services Act (DSA) and the New Competition Tool (NCT), which are both aimed at introducing rules to address the challenges brought about by the large digital players.

Digital business models have become complex and multi-layered, especially due to the critical role of the big online platforms governing the relationship between the different parties in the whole ecosystem. Large gatekeepers hold the key to the online user experience and they are the strategic partners for all actors along the value chain who want to participate in economic and social activities. Gatekeeper platforms should consequently exert their essential role in a manner that promotes fairness, competition and innovation for all their users, competitors and partners.

Due to the global dimension of the issues at stake, TIM believes that an enforcement of the new rules at EU level would be the most appropriate way to be effective and reach a harmonized approach.

Digital Services Act

In order to make digital market contestable (and contested), TIM deems it a priority to introduce an ex-ante regulatory framework. This framework should include asymmetric rules targeted only at large gatekeepers, clearly identified according to specific and cumulative thresholds (e.g. number of subscribers of the relevant platform, presence in several products and geographical markets), in order not to prevent the emergence and development of start-ups and smaller players.

Large gatekeepers in the scope of the new regulatory framework should refrain from carrying out certain behaviours (blacklist) and, at the same time, perform others in order to ensure a fair competition (white list).

We propose the following **blacklist** of activities/behaviours that large online digital gatekeepers should be forbidden to carry out:

- Self-preferencing;
- Leveraging;
- Use of unfair contractual terms or unfair practices;
- Prohibiting business users from using a competing online intermediation service.

Such black list should be complemented by the following white **list**:

- Data Access, interoperability and portability:
  - volunteered data (directly provided by the user)
  - observed data (e.g. telematics, observed online usage behaviour)
- Access and interoperability of certain key facilities (software/hardware,) which are critical to compete;
- Transparency and non-discrimination;

- Prohibition of bundling/tying with 'must have' services;
- Prohibition of unfair terms and conditions of a contract (e.g. predatory pricing, non-price terms, restrictions on use, exclusivity clauses etc....);
- Separation (accounting and functional);
- Responsibility for possible illegal activities (such as selling online illegal/harmful goods e.g. dangerous products, counterfeit goods, prohibited and restricted goods, protected wildlife, pet, trafficking, illegal medicine or misleading offerings e.g. on food supplements);
- Responsibility for activities that can cause harm to users online (which are not necessarily illegal) such as the spread of online disinformation or harmful content to minors.

These lists are not to be considered as static, but can be adapted according to the specific challenges posed by the platforms in specific markets.

In addition, we would like to point out some relevant aspects of the review of the 2003 eCommerce Directive, which will be part of the DSA. In our opinion, the review should preserve the fundamental principles of the eCommerce Directive such as the ones of no liability described in articles 12, 13 and in Artcle14 and of no general obligation to monitor described in Artcle15.

Nonetheless, due to the technical, market and judicial developments, an update to the legal framework may be needed on the responsibilities of some hosting services as new business models have emerged. We believe the provisions of Artcle14 of the eCommerce Directive should be amended consistently with the jurisprudence of the CJEU, which introduced the crucial distinction between active and passive hosting service providers. While the liability exemption of Artcle14 is still needed for passive hosting providers, it is essential to redefine the categorization and the responsibilities of online services that play an "active" role in the dissemination of content online.

New Competition Tool

Articles 101 and 102 of the Treaty on the Functioning of the European Union are in principle suitable to tackle anticompetitive behaviours. However, their enforcement should be improved to better reflect the dynamics of the digital markets, both in terms of market definition and in terms of speed of intervention. In-fact, according to TIM, competition law alone has proven over the years to be insufficient to provide effective rapid solutions to behavioural problems arising from market power in digital markets.

Therefore, TIM believes that a revised competition framework, addressing the need for a quick intervention on fast-moving markets would be necessary. As such the following measures should be considered:

- adapting the horizontal and vertical guidelines which would allow European firms to gain scale through cooperation;
- correctly revising the market definition notice to take into account the characteristics of the digital market (as per the ongoing public consultation);
- reviewing the European Merger Regulation to account for pre-emptive mergers.

On top of that, and as a second priority, the introduction of a NCT may be useful to tackle "residual" competition risks caused by gatekeepers operating at EU level (not just purely national players) and limited to digital markets. The NCT should be in any case structured as a complement to the DSA in order to avoid an overlapping of rules and a situation of overenforcement.

EU Supervision and Enforcement

Supervision and enforcement of both the DSA and NCT should be undertaken at EU level, since large online platforms operate in global ecosystems and competition concerns, arising in digital markets, have by definition an important cross-border dimension.

The EU body should be primarily responsible for monitoring markets and enforcing dedicated rules for major digital gatekeepers. This body (whether new or existent) should be vested with adequate resources and investigative powers, as well as with oversight and monitoring powers that would enable it to collect relevant information from digital firms, to fully appreciate the competitive dynamics of digital markets.