

## **The Malta Communications Authority's rationale for its responses to the European Commission's consultations on the Digital Services Act and the New Competition Tool**

The Malta Communications Authority (MCA) welcomes the European Commission's consultation on the Digital Services Act package launched last June which aims at (i) proposing new and revised rules to deepen the single market for digital services and (ii) having *ex-ante* rules to ensure that markets remain fair and contestable for stakeholders. It also welcomes the Commission's consultation about a new competition tool, which if implemented, could allow it to impose behavioural and structural remedies on online platforms and possibly other sectors. For the of this note and the formal submission to the consultation, the MCA is focusing on digital platforms rather than just online platforms. In this case, digital platforms would also include platforms that do not strictly provide online services, but which may still control and influence access to them (e.g. operating systems).

The MCA recognizes the economic benefits of digital platforms, however, it is also aware that the digital environment may indeed present scenarios where large digital platforms act as gatekeepers, given the structural nature of markets where these platforms are present and their ability to implement potentially unfair contractual terms and unfair practices at the expense of consumers and businesses.

The MCA therefore acknowledges the perceived competition problems attributed to the digital environment. To this effect, the MCA would be amenable to a possible new EU ex-ante regulatory framework for digital platforms, aimed to address behavioural and structural concerns that could potentially be raised by large digital platforms in the digital sphere.

The MCA considers that the regulatory oversight of digital and online platforms should mirror the ex-ante regulatory oversight that is currently in place for telecoms. This means that an ex-ante regulatory framework for large digital platforms and the corresponding rationale for regulatory intervention should rest on the well-understood concept of dominance. The dominance concept is underscored by the requirement on National Regulatory Authorities (NRAs) to gather robust evidence of potential market failure before actually arriving at a decision to implement ex-ante regulatory measures.

The dominance test needs to be well-defined, carried out within the parameters of quantifiable criteria of market power and supplemented with key indicators on aspects such as economies of scale and scope, data advantages, network effects etc. These quantifiable criteria could then also set the benchmark for the implementation of a general streamlined economic and competition model that can apply across different national or specific circumstances. Such an approach would guarantee a clearly set threshold of intervention that offers certainty and clarity to market players and the industry in general.

The MCA is also of the opinion that a proposal for an ex-ante regulatory framework should make way for both economic and societal objectives, namely competition enhancement, innovation, protection of end-users' rights, and security in an open digital environment.

As for the regulatory intervention and the remedies per se, the MCA acknowledges that potentially the best option would entail a combination of principle-based obligations / prohibitions and the implementation of data-driven regulatory tools. This is subject to having the necessary safeguards in place to ensure that regulation is only proportionally implemented where actually required.

On the institutional design the MCA sees the validity of having a robust coordinative effort at EU level to address concerns raised by large digital platforms. In any case, EU Member States should always retain discretionary power to designate the competent national regulatory body to deal with competition shortcomings in the digital environment.

The MCA considers that a robust ex-ante regulatory framework would go a long way in addressing most structural competition issues. So, it would be better that such a framework is sufficiently robust to address all structural competition issues, rather than setting a New Competition Tool that risks overlapping with the ex-ante regulatory framework and other regulatory tools. However, the MCA does acknowledge that the New Competition Tool, if implemented by competent regulatory authorities, could potentially serve as a safety net in exceptional cases or what may be referred to as regulatory blind spots. In such case(s), utmost attention would need to be paid to potential regulatory overlaps, in order to avoid legal uncertainty and potential negative implications for current and future investment. In this regard, legal certainty could be achieved via the adherence to the *lex specialis* principle, whereby the ex-ante regulatory framework for any sector remains the applicable legislation to address competition and societal aspects, whilst any form of New Competition Tool would serve as a complementary tool aimed to address exceptional issues and outcomes that classify as 'blind spots' under sectorial regulation.