ICC replies to questionnaire for EC consultation on the need for a new competition tool

Questions 6 to 42

8 September 2020

6. Please indicate to what extent each of the following market features/elements can be a source or part of the reasons for a structural competition problem in a given market in your view. Please, give examples of sectors/markets or scenarios you are aware of in the follow-up question.

	No knowledge/No experience	No importance/No relevance	Somewhat important	Important	Very important
A - One or few large players on the market (i.e. concentrated market)	○	○	●	○	○
B - High degree of vertical integration ('Vertical integration' relates to scenarios where the same company owns activities at upstream and downstream levels of the supply chain)	○	○	●	○	○
C - High start-up costs (i.e. non-recurring costs associated with setting up a business)	○	○	●	○	○
D - High fixed operating costs (i.e. costs that do not change with an increase or decrease in the amount of goods or services produced or sold)	○	○	●	○	○
E - Regulatory barriers ('Regulatory barriers' refer to regulatory rules that make market entry or expansion more cumbersome or extensively expensive)	○	○	●	○	○
F - Importance of patents or copyrights that may prevent entry	○	○	●	○	○
G - Information asymmetry on the customer side ('Information asymmetry' occurs when customers (consumers or businesses) in an economic transaction possess substantially less knowledge than the other party so that they cannot make informed decisions)	○	○	●	○	○

H - High customer switching costs ('Switching costs' are one-time expenses a consumer or business incurs or the inconvenience it experiences in order to switch over from one product to another or from one service provider to another)	○	○	●	○	○
I - Lack of access to a given input/asset which is necessary to compete on the market (e.g. access to data)	○	○	●	○	○
J - Extreme economies of scale and scope ('Extreme economies of scale' occur when the cost of producing a product or service decreases as the volume of output (i.e. the scale of production) increases. For instance serving an additional consumer on a platform comes at practically zero cost. 'Economies of scope' occur when the production of one good or the provision of a service reduces the cost of producing another related good or service)	○	○	●	○	○
K - Strong direct network effects (Where network effects are present, the value of a service increases according to the number of others using it. For instance in case of a social network, a greater number of users increases the value of the network for each user. The more persons are on a given social network, the more persons will join it. The same applies e.g. to phone networks)	○	○	●	○	○
L - Strong indirect network effects (Indirect network effects, also known as cross-side effects, typically occur in case of platforms which link at least two user groups and where the value of a good or service for a user of one group increases according to the number of users of the other group. For instance, the more sellers offer goods	○	○	●	○	○

M - Customers typically use one platform (i.e. they predominantly single-home) and cannot easily switch	○	○	●	○	○
N - The platform owner is competing with the business users on the platform (so-called dual role situations, for instance the owner of the e-commerce platform that itself sells on the platform)	○	○	●	○	○
O - Significant financial strength	○	○	●	○	○
P - Zero-pricing markets ('Zero-price markets' refer to markets in which companies offer their goods/services such as content, software, search functions, social media platforms, mobile applications, travel booking, navigation and mapping systems to consumers at a zero price and monetise via other means, typically via advertising (i.e. consumers pay with their time and attention)	○	○	●	○	○
Q - Data dependency ('Data dependency' refers to scenarios where the operation of companies are largely based on big datasets)	○	○	●	○	○
R - Use of pricing algorithms ('Pricing algorithms' are automated tools that allow very frequent changes to prices and other terms, taking into account all or most competing offers on the market.)	○	○	●	○	○

6.1. Can you think of any other market features/elements that could be a source or part of the reasons for a structural 6.1. Can you think of any other market features/elements that could be a source or part of the reasons for a structural competition problem in a given market?

- ○ **Yes**
- ◉ No

7. Please indicate <u>what market scenarios may in your view qualify as structural competition problems</u> and rate them according to their importance.

	No knowledge/No experience	No importance/No relevance	Somewhat important	Important	Very important
*A (not necessarily dominant) company with market power in a core market extends that market power to related markets.	○	●	○	○	○
*Anti-competitive monopolisation, where one market player may rapidly acquire market shares due to its capacity to put competitors at a disadvantage in the market unfairly.	○	○	○	●	○
*Highly concentrated markets where only one or few players are present, which allows to align their market behaviour.	○	○	●	○	○
*The widespread use of algorithmic pricing that allows easily to align prices.	○	○	●	○	○
*Gatekeeper scenarios: situations where customers typically predominantly use one service provider/platform (single-home) and therefore the market dynamics are only determined by the gatekeeper.	○	○	●	○	○
*Tipping (or 'winner takes most') markets ('Tipping markets' refer e.g. to markets where the number of customers is a key element for business success: if a firm reaches a critical threshold of customers, it gets a disproportionate advantage in capturing remaining customers. Therefore, due to certain characteristics of that market, only one or very few companies will remain on those markets	○	○	●	○	○

7.1. Please explain your answers above and give examples if possible.

After a careful and attentive analysis of the text that precedes point C of the Questionnaire, regarding "structural competition problems", we must point that "the questions in this section aim to gather information on the types of market characteristics that may result in structural competition problems, and on gaps in Articles 101 and 102 of the EU Treaty, in order to understand the most appropriate scope for a new competition tool". Therefore, the answers provided by ICC, as well as this explanation, *a priori*, are entirely based in the predisposition that there is not a need for a new competition tool. Briefly explaining the ICC position which is of the most importance to understanding the responses given, we consider that due to the existing regulatory framework based on Articles 101 and 102 TFEU and its application through Regulation 1/2003, the existing "toolbox" has demonstrated itself to be flexible and malleable enough to adapt to a digitalized driven economy, thus, as revealed by several court-cases the existing competition regulatory framework is sufficient and adequate.

Proceeding to explain the answers presented:

1. This situation does not constitute an inherent competition problem and may be, in fact, an essential part of the competitive process. If an enterprise has transferable assets, skills and know-how's, utilising those for entering a new area of activity is indeed a contribution for better outcomes regarding the users. This can be considered a normal activity concerning cost reduction and a way to increase the

possibilities to successfully enter a new market. This situation could only be problematic, justifying an intervention and perhaps the imposition of a remedy or a commitment by the Commission after a detailed assessment concludes that this practices were of an anti-competitive leveraging nature, situations that already fall into the existing regulatory framework (if an undertaking is dominant). Only in these cases an intervention can be considered proportionate and fair. Additionally, we must consider the dubious essence and criteria utilised to describe a "not necessarily dominant company" with such extended market power. Case AT. 39740 Google Search (Shopping).

2. Unilateral anti-competitive behaviours by a dominant company already fall within the scope of Article 102 TFEU. There is a need for redoubled attention in distinguished practices that are innovative, and attribute determined positions to companies due to its own merit and those that "put competitors at a disadvantage in the market unfairly" (emphasis added). Having that said, Article 17 of Regulation 1/2003 permits sector inquires that allow thorough processes that ultimately permit to distinguish those practices and, in case of finding an infringement, the normal procedures adopted.

3. and 4. The two situations appointed appear based on what is called the algorithmic control in oligopolistic markets. This theory posits that the increased availability of information that results from digitalisation enhances the risk of price hegemony based on tacit collusions, particularly in oligopolistic markets. Nonetheless, we must acknowledge there is an important distinction between a highly informed market where price differences between competitors are very small because competition has made such marginal differences significant and a market involving tacit agreements among competitors to restrict competition. Both situations can yield a market where competitors' prices tend to cluster at particular points, but one situation is highly competitive and the market highly responsive to new information, while the other is resistant to new information and static. This problem yields readily to the traditional tools for competition analysis. First, there is a need to identify if this behaviors fall within the prohibition of cartels (which is already regulated) or if it consists in parallel behaviours resulting from collaboration of algorithms not involving market behaviour that would restrict competition and, therefore, not being considered prohibited. In any case, it is yet to be demonstrated that the existing regulation that enforces competition law is inadequate, inclusively sector inquires can provide a lot of experience and the needed expertise to develop a legally reliable use of algorithms, instead of considering other stricter measures that could have a prejudicial impact on innovation.

5. Please see reply to question 42, below.

6. Once again, "tipping markets" are not necessarily problematic. In fact, we have to consider that the idiosyncrasy of "tipping" is related to the increased value that users acquire from network effects. In markets with such characteristics preventing "tipping" would be nothing but a pure restriction of performance competition, preventing the internal growth of businesses, ultimately, determining worse results for consumers. Also, this practice is very difficult to be distinguished from successful integral growth as the outcome of a company's competition achievements on its own merits. Therefore, an intervention regarding "tipping markets" is realistically not needed, only being justified when an undertaking has critical market power and abuses it (deliberately and perversely driving competitors out of a certain market), but for these types of situations already fall under the existing competition legislation.

8. Structural competition problems may arise in markets where a (not necessarily dominant) company with market power in a core market may apply repeated strategies to extend its market position to related markets, for instance, by relying on large amounts of data.

*** 8.1. Do you have knowledge or did you come across such market situation?**

- ○ Yes
- ◉ No
- ○ Not applicable /no relevant experience or knowledge

*** 9. Do you think that there is a need for the Commission to be able to intervene in situations where structural competition problems may arise due to repeated strategies by companies with market power to extend their market position into related markets?**

- ◉ Yes
- ○ No
- ○ Not applicable /no relevant experience or knowledge

*** 9.2. Do you consider that Articles 101 and 102 of the EU Treaty are suitable and sufficiently effective to address those market situations?**

- ◉ Yes
- ○ No
- ○ Not applicable /no relevant experience or knowledge

10. Anti-competitive monopolisation refers to scenarios where one market player may rapidly acquire market shares due to its capacity to put competitors at a disadvantage in the market unfairly, for instance, by imposing unfair business practices or by limiting access to key inputs, such as data.

*** 10.1. Do you have knowledge or did you come across such market situation?**

- ○ Yes
- ◉ No
- ○ Not applicable /no relevant experience or knowledge

*** 11. Do you think that there is a need for the Commission to be able to intervene in situations where structural competition problems may arise due to anti-competitive monopolisation?**

- (•) Yes
- ( ) No
- ( ) Not applicable /no relevant experience or knowledge

*** 11.2. Do you consider that Articles 101 and 102 of the EU Treaty are suitable and sufficiently effective to address anti-competitive monopolisation?**

- (•) Yes
- ( ) No
- ( ) Not applicable /no relevant experience or knowledge

12. An oligopoly is a highly concentrated market structure, where a few sizeable firms operate. Oligopolists may be able to behave in a parallel manner and derive benefits from their collective market power without necessarily entering into an agreement or concerted practice of the kind generally prohibited by competition law. In those situations rivals often 'move together' to e.g. raise prices or limit production at the same time and to the same extent, without having an explicit agreement. Such so-called coordinated behaviour can have the same outcome as a cartel for customers, e.g. price increases are aligned.

*** 12.1. Do you have knowledge or did you come across such market situations?**

- (•) Yes
- ( ) No
- ( ) Not applicable /no relevant experience or knowledge

*** 12.4. Can you think of any other features of an oligopolistic market with a high/substantial risk of tacit collusion?**

- (•) Yes
- ( ) No

*** 13. Do you consider that there is a need for the Commission to be able to intervene in oligopolistic markets prone to tacit collusion in order to preserve/improve competition?**

- (•) Yes
- ( ) No

- ( ) Not applicable /no relevant experience or knowledge

*** 13.2. Do you consider that Articles 101 and 102 of the EU Treaty are suitable and sufficiently effective instruments to address oligopolistic market situations prone to tacit collusion?**

- (•) Yes
- ( ) No
- ( ) Not applicable /no relevant experience or knowledge

14. Relying on digital tools, companies may easily align their behaviour, in particular retail prices via pricing algorithms. (Pricing algorithms are automated tools that allow very frequent changes to prices and other terms taking into account all or most competing offers on the market.)

*** 14.1. Do you have knowledge or did you come across such market situations?**

- ( ) Yes
- (•) No
- ( ) Not applicable /no relevant experience or knowledge.

*** 15. Do you consider that there is a need for the Commission to be able to intervene in markets where pricing algorithms are prevalent in order to preserve/improve competition?**

- (•) Yes
- ( ) No
- ( ) Not applicable /no relevant experience or knowledge

*** 15.2. Do you consider that Articles 101 and 102 of the EU Treaty are suitable and sufficiently effective instruments to address all scenarios where algorithmic pricing can raise competition issues?**

- (•) Yes
- ( ) No
- ( ) Not applicable /no relevant experience or knowledge

16. So-called tipping (or 'winner takes most') markets are markets where the number of users is a key element for business success: if a firm reaches a critical threshold of customers, it gets a disproportionate advantage in capturing remaining customers. Therefore, due to certain

characteristics of that market, only one or very few companies will remain on those markets in the long term.

*** 16.1. Do you have knowledge or did you come across such market situations?**

- ○ Yes
- ◉ No
- ○ Not applicable /no relevant experience or knowledge

*** 17. Do you consider that there is a need for the Commission to be able to intervene early in tipping markets to preserve/improve competition?**

- ◉ Yes
- ○ No
- ○ Not applicable /no relevant experience or knowledge.

*** 17.2. Do you consider that Articles 101/102 of the EU Treaty are suitable and sufficiently effective instruments to intervene early in 'tipping markets', to preserve/improve competition?**

- ◉ Yes
- ○ No
- ○ Not applicable /no relevant experience or knowledge

18. So-called 'gatekeepers' control access to a number of customers (and/or to a given input/service such as data) that – at least in the medium term – cannot be reached otherwise. Typically, customers of gatekeepers cannot switch easily ('single-homing'). A gatekeeper may not necessarily be 'dominant' within the meaning of Article 102 of the EU Treaty.

*** 18.1. Have you encountered or are you aware of markets characterised by 'gatekeepers'?**

- ○ Yes
- ◉ No
- ○ Not applicable / no relevant experience or knowledge

*** 19. Do you consider that there is a need for the Commission to be able to intervene in gatekeeper scenarios to prevent/address structural competition problems?**

- (•) Yes
- ( ) No
- ( ) Not applicable /no relevant experience or knowledge

*** 19.2. Do you consider that Articles 101 and 102 of the EU Treaty are suitable and sufficiently effective instruments to intervene in markets characterised by 'gatekeeper platforms' in order to preserve/improve competition?**

- (•) Yes
- ( ) No
- ( ) Not applicable /no relevant experience or knowledge

*** 20. In <u>which sectors/markets</u> do you consider that structural competition problems may occur?**

- (•) Structural competition problems may occur in all sectors/markets
- ( ) Structural competition problems may occur in some specific sectors/markets (including but not only digital sectors/markets).
- ( ) Structural competition problems only occur in digital sectors/markets
- ( ) Structural competition problems mainly occur in digital sectors/markets
- ( ) Not applicable / no relevant experience or knowledge

*** 21. If in response to question 7 you indicated that other forms of structural competition problems in addition to the ones listed above exist, do you consider that there is a need for the Commission to be able to intervene in order to address these other forms of structural competition problems in order to preserve/improve competition?**

- (•) Yes
- ( ) No
- ( ) Not applicable /no relevant experience or knowledge

*** 22. Article 101 of the EU Treaty prohibits agreements between companies which prevent, restrict or distort competition in the EU and which may affect trade between Member States (anti-competitive agreements). These include, for example, price-fixing or market-sharing cartels. Is Article 101 of the EU Treaty, in your view, a suitable and sufficiently effective instrument to address structural competition problems?**

- (•) Yes
- ( ) No
- ( ) Not applicable/no relevant experience or knowledge

*** 23. Article 102 of the Treaty prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it. Is Article 102 of the Treaty, in your view, suitable and sufficiently effective to address structural competition problems?**

- (•) Yes
- ( ) No
- ( ) Not applicable/no relevant experience or knowledge

D. Assessment of policy options

The questions in this section seek to gather feedback on the policy options outlined in the Inception Impact Assessment.

*** 24. In light of your responses to the questions of Section C, do you think that there is a need for a new competition tool to deal with structural competition problems that Articles 101 and 102 of the EU Treaty (on which current competition law enforcement is based) cannot tackle conceptually or cannot address in the most effective manner? (Article 101 of the EU Treaty prohibits agreements between companies which prevent, restrict or distort competition in the EU and which may affect trade between Member States (anti-competitive agreements). These include, for example, price-fixing or market-sharing cartels. Article 102 of the Treaty prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it.)**

- ( ) Yes
- (•) No
- ( ) Not applicable /no relevant experience or knowledge

*** 25. Do you think that such a new competition tool (that would not establish an infringement by a company and would not result in fines) should also be able to prevent structural competition problems from arising and thus allow for early intervention in the markets concerned?**

- ( ) Yes
- (•) No

Not applicable /no relevant experience or knowledge

*** 26. What are in your view the most important structural competition problems that should be tackled with such a new competition tool?**

3000 character(s) maximum

The current regime -- including the tools presently available to the Commission for competitive oversight, analysis, and enforcement – is as well-equipped to handle digital age competition issues as it has been for decades of handling industrial age competition issues. Because the fundamental elements of competition remain the same, a NCT, in the molds that it is designed and predicted by the "Inception Impact Assessment" is not necessary. Consequently, even though we commend the Commission for raising such important and currently pertinent questions regarding the modernisation and digitalisation of markets and the economy and its adaptability to competition law and its new problems, we find that there are no "important structural competition problems that should be tackled with such a new competition tool" (emphasis added).

The existing regulatory framework comprises Articles 101 and 102 TFEU and their application through Regulation 1/2003, predominantly by the use of Articles 7, 8, 9 and 17, as well as rules mandated by recent EU legislation, including Regulation 2019/1150 and the ongoing review of the E-Commerce Directive. Several recent cases demonstrate that these tools can readily address digital-oriented structural competition problems: **Case AT. 39740 Google Search** that confronted fair new theories of harm - leveraging strategies; **Case AT. 40099 – Google Android and Case M.8124 Microsoft/LinkedIn** (tying); **Case AT. 40411 – Google AdSense** (exclusivity requirements); even cases of economic dependency/relative market power (**General Motors Continental NV v Commission, C-26/75**).

In parallel the Commission may ponder, if so deemed required, the review and update of various of its Guidelines and Notices (*e.g.* the current consultation into the Market Definition Notice, and similarly support updates to the Horizontal and Vertical Guidelines and 102 Enforcement Priorities Guidelines) to ensure they are fit for purpose and reflect the new challenges brought about by modernisation and digitalisation of the economy.

As shown in question 7.1 of the questionnaire, ICC is concerned that the Commission's approach to identifying problematic structural competition scenarios indiscriminately wheat as well as tares. That overbreadth particularly when applied in an early intervention scenario where there is no finding of misconduct would do harm to innovation, competition and, inevitably to the consumers. It is entirely foreseeable that any tool that can produce such undesired outcomes may be applied selectively and inconsistently. The Commission can better attain its enforcement objectives by applying the familiar analytic tools of existing competition law – fact-based definition of product and geographic markets, abuse of dominance, and cartel actions -- more consistently and more searchingly. Proportionate intervention should occur only after a methodical and thorough finding of misconduct, and for that, there already is a functioning "toolbox". For that reason, to the extent that the new tool would restrict market participants in ways current competition laws and regulations do not, it presents a significant risk of making markets *less* competitive, rather than more. And to the extent that it reaches different conclusions via different analytic approaches, it increases complexity, creates opportunities for enterprises to game one system against another, and decreases the predictability of enforcement on which both consumers and competitors alike depend.

This is not saying that the existing regulatory toolbox is "*bulletproof*" and does not need to be updated. For instance, distinguishing between collusion and competition in oligopolistic markets where information enables algorithmic pricing decisions may be an area where that key distinction can be facilitated by development of analytic techniques that make use of the very information that gives rise to the situation. In contrast, it is saying that there is not a need for such a deep legislative reform, especially the one entailed by the IIA, due to the uncertainties and incoherencies it would impose, but preferably a better use of the full panoply of instruments that the Commission already has at its disposal.

*** 27. In your view, what should be the basis for intervention for the new competition tool?**

- ○ The tool should be dominance-based (i.e. it shall only be applicable to dominant companies within the meaning of Article 102 of the EU Treaty)
- ○ The tool should focus on structural competition problems and thus be potentially applicable to all undertakings in a market (i.e. including dominant but also non-dominant companies).
- ○ Other
- ◉ Not applicable /no relevant experience or knowledge

*** 28. In your view, what shall be the scope of the new competition tool?**

- ○ It shall be applicable to all markets (i.e. it should be horizontal in nature)
- ○ It shall be limited in scope to sectors/markets where structural competition problems are the most prevalent and/or most likely to arise
- ○ Other
- ◉ Not applicable / no relevant experience or knowledge

*** 28.2. Do you consider that the new competition tool should apply only to markets/sectors affected by digitisation?**

- ○ Yes
- ○ No
- ◉ Not applicable / no relevant experience or knowledge

*** 29. If a new competition tool were to be introduced, how should a smooth interaction with existing sector specific legislation (e.g. telecom services, financial services) be ensured?**

3000 character(s) maximum

Presently, the EC is empowered to apply competition rules to all economic sectors, including financial service sectors (banking and insurance) and telecoms. Competition law is intertwined with an increased tendency for parallel sectoral regulation, being that the conduct that breaches antitrust law

may also breach sectoral regulatory laws. This trend is proving to be very efficient at dealing with modern problems, all due to the flexibility of the existing competition framework.

Equally, in the telecoms sector competition rules are also applicable and are a contributor to increased competition in a market traditionally identified for its tendency to form monopolies based on past state sponsored incumbents. Hence, competition legislation is conjugated with telecoms own regulatory framework and as stated by the Commission, "one of the main features of the Telecoms Regulatory Framework is the set-up of *ex ante* access regulation, which consists of a procedure to identify competitive bottlenecks in telecoms and to impose remedies to address such bottlenecks, following competition law principles and methodologies", through a concise implemented processes closely followed by both the NRAs and the Commission. It is also very important to stress the ongoing EU legislative initiatives towards the DSM involving a review of telecoms regulatory framework that aims at creating a "reliable, trustworthy, high-speed, affordable networks and services that safeguard consumers' fundamental rights to privacy and personal data protection while also encouraging innovation." This also requires a precise, certain and consolidated competition framework.

Having that said, consistently with the position we have been defending, we must conclude that in the one hand the current competition legislation is proving to be very efficient, especially when coupled with adjacent regulations in addressing novel "digitalised" problems in these specific sectors. On the other hand, as it was already shown, the NCT proposed by the Commission would be accompanied by a lot of uncertainty and discretionary powers that would put a stall on all the progress that is foreseeable to be made.

30. Do you consider that under the new competition tool the Commission should be able to:

	Yes	**No**	**Not applicable /no relevant experience or knowledge**
***• Make non-binding recommendations to companies (e.g. proposing codes of conducts and best practices)**	○	○	◉
***• Inform and make recommendations/proposals to sectorial regulators**	○	○	◉
***• Inform and make legislative recommendations**	○	○	◉
***• Impose remedies on companies to deal with identified and demonstrated**	○	○	◉

	Yes	No	Not applicable /no relevant experience or knowledge
structural competition problems			

*** 30.1. Please explain your answers indicating why you consider that the new competition tool should include or not include the options above.**

Besides the already developed explanation that we consider that there is not a need for a NCT, which inherently implies a constant contraposition to every aspect that involves the tool itself, this particular question needs to be assessed considering that the NCT potential legislation is actually enacted.

According to the IIA the NCT would be complementary to the already existing competition legislation, which implies that they would, in certain measure, contend with each other, in specific situations for determining with legal instrument would be applied, having in consideration that, according to the IIA, the NCT would only be applicable where there is a gap in traditional legislation that could not (at least effectively) be resolved. Alongside the uncertainty and risks that this reality creates to companies, the main difference between the instruments, at least the one that is transversal to all the Options proposed in the IIA, is that while the NCT could impose its structural and behavioral measures before the finding of an infringement, legitimated (allegedly) by an early and faster intervention, before the competition structural problem occurs. Meanwhile, the existing regulatory framework requires the need to find an infringement to impose remedies.

Analysing the fourth point, it looks like there is a confluence between the two legislative instruments. However, this is merely apparent, the reality is even worse, because as predicted by the NCT IIA the legal basis for the new competition tool would be Articles 103 and 114 TFEU. Nonetheless, it is evident that the scope of Article 114, regarding it being an appropriate legal basis for approximation measures, is settled on the fact that it removes or prevents distortions of competition by developing conditions of the functioning of the internal market. Now, if we look at the aim of the NCT IIA, it is not based on eliminating distortions of competition, but rather eliminating structural risks that cannot (allegedly) be tackled by the existing regulatory framework for competition law.

We also need to consider that the options (from bottom to top) become increasingly severe and empower, each time more, the Commission. Generally speaking, we come from a position that considers that it is disproportionate that the Commission should have the power to impose structural or behavioral remedies without the need of having to find an infringement, based solely on the finding of a structural competition problem. Alongside the different view on current structural competition problems, with the market constantly evolving, anything defined as structural problem could be tackled by one these options, which is extremely discretionary and would definitely culminate in an uncertainty for companies to know whether they are or not in such situations, resulting in decreased incentive to invest and prejudicing the consumers.

31. Do you consider that in order to address the aforementioned structural competition problems, the Commission should be able to impose appropriate and proportionate remedies on companies? If yes, which?

	Yes	No	Not applicable /no relevant experience or knowledge
***• Non-structural remedies (such as obligation to abstain from certain commercial behaviour)**	○	○	◉
***• Structural remedies (for instance, divestitures or granting access to key infrastructure or inputs)**	○	○	◉
***• Hybrid remedies (containing different types of obligations and bans)**	○	○	◉

*** 31.1. Please explain your answer and why you indicated or not indicated the remedies listed above.**

The question itself can be perceived as paradoxical: of course, that if the Commission should be able to impose remedies through the NCT (contradictorily to what we defend), they should be appropriate and proportionate. Now, the real question that poses is that if it is possible for the Commission to pursue these objectives with the intended scope of the NCT.

Contrasting with the normal sieves of the application of Articles 101 and 102, it is evident the absence of a sense of proportionality, much more evident when we realize that contrary to the existing legal framework, there is not a need to find an infringement. An “early intervention” whenever the Commission concludes there is a “threat to competition” does not suffice.

Another consideration, attentive to NCT IIA reference that even though the Commission is being enabled to impose behavioural and structural remedies, it would not impose fines “and thus not generate rights to launch damage claims”. This situation leaves the impression that by the fact that the Commission does not impose fines it is being “helpful” towards the undertakings. Nonetheless, we must

take in consideration that by mandating structural remedies that could imply the unbundling of undertakings and restructuration's of business models and industries, these impositions are far more prejudicial to enterprises than paying fines. The Commission would be empowered to impose significant market changes in the European Union.

Finally, concerning this aspect, we cannot forget that the proposed NCT has the ability to propose stricter remedies, even without having to find any infringement or the indication of one. Comparing two potential situations we could have scenarios where an undertaking after the Commission finds an infringement that falls into the existing regulatory framework may adopt a commitment in the terms of Article 9 of Regulation 1/2003, while an undertaking without a dominant position and without committing any wrongdoing could be subjected to impositions regarding structural or behavioural remedies. This means that companies might face stricter remedies, with less procedural rights, without committing any infringement. Besides being outrageously disproportionate this situation does not meet the standards of Fundamental and Constitutional rights.

It is also imperative that we realise that the introduction of a NCT, as described by the IIA, would surely constitute a lot of legal uncertainty and incoherencies, constricting the innovation and dynamism potential for enterprises that would be limited or even punished for being successful and outdoing their competitors, even though fair competition, solely because they could became "market dominant". Ultimately, this situation would turn into a vicious cycle leading to disincentive to invest, therefore less innovation and competition, with the spill-over effects to smaller and new-coming enterprises, resulting in far worst conditions for consumers.

*** 32. Do you consider that certain structural competition problems can only be dealt with by structural remedies, such as the divestment of a business?**

- ○ Yes
- ○ No
- ◉ Not applicable /no relevant experience or knowledge
- ○ Other

E. Institutional set-up of a new competition tool

The questions in this section seek feedback on what features and set-up the new competition tool should have.

* 33. Do you consider that enforcement of the new competition tool by the Commission would require adequate and appropriate investigative powers in order to be effective?

- • Yes
- ○ No
- ○ Not applicable /no relevant experience or knowledge

* 34. Do you consider that the new competition tool should be subject to binding legal deadlines?

- Yes
- No
- Not applicable /no relevant experience or knowledge

* 35. Do you consider that the new competition tool should include the possibility to impose interim measures in order to pre-empt irreparable harm?

- Yes
- No
- Not applicable /no relevant experience or knowledge

* 36. Do you consider that the new competition tool should include the possibility to accept voluntary commitments by the companies operating in the markets concerned to address identified and demonstrated structural competition problems?

- Yes
- No
- Not applicable /no relevant experience or knowledge

* 37. Do you consider that during the proceedings the companies operating in the markets concerned, or suppliers and customers of those companies should have the possibility to comment on the findings of the existence of a structural competition problem before the final decision?

- Yes
- No
- Not applicable /no relevant experience or knowledge

* 38. Do you consider that during the proceedings the companies operating in the markets concerned, or suppliers and customers of those companies should have the possibility to comment on the appropriateness and proportionality of the envisaged remedies?

- Yes
- No
- Not applicable /no relevant experience or knowledge

* 39. Do you consider that the new competition tool should be subject to adequate procedural safeguards, including judicial review?

- Yes

- No
- Not applicable /no relevant experience or knowledge

F. Concluding questions and document upload

40. Taking into consideration the parallel consultation on a proposal in the context of the Digital Services Act package for ex ante rules to ensure that markets characterised by large platforms with significant network effects acting as gatekeepers remain fair and contestable for innovators, businesses, and new market entrants, please rate the suitability of each option below to address market issues raised by online platform ecosystems.

	Not applicable /No relevant experience or knowledge	Not effective	Somewhat effective	Sufficiently effective	Very effective	Most effective
***1.Current competition rules are enough to address issues raised in digital markets**	○	○	○	◉	○	○
***2.There is a need for an additional regulatory framework imposing obligations and prohibitions that are generally applicable to all online platforms with gatekeeper power**	◉	○	○	○	○	○
***3. There is a need for an additional regulatory framework allowing for the possibility to impose tailored remedies on**	◉	○	○	○	○	○

	Not applicable /No relevant experience or knowledge	Not effective	Somewhat effective	Sufficiently effective	Very effective	Most effective
individual large online platforms with gatekeeper power on a case-by-case basis.						
***4. There is a need for a New Competition Tool allowing to address structural risks and lack of competition in (digital) markets on a case-by-case basis**	○	◉	○	○	○	○
***5. There is a need for combination of two or more of the options 2 to 4.**	◉	○	○	○	○	○

*** 40.1. Please explain which of the options, or combination of these, in your view would be suitable and sufficient to address the contestability issues arising in the online platforms ecosystems.**.

Throughout the questionnaire we maintained a consistent position defending that there is not a need for the introduction of a NCT. Quite contrarily, we asserted several times that the existing toolbox is still adequate and sufficient. Therefore, the suitable option, amongst those presented, could only be the one that predicts that “current competition rules are enough to address issues raised in digital markets”.

In fact, to date, there is a lack of evidence-based claims that the TFEU leaves a material enforcement gap regarding anti-competitive unilateral conduct, even in the scenarios described by the Commission. As previously shown, contrarily to what the Commission indicates, the existing framework for EU competition law has proven to be singularly effective at treating new and complex issues, even those that potentially arise in digital-enabled markets - two-sided-markets, zero-price factors – between others, like shown in several court-cases (see above point 7.1). The Commission could ponder an active increase in the use of these current tools. Further we believe that zero-pricing market may not be

important as a reason for a structural competition problem. Zero-pricing is only a way in which services and products are provided, and this is usually the common case in digital markets. Besides, in a zero-pricing market, the customers are usually sensitive to price changes, which means that the undertaking will quickly lose customers once they charge a price.

Having that said, it is therefore recommendable that the Commission, before committing to a big regulatory reform, should do a more efficient use of the existing competition tools under Articles 101 and 102 TFEU, as well as the merger control regime that it has at its disposal, which constitutes a sufficient way to resolve main competition concerns across markets (even those extended to the digital era). Moreover, the current "toolbox" has much more potential than what it is recognized for by the "NCT IIA". Mainly through the application of the Regulation 1/2003 which implements the rules on competition laid down in Articles 101 and 102 TFEU, especially Articles 7, 8 (Interim Measures) and 17 (Sector Inquiries). All these articulated with increasing national legislative initiatives and EU legislation concerning specific sectors competition rules form a well-oiled mechanism that has proven its efficiency throughout decades.

Even if this was not the case, the NCT has structural problems of its own: Starting by poorly identifying the structural competition problems that would represent its cause, as it was argued in point 7.1; followed by an inaccurate prediction or even potential to go beyond the existing European competition legislation, concentrated in three situations: the overlapping of the existing regulatory framework (Articles 101 and 102 TFEU and merger control regime); the overlapping of the Commission proposed *ex ante* regulatory tool and even an overlapping with Member States (expected) national legislative initiatives. It is concerning that the NCT roadmap fails to explain the relationship between an NCT and Articles 101 and 102 TFEU and that a number of questions in the NCT questionnaire ask whether these Articles are suitable and sufficiently effective. This is all the more so because the options set out in the NCT roadmap appear to target exclusively or to a very substantial extent single firm conduct but without providing the substantive and procedural safeguards enshrined in Article 102 TFEU. Absent adequate standards and safeguards, this creates an incentive to bring cases under the NCT instead of Article 102 TFEU.

Other problems consist, as stressed in point 31.1 in the far-reaching scope of the NCT which would constantly be battling with some Fundamental and Constitutional Rights. Finally, yet another problem that can be pinned is the lack of the legal basis that supports and legitimates the New Competition Tool.

Question 41 or 42

ICC is against the introduction of a new competition tool. Moreover, it is extremely far-reaching and heralds a paradigm shift by calling into question the current fundamental principles of competition law.

ICC supports enforcement objectives that are aimed at stopping specific infringements of competition law. However, the proposals of the Commission (options 1 to 4) do not relate to infringements of competition law and related possible inadequacies of enforcement of competition law, but rather they partly (options 3 and 4) address issues below the radar of competition law scrutiny, in particular below the established intervention thresholds for the control of abuse of a dominant position, and outside of concrete infringements (all options), whereby there is even talk of a structural reorganisation of markets and the market players by the Commission ("market by design").

In view of the ongoing and open question, if there is a need for action, the open and wide circle of addressees, a dubious legal basis and, above all, serious problems under EU law, competition policy, constitutional law and the rule of law, particularly with regard to the planned structural and non-abusive

powers of intervention in all four options mentioned, ICC is against the four options and is in favour of retaining the existing competition regime ("baseline scenario") and its consistent application.

ICC does not believe that there is a need for the NCT to ensure fair and competitive markets with a view to delivering lower prices and higher quality, as well as more choice and innovation to consumers, because the existing instruments in the European Commission's toolbox (enforcement of Articles 101 and 102 TFEU) are sufficient for this purpose. If at all, a smarter and more efficient application of the existing tools is required.

The introduction of the NCT instrument bears the inherent risk of creating legal uncertainty and causing unwanted side- and spillover effects which could have a chilling effect on the competitiveness of companies.

New digital business models and platform solutions are continuing to emerge, and this innovation and development should not be limited by restrictive regulations. The introduction of the NCT would create a lot of legal uncertainty and likely lead to a limitation of development and innovation, in particular if highly innovative companies could later be "punished" for their success. This would be counterproductive for competition and thus for customers' opportunity to receive the best and most innovative products.

However, in the case that it is implemented, please find below our position on how we believe the tool should operate and be used by the Commission.

In reference to question 33:

The enforcement of the NCT by the Commission should require adequate and appropriate investigative power in order for the decisions to be based on precise and reliable information and objective and robust economic analysis. Investigative powers will enable the Commission to assess the market, understand its dynamics, and more importantly, to make the most appropriate and effective decisions. Moreover, with the possibility of these investigative measures, the remedies imposed by the Commission will be more readily accepted by the stakeholders and will face less criticism if they are based on sound information.

In conclusion, the investigative power created by the NCT is necessary to help protect the Commission against accusations of acting arbitrarily and will help enhance the legitimacy of its decisions, while at the same time reassure all affected parties that the Commission's analysis was fully informed.

In reference to question 34:

ICC considers that the NCT should be subject to binding legal deadlines for two reasons: efficiency and greater legal certainty.

Indeed, we understand that the purpose of the NCT is to tackle structural risks to competition, especially in quickly evolving markets. Therefore, to be effective on dynamic markets such as digital platforms, the Commission must act quickly before the structural damage is no longer reversible and/or before the dynamic has made the approach of the Commission irrelevant.

Moreover, being subject to binding legal deadlines also implies legal certainty for stakeholders. The firms will know how long the Commission's investigation will last, and the shareholders will have a certain predictability regarding the future of their company and their share prices. Indeed, a tool that enables the Commission to impose dramatic and even structural remedies would greatly impact the value of the companies. In the tech sector where investors must have an exit plan, it is essential to avoid a 'sword of Damocles' threatening the future value of a company for years.

Based on feedback from the British Competition and Markets Authority experience, market investigation and review processes lasting for years are likely to happen.

In reference to question 35:

ICC does not consider that the NCT should include the possibility of imposing interim measures in order to pre-empt irreparable harm.

Indeed, the NCT would allow the Commission to impose measures on companies that have not committed any anti-competitive practices. Today, to impose interim measures, the Commission must at least prove the existence of a *prima facie* illegal behavior; this test would not even exist in the case of the NCT.

Moreover, because of they are based on an in-depth investigation, interim measures can be pronounced even if unwarranted. That is especially dangerous given that they can slow down or even impede the development of a growing business. This can lead to a loss of dynamism in the company, a loss of income, or even an exit from the market, those consequences being unacceptable.

In light of the above, ICC suggests, instead of allowing for interim measures, to use shorter (but still reasonable) deadlines when the structural risks to competition are imminent. In any event, in an interim measures NCT framework these must be subject to a number of safeguards such as judicial approval by the EU General Court, and subject to a legal test similar to that used widely by courts for an interim injunction – that is (1) significant likelihood that a permanent remedy will be imposed (2) significant risk of harm that won't be able to be reversed, (3) balance of convenience in favour of intervention, and (4) full opportunity for the parties affected to be heard.

In reference to question 36:

ICC considers that the NCT should include the possibility of accepting voluntary commitments by the companies operating in the markets concerned to address identified and demonstrated structural competition problems.

This will speed up the proceedings and the measures will be more effective. Moreover, it will lower the cost of the Commission's investigations. However, as in commitments considered in the context of mergers or behavioural infringements, the Commission will need to be satisfied that the voluntary commitments are sufficient to resolve the concerns raised, do not raise material additional concerns on their own, and are able to be monitored in the medium to long term. The Commission should plan to consult widely on any measures before they are accepted.

In reference to question 37:

ICC considers that during the proceedings, the companies operating in the markets concerned, or suppliers and customers of those companies, should have the possibility to comment on the findings of the existence of a structural competition problem before the final decision.

Indeed, a robust market test including all stakeholders in the market will enable the Commission to assess, both the existence of a structural risk to competition and the most effective remedies to tackle the issue.

Moreover, the Commission will have to take into account the view of the suppliers, the competitors, and the demand in order to make the final decision.

The market test should be the Commission's main investigative tool. Further it is surely sensible and necessary to allow affected businesses to comment on remedies that have a major impact on them before they are imposed – the experience in the UK is that this is an extremely important and constructive part of the UK regime, where much of the engagement occurs to try to shape a sensible remedy that resolves the competition concern but limits the risk of disproportionate and unforeseen consequences. It does take some time, but this trade off tends to be worth it rather than the market having to deal with disproportionately expensive or ineffective interventions, or their unforeseen consequences, for years to come.

In reference to question 38:

ICC considers that during the proceedings, the companies operating in the markets concerned, or suppliers and customers of those companies, should have the possibility to comment on the appropriateness and proportionality of the envisaged remedies.

We consider that consulting the market stakeholders to assess if there is a structural risk to competition in a market is a necessary requirement. Still, consulting them on the appropriateness and proportionality of the remedies envisaged by the Commission will increase the length of the proceedings. The aim of the NCT is to act swiftly to readjust the market before it is too late. It seems like this consultation will have the opposite effect of the one expected.

The Commission should thus limit the stakeholder's comments to the existence of structural risks to competition.

In reference to question 39:

ICC considers that the NCT should be subject to adequate procedural safeguards, including judicial review.

It is important to emphasise that the NCT would be used by the Commission without any infringement of competition law. The Commission would be at risk of violating the companies' fundamental rights, such as the presumption of innocence and right to property. The EU is founded on the rule of law and there are strong traditions in EU competition law for ensuring procedural fairness and protecting rights of defense. The envisaged NCT would be highly intrusive and far reaching. It would empower the Commission to impose intrusive behavioral and possibly even structural remedies. Such measures would therefore need to be subject to strong internal checks and balances, as well as procedural safeguards that protect rights of defense effectively.

Therefore, procedural safeguards such as full access to the file and full rights of defence, including the right to be heard orally are essential to legitimize the use of this NCT by the Commission and to protect the companies against any arbitrary use.

The NCT should also consider as a subsidiary alternative procedural safeguard, to the Commission requesting such decisions from the EU General Court, the use of an independent decision-making panel where initial concerns are identified and an in-depth review is warranted. This is a fundamental feature of the UK markets regime, where the Phase 1 review (a market study) is carried out by CMA staff under the supervision of the executive of the CMA, but a Phase 2 review (an in-depth market investigation,

which can result in remedies) is led by a panel of independent experts appointed by the CMA, with support from CMA staff. This independence of decision-making helps the CMA process be seen as generally fair and largely insulated from allegations of political interference or bias. The ICC expects a similar process could be a significant mitigant to similar concerns in the EU.

In the same line, judicial oversight of the Commission proceedings and its decisions is essential to ensure a perception of high quality and objective decision-making and respect for the companies' rights. For example, core to the credibility of the UK market investigations process is a right to request review by the specialist Competition Appeals Tribunal, comprising experienced judges and other experts with significant experience in competition law and economics. This appellate body has the expertise and resource to engage in detail with the detailed economic analysis carried out by the CMA in its market investigation, and thereby helps to ensure that a review is based on the merits of the underlying factual issues, rather than on narrow procedural and legal grounds of judicial review.

ICC also suggests that an appeal against the Commission's decision should have, in principle, an automatic suspensory effect, unless any interventions being made are limited in nature and easily reversible.

But ICC's proposal goes further. Given the danger of harm to fundamental rights, the risk of decisions being (or being seen to be) politically motivated, and probability that interventions motivated by fixing issues of competition could easily affect a number of other policy areas (including, for example, freedom of speech, press freedom, privacy, taxation and geopolitical matters) we propose that the Commission should not receive the power to pronounce itself decisions such as imposing remedies. Instead, the Commission should have to request such decisions from the EU General Court. This will avoid any issues with the impartiality of the Commission.

In any event, as detailed above, ICC is against the implementation of the NCT.

42. Do you have any further comments on this initiative on aspects not covered by the previous questions ?

One of the apparently central structural competition problems that the Commission aims to fix are "Gatekeeper scenarios". After a meticulous analysis of The Special Advisors' report and the Inception Impact Assessment itself, there is an overall indication that the main focus of the Commission regarding this aspect are large online platforms (not necessarily dominant but with extensive market power) that control the platform ecosystem being "the market dynamics only determined by the gatekeeper". The notions appointed by the Commission are particularly directed to the fact that these "gatekeepers" control the market and are able to eliminate competitors due to its monopolized position.

Also, as some of the Options described in the IIA predict, there is a predisposition from the Commission to departure from the pre-conditions incorporated in the existing regulatory framework, more precisely Articles 101 and 102, for the need to establish dominance, that would accelerate the procedures by not being limited to normal sieves of determining the dominant position through a fairly archaic process.

In this context, the real question is raised: what we have in our hands is really a gap within the current EU legislation that exempts some "gatekeepers" from the competition law? Or this question only emerges due to the fact that the main tool for assessing dominance must updated? Of course, that the control of considerable market shares conjugated with entry barriers and concentration are good indicators of market power, but if the problem is that its concentration of market shares doesn't reach

the value of 40%, maybe we should change this paradigm, not basing the establishment of a dominant position on the assessment of market shares, but rather on more dynamic and modernized evidences. Therefore, if we look, for instance, to the definition of dominance in case-law Hoffman La Roche, that is more integrative, concerned with the actual strength presented by an undertaking that would potentially cease relevant competition on a given market and have an “appreciable influence on the conditions under which that competition will develop” the gatekeeper position could fall under this standard, and therefore, we would be re-railed to normal EU competition law procedures. Having that said, before a big legislative reform with such undetermined impacts in the economy and the consumers, there should be a further assessment on the question presented.

EC consultation on the need for a new competition tool

ICC General Comments

8 September 2020

1. Introduction

One must acknowledge the modernisation of the world and its economy. The interactions between companies and consumers have become much more facilitated due to the digitalisation of processes. Everyone is a click away from everything. Nonetheless, this new reality is not only apparent in the Digital Markets but has spread over other (more traditional) markets. In this regard it is imperative that competition remains transparent and inclusive. The existence of an established regulation that support this phenomenon while ensuring fair and competitive market conditions is crucial to preserve innovation and to protect consumers welfare.

2. New Competition Tool – Inception Impact Assessment

This reality then raises the question of knowing, as said by the Commission Vice-President Vestager, whether "the competition policy and rules are fit for the modern economy"[1]. In this regard, the European Commission points out a broad range of structural competition problems that can be agglomerated in two categories: "**Structural risks for competition**" referring to "scenarios where certain market characteristics (…) and the conduct of the companies in the markets concerned create a threat for competition" either trough "the creation of powerful market players with an entrenched market and/or gatekeeper position (…)"[2] or "unilateral strategies by non-dominant companies to monopolise a market through anti-competitive means"[3]. Or, **Structural lack of competition,** referring to "markets displaying systemic failures going beyond the conduct of a particular company with market power due to certain structural features such as high concentration and entry barriers, consumer lock-in, lack of access to data or data accumulation, and oligopolistic market structures with an increased risk for tacit collusion (…)"[4]. According to the Commission these structural problems consist in gaps that the current regulation cannot fill (at all or effectively). This concerns "the baseline scenario" - consisting in the current EU competition law framework through the application of Articles 101 and 102 TFEU.

In this context, the Commission took the initiative to present policy options for stakeholders to consider. These should be applied complementarily to existing regulations: they have in common the fact that in all these options the Commission would be able to act without the need to find an infringement. Options (1) and (2) share the fact that there is still a need for the undertaking to be considered dominant, something that is not necessary in options (3) and (4) which means that in these scenarios, the Commission can (hypothetically) impose structural remedies to undertakings without the need of finding an infringement and without the need for them to be considered dominant, intervening beforehand. In options (1) and (3) there's a horizontal scope, meaning that this tool would be applied to all markets,

[1] Inception Impact Assessment – Part A. (Context)
[2] Ibid.
[3] Ibid.
[4] Ibid.

contrary to options (2) and (4) where the use of the tool would be limited in scope to sectors with the determined characteristics (digital or digital-enabled markets).

3. Problems

Having this broad sense of the questions presented by the "NCT IIA", one can now focus on some of the issues that the introduction of this tool could have on the EU competition policy, whether it is for the consumers or for the willingness to invest, directly affecting innovation and competition itself. A larger emphasis will be given to certain topics that will be densified: (i) Overlap of Regulations (within the Digital Services Act, colliding with the *ex ante* regulation; also colliding with the "baseline scenario" of Articles 101 and article 102 of the TFUE and national legislation), (ii) the ("far-reaching") Scope of the "New Competition Tool", (iii) Conflict with Fundamental and Constitutional Rights; and (iv) Insufficiency of Legal Basis.

3.1 Overlap of Regulations

This specific topic raises several questions of its own: Is there (according to the structural competition risks presented by the Commission) a gap that needs to be filled with a new toolbox as the Commission proposes? Or is the current legal framework sufficiently flexible and malleable to be applied transversally to the modern digitally-enabled markets? If enacted, what would the thresholds between the current legislation and the "NCT" be without them overlapping? And between the "NCT" and the *ex ante* regulatory tool? National legislative initiatives must also be considered in this regard.

3.1.1 Is there really a "gap"?

3.1.1.1 The existing toolbox is adequate and sufficient

As seen, the Commission identifies two types of structural competition problems (as shown above – point 2) consisting in "structural risks for competition" and "structural market failure"[5]. Nonetheless, to date, there is a lack of evidence-based claims that the TFEU leaves a material enforcement gap regarding anticompetitive unilateral conduct, even in the scenarios described by the Commission. In fact, according to Article 102 TFEU, the Commission has clear powers and the authority to impose behavioral and structural remedies when there is a breach of the Article itself. Also, the European Courts have systematically considered that unilateral conduct is only applicable, according to the scope of EU competition law, if the undertaking is dominant.

Considering this, contrary to what the Commission indicates, the existing framework for EU competition law has proven to be singularly effective at treating new and complex issues, even those that arise in digital-enabled markets - two-sided-markets, zero-price factors – between others, like shown in several cases: **Case AT. 39740 Google Search (Shopping)** that confronted fair new theories of harm - leveraging strategies; **Case AT. 40099 – Google Android and Case M.8124 Microsoft/LinkedIn** (tying); **Case AT. 40411 – Google AdSense** (exclusivity requirements), even cases of economic dependency/relative market power (**General Motors Continental NV v Commission, C-26/75**).

[5] Ibid.

In parallel the Commission may ponder, if so deemed required, the review and update of various of its Guidelines and Notices (*e.g.* the current consultation into the Market Definition Notice, and similarly support updates to the Horizontal and Vertical Guidelines and 102 Enforcement Priorities Guidelines) to ensure they are fit for purpose and reflect the new challenges brought about by modernisation and digitalisation of the economy.

Having that said, ICC suggests that the Commission, before committing to a big regulatory reform, should make a more efficient and effective use of the existing competition tools under Articles 101 and 102 TFEU as well as the merger control regime that it has at its disposal, considering that both constitute a sufficient way to resolve main competition concerns across markets (even those extended to the digital era).

Moreover, the current, so called, "toolbox" has much more potential than what it is recognised for by the "NCT IIA". Mainly through the application of the Regulation 1/2003 which implements the rules on competition laid down in Articles 101 and 102 TFEU. Article 8/1 of Regulation 1/2003 provides the possibility for the Commission, on its own initiative, to order provisional measures in "cases of urgency due to the risk of serious and irreparable damage to competition". Contrary to what the Commission proposes with the "NCT", this provisional measure dependent on the finding of an infringement: on one hand this fact supports the legitimacy to impose interim measures, on the other hand, it enables an intervention before a "serious and irreparable damage to competition" occurs, making it possible to counter competition problems even in this modernised digital market. Nonetheless, accounts show that the Commission has rarely made use of this prospect.

Taking into consideration that there is not a detailed configuration of what the NCT would look like, it is indeed expected that any remedy to be imposed, regardless of the Option (between those provided in the IIA), must be accompanied by a market investigation exactly to determine the structural competition problem. In this regard, the information and disclosure requirements will have to be analogous to those predicted in Article 17 of Regulation 1/2003 for the sector inquiries. In fact, considering that this instrument already exists, it raises the question if there is a need to create an uncertain (arbitrary) direct disclosure power for the Commission, that is in its core intrusive and can lead to bigger problems like exposing trade secrets, with the added vicissitude that, by principle, in every Option presented by the Commission, there would be no need to find an indication of an infringement. This situation presents itself as very disproportionate and unfair. Therefore, even though sector inquiries do not predict the imposition of remedies, this instrument has shown to have an effect on market actors and allows the Commission to conduct thorough examinations into determined sectors. Clearly, if an infringement detrimental to competition is found, the Commission has the possibility either to impose structural or behavioral remedies (Article 7) or to make a commitment binding (Article 9). Consequently, instead of suggesting new "tools", ICC believes that there should be a greater implementation (and enforcement) of the existing toolbox that proves to be sufficient.

Furthermore, Article 7 of the Regulation 1/2003 must be considered. This article empowers the Commission, by acting on a complaint or on its own initiative, to adopt behavioral or structural remedies "which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end". It raises no questions that the core of the applicability of this article resides on the finding of an infringement committed by the undertaking - an abusive behavior regarding its dominant position - and its purpose to cease an infringement of competition law. On the contrary, the undescribed remedies that emerge throughout the Options presented by the Commission according to the NCT IIA are not limited. As already seen, there would not be (in any option) a requirement to put an end to an identified and specific infringement of competition law. The consequences of not limiting

materially a remedy to the cessation of an identified competition infringement would be a far-reaching empowerment of the Commission, acting as a regulator, with the ability to reconstruct entire markets and unbundle enterprises. The inexistence of objectively delimited remedies would give a wide margin of discretion to the Commission which could imply the characterisation of determined business conducts and business models harmful to the competition that currently are seen as an expression of normal and pertinent performance by enterprises. This conclusion leads to the fact that, besides the already predictable effects of lack of investment, innovation and uncertainty that harms the consumers the most, it is against the established principle in antitrust law that internal company growth should not be restricted which, in any case, would be possible with the enactment of this proposition, by imposing remedies independent of abuse of dominance or even a dominant position.

Moreover, besides the unestablished evidence showing the need for a new a tool, each time more, possible competition problems are in the course of being addressed via recent EU legislation, for instance, the Regulation 2019/1150 “on promoting fairness and transparency for business users of online intermediation services” and the ongoing review of the E-Commerce Directive. Adding to all this, an underlying theme in the IIA is the need for timely intervention that would supposedly be brought by the NCT allowing the Commission to impose remedies and “solve problems” in a much more (allegedly) rapid way. However, if we observe a similar instrument - the UK system of market investigation – it is rather obvious that quick results should not be expected, since most procedures inducted by CMA do not offer the timely response the IIA is seeking.

3.1.1.2 Poorly identified problems by the Commission

<u>“Tipping” Markets</u>

One of the key points that the NCT IIA identifies as a structural competition problem, are certain markets that are prone to “tipping”. The risks that “tipping” supposedly present emerge from the fact that certain powerful market participants (that exhibit a gatekeeper position) become so influential in that market that they acquire the monopoly of profits and consumers and a position which is almost invulnerable to competition. The alleged aim of the NCT is exactly to prevent these situations, by intervening beforehand, imposing structural and behavioral remedies. Criticism can be made regarding this aspect: firstly, it is very rare any enforcement practice that relates with this subject, much rarer a case law from the ECJ. This is a matter that has not been adequately studied and analysed to legitimate the Commission’s extensive empowerment. Therefore, “tipping” markets as one of the frontal structural competition problems that needs to be tackled, even consisting on the basis for the introduction of a new legislation, seem very dubious, at least.

More importantly, “tipping markets” are not necessarily problematic. In fact, it has to be considered that the idiosyncrasy of “tipping” is related to the increased value that users acquire from network effects. In markets with such characteristics preventing “tipping” would be nothing but a pure restriction of performance competition, preventing the internal growth of businesses, meaning worse results for consumers. This practice cannot be distinguished from successful integral growth as the outcome of competition on its merits. Therefore, an intervention regarding “tipping markets” is realistically not needed, only being justified where an undertaking has critical market power and abuses it, but for those types of situations already fall under existing competition legislation.

<u>Leveraging into adjacent markets</u>

Another structural competition problem indicated by the NCT IIA is the fact that a not necessarily dominant company with market power may extend its market position to related markets. Again, this situation does not constitute an inherent problem and may be, in fact, an essential part of the competitive

process. If a company has transferable assets, skills and know-how's, utilising those for entering a new area of activity is indeed a contributing factor for better outcomes regarding the users. This can be considered a normal activity regarding cost reduction and increasing the possibilities to successfully enter a new market. This situation could only be problematic, justifying an intervention and perhaps the imposition of a remedy or a commitment by the Commission after a detailed assessment concludes that these practices were of an anti-competitive leveraging nature, situations that already fall into the existing regulatory framework (if a undertaking is dominant). Only in these cases an intervention can be considered proportionate and fair.

"Gatekeeper position"

One of the apparently central structural competition problems that the Commission aims to fix are "Gatekeeper scenarios". This question must be evaluated in two fronts: firstly, after a meticulous analysis of The Special Advisors' report and the Inception Impact Assessment itself, there is an overall indication that the main focus of the Commission regarding this aspect are large online platforms (not necessarily dominant but with extensive market power and at the same the Commission is separately proposing to introduce targeted *ex ante* regulation of digital platforms under the DSA and these measures should be evaluated before further intervention in the form of the NCT) that control the platform ecosystem being "the market dynamics only determined by the gatekeeper". The notions appointed by the Commission are particularly directed to the fact that these "gatekeepers" control the market and are able to eliminate competitors due to its monopolised position. Also, as some of the Options described in the IIA predict, there is a predisposition from the Commission to departure from the pre-conditions incorporated in the existing regulatory framework, more precisely Articles 101 and 102, for the need to establish dominance, that would accelerate the procedures by not being limited to normal sieves of determining the dominant position through a fairly archaic process.

In this context, the real question is raised: Is what we have in our hands really a gap within the current EU legislation that exempts some "gatekeepers" from the competition law? Or does this question only emerge due to the fact that the main tool for assessing dominance must updated or enforced? Of course, that the control of considerable market shares conjugated with entry barriers and concentration are good indicators of market power, but if the problem is that its concentration of market shares does not reach the applicable thresholds, maybe this paradigm should be changed, not basing the establishment of a dominant position on the assessment of market shares, but rather on more dynamic and modernised evidences. Therefore, if looked, for instance, to the definition of dominance in case-law Hoffman La Roche, that is more integrative, concerned with the actual strength presented by an undertaking that would potentially cease relevant competition on a given market and have an "appreciable influence on the conditions under which that competition will develop" the gatekeeper position would always fall under this standard, and therefore, we would be re-railed to normal EU competition law procedures. Having that said, before a big legislative reform with such undetermined impacts in the real economy and the consumers, ICC recommends that there should be a further assessment on the question presented.

According to the "NCT IIA" the "(…) initiative is without prejudice to existing sector-specific regulation. It is also complementary to the Commission's new initiative on platform-specific *ex ante* regulation (…)"[6]. Nonetheless, taking in consideration the NCT IIA itself, it is very hard to conceive a complemental relationship with clear separation of competence. In fact, the New Competition Tool seems to considerably duplicate either the existing regulatory framework of the EU, as well as the proposed *ex*

[6] Ibid.

ante regulatory tool, another measure adopted by the EU Commission, currently subjected to its own public consultation and even Member State legislation:

Overlapping of the existing regulatory framework (Articles 101 and 102 TFEU)

This is one of the central questions that needs further analysis. In fact, as previously shown, a great part of the "new-era digital problems" that the Commission entails to fix, seen as gaps that cannot be resolved (at least effectively) under the current regulatory framework are, indeed, still approachable by this legislation, due to its flexibility and malleability that encompasses to novel problems. Having that said, there is no entail (according to NCT IIA) on how the Commission could be able to separate the cases without being discretionary (e.g. identifying which cases would still be under the Articles 101 and 102 TFEU, and which cases would be under the new tool). Considering that digital markets expand every day, creating new problems and conflicts regarding competition, there would be a lot of uncertainty on whether a given undertaking is subjected to a regulatory frame or the other, creating a substantial burden on businesses, potentiating the risk of inconsistent arbitrary outcomes and, ultimately, disincentivising investment. These situations would be very detrimental for consumers. Therefore, the importance of properly defining the differentiated scope of application of (eventual) different tools should be stressed. In this sense, without identifiable boundaries other than the Commission could intervene when there is a (potential unidentified) structural problem that poses a threat to competition that cannot be resolved "in the most effective manner" by Articles 101 and 102 TFEU, the New Competition Tool can only be recognised as a (political) shortcut concerning the established competition enforcement legislative process, which threatens its legitimacy.

As previously stated, the existing regulatory framework also includes the EU Merger Regulation (ECMR) that deals with preventive market structure control (if said mergers lead to an impediment of effective competition). In this sense, behavioral and structural remedies that might be applied by the Commission (unbundling especially), are prone to conflict with the principal of allocation of competences. This is another example of the redundancy of the "NCT" and the way it deteriorates legal safety and certainty.

Overlapping of the Commission proposed *ex ante* regulatory tool

The New Competition Tool although seemingly complementary, as explained by the NCT IIA, even with the Commission's new initiative (*ex ante* regulatory tool), does not seem to have its own place. A deeper analysis reveals that both tools can be treated as a regulatory instruments that would target large online platforms (positions of dominance or "market power") acting as gatekeepers, which benefit from identified structural competition problems (network and scale effects) that need to be tackled. In this sense, their scope partially replicates, becoming redundant.

Contributing to this situation of inconsistency and added burden for enterprises, is the fact that, even though the scope of this initiatives is not defined, there is already the decision that they will be (if enacted) administered by distinct Directorates (CNECT and COMP) creating an increased risk of diminished clarity on who relies the competence in a given case, again, potentiating uncertainty.

Overlapping Member States (expected) national legislative initiatives

Concerning the enforcement of competition rules in the EU, the Commission gave up its monopoly, by decentralising EU competition law enforcement to member states and their national authorities via Regulation 1/2003. Having that said, several EU members have already initiated legislative adaptations of Article 102 TFEU making its scope broader concerning unilateral conducts, therefore, falling outside the division of competence initially predicted with Regulation 1/2003. This is an added concern, whether because it makes national legislation redundant or, even worst, it may be contradictory to these national

regulatory initiatives. The consequences are the same: unpredictability, uncertainty and increased risks of inconsistent outcomes which would be nothing but detrimental for the economy and businesses and, ultimately, the consumers.

3.2 The "far-reaching" Scope of the New Competition Tool

As stated above (point 2), in all the options given by the Commission to be considered, there is not a need for the Commission to find an infringement of the law to be able to impose a wide range of behavioral and structural remedies. In options (3) and (4), inclusive, there would not have to be established abuse or even a dominant position (under Article 102 TFEU) in order for those sanctions, as long as they have "market power".

Assessing the data provided by the NCT IIA, there is a manifest insufficiency of a description that justifies such a panoply of regulatory arbitrary discretion by the Commission. In contrast, the proposals lack a very much needed detailed consideration of a system of checks and balances in these cases, in a way to mitigate the apparent discretionary powers that are being given to the Commission. There is not a defined legislative instrument, it is the Commission itself defining (eventually) what is considered a structural problem and also imposing the appropriate remedies. Contrasting with the normal sieves of the application of Articles 101 and 102, it is evident the absence of a sense of proportionality, much more evident when we realise that contrary to the existing legal framework, there is not a need to find an infringement. An "early intervention" whenever the Commission concludes there is a "threat to competition" does not suffice. Even though the NCT IIA indicates that the Commission will be "taking into account the rights of defense and the right to judicial review", a system of checks and balances needs to be a lot more densified, assuring that interventions are only prosecuted when proportionate, necessary, substantiated in hard evidence and, therefore, capable of addressing any perceived issues, which does not seem to be the case.

Still regarding this aspect, the NCT IIA refers that even though the Commission is being enabled to impose behavioral and structural remedies, it wouldn't impose fines "and thus not generate rights to launch damage claims". This is a paradoxical situation, because it gives the impression that by the fact that the Commission does not impose fines it is being "helpful" towards the undertakings. Nonetheless, we must take in consideration that by mandating structural remedies that could imply the unbundling of undertakings and restructuration's of business models and industries, these impositions are far more prejudicial to enterprises than paying fines. The Commission would be empowered to impose significant market changes in the European Union. There could also be the expectation that the "NCT" would claw off some burdens, more precisely the burden of proof.

Finally, concerning this aspect, it should not be forgotten that the proposed "NCT" has the ability to propose stricter remedies, even without having to find any infringement or the indication of one. Comparing two potential situations we could have scenarios where an undertaking after the Commission finds an infringement that falls into the existing regulatory framework may adopt a commitment in the terms of Article 9 of Regulation 1/2003, while an undertaking without a dominant position and without committing any wrongdoing could be subjected to impositions regarding structural or behavioral remedies. This means that companies might face stricter remedies, with less procedural rights without committing any infringement. Besides being outrageously disproportionate, this type of situation does not seem to meet the standards of Fundamental and Constitutional rights.

It is imperative that one realises that the introduction of a NCT, as described by the Inception Impact Assessment, would surely create legal uncertainty and incoherencies, constricting the innovation and dynamism potential for companies that would be limited or even punished for being successful and outdoing their competitors even trough fair competition, solely because they could became "market dominant". Ultimately, this situation would turn into a vicious cycle leading to disincentive to invest, therefore leading to less innovation and competition, with the spill-over effects to smaller and new-coming enterprises, resulting in far worst conditions for consumers.

3.3 Fundamental and Constitutional Rights

Throughout the presentation of the previous points one was already able to showcase some circumstances concerning the introduction of this "New Competition Tool" and its relationship with some fundamental protected rights. In this regard, we can talk about an inherent risk of deviation from legal standards entrenched in European Law and the European Court of Justice.
Firstly, as already referred to, the extensive empowerment of the Commission to impose structural and behavioral remedies, particularly without the need to establish an infringement, is a disproportionate measure that interferes with the free market economy and private property. This, combined with a lack of details concerning the "when's and how's" of its intervention, results in a discretionary and uncertain procedure. It is a departure from the evidence-based approach to competition law that is applicable today, which is subject to clear standards and judicial review.

Therefore, in this regard, it must be also stressed the insufficiency of guidelines that indicates (a much needed) rigorous procedural safeguard(s), ensuring that the concerns brought by the Commission (even without an indication of an infringement) are thoroughly and methodically investigated when determining a remedy. On the other hand, the interests of stakeholders must be accounted for. They should have rights to defense and independent judicial reviews, which requires a case-by-case analysis, ensuring high-quality decision making (like nowadays). In this sense, the Commission should be careful concerning the violation of Article 47 of the EU Charter of Fundamental Rights that predicts a "right to an effective remedy and to a fair trial". Also, the Commission should very attentive in regard to Article 48 CFR, especially when imposing a remedy without finding any infringement. There seems to be an incoherency between this type situation and the presumption of innocence of the enterprises as provided in the European Convention of Human Rights, that is yet to be justified.

More particularly, if one analyses the unbundling procedures, they will come to the conclusion that these processes eliminate productivity and capability of prosperous enterprises and diminishes the willingness to invest. In current times, there is yet to appear convincing evidences that these adverse circumstances are counterbalanced by consequential improvement in competitive conditions. Like the similar cases where this used to happen in the US, there is a tendency to abandon the intention of splitting companies regardless of their conduct as a measure to eradicate market power. Besides the economic impacts, it is very important to highlight that if such powers are given to the Commission (unbundling without a previous justified reason) we can be standing on, as indicated by the ECJ, an infringement of the fundamental right of freedom of property recognised under Article 6/3 TEU and Article 17 CFR, where the sole establishment of a competence for property intervention is considered an interposition in fundamental rights. Concerning this aspect, it should be pointed out that an imposed transfer of assets, specifically by unbundling would constitute an expropriation that requires, for proportionality and fairness reasons, a damage (compensation) claim, something the Commission is not intending on doing as demonstrated by the NCT IIA.

As stated above, this wide and discretionary empowerment of the Commission is prone to conflict to the “right to do business” under Art. 16 CFR. In fact, through its mission of regulating and impeding a distortion of competition by enforcing behavioral and structural measures without the need to find an infringement and without any coherent formalisation of the set of circumstances that fall within its powers, it has opened the susceptibility for the Commission to (politically) intervene, changing business models and proceeding to restructure markets. We would be able to see a lot of ordinary situations in the traditional model become subject to interventions of the Commission, being virtually impossible to differentiate the good and the bad practices in the Commission’s view, implying directly with this fundamental right that would stunt companies’ growth and innovation, alongside other economical stand points.

3.4 Legal Basis

The Commission submits, according to the proposals embedded in the New Competition Tool Inception Impact Assessment, that the legal basis for this new tool should be based on Article 103 TFEU conjugated with Article 114 TFEU.

First and foremost, we must acknowledge that the ECJ have been consistently considering that the appropriate legal basis is a matter of constitutional implication. In fact, it ensures conformity with the principle instituted in Article 5 TEU and limits the scope of the EU competence. Nevertheless, neither of these articles seems to be an adequate legal basis: the scope of Article 103 TFEU is to enable the adoption of legislation to “give effect to the principles set out in Articles 101 and 102” – its aim is to provide the application of these provisions, but not to alter or complement them. In contrast, the NCT seeks to create a new instrument to be applied where an infringement has not even occurred or where a dominant position does not exist, which makes it very dubious if any of the Options presented by the Commission seeking to remedy the identified structural problems could be based on Article 103 TFEU. On the other hand, when it comes to Article 14 TFEU two conditions have to be considered: on one side, the fact that a lot of Member States are in a legislative process to produce new competition laws aiming at an adaptation to a digitalised economy, On the other side because the scope of Article 114 TFEU, regarding it being an appropriate legal basis for approximation measures, is settled on the fact that it removes or prevents distortions of competition by developing conditions of the functioning of the internal market. Now, if one looks at the aim of the NCT IIA, it is not based on eliminating distortions of competition, but rather eliminating structural risks that cannot (allegedly) at least efficiently be tackled by the existing regulatory framework for competition law.