



The proposal to create a 'new competition tool'

Introduction

The Commission has proposed the introduction of a 'new competition tool' (NCT) to complement both existing competition law and proposed new *ex ante* regulation in the digital sector. The proposed NCT would enable the Commission to introduce significant market interventions, including breaking up firms, without a finding of abuse of dominance or other breach of competition law.

Sky strongly opposes the introduction of a NCT that applies to all sectors of the economy. Without prejudice to this position, if a NCT is introduced in any form, it should be the minimum required to address clearly defined problems in digital markets and any decisions taken under this regime must be subject to strong checks and balances given the potentially far reaching interventions that it would enable.

Three core principles

In responding to this consultation, as Europe's leading entertainment company and a major investor and employer in the European Union, Sky is guided by three key principles: (i) legal certainty; (ii) the need for clear identification of problems with proportionate regulation targeted at those problems; and (iii) free trade. These principles are deeply enshrined in the Union's legal system and in the case of free trade, fundamental to its existence. They are vital in ensuring that the conditions are right for investment and innovation and in ensuring the competitiveness of the European market.

With these core principles in mind, Sky would urge the Commission to proceed cautiously before proposing new regulation. The Commission must be confident that there is a clear and obvious gap within its existing toolkit and any new *ex ante* rules that are introduced and clear as to the specific problems that cannot be addressed with greater use of those powers. If, at the end of these consultations the Commission is satisfied that this threshold (which is a high one) is passed, then it must proceed cautiously in the design of any new NCT, to ensure it is the *minimum* required to address clearly identified harms. Failure to do so risks significant unintended consequences, chilling investment and undermining the significant achievements made to date via the single market.

Sky's position

Sky strongly opposes the introduction of a NCT applicable across all sectors of the economy.

The proposal to develop a 'new competition tool' has emerged as part of the debate about the adequacy of existing competition law, and associated processes, to address issues associated with digital markets. Indeed, the proposal forms part of the Commission's package in relation to a Digital Services Act, and the inception impact assessment explicitly refers to its origin in relation to the broad discussion about whether competition law is fit for purpose in the digital age. The proposal that it should apply to all sectors of the economy, rather than in relation to digital services, is an extremely significant extension of that original idea, and is not justified.

As noted above, the impact assessment refers to the fact that there has been extensive discussion, and numerous in-depth inquiries, across the world, on the subject of the adequacy of existing competition law and processes in relation to digital products and services. There has been no such discussion or debate in relation to the adequacy of existing competition law and processes in more traditional markets. We consider that a proper debate and discussion of this issue is a critical pre-requisite for a proposal for a NCT that applies to all sectors of the economy.

The current justifications put forward for a broad NCT do not withstand scrutiny. The assertion that all sectors of the economy are becoming digitised, and therefore arguments in support of the introduction of the NCT in digital sectors apply equally, does not stand up. Equally, propositions such as the NCT being required to deal with undesirable market structures, or behaviour of non-dominant firms, in all markets across the economy, lack any justification and cannot form a proper basis for a wide-ranging NCT.

If a NCT is required at all, to fill clearly identified gaps not currently served by Articles 101 and 102, sector inquiries, or, importantly, to be served by any new *ex ante* rules, then Sky considers that a more targeted and proportionate form of intervention, in digital markets only, is appropriate.

Without prejudice to this position, if a NCT is introduced, in any form, it would require fundamental changes to the current approach to checks and balances in the area of European competition policy. A NCT of the type currently proposed would give the European Commission enormous ability to intervene in markets in ways that have potentially far reaching consequences – for example, by forcing companies to make major changes to their businesses, including requiring divestments – without any finding of wrong-doing or anticompetitive behaviour.

One key check that would need to be reconsidered is the appeal process. This would become of critical importance in the presence of a NCT as currently proposed.

In particular, appeals of competition decisions in Europe currently take too long. For example, the judgment overturning the European Commission's decision in Three/O2 happened some 5 years after the deal was announced and long after it could be resurrected. Given the potential significant economic damage that could result from inappropriate interventions in markets under the NCT, appeal processes would need to be much quicker.

Sky considers that there would be significant merit in consideration being given to the establishment of a specialist appeal tribunal, similar to the UK's Competition Appeal Tribunal, to hear full merit-based appeals under the NCT (and potentially other competition cases) both in order to bring specialist expertise to bear, and to ensure timely appeals.

Ideally, there would also be some separation as between the referring body, which identifies the relevant market to be investigated, and the decision-making body that decides if there is

an adverse effect on competition in that market and whether any remedies are required, to ensure a 'fresh pair of eyes'. Potentially this could be achieved with the establishment of a separate investigatory body, separate from the decision-making authority.

Sky

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