

The EU Digital Services Act

ITI Views on the on the DSA Questionnaire on the “New Competition Tool”

1. Introduction

The Information Technology Industry Council (ITI) appreciates the opportunity to provide comments to the European Commission on the New Competition Tool. While doing that, we will make reference to relevant aspects presented in the separate Inception Impact Assessment on the New Competition Tool that the European Commission published when launching the DSA consultation. ITI is also submitting [comments separately to the parallel questionnaire on the broader DSA issues and the gatekeeper aspects.](#)

As the global voice of the tech industry, ITI strongly supports free and undistorted competition as key to promoting innovation and consumer welfare. Together with our member companies, that include leading innovation players with worldwide value chains and active through all the segments of the technology sector, we are committed to addressing challenges potentially arising from digitalisation globally and in the EU.

ITI is resolutely in favour of this reflection process as part of a broader policy debate about the need for changes to the current competition law framework in order to allow interventions that preserve competitive markets. We strongly believe that proportionate instruments that ensure a consistent policy approach and fair competition should be considered wherever necessary.

With this goal in mind, grasping differences in business models and user interaction across digital platforms is key to gauging potential non-competitive conduct and properly addressing any challenges. As the notion of platform refers to very different business models, policymakers should consider the role that specific companies play in the markets they operate in, the value they create, their relationship to customers and competitors, and the possible alternatives. The goal should be to ensure market access for innovative challengers, ensure consumer welfare and economic efficiency, and focus on resolving proven market failures.

ITI believes that any remedies would have to focus on the specific situation, and be preceded by a consideration of whether other, less radical alternative approaches would be effective. It would be difficult to enact a one-size-fits-all approach across all types of situations. Policymakers should consider how to ensure that new market entrants are able to succeed, while not imposing rigid rules that disrupt the consumer experience or value that they receive from a platform.

The following sections provide more in-depth comments that mirror the different sections of the Commission’s survey on the topic. We hope that our contribution below will be a useful resource for policymakers, and we look forward to continuing to engage on this topic in the future.

2. Structural Competition Problems and Problem Definition (Q. 6)

With regard to Question no. 6, the Commission links the need for a New Competition Tool (“NCT”) to the existence of structural competition problems that cannot be tackled under the EU competition rules while resulting in inefficient market outcomes. We recommend that the Commission provides more evidence in support of this statement, also considering that while competition challenges may exist, further consideration should be given to the fact that by reducing entry barriers and making it easier for small suppliers to reach new customers, innovative technologies and businesses benefit consumers by offering new services and increasing competition and economic efficiencies in innumerable fields. By doing so, they offer major opportunities to start-ups and SMEs, who can grow more and faster than they would otherwise do, underpinning future European prosperity.

We would welcome a deeper reflection by the Commission on the problem definition and market analysis to support the introduction of new measures (such as those described in the IIA). Among other aspects, deeper analysis of network effects is needed – markets are not necessarily less competitive or less innovative, as there are several medium and smaller platforms that continue to help customers reach a wide range of goods and services. This is particularly relevant as regards the statement in the IIA on the NCT that intervention at national level would not be effective, as it is not infrequent that the competitive balance varies significantly in some Member States’ markets where local platforms play a very strong role.

Competitive dynamics across platforms offering different core services to the same customers should also be assessed. Grasping differences in business models and user interaction across digital platforms is key to gauging potential non-competitive conduct and properly addressing any challenges. Enforcement should focus on a company’s conduct and not on structural issues, like the amount of data a company holds, or its size. Nevertheless, all of the options under consideration in the IIA would allow the European Commission to impose behavioural or structural remedies even in absence of any infringement. In addition, the IIA does not provide any indication as to what kind of behavioural or structural remedies would be deemed appropriate for application to a business that has not been infringing any rules.

As a minimum, if a new tool were to be introduced, it should be subject to the highest threshold of burden of proof, demonstrating that any remedy is underpinned by robust economic analysis. **Competition policy enforcement should focus in particular on consumer welfare, not on protecting competitors.** For example, artificially constraining the size of a company or network may appear to increase competition, but it could also reduce consumer welfare. Policymakers should consider how to ensure that new market entrants are able to succeed, ensuring markets remain open to innovative challengers, while not imposing rigid rules that disrupt the consumer experience or value that they receive from a business, therefore keeping consumer welfare and economic efficiency as final objectives.

In addition, platforms play a beneficial role as engines of the digital marketplace, not least by facilitating information and communication and helping match offer and demand in the Digital Single Market and globally. Platforms make it easier for consumers to buy online, compare products and their prices, learn from other consumers’ experiences. In e-commerce, they are one of the main channels for cross-border transactions, allowing SMEs to compete beyond their national market and grow more, or more rapidly, than they would without an online intermediary. Consumers greatly benefit from the resulting increase in competition, variety and offer.

3. Specific situations identified by the NCT Questionnaire

3.1 Concentrated markets

Most discussion of antitrust issues and platforms seems to focus on large companies. While efficiencies of scale and network effects may push toward concentration, this is not always the necessary outcome and careful analysis of the network effects as applied to different markets is needed – they will not necessarily be less competitive or less innovative. Furthermore, a concentrated market does not in itself present a structural competition problem as long as competition among the existing players results in competitive prices, quality, choice, and innovative products and services. Market definitions should better reflect the competitive dynamics in the sectors (for example competition between online and offline operators in a certain market). Also, these markets are increasingly competitive and innovative, as medium and smaller Internet platforms continue to play important roles in helping match suppliers and customers for a wide range of goods and services. In addition, the presence of large platforms can increase competition by making it easier for users to reach a vast range of suppliers and find the best offers.

3.2 Vertical integration

First, a high degree of vertical integration in itself does not represent a structural competition problem and might in some instances increase competition. The benefits of vertical integration are recognized in the Commission's Guidelines on Non-Horizontal Mergers: the elimination of double-marginalization and better alignment of incentives as regards the development, production and marketing of new products and services. They can also be consumer welfare enhancing, by improving user experience and increase user safety.

It is important to consider how gatekeeper definitions may apply to companies with multiple verticals. For example, a company may have a dominant position in one area, such as social media, ecommerce, or music streaming, but also compete as a smaller player with large platforms that dominate other verticals. The Commission should focus on specific conduct and actions, rather than the size of one or more business units. Furthermore, the variegated nature of online platforms and the incentives driving specific decisions by platforms must be taken into account when assessing conduct. An incentive to protect the user against fraud, data violations or security threats might be to the immediate detriment of specific business users, while sustaining consumer trust to the benefit of all users.

3.3 Customer Switching

Consideration of issues related to switching, access to data and portability (also **addressed in Q. 18.9**) would necessarily have to focus on the specific platform and data concerned, and the available alternatives. It would be difficult to enact a one-size-fits-all approach to these issues across all types of platforms. Relatedly, bundling between operating systems and applications could on the one hand limit choice, while on the other benefit consumers, for instance by offering mobile devices working right out of the box.

3.4 Network effects

In some cases, a platform's value to each individual user grows with the number of other users, and its size brings considerable benefits. However, network effects may be observed even when no dominant position exists, potentially resulting in user lock-in or limiting new entrants on the market.

On the one hand, proposals to artificially constrain the size of networks might increase competition while reducing consumer welfare. Moreover, users may even benefit from concentration, as it enables them to rely on one (or few) platform(s) for each specific service or activity, be it shopping, social interaction, transportation or accommodation among others. This should not necessarily lead to competition concerns – when a new, more innovative and competitive alternative will come along, it will supplant the current incumbent platforms as users will migrate towards it for either one or all aspects of a given service. Furthermore, network effects can go both ways – they can reinforce a company’s market position but also weaken it – if users no longer trust the platform on one side, the other side will also look elsewhere.

On the other hand, network effects may however disincentivise switching between platforms, thereby possibly diminishing choice and effective competition (**see also Q. 18.9**). This could be reinforced in some cases by lack of interoperability. In this context, better understanding how certain company practices impact a specific market and correcting potential imbalances and failures may be useful, as long as such tools and rules are carefully assessed in order not to negatively impact consumer choice, innovation, and rapidly evolving markets and business models.

These effects should be considered, but only in combination with other indicators like market behaviour and a company’s conduct.

3.5 Data dependency

This issue is also **referred to in Q. 6**. Big data generates substantial innovations and efficiency gains, many of which are passed on to consumers, who are offered new products and services often free of charge. In addition, controlling large datasets does not necessarily lead to market power, as most digital markets are characterised by vigorous dynamic competition. As with many other assets, data could potentially be used in anticompetitive ways: large network effects can potentially diminish consumer choice and effective competition. This could be reinforced by lack of interoperability and the possibility to exert filtering power, which grows with size. ITI believes that competition policy can currently deal with these situations, and the existing European legal framework gives competition and data protection regulators abundant tools to protect markets and consumers when needed. At the same time, intervention should focus on a company’s conduct and not on structural issues as such, like the size of a company or the amount of data it holds or collects. In most cases the acquisition and use of data does not represent a threat to competition – and large amounts of data, including personal information, are increasingly a vital input for some of the economy’s most important innovations, in healthcare, safety, transport and environmental protection just to name a few. In this context, independent data analysis solutions play an important role in helping provide transparency to the market.

3.6 Extension in related markets

As regards the issue of extension in related markets (**referred to in Qs. 7A, 8**) platforms can also extend into other markets with their own applications that compete with other providers, sometimes leveraging their pre-existing position from one market to another. While this should be closely monitored, it could have pro-competitive effects: by reducing entry barriers and making it easier for small suppliers to reach new customers, platforms increase competitive pressure on traditional industries like transport, communications, or tourism, to the benefit of consumers. Regulators should in these cases focus on consumer welfare, not on protecting competitors. Platforms that provide more choice and lower prices usually lead to some disruption on more traditional competitors in the market. Any potential intervention

should take into account the specific characteristics of the market and respond only to uncompetitive behaviour by platform or non-platform actors equally.

The survey also asks whether large amount of data have an anti-competitive role when a company with market power in a core market may apply repeated strategies to extend its market position to related markets (**question 8**). We believe that value of data depends on its commercial use and generally does not raise special antitrust-related concerns, as in itself it neither constitutes a barrier to entry, nor *by default* grants a competitive advantage in the market. In fact, holding a certain amount of data can often lead to a competitive advantage if a business is also able to analyse and extract value from it, which is often passed on to consumers through new applications. Moreover, the amount of data is infinite, and data is non-rivalrous in that it can be simultaneously collected and use by multiple firms, and consumers can use or share their data multiple times. When acting as an antitrust enforcer, we recommend the Commission therefore assess data under the existing competition framework as any other asset that companies compete with in the market.

3.7 Pricing algorithms

Question 14 refers to pricing algorithms, as automated tools that allow very frequent changes to prices and other terms taking into account all or most competing offers on the market. Big data and artificial intelligence technologies are rapidly changing the way strategic market decisions are made. An issue which is often referred to is the potential for market distortion of pricing algorithms. The fact that pricing algorithms are used or not should not change an antitrust enforcement agency's conclusion in relation to certain conduct. Still, increasing use of these algorithms raises enforcement questions as it might facilitate collusion, or make detection of collusive behaviour more difficult. However, concepts such as “machine-to-machine” have not been established. The use or misuse of pricing algorithms always requires human input and thus existing tools under Article 101 are sufficient.

The uncertainty surrounding AI technologies and the applicable rules may lead to concerns among those businesses considering the use of pricing algorithms. This would not be a desirable outcome, since there do not seem to be default antitrust concerns that would justify sacrificing the potential economic efficiency brought about by AI. We therefore encourage the Commission to evaluate existing policy tools and use caution before taking measures that may inadvertently or unnecessarily decrease competition instead of fostering it.

3.8 Tipping markets

The section of the questionnaire addressing structural competition problems also addresses the issue of tipping markets in **question 17**, and the possible need to intervene “early” in tipping markets to preserve or “improve” competition. In parallel, the objectives of the IIA refer to the importance of restoring *undistorted* competition. In both cases, the policy approach presented – and developed in the IIA's policy options – seems to address situations where competition has not been distorted yet, and would rather require regulators to predict the future development of a market, based on the assumption that competition law remedies aimed at addressing an illegal conduct that *has actually taken place* would not be sufficient.

4. Gatekeepers

Question 18 and following address the issue of gatekeepers, which ITI is also addressing in our separate submission to the first *DSA questionnaire on e-commerce issues and gatekeepers**. In our view, the nature of a platform and its size should not automatically be perceived as harmful, particularly given the demonstrated benefits the platform economy brings to all users, including to deliver trust, reach and efficiencies. We therefore encourage the Commission to consider focusing the scope and test for intervention on particular actions and conduct, rather than companies. The characteristics of a market, specific activities by a platform, and interactions with other platforms and with users will be more indicative of a potential market failure than just the characteristics of a particular platform, such as market share, number of users, or number of services offered.

In relation to **question 19** on the potential need to intervene, we recognize the challenge in introducing new restrictions or limitations, as the Commission does not want to create unintended consequences that could needlessly hamper innovation, consumer experiences, or business growth. Carefully considering the impact of potential limitations is crucial in order to prevent any regulatory failure from overbroad instruments or poorly tailored requirements. Any potential limitation to behavior or business practices should be narrowly focused to achieve the intended goal.

In addition, a company should not be singled out based exclusively on size (market share, number of users, amount of services...) or impact. It would be helpful to better clarify the potential consumer harm caused by certain platforms becoming or acting as “gatekeepers” and how this approach would help alleviate competitive concerns that cannot already be addressed by existing instruments. To the contrary, there is a risk of discouraging growth beyond a certain threshold due to the increased burden of compliance with additional legal obligations.

5. Suitability and effectiveness of the existing framework of Articles 101 and 102 TFEU

This issue is addressed by several questions in relation to various situations (e.g. **Qs 9.2, 15.2, 17.2, 19.2, 21.2**). Also, All of the options in the IIA would constitute a major shift from the current European Competition law setting based on the framework provided by articles 101 and 102 TFEU, which has served the European single market well for the past nearly 60+ years, during which it has undergone deep scrutiny by the European Courts, demonstrating it is both durable and sufficiently flexible to address new challenges.

In the case of specific concerns is referred to in the survey - like tacit collusion, or the growing availability of algorithm-based technological solutions that may facilitate the monitoring of competitors’ conduct – we believe these could and should be addressed by more targeted measures. In any case, we fundamentally believe any remedy should seek to address specific unlawful conduct or a systemic problem in the market, not focus on the actors and the characteristics of a type of company.

6. Potential Set-up of the Tool

The following section of the survey addresses the potential need for a new competition tool (NCT) to deal with structural competition problems that cannot be tackled by the existing EU competition law framework (**question 24**). The options for an NCT are further described in the IIA.

Among others, the survey mentions the concept of “early intervention” to prevent structural risks to competition, presumably in the future and particularly for tipping markets (for instance in **question 25**). ITI believes it is difficult to conceive how this type of intervention by a public enforcement authority, in absence of a well-identified infringement of existing laws, would not be too interventionist in a market economy.

It is also our perspective that, if such a tool would ever be enacted, it should be strictly dominance-based (**question 27**). Provided that all of the options in the IIA are in our view unjustified given the **potential application absent any infringement**, options 3 and 4 appear to be particularly problematic as they would allow the Commission to apply behavioural and structural remedies even without a requirement to demonstrate dominance – dominance and abuse should remain fundamental preconditions for antitrust intervention.

As regards the **scope (question 28)**, also based on the current level of development of thinking in the IIA, the difference between horizontal (options 1 and 3) vs limited scope does not seem particularly meaningful, since even when the scope would be limited in principle, the tool could be applied to digital markets, *as well as other markets identified* by the Commission. This being said, it is our perspective that if such a tool would ever be enacted, it should be based on *rigorous application across all sectors* so that any potential benefits apply across various markets.

The need for remedies should be evidence-based, and should be effective and proportionate. Any remedies should be objectively justified and proportionate (i.e. requiring the minimum action that is necessary to address the problem identified). The tool should offer the possibility to submit voluntary commitments at an early stage, particularly given its non-punitive nature.

Finally, particularly in light of the potential to impose far-reaching behavioural remedies on non-dominant firms, any potential implementation of a new tool should contain **strong procedural safeguards** guaranteeing enhanced due process and rights of defence, including a straightforward and predictable test to trigger an investigation and possible subsequent intervention, based on clear criteria, with the enforcement authority carrying the burden of proof.

Relation between the NCT and the Ex-ante Tool for Gatekeepers in the DSA (Q. 40)

The Commission should take into account the overall proportionality of the parallel consideration of both an ex ante regulatory intervention about “gatekeepers” and the potential introduction of broad-ranging ex-post remedies, that are meant to address similar concerns. While in principle ITI would rather be in favour of a targeted approach, addressing specific, individual situations that are negatively affecting competition, we do not believe the current options as described in the IIA can provide an appropriate basis for that approach. We stand ready to work with the Commission to better scope any emerging challenge and identify the most appropriate way forward.

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