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**European Commission**

**DG Connect**

E-Commerce and Platforms (Unit F.2)

att. Mr. Prabhat Agarwal (head of unit)

[cnect-f2@ec.europa.eu](mailto:cnect-f2@ec.europa.eu)

8 December 2020

Dear Mr Agarwal

**Re:** Digital Services Act package – Public Consultation of 2 June 2020

1. We very much welcome the broad range of initiatives and numerous public consultations the Commission has launched in order to contribute to “Shaping Europe’s Digital Future”. Unfortunately, the depth and breadth of the work undertaken by the Commission, including its work on the digital finance strategy, the retail payments strategy, the EU markets’ operational resilience and, last but not least, on markets for crypto-assets, meant that we were unable to respond to the consultation on its Digital Services Act package and on the related earlier Inception Impact Assessments within the set deadlines. We hope that it is still possible for you to take into consideration the following high-level comments on these very important issues.

**Introduction**

2. The EMA is the EU trade body of FinTech and BigTech firms engaging in the provision of alternative payment services and the issuance of electronic money. Our members include leading payments and e-commerce businesses providing online/mobile payments, card-

based products, electronic vouchers, virtual currency exchanges, electronic marketplaces, merchant acquiring services and a range of other innovative payment services. Most members operate across the European Union (“EU”) and globally on a cross border basis. A list of current EMA members is provided at the end of this document.

3. Retail financial services, and more specifically efficient and cost-effective electronic payment services offered by our members, have been, and will continue to be, vital for the rapid growth of digital markets and online platforms for digital and also non-digital products and services. The digitalisation of our economy and society does presuppose effective and reliable electronic online and mobile payment functionalities.
4. We, therefore, very much **welcome** the EC’s initiative to develop as part of the “**Shaping of Europe’s Digital Future**” a much-enhanced **regulatory framework for electronic commerce** and more specifically **for the online markets and platforms for digital services**. The EC’s consultations on the “Digital Services Act package”, and, before that, on the related Inception Impact Assessments on an “Ex ante regulatory instrument for large online platforms ...”, on a “New Competition Tool” and on “... deepening the Internal Market and clarifying responsibilities for digital services” are major steps towards an EU regulatory regime assisting the thriving of a truly internal market for digital services needed to keep pace with the rapid digitalisation of the European and global economies and societies.
5. The EMA fully concurs with the Commission’s objective of developing as the **first pillar** of its Digital Services Act package **clear rules framing the responsibilities of online platforms and information service providers** in order to address the risks consumers are facing and to protect their rights. We agree that a modern system of cooperation for the supervision of platforms and the effective enforcement of their obligations is needed. We would highlight, however, that **we do not see the need to include entities that are already subject to an existing robust regulatory framework within the scope of the new regime, for example Credit Institutions, Payment Institutions and Electronic Money Issuers**. The existing EU regulatory and supervisory system for payment and electronic money services (EMD2, PSD2, CRD, 4MLD etc.), the applicable extensive and demanding sectoral regulation, the significant body of self-regulation (e.g. MasterCard’s Business Risk Assessment, Visa’s Global Brand Protection Program), and the ongoing revision and strengthening of this sectoral regime is sufficient to address the current and any upcoming new challenges.
6. Whilst this first pillar is very important, our following comments are focussed on the **second pillar** consisting of **ex ante rules** to ensure that markets characterised by large platforms with significant network effects remain fair and contestable for innovators, businesses, and new market entrants. We fully concur with the Commission that the emergence of these large online platforms and their gatekeeper role require a revision and strengthening of the EU competition regime. However, before commenting more

specifically on the Commission's proposals we wish to highlight the potentially beneficial role of enhanced interoperability, data portability and transparency in improving the competitive landscape.

### **Interoperability, data portability and transparency**

7. EU regulatory and non-regulatory efforts to develop and implement an **open banking** and, going forward, an **open finance** ecosystem have increasingly provided **evidence that interoperability and data portability** can and should be **key elements** in the policy mix when aiming at maintaining a highly competitive market environment. We are convinced the same approach should apply for online markets for digital services, including in particular large online platforms. The ability for consumers to have full control of their personal data, the protected portability of data and the resulting freedom and ease to switch between service providers, and online markets and platforms are instrumental for fair and healthy competition in these markets. Data portability between platforms should not be limited to personal data in a narrow sense but should extend to stored, potentially large amounts of data that consumers may wish to transfer from one cloud service or social media provider to another. The same should be possible for content-related data (e.g. lists of favourite movies or music) consumers may want to migrate from one entertainment platform to another.
8. **Standard-setting for interoperability and data portability** should, however, not be restrictive to the point of undermining product innovation and choice based upon differentiation of product and service features to the benefit of consumers. To that end, any such standardisation should be left as much as possible to **voluntary industry initiatives**.
9. Similarly, **transparency** can contribute significantly to informed consumer choice and hence **market discipline**, so is another important aspect and driver of a well-functioning competitive environment. Together with interoperability and data portability it strengthens the role consumers are able to play in driving and enhancing competition between providers of digital services. At the same time, as in other areas of mandatory disclosure, any transparency standards must allow for **proprietary information** not to be disclosed.

### **Ex Ante Regulatory Instruments - Revision of the EU Competition Regime**

10. We fully concur with the Commission that the increase in importance of digital markets characterised by large online platforms operating as gatekeepers with potentially significant economic power requires a revision of the EU competition regime. Competition

regulation and administrative powers and resources need to be strengthened in order to ensure that digital markets remain fair and contestable for innovators, businesses, and new market entrants.

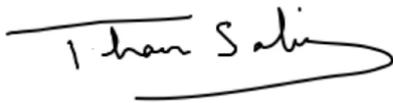
11. However, in so doing, we would encourage the Commission to carefully consider how to **strike the right balance**. The rise of online platforms is due to a large extent to their innovative potential and the enormous benefits generated for consumers due to the network effects that in some cases have generated a considerable concentration of economic power and an effective gatekeeper role. Any aspect of the revised regime should be assessed against whether or not it serves the ultimate objective which, as we fully agree, 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”.
12. Accordingly, the revision of the current regime should **combine existing instruments** with a proven track record, **ex ante regulatory instruments** and, where needed, other **new competition tools** in such a way as to leave as much room as possible for detailed, case-by-case and fact-based assessments of potentially problematic concentrations of economic power. Such case-by-case and fact-based assessments are best suited to inform regulatory discretion in the choice of the most suitable antitrust instrument for remedial action. Regarding in particular ex ante regulatory instruments and the related policy options discussed in the Commission’s Inception Impact Assessment we would welcome a combination of a **revision of the horizontal framework strengthening regulators’ powers** to collect information and put in place ongoing monitoring of online platforms with the so-called “**second pillar**” of “**tailor-made remedies addressed to large online platforms ... on a case-by-case basis** where necessary and justified”. In our view this policy mix would be best suited not least in order to respond to the ongoing rapid development of digital markets and online platforms. That in turn presupposes introducing **future-proof**, that is robust, but not rigid **regulatory concepts**, for example of “online platform”, and “gatekeeper”. These concepts would need to be sufficiently open and principles-based to allow for the development of proportionate and effective regulatory responses in a digital market environment subject for the foreseeable future to constant change.
13. At the same time the tool kit of instruments the revised regime will offer should be **subject to a strict proportionality test**. Restrictive regulatory measures including measures applicable at the horizontal or sectoral level should only be implemented if the same or an equivalent remedial effect cannot be achieved by other more targeted measures such as administrative powers – such as financial sanctions - delegated to competition authorities.
14. In addition, we would strongly encourage the Commission to explore the **potential for strengthening the ability of competition authorities to address anti-competitive behaviour by introducing organisational and procedural changes** in order to allow

for a more swift and effective use of existing and newly introduced tools. Building up resources and expertise combined with the targeted use of a broad range of **interim measures** may well contribute significantly to less intrusive but more effective and, hence, truly proportionate market interventions and outcomes.

#### Other issues

15. Among the many other important issues covered in the Commission's consultation we would highlight in particular the remaining uncertainties surrounding **smart contracts**, their validity, and the applicable law and jurisdiction. In this regard we believe that binding EU regulation covering all key aspects of smart contracts is preferable to mutual recognition of national legislation.

Yours sincerely,



Dr Thaer Sabri  
Chief Executive Officer  
Electronic Money Association

## List of EMA members as of December 2020

[AAVE LIMITED](#)  
[Account Technologies](#)  
[Airbnb Inc](#)  
[Airwallex \(UK\) Limited](#)  
[Allegro Group](#)  
[American Express](#)  
[Azimo Limited](#)  
[Bitstamp](#)  
[BlaBla Connect UK Ltd](#)  
[Blackhawk Network Ltd](#)  
[Boku Inc](#)  
[CashFlows](#)  
[Ceevo](#)  
[Circle](#)  
[Citadel Commerce UK Ltd](#)  
[Coinbase](#)  
[Contis](#)  
[Corner Banca SA](#)  
[Crypto.com](#)  
[Curve](#)  
[eBay Sarl](#)  
[ECOMMPAY Limited](#)  
[Em@ney Plc](#)  
[ePayments Systems Limited](#)  
[Euronet Worldwide Inc](#)  
[Facebook Payments International Ltd](#)  
[Financial House Limited](#)  
[First Rate Exchange Services](#)  
[FIS](#)  
[Flex-e-card](#)  
[Flywire](#)  
[Gemini](#)  
[Globepay Limited](#)  
[GoCardless Ltd](#)  
[Google Payment Ltd](#)  
[IDT Financial Services Limited](#)  
[Imagor SA](#)  
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[Moneyhub Financial Technology Ltd](#)  
[MuchBetter](#)  
[myPOS Europe Limited](#)  
[Nvayo Limited](#)  
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[OKTO](#)  
[One Money Mail Ltd](#)  
[OpenPayd](#)  
[Optal](#)  
[Own.Solutions](#)  
[Park Card Services Limited](#)  
[Paydoo Payments UAB](#)  
[Paymentsense Limited](#)  
[Payoneer](#)  
[PayPal Europe Ltd](#)  
[Paysafe Group](#)  
[Plaid](#)  
[PPRO Financial Ltd](#)  
[PPS](#)  
[Remitly](#)  
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