Questionnaire for a public consultation on a New Competition Tool

Introduction

Objectives of the public consultation

The proposal for a New Competition Tool is one of the measures aimed at making sure that competition policy and rules are fit for the modern economy. It is meant to address gaps in the current EU competition rules, which have been identified based on the Commission's enforcement experience in digital and other markets, as well as the worldwide reflection process about the need for changes to the current competition law framework to allow for enforcement action preserving the competitiveness of markets.

EU competition law can address (i) anti-competitive agreements and concerted practices between companies pursuant to Article 101 of the Treaty on the Functioning of the European Union ("the EU Treaty") and (ii) the abuse by a company of its dominant position pursuant to Article 102 of the EU Treaty. The enforcement experience of the Commission and national competition authorities, as well as the worldwide reflection process on the fitness of the existing competition rules to tackle today's challenges have helped to identify certain structural competition problems that these rules cannot tackle (e.g. monopolisation strategies by non-dominant companies with market power) or cannot address in the most effective manner (e.g. strategies by companies with market power to extend their market position into multiple related markets).

The objective of this consultation is to collect stakeholder views on two aspects. First, stakeholders are asked to provide their views on whether there is a need for a new competition tool to ensure fair and competitive markets with a view to delivering lower prices and higher quality, as well as more choice and innovation to European consumers. Second, stakeholders are asked to provide their views on the characteristics that such a new competition tool should have in order to address structural competition problems in a timely and effective manner.

In parallel, the Commission is also engaged in a process of exploring, in the context of the Digital Services Act package, 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. As part of that process, the Commission has launched a consultation to seek views on the framing, on the scope, the specific perceived problems, and the implications, definition and parameters for addressing possible issues deriving from the economic power of large, digital gatekeeper platforms. As such, the work on a proposed New Competition Tool and on the ex ante rules complement each other. The work on the two impact assessments will be conducted in parallel in order to ensure a coherent outcome. In this context, the Commission will take into consideration the feedback received from both consultations. We would therefore invite you, in preparing your responses to the

questions below, to also consider your response to the parallel consultation on ex ante rules for large, digital gatekeeper platforms, which can be found at Digital Services Act survey.

About you

* Language of my contribution

English

* I am giving my contribution as

Business association

* First name

Gerard

* Surname

Pérez Olmo

* Email (this won't be published)

gerard.perez@dwf-rcd.law

* Organisation name

255 character(s) maximum

Asociación Española para la D

* Organisation size

Medium (50 to 249 employees)

* Web address

www.aedc.es

Transparency register number

255 character(s) maximum

Check if your organisation is on the transparency register. It's a voluntary database for organisations seeking to influence EU decision-making.

793306734969-23

0 / 255

* Country of origin

Please add your country of origin, or that of your organisation.

Spain

* Publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

- **Anonymous**
  Only your type of respondent, country of origin and contribution will be published. All other personal details (name, organisation name and size, transparency register number) will not be published.

- **Public**
  Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

☑ I agree with the personal data protection provisions

A. How to answer?

You are invited to reply to this public consultation **by 8 September 2020** by filling out the eSurvey questionnaire online. The questionnaire consists of four main sections:

1. General information on the respondent
2. Structural competition problems: this section aims to gather the experience and views of stakeholders on scenarios resulting in a structural lack of competition and structural risks for competition, as well as about whether the current EU competition rules can deal with them.
3. Assessment of policy options: this section aims to gather the views of stakeholders on the four policy options outlined in the Inception Impact Assessment.
4. Institutional set-up of a new competition tool: the section aims to gather the views of stakeholders about how the new competition tool should be shaped in order to address structural competition problems in a timely and effective manner.

The Commission will summarise the **results in a report**, which will be made publicly available on the Commission's Better Regulation Portal.

In the interest of time, the questionnaire is available in English only during the first two weeks. Thereafter the questionnaire will also be available in all official EU languages. You may respond to the questionnaire in any official EU language.

To facilitate the analysis of your reply, we would kindly ask you to **keep your answers concise** and to the point. You may include documents and URLs for relevant online content in your replies. **You are not required to answer every question**. You may respond 'not applicable/no relevant experience or knowledge' to questions on topics where you do not have particular knowledge, experience or opinion. Where applicable, this is strongly encouraged in order to allow the Commission to gather solid evidence on the different aspects covered by this questionnaire.

You are invited to read **the privacy statement attached** to this consultation for information on how your personal data and contribution will be dealt with.

You have the option of saving your questionnaire as a 'draft' and finalising your response later. In order to do this you have to click on 'Save as Draft' and save the new link that you will receive from the EUSurvey tool on your computer. Please note that without this new link you will not be able to access the draft again and continue replying to your questionnaire. Once you have submitted your response, you will be able to download a copy of your completed questionnaire.

Whenever there is a text field for a short description, you may answer in **maximum 3000 characters**.

Questions marked with an asterisk (*) are **mandatory**.

Digital markets in this questionnaire refer to markets largely relying on digital technologies with certain specific characteristics, such as extreme economies of scale and scope, strong network effects, zero pricing and data dependency.

No statements, definitions, or questions in this public consultation may be interpreted as an official position of the European Commission. All definitions provided in this document are strictly for the purposes of this public consultation and are without prejudice to definitions the Commission may use under current or future EU law or in decisions.

In case you have questions, you can contact us via the following functional mailbox: COMP-NEW-COMPETITION-TOOL@EC.EUROPA.EU;

If you encounter technical problems, please contact the Commission's CENTRAL HELPDESK.

*** 1. Please indicate your role for the purpose of this consultation.**

- ○ An individual citizen
- ○ An association or trade organisation representing consumers
- ○ An association or trade organisation representing businesses
- ◉ An association or trade organisation representing civil society
- ○ A business / economic operator of small size
- ○ A business / economic operator of medium size
- ○ A business / economic operator of large size
- ○ A public authority
- ○ A research institution / Think tank
- ○ Academia (Legal field)
- ○ Academia (Economics)
- ○ Academia (Engineering)
- ○ Academia (Other)
- ○ Law firm / consultancy

○ Other: Optional

*** 2. Only for businesses / economic operators: Please identify the markets/sectors in which you provide your services.**

☐ A - Agriculture, forestry and fishing

☐ B - Mining and quarrying

☐ C - Manufacturing

☐ D - Electricity, gas, steam and air conditioning supply

☐ E - Water supply; sewerage; waste managment and remediation activities

☐ F - Construction

☐ G - Wholesale and retail trade; repair of motor vehicles and motorcycles

☐ H - Transporting and storage

☐ I - Accommodation and food service activities

☐ J - Information and communication

☐ K - Financial and insurance activities

☐ L - Real estate activities

☑ M - Professional, scientific and technical activities

☐ N - Administrative and support service activities

☐ O - Public administration and defence; compulsory social security

☐ P - Education

☐ Q - Human health and social work activities

☐ R - Arts, entertainment and recreation

☐ S - Other services

☐ T - I am not a business/economic operator

☐ Other

*** 3. Please briefly explain your activities/describe your organisation/company and - if applicable - the main goods/services you provide.**

The Asociación Española para la Defensa de la Competencia (AEDC) is an association of Spanish lawyers, economists and scholars practising competition law dedicated to the study and promotion of competition and antitrust law.

A number of members of the association have participated in these comments, namely Patricia Vidal, Oriol Armengol, Rafael Allendesalazar, Marcos Araújo, Patricia Liñán, Fernando Díez Estella, Carlos Vérgez, Aida Oviedo, Fernando Las Navas, Aixa Pol, Tomás Arranz, Pablo Solano, Raquel Lapresta, Carlos Fernández, Alfonso Lamadrid, Roberto Vallina, Carolina Fernández Bustillo and Gerard Pérez Olmo.

57 / 3000

*** 4. Only for businesses / economic operators: Does your company provide digital goods or services?**

- ☐ I am not a business operator/representative of businesses
- ☐ No
- ☑ Not applicable
- ☐ Yes, I am active as an e-commerce marketplace
- ☐ Yes, I operate an app store
- ☐ Yes, I develop and provide apps
- ☐ Yes, I provide a search engine
- ☐ Yes I provide an operating system
- ☐ Yes I provide a social network
- ☐ Yes, I provide network and/or data infrastructure/cloud services
- ☐ Yes, I provide digital identity services
- ☐ Other

Please specify

3000 character(s) maximum

0 / 3000

*** 4.1. Please explain your answer. Please indicate what types of digital goods or services you provide. If you replied 'no', please indicate if you expect to provide digital goods or services in the next five years.**

The association does not provide goods or services to third parties. The association is dedicated to the study and promotion of competition and antitrust law, and frequently collaborates and assists competition authorities in legal and soft law consultation procedures. Almost all the members of the association have extensive practice in competition law and/or the academic fields.

111 / 3000

5. Only for business / economic operators: As a business user, do you rely on digital services or on digital operators and/or online platforms? (For the purposes of this questionnaire 'online platform' refers to a firm operating in two (or multi)-sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups.)

- ○ Yes, my business is fully dependent on digital operators and/or online platforms
- ○ Yes, my business is largely dependent on digital operators and/or online platforms
- ○ Yes, my business is somewhat dependent on digital operators and/or online platforms
- ○ No
- ○ Not applicable / no relevant experience or knowledge
- ○ I am not a business operator/representative of businesses

C. Structural competition problems

Structural competition problems concern structural market characteristics that have adverse consequences on competition and may ultimately result in inefficient market outcomes in terms of higher prices, lower quality, less choice and innovation. These market characteristics (explained in more detail below)

include extreme economies of scale and scope, strong network effects, zero pricing and data dependency, as well as market dynamics favouring sudden and radical decreases in competition ('tipping') and 'winner-takes-most' scenarios. These characteristics can typically be found in digital but also in other markets.

As the Commission has established in some of its competition decisions, these characteristics can make a position of market power or dominance, once acquired, difficult to contest.

While structural competition problems can arise in a broad range of different scenarios, they can be generally grouped into two categories depending on whether harm is about to affect or has already affected the market:

- **Structural risks for competition** refer to scenarios where certain market characteristics (e.g. network and scale effects, lack of multi-homing and lock-in effects) and the conduct of the companies operating in the markets concerned create a threat for competition, arising through the creation of powerful market players with an entrenched market position. This applies notably to tipping markets. The ensuing risks for competition can arise through the creation of powerful market players with an entrenched market and/or gatekeeper position, the emergence of which could be prevented by early intervention. Other scenarios falling under this category include unilateral strategies by non-dominant companies to monopolise a market through anti-competitive means.
- **Structural lack of competition** refers to a scenario where a market is not working well and not delivering competitive outcomes due to its structure (i.e. structural market failures). These include (i) markets displaying systemic failures going beyond the conduct of a particular company due to certain structural features, such as high concentration and entry barriers, customer lock-in, lack of access to data or data accumulation, and (ii) oligopolistic market structures characterised by a risk for tacit collusion, including markets featuring increased transparency due to algorithm-based technological solutions.

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. (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.)

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.

Competition law has ample experience regarding all of the market features identified by the Commission in Q6. There is ample case law, decisional practice and research confirming that features such as high fixed costs (C, D), financial strength (O) regulatory barriers (E), IPRs (F), switching costs (H) and access to indispensable assets may constitute barriers to entry (I). Experience also shows that one cannot necessarily draw a direct connection between market concentration (A) and insufficient competition. Similarly, the fact that consumers may predominantly single-home (M) may in some cases be plausibly explained by the superior quality of a given service. What matters is whether users face technical or economic barriers to switching.

There are other features, like vertical integration (B), zero-pricing (P), economies of scale and scope (J), network effects (K, L) and dual-role situations (N) that are more ambiguous from a competitive standpoint. These can be a source of market power as well as a source of value and efficiencies, often at the same time. Mere access to data is most often not determinative (only in few occasions, for instance, when pooling agreements exist -for instance, statistical data on losses for insurance purposes and new entrants should be allowed to join and access that common data for calculating the loss premium); competition is more driven by skill, foresight and industry in deciding what data to collect, how to collect it and how to process them in a way that adds value and may be monetized. In sum, the relevance of the features identified in Q6 needs to be assessed on a case-by-case basis.

In conclusion, it is not possible to hold general sweeping assumptions about these features being generally positive or negative. On the contrary, the anticompetitive or pro-competitive nature of these features seems to largely depend on whether there is a bottleneck (an unavoidable or at least very important point of entry to an assemble of related markets), and there are significant and permanent barriers to entry and expansion in the bottleneck. This, in turn, varies decisively depending on the legal and economic context (regulation, business model, etc.).

Example: In *Microsoft/Skype* the Commission dismissed competition concerns in a concentrated market, characterized by economies of scale and scope, strong

network effects, vertical integration, zero-pricing and self-preferencing by a dominant platform with shares of 90% in all relevant markets under consideration. Both the General Court's Judgment in *Cisco* and the recent evolution of the market for video calls on Windows PCs have confirmed that the Commission's competitive assessment was correct. That assessment would appear to be at odds with some of the assumptions underlying the concerns in Q6.

Furthermore, those market features are also present in non-digital markets. In fact, many of them are mentioned in the Commission's Guidance on exclusionary conducts, published in 2009, which were drafted having mostly the traditional sectors in mind.

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?

The existence of significant and permanent barriers to entry and expansion in the bottleneck, which in its highest degree generates customer lock-in and, hence, an ecosystem. The presence of an ecosystem, which clearly has advantages from a consumer perspective, but depending on the technical components of the ecosystem and interoperability mechanisms in place, can also increase switching cost for the different components of the ecosystem.

In non-digital markets, the EU sectorial enquiries have shown some market features that could be a source of structural competition problem. As a mere example, in the insurance/reinsurance sector the reiteration between same players in ad-hoc insurance/reinsurance schemes, that favour alignment of conditions and may lead to lower competition just focussed on commissions for reinsurance. The UK market investigations have also shown some structural problems in many other markets (usually oligopolistic but with additional elements as well[1]). As a mere example, in the aggregates case part of the source of the problem was dual role of suppliers/clients between competitors as these relations increased price transparency and could favour price alignment not caught by art. 101 TFEU (aggregates case).

6.2 Please indicate which are these other market features/elements that can be a source or part of the reasons for a structural competition problem in a given market and rate them according to their importance from 0 to 4 (0 = no knowledge/no experience; 1 = no importance/no relevance; 2 = somewhat important; 3 = important; 4 = very important).

[1] For easy reference, see the chart included in Amelia Fletcher, *Market Investigations for Digital Platforms: Panacea or Complement?*, 6 August 2020, Centre for Competition Policy.

N/A

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

"Somewhat important" (all scenarios)

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

All of the market scenarios described in Q7 may or may not give rise to competition concerns. Problems should not be ruled out, but they should not be taken for granted either. The formulation of the questions in Q7 appears to make some assumptions that do not necessarily follow from the market situation described. For instance, highly concentrated markets or the use of algorithmic pricing do not necessarily allow undertakings to align their market behaviour. Similarly, the fact that a company may reach a critical mass of users in a market subject to network effects does not necessarily confer a "disproportionate advantage". Absent barriers to switching, even companies with high markets share will need to innovate and be disciplined by actual or potential competition. The problems identified in Q7 cannot, however, be ruled out in all scenarios. We support vigorous competition enforcement to identify and address those problems should they arise but without taking any aprioristic position in any specific sector (for instance, digital) or in any specific market scenario.

7.2. Can you think of any other market scenarios that qualify as structural competition problems?

No.

7.3 Please indicate which are these other market scenarios that in your view qualify as structural competition problems and rate them according to their importance from 0 to 4 (0 = no knowledge/no experience; 1 = no importance /no relevance; 2 = somewhat important; 3 = important; 4 = very important).

N/A

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.

8.2 In which sectors/markets did you experience repeated strategies to extend market power to related markets?

It is very common for companies (dominant or not) to try to extend their position from one market to other related markets. This happens in all kinds of markets and sectors of the economy (not only in digital sectors) and it is most often procompetitive (for instance, incumbent operators or simply strong operators in one energy market - electricity- extend its activities to the gas sector or viceversa, in the telecoms & media sector -fix telephony, afterwards, mobile telephony, further internet, then media content, etc.; all in all: same companies using their client portfolio to enlarge the range of products offered and that are usually acquired by those same clients).

Strategies to operate in related markets are also inherent to platform business models, which consist of connecting different but interdependent set of users, fostering complementarities and creating value across multi-sided settings. Every company can, and should be encouraged to, legitimately make use of its competitive advantages to enter and compete in other markets to the extent that its conduct does not foreclose competitors in an anticompetitive way. Competition law and economics generally view vertical integration as a source of efficiencies (e.g. the Commission's Guidelines on non-horizontal mergers). In some cases, dominant companies may seek to extend their market power via different means of anticompetitive leveraging. There is established case law and experience regarding the circumstances in which those strategies may be anticompetitive. Competition authorities have a proven track-record of flexibility and success in addressing this kind of strategies.

8.3 Please list and explain instances where a company with market power has used its position to try to enter adjacent/neighboring markets to expand its market power.

Many companies with or without market power in all sectors of the economy often try to enter adjacent/neighbouring markets. The case law offers examples of instances of such strategies, and offers guidance as to their legality (e.g. *Microsoft, Commercial Solvents, Tetra Pak, Telemarketing*, *Deutsche Telekom*, *Wanadoo*, etc.). Even in less sophisticated markets, that do not seem to pose competition concerns so far, such as supermarkets, it is very frequent to see that retailers become "manufacturers" of their own products and compete with their suppliers of branded products. See also some examples provided above in the telecom & media sector.

8.4. Do you consider that strategies to extend market power to related markets are common in digital sectors/markets?

Yes, to some extent; but also in non-digital sectors/markets.

8.5 Please explain your answer and identify the sectors/markets concerned.

As explained in the response to 8.2, strategies to operate in related markets are also inherent to platform business models, which consist of connecting different but interdependent set of users, fostering complementarities and creating value across multi-sided settings. In addition, the narrow market definitions adopted in many digital markets may facilitate the definition of a variety of closely connected markets which, in turn, might facilitate the identification of "leveraging". Providing complementary services across markets is one of the ways in which digital companies and ecosystems may compete and create value for users. Whether these strategies are ultimately pro- or anti-competitive needs to be assessed in light of the relevant economic and legal context to every strategy and market. Making wrong assumptions either way can be costly for society.

Moreover within the context of a possible NCT which is does not seem to subject to the limits and procedural safeguards of articles 101 and 102 TFEU, making wrong assumptions may reduce certainty and attractiveness for investors in the EU in digital markets (which is precisely one of the areas in which the EU has a competitive disadvantage).

8.6 In your experience, does a repeated strategy by a company with market power to extend its market power to related markets raise competition concerns?

The question is unclear. In view of the respondents, the Commission should provide a clear definition of what is meant by the notion of "market power" as it seems to set a new threshold for intervention different from that of "dominant position" set out in Article 102 TFEU. The same applies to the expression of "extension of market power", which in itself is vague and imprecise. Moreover, respondents also find questionable that the concerns the NCT should address only relate to a "repeated strategy", excluding one-time strategies from dominant companies/companies with market power aimed at extending such power in their own or other markets.

8.7. Please explain your answer, and indicate the competition concerns that may arise in case of leveraging strategies.

Leveraging strategies will be procompetitive when based on competition on the merits as well as in situations where the entry of a new company/business model in the adjacent market may translate into greater competition.

Ample experience in law and economics has shown that leveraging strategies may give rise to competition concerns when three conditions are met: (i) undertaken by dominant companies in markets with high barriers to entry and where the dominant company has a competitive advantage not accessible to

others; (ii) not based on competition on the merits, and (ii) likely to lead to anticompetitive foreclosure of rivals who could become as-efficient as the dominant firm.

Respondents understand that the intervention of the Commission should be based on the established threshold of dominance rather than on a new, apparently lower but in any case undefined threshold of "market power" that creates legal and economic uncertainty.

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?

See response to question 8.6 above.

9.1. Please explain your answer. If you replied yes, please also indicate the type of intervention that would be needed.

The European Commission and every other competition authority and court should be able to intervene in the face of risks of anticompetitive leveraging. Experience shows that competition authorities currently enjoy the powers to do so under the coverage of articles 101 & 102 TFEU and through additional tools (merger control, sectorial enquiries, commitment decisions under aticle 9 of Regulation 1/2003).

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.

9.3. Please explain your answer

There is a great wealth of experience concerning the successful application of competition law to anticompetitive leveraging strategies articulated around different business methods, including tying/bundling, exclusivity, predatory pricing, margin squeeze and even product design, among others.

EU and national courts have developed flexible standards based on "imprecise legal concepts" (see Case T-167/08, *Microsoft,* para. 91) that have been replicated around the world and that enable authorities to intervene in the face of risks that a conduct may be "capable" of "potentially" restricting competition. Under these provisions, the Commission also has the powers to impose behavioural or structural remedies. Under Art. 9 of Regulation 1/2003, moreover, the Commission enjoys the power to make binding behavioural or structural commitments, even when disproportionate to the competition concerns at issue.

Even a cooperation mechanism in exchange for a fine reduction has been applied beyond cartel settlement procedures to vertical restraints (see, for instance, Cases AT. 40465 Asus, AT. 40469 *Denon & Marantz*, AT. 40181 *Philips*, and AT.40182 *Pioneer*) and abuse (see, for instance, Case 39759 *ARA foreclosure*).

Whereas Arts. 101 and 102 do not cover purely "unilateral" conduct by non-dominant firms, it is not easy to anticipate scenarios where such conduct may be capable of foreclosing as-efficient competitors.

The experience gained across thousands of cases in virtually all sectors is also extremely helpful to understand the circumstances in which Articles 101 and 102 should not intervene. Lack of enforcement in certain situations is not necessarily explained by the insufficiency of the tools, but because of the existence of important reasons not to deploy them.

For all of their flexibility and adaptability, Articles 101 and 102 (like any other rule of law) should not be deployed to pursue desired outcomes on the basis of "fairness" ideals.

Deterrence. Some members take the view that the system of remedies (based eminently on fines) may not always have been historically sufficient to deter repeat offenders. There is, however, a view that the increase in damages actions, the increase in the level of fines and greater reputational damage may now reduce this perceived shortcoming.

Remedies. Some members have also pointed out that remedies should be better designed. If the Commission's objective is to regulate markets and create and administer intrusive remedies along the lines of *ex ante* access obligations, then there is ample consensus that competition law would not be well-suited and ex-ante legislation (with clear cut obligations and prohibitions ensuring predictability) should be adopted. The experience of the UK market investigations regime in, for example, retail banking, shows that remedies can eliminate obstacles to competition (e.g. by facilitating switching and interoperability) without intruding on complex business models or market structures. However, also like in the UK, strong safeguards and balances should be adopted within the context of these procedures (hearings, public reports, consultations, etc.).

Duration of investigations. Whereas the length of enforcement proceedings might also be a problem in some cases (also in non-digital scenarios), this is a risk that may have been somewhat overstated (there are no clear examples of cases where swifter enforcement would have had brought about meaningful change) and that could be addressed via the welcome re-use of interim measures. There is ample consensus among our members that justifying a new competition tool on the basis of this observation could lead to an overlap with

Articles 101 and 102 that could be difficult to manage and would raise significant legal concerns.

Perceived shortcomings should be addressed with greater resources. There is a consensus that concerns about the sufficiency and effectiveness of Articles 101 and 102 would be best addressed by granting significant additional resources to competition authorities and making more proactive use of interim measures when need be.

Other suggestions:

- The creation of informal forums where companies and competition authorities could exchange information and feedback regarding contemplated or current business practices could also avoid certain problems while resulting in somewhat greater legal certainty. A more proactive use of sectorial enquiries and general recommendations, as well as commitment decisions could be better suited to address structural problems.

- If the Commission finally decides to opt for a new competition tool (which is an option the respondents do not support), we propose that this tool is limited to clearly identified competition concerns in each case (regardless of the specific economic sector; i.e., no "digital only") and is limited to permanent market structure problems. If the concerns mainly refer to behavioural aspects, they should be treated under arts. 101 & 102 TFEU, which ensure a deeper analysis on a case-by-case basis and with all the procedural, legal and economic guarantees that the new tool does not seem to envisage at this stage.

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, but not only in digital and not only data related.

10.2. In which sectors/markets did you experience anti-competitive monopolisation strategies?

Anticompetitive monopolisation can occur in traditional markets where an aspiring monopolist prevents competitors' products from reaching consumers. For example, this could occur in the consumer products' sector when misusing a category manager position at the retail level (see paras. 209-213 of the Commission's Guidelines on vertical agreements). Also in services related markets (for instance in Spain, using clients data bases created for supply of energy under a non-liberalised regime to render additional installing services and refusing access to that data to competing installers: a case duly addressed under traditional dominance /article 102 TFEU provisions without the need of additional tools).

It has also occurred (and could occur) in dynamic technology markets and new-economy markets, such as the computer hardware or communication industries, concerning malpractices in the standard setting processes. On these occasions, the EC has been able to tackle the problem through articles 101 and 102 TFEU.

Unilateral anticompetitive conducts could also, to some extent, occur across digital markets, where IP rights play a relevant role and there are important network effects. For example, practices designed to exclude competitors in tipping markets: a platform refusing to list a product on its platform which competes with the platform's own product, providing preferential treatment to its own products vis a vis that of rivals or reducing the attractiveness or functionality of rival products. For tipping markets, please see answers to Q16 below.

10.3. Please provide examples and explain them.

See answer to Q 10.2 above.

10.4. Do you consider that anti-competitive monopolisation is common in digital sectors/markets?

Yes, to some extent but not necessarily more than in other sectors.

10.5. Please explain your answer and identify the sectors/markets concerned.

See answer to Q 10.2 above.

10.6. In your experience, does anti-competitive monopolisation raise competition concerns?

As a matter of law, any anti-competitive action raises competition concerns, and so does anti-competitive monopolisation.

10.7. Please explain your answer and indicate the competition concerns that may arise in case of anticompetitive monopolisation.

Companies are legally permitted, and encouraged, to try to acquire market power. The prospect, or the desire for, substantial market power stimulates competition and innovation, and monopolies can be, on occasions, more efficient than other smaller competitors.

Traditionally, some unilateral practices can raise significant competition concerns when exerted by dominant undertakings (i.e. exclusionary conduct and exploitative abuses), and other conduct exists that can be harmful irrespective of market power (such as regulatory gaming).

Certain conduct when exerted by undertakings with the aim of monopolizing could, on some occasions, raise competition concerns. This would particularly be the case if it leads to a monopolisation of the market. Some examples of these conducts would be:

- Fraudulent patent infringement suits (i.e. gaming the regulatory regime controlling the approval of generic drugs).
- Abuse of standard-setting processes.
- Tortuous conduct, including fraud or misrepresentation towards other market participants or consumers.
- Acquisition of market power in tipping markets through anticompetitive conduct.
- Unilateral anticompetitive acquisitions (i.e. acquisition of potential disruptor).

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?

No, unless a breach of competition law is demonstrated under arts 101 & 102 TFEU or under the merger regulation test. Otherwise, the careful balance stricken between the principles of an open and free economy, legal certainty and the limits imposed to dominant players whenever they abuse of their market power would be jeopardised.

11.1. Please explain your answer. If you replied yes, please also indicate the type of intervention that would be needed.

Conduct can have ambiguous competitive effects. Unilateral conduct may or may not lead to an increase in market power or to a monopoly.

Unilateral conduct regimes could alter efficient markets and their competitive processes. Market forces alone may generate efficient results and government

intervention can become counterproductive. Moreover, market power in new-economy and high-tech markets can quickly vary over time and, thus, early intervention in this context could try to address questions that would be readdressed naturally by competition dynamics in the short-medium term.

In addition, establishing a threshold concerning market power can lead to a lot of false positives, which in rapidly growing models risk stifling promising business models. Intervention to address anticompetitive monopolisation would only be justified if there is robust evidence of a clear intent to monopolize anticompetitively and if the predatory or anticompetitive conduct will most likely or almost certainly lead to achieving monopoly power. This would be very difficult to determine in advance.

On the other hand, it is unclear which type of conduct would qualify as "anticompetitive".

Finally, apart from article 102 TFEU (see below), national unfair competition rules could tackle some of these unilateral behaviours. For instance, behaviours that entail a breach of other regulations (patent, privacy, consumer protection laws, etc.) and which precisely due to that breach the company gains a competitive advantage, is a typical act covered by unfair competition laws. The same happens with situations of abuse of "relative" situation of dependency (not an "absolute" situation of dominance in the market, but specific market power vis -à- vis a supplier or a client). Transforming potential infringements of regulatory regimes by dominant firms or firms with market power that give them a competitive advantage in situations quasi equivalent to breaches of article 102 TFEU would not probably pass the EU Courts' tests. Much less would it be appropriate to use such a dilutive concept to implement a new tool that does not meet the procedural standards and safeguards of article 102 TFEU.

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.

11.3. Please explain your answer.

Article 102 TFEU is enough to address anticompetitive conduct once its perpetrator has reached dominance or near-monopoly.

In addition, article 102 TFEU has traditionally adapted to prevent anticompetitive unilateral conduct. In this respect, the EC has confronted anticompetitive monopolisation in the past by either imposing liability on the unilateral conduct of the dominant firms even for conduct outside the market which they dominate or by narrowly defining relevant markets.

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.

12.2. Please identify the markets concerned and explain those market situations.

An oligopoly is a highly concentrated market where a few firms operate. An oligopolistic market structure should not be, as such, a cause of concern. Under certain conditions players may coordinate their behaviour without an agreement, under other circumstances they may compete.

Parallel behaviour in some markets may be the rational response to competitors' actions.

The level of concentration is not *per se* a sign of collusion, other elements such as the symmetry of the market shares, the transparency of the prices, and the existence of facilitating practices are additional elements that are often necessary for collusion.

Not all markets compete on prices some may have other dynamics and they may compete e.g. in volume of products sold, quality or innovation. It is important to understand the competitive parameters, incentives and dynamics present in each of the markets.

Markets such as telecoms, cement/aggregates, tobacco, TV advertising or breweries, energy, pharma/biomedical devices in some markets, etc. can be highly concentrated.

In some of them you may observe that competition is enhanced by competitive constrains coming from neighbouring markets e.g. Digital advertisement to TV advertisement or mobile phones to fixed phones; in pharma markets potential competition from other innovative products or adaptations is essential.

Again, the narrow definition of markets often ignores the competitive pressure coming from other markets that have a significant impact on the business plans.

12.3. In your experience, what are the main features of an oligopolistic market with a high/substantial risk of tacit collusion?

- High concentration levels. **Somewhat important.**
- Competitors can monitor each other's behaviour. **Important.**
- Oligopolists competing against each other in several markets **No relevance.**
- Homogeneity of products. **Important**.
- High barriers to enter (e.g., access to intellectual property rights, high marketing costs, global distribution footprint, strong incumbency advantages, network effects...). **Important.**
- Strong incumbency advantages due to customers' switching costs and/or inertia. **No relevance.**
- Lack of transparency for customers on best offers available in the markets. **No relevance.**
- Vertical integration into key assets of the vertical supply chain. **No relevance unless members of the oligopoly are at the same time suppliers & clients between themselves in vertically related markets.**

Please explain your answer and your rating above.

In our opinion the conditions that may impact the risk of tacit collusion in an oligopolistic market are the existence of high barriers to entry and the possibility to monitor your competitor's behaviour; when the products are homogenous the possibility to monitor your competitor's' behaviour is enhanced.

High concentration levels might be somewhat important depending on other market features, such as the competitive pressure exercised by potential entrants or from neighbour markets.

Strong incumbency advantages due to customers' switching costs and or inertia are not relevant as such since they are to be considered barriers to entry or barriers to potential competitive pressure. The lack of transparency for customers on best offers available in the markets should be regarded as a switching cost

and therefore as a barrier to competitive pressure, however it will diminish the risk of collusion.

The fact that oligopolists compete in several markets may or may not increase the risk of collusion. As a matter of fact, it will depend on the features of each particular market. Vertical integration into key assets of the vertical supply chain is somewhat important. It will also depend on the features of each of the markets integrated vertically.

The lack of transparency for customers on best offers available in the market may both reduce the level of competition in the market and the possibility to monitor competitors' behaviour.

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

Yes.

12.5. Please indicate which are these other features of an oligopolistic market with a high/substantial risk of tacit collusion and rate them according to their importance from 0 to 4

Question 12. 3. of the survey identified endogenous market features of an oligopolistic market with high risk of tacit collusion but ignores the existence of other exogenous market features that can be of relevance such as:

- statutory obligations such as price regulation **2**
- facilitating practices such as MFC/MFN clauses, signalling of prices, information exchanges, joint ventures, use of algorithms **3**

(0 = no knowledge/no experience; 1 = no importance /no relevance; 2 = somewhat important; 3 = important; 4 = very important).

12.6. In your experience, what are the main competition concerns that arise in oligopolistic markets prone to tacit collusion?

Although facilitating practices may have pro-competitive effects e.g. exchange of information, they may rise higher concern when they happen in oligopolistic markets.

12.7. Do you consider that oligopolistic market structures are common in digital sectors/markets?

Not applicable / no relevant experience or knowledge.

12.8. Please explain your answer and identify the sectors/markets concerned.

- The existence of an oligopolistic market depends on how markets are defined.
- Digital markets are normally two-sided markets, where the interdependence among the different actors is more complex.
- The existence of economies of scale/scope and direct/indirect networks effects in digital sectors have a rational impact on concentration levels in digital markets.
- However, fast innovation in digital and technological markets in general, markets may redefine the boundaries of existing markets in short periods of time.
- There are some facilitating practices that are specific to digital sectors such as the use of algorithms. However, the use of these facilitating practices involving new AI tools might also be used in markets where there are many players.

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?

No, unless a breach of competition law is demonstrated under arts 101 & 102 TFEU.

13.1. Please explain your answer.

Articles 101 and 102 TFEU are adequate tools to tackle collusion when it departs from a legitimate behaviour in a particular oligopolistic market.

There is neither a legal definition of “markets prone to tacit collusion” nor economic evidence that support or suggest the benefit of an ex ante intervention.

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.

13.3. Please explain your answer.

Tacit collusion in oligopolistic market situations can be tackled with the existing tools, enforcement of Articles 101 and 102, in a case by case scenario or in the alternative, with recommendations and sectorial enquiries or even in commitment cases where a breach of article 102 TFEU is possible but doubtful.

The Commission has in the past successfully intervened to address concerns derived from the implementation of facilitating practices, including price signalling and the use of MFN clauses.

An update of the "Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements" in order to better define facilitating practices, particularly in new environments such as digital sectors, should be considered in order to facilitate a uniform application of competition law in all the member States.

14. Relying on digital tools, companies may easily align their behavior, 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 situation?

No.

14.2. Please list those situations and which markets you encountered them.

The use of pricing tools based on algorithms has exponentially increased in the last years, particularly in the on line markets. A significant number of on line suppliers rely on more or less sophisticated tools for pricing their products or services in the Internet.

Despite the increasing use of dynamic pricing tools, participants have not observed a generalized price alignment effect in on line markets where these tools are typically used (transport, hotel booking or consumer goods).

We are aware of the solid economic literature that foresees that the extended use of algorithmic pricing might facilitate tacit collusion even in non-oligopolistic markets and that this might result into higher prices and less choice for consumers.

However, as of today, participants have not come across significant evidence to conclude that use of algorithmic pricing necessarily results into an alignment in prices. By contrast, algorithmic pricing could be allowing suppliers to respond more adequately and effectively to market demand.

14.3 In your view, what are the main features of the markets where pricing algorithms are used?

	No knowledge / No experience	No importance /No relevance	Somewhat important	Important	Very important
The market is highly transparent (i.e. competitors can easily observe and understand the market behaviour of other players and align their conducts), even without using the pricing algorithms	○	○	○	○	○ X
The market is not transparent (i.e. without the pricing algorithms, competitors would not be able to observe and understand market behaviour of other players)	○	○ X	○	○	○
Prices might be aligned, without market players explicitly agreeing their prices	○	○ X	○	○	○
The good and services offered in the market where the	○	○ X	○	○	○

pricing algorithms are used are digital					
The good and services offered in the market where the pricing algorithms are used are not digital	○	○ X	○	○	○

14.4. Please explain your answer above. Please use this space to mention other features of markets where pricing algorithms are used and rate their importance.

Algorithmic pricing is essentially used in markets that are transparent and where more frequent interactions take place:

Firstly, algorithms are used in markets with certain degree of transparency. Price algorithms need information to operate. The success of the price algorithm in predicting how the offer and demand will react critically depends on the information on what other competitors and clients are doing. In markets that are not transparent, algorithms cannot successfully predict the behaviour of clients and competitors in order to set the right price that guarantees profitability.

Secondly, algorithmic pricing is particularly useful in markets where there is a frequent interaction between the supplier and the client. Algorithmic pricing allows a dynamic adaptation of the prices to the particular circumstances of the market (including the prices that other competitors are offering for similar products). Therefore, the more frequent the interaction between the suppliers and their clients, the more useful becomes the use of a tool to adapt prices to the changing circumstances of the market.

Participants do not contemplate the possibility or not of aligning prices as a feature of markets where pricing algorithms typically operate. They observe that markets that are not candidate prima facie for an alignment in prices (non-concentrated markets with differentiated products) have been intensively using pricing algorithms (e.g. hotels).

Participants consider that the use of pricing algorithms is similar in digital and non-digital products or services.

14.5. Do you consider that pricing algorithms are common in digital sectors/markets?

Yes, common.

14.6 Please explain your answer and identify the sectors/markets concerned.

See answer to question 14.2 above.

14.7. In your experience, what are the main competition concerns that arise in markets where pricing algorithms are used?

From a theoretical perspective, the main competition concerns arising in the use of pricing algorithms are:

- Alignment of prices/less competition between market players.
- Price increases.
- Less choice for customers.

14.8. Please explain.

Algorithmic pricing can predict market trends, better adjust to demand and thus generate efficiencies and be procompetitive. However, the main concern from a competition law perspective is that algorithmic pricing could be increasing the likelihood of tacit collusion even in markets that do not meet the requirement for collusion (non-concentrated markets with differentiated products, for example). Tacit collusion typically results **into higher prices and less choice for consumers**.

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?

No.

15.1. Please explain your answer.

Participants agree that there is no sufficient empirical evidence of the negative effects of algorithm pricing on competition to justify a general intervention in markets where pricing algorithms prevail.

This is without prejudice of the use that the Commission could -and should- make of the powers of investigation under article 17 of Regulation 1/2003 in case the Commission suspects that competition is being distorted in a given market as a result of the use of algorithm pricing.

Indeed, the participants consider that sectorial investigations could be a most useful tool in order to determine if algorithmic pricing is having an anticompetitive

effect in the real world and if such anticompetitive effect can be sufficiently addressed under articles 101 and 102 TFEU prior to adopting any legislative measure in this regard.

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 law issues?

Yes.

15.3. Please explain your answer.

In the interest of simplicity, we can group in three the scenarios where **algorithmic pricing can raise competition law issues**:

- *Scenario 1*: algorithmic pricing is used as an instrument to implement or to monitor price agreements between competitors. This includes "hub-and-spoke" schemes, where competitors (spokes) use the same third-party pricing algorithm (hub) that (potentially) leads to coordinated pricing.

- *Scenario 2*: unilateral use (i.e., without any concertation) of pricing algorithms that may lead to collusion because of the collusive features in the algorithm.

- *Scenario 3*: unilateral use of pricing algorithms that increases the likelihood of conscious parallelism or tacit collusion because it increases transparency and intensifies repeated interaction in the market.

Participants agree that article 101 TFEU has proven sufficient to address Scenario 1. In the participants´ view, article 101 TFEU is flexible enough to address similar cases in the future despite foreseeable challenges, essentially in terms of detection and proof. The Eturas case (C-74/14) is a good example of adaptability of article 101 TFEU to new scenarios in which coordination is facilitated by IT (in this case, an electronic platform).

Participants also agree that a significant number of cases under Scenario 2 could also be covered by article 101 TFEU. The user of the algorithm can be held liable under article 101 TFEU for the acceptance of the use of collusive features in the design of the algorithm (liability per design). In can also be taken into account at the stage of assessing the effects of, for instance, a vertical restraint put in place by a manufacturer spreading more easily due to the generalised use of price monitoring algorithms by retailers (see, for instance, Cases AT. 40465 *Asus*, AT. 40469 *Denon & Marantz*, AT. 40181 *Philips*, and AT.40182 *Pioneer*).

Admittedly, machine learning could give rise to situations where the decision to collude is taken by the algorithm itself without any participation of the programmer or the user in the decision – making process. In these circumstances, except

under an undesirable strict liability approach, the user could not be held liable for the decision of the algorithm to collude. Strict liability (holding the user liable for any outcome of the algorithm, including collusion) is undesirable because it might discourage developments in algorithmic pricing.

In any event, participants consider that there is no sufficient knowledge on how machine learning operates and impacts in prices and therefore any intervention in this regard would be premature.

Participants point out that the prohibition of an abuse of a (joint) dominant position under Article 102 TFEU could exceptionally cover some cases where the concertation in terms or article 101 TFEU cannot be established. However, they admit that its application would be rather exceptional given the difficulties in establishing both the existence of a (joint) dominant position and the abusive pricing behaviour.

In some cases (provided that the Airtours conditions are met and the adoption of the algorithm is seen as a facilitating practice), such conduct could be conceivably covered by the prohibition of individual abuses of a collective dominant position (validated by the EU Courts in *Irish Sugar*). The US FTC relied on a similar theory of harm under Section 5 of the FTC Act in Ethyl, E.I Du Pont de Nemours c. FTC, 729, F.2d 128 (2nd Cir. 1984).

In any event, the purely unilateral use of pricing algorithm leading to *supracompetitive* prices as a result of tacit collusion (Scenario 3) might not be tackled under articles 101 and 102 TFEU.

The possibility of prohibiting tacit collusion has been widely discussed in the past in relation to traditional markets. This possibility has been rejected essentially because it could give rise to too many false positive, including situations of legitimate adaptation of competitors to the market conditions.

As explained below, there is no sufficient evidence that the use of pricing algorithms would necessarily result into tacit collusion leading to *supracompetitive* prices and reduced choice for customers.

Therefore, it might be too soon to adopt any measure aimed a prohibiting tacit collusion through algorithmic pricing (including any measure aimed at widening the scope of the term agreement under article 101 TFEU as to cover collusion through algorithms).

Consequently, participants consider that the European Commission should not make any substantive legislative proposal or implement any new ex-ante tool regarding algorithmic pricing until:

- It has gained experience in the application of articles 101 and 102 TFEU to algorithmic pricing, including the guidance that the European Court of Justice provides in the application of such articles to different situations.

- There is more solid empirical evidence on the negative impact of algorithmic pricing in competition (in the form of higher price and less choice for consumers).

In the meantime, the Commission could:

- Consider carrying out sector inquiries in those markets where there are indicators that prices could be artificially high as a result of the use algorithmic pricing.

- Consider improvements in the tools to detect collusive behaviour on the part of companies using pricing algorithms (for example, reinforcing disclosure obligations and hiring programming experts).

- Guarantee that the application of articles 101 (and 102 in some instances) TFEU to algorithmic pricing is homogenous by including a specific section in the revised Horizontal Cooperation Guidelines.

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.

16.2. Please list and explain those situations and in which markets you encountered them.

Many markets exhibit positive externalities originating from direct or indirect network effects and many companies across all sectors benefit from economies of scope and scale. The intensity of these features varies, but it may be particularly important in network markets, including, e.g. telecoms, energy or transport. Digital markets also exhibit these features. These characteristics may lead to some degree of tipping. The degree to which markets may tip depends on product differentiation (one should be cautious about not narrowing down relevant markets in the light of product differentiation, as this may often be parameter of competition), interoperability,

multi-homing and possible diminishing returns. Some degree of tipping may also be caused by “learning-by-doing” effects.

Tipping may or may not be anticompetitive; there may be markets that can only accommodate a limited number of firms or markets that operate more efficiently with a limited number of firms. In other markets, tipping may be temporary and may act as an incentive to spur competition for the market. Tipping may be a source of concern to the extent that there may be a risk of “lock-in” (i.e. if users do not multi-home and face technical or economic barriers to switching).

Furthermore, there should not be a presumption that companies that have benefited from tipping effects will not be subject to competition. With hindsight, companies that 10/20 years ago seemed unavoidable have now almost disappeared; also, in the technological sector. There is no reason to believe that this can/will not occur in time to present market leaders.

16.3. Please indicate what are in your view, the main market features of a tipping market. Please rate each of the listed competition concerns according to its importance.

All of them “very important”.

16.4. Please explain your answer, indicating why you consider the above features relevant for a tipping market and describe any other feature that you consider important.

Network effects, economies of scale and single-homing are necessary factors for tipping to occur, single-homing being the most important. For anti-competitive tipping to occur, markets would also need to be characterized by technical and economic high barriers to switching/multi-homing and lack of differentiation. Absent these barriers or even absent users relevant costs, single-homing may be plausibly explained by consumers (and/or suppliers) unfettered choice.

One should not lose sight of the fact that network effects, like economies of scale, have ambiguous effects on competition: they may be a source of market power, but they may also be a source of value, efficiency and consumer welfare. The assessment of whether their pro or anti-competitive potential prevails should be subject to a case-by-case determination.

An empirical approach is preferable to the use of network effects as an argumentative tool capable of supporting far-reaching hypothetical predictions and of justifying antitrust intervention even in absence of any evidence of tipping or market foreclosure.

16.5. In your view, is tipping common in digital sectors/markets?

Yes, to some extent, but not only.

16.6. Please explain your answer and identify the sectors/markets concerned.

See answer to Q 16.2

16.7. In your experience, what are the main competition concerns that arise in tipping markets? Please rate each of the listed competition concerns according to its importance.

All of them “somewhat important”

16.8. Please explain your answers above. Please also use this space to mention any other competition concerns that arise in tipping markets and rate their importance.

All of the concerns identified in Q16.7 are related to the risk of “path dependency” (i.e. that tipping and lock-in may lead to the entrenchment of a particular provider/technology/network in spite of its possible inferiority). Whether these concerns materialize or not is an empirical question. There are markets often identified as tipping markets that nevertheless exhibit high degrees of innovation, R&D investments, quality services and consumer satisfaction.

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?

No

17.1. Please explain your answer.

Competition law has never been used to fine-tune markets, and new tools should not be focused on “improving” competition by reference to idealized benchmarks.

Similarly, competition should not intervene “early” in markets before tipping occurs. There is no evidence that public authorities/private companies may be able to predict whether tipping is likely to occur in a given market, nor whether tipping, in a given situation, might have positive or negative effects. Absent a high degree of certainty, early intervention to prevent tipping might be counterproductive. In addition, the possibility of early intervention absent dominance, and absent a restriction of competition may be problematic from the point of view of legal certainty, constitutional elements (right to free

enterprise) and could chill incentives to invest and compete. These negative aspects are even more acute in an scenario that so far does not seem to foresee legal and procedural safeguards similar to Regulation 1/2003.

Competition law can, and should, kick-with full strength in tipped markets, where the leading provider will be subject to strict "special responsibility" obligations to compete on the merits under Article 102 TFEU in addition to across-the-board limitations under Article 101 TFEU. It should ensure that the current "winner takes it all/most" can be challenged by a future "winner takes it all/most", which will probably not be a direct competitor (me-too competition) but a challenger coming from an adjacent market.

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.

17.3. Please explain your answer.

Articles 101 and 102 have not been used to "improve competition" (with the exception of commitment cases under Article. 9 of Regulation 1/2003) under the logic that competition law should not second guess companies' strategies absent wrongdoing. They are nonetheless suitable and sufficiently effective to preserve competition. For a new competition tool to be adopted out of concerns about tipping, it would be important to identify examples where a new competition tool could have been used to effectively prevent tipping in any real-life markets. The Impact Assessment Analysis does not currently offer any such examples.

Articles 101 and 102 have always applied to tipping markets. Already in 2002 some authors observed that that "[m]any antitrust decisions of the last decade refer to the existence of network effects as a clue that a certain degree of intervention is needed" (see e.g. Pardolesi & Renda, How safe is the king's throne? Network externalities on trial, in Post-Chicago Developments In Antitrust Law 214, 219 (2002)).

The EU Courts have also been confronted to "tipping" arguments, including in *Microsoft* (where the Commission observed a risk of tipping and made it an important part of the case) and Cisco (where, on the contrary, the Commission ruled out the risk of tipping even in presence of strong network effects and very limited multi-homing). The current competition law framework allows for this evolving and nuanced approaches and gives the Commission sufficient margin of manoeuvre to come up with different conclusions in different settings.

The existing tools moreover enable competition authorities to act even when a practice is "capable" of having "potential" anticompetitive effects. This, combined with the possibility of adopting interim measures, permits forward-looking precautionary intervention that is backed by solid evidence.

The Impact Assessment Analysis does not state that a New Competition Tool would apply lower legal tests or evidentiary standards but does not state the contrary either. If the Commission seeks to maintain similar standards, this is welcome and should expressly indicate it so in the future regulation and establish also similar procedural safeguards. However, if the Commission seeks to lower standards of intervention and procedural safeguards this could run the risk of conflicting with the established case law of the EU Courts. It will create an unsustainable degree of uncertainty for current (and future) investors and partners in business, reducing future innovation and prosperity.

In any event, a New Competition Tool having Article 103 TFEU as its legal basis could arguably not rely on lower standards than those set by the EU Courts in its interpretation of Articles 101 and 102 TEFU.

As explained above, tipping is not necessarily problematic in itself, and we may not have the ability to predict it or to intervene adequately. In the event that a market tips, vigorous enforcement should eliminate any scope for anti-competitive practices.

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

Yes.

18.2. Please list which companies you consider to be 'gatekeepers' and in which markets.

There is ample experience with companies that may act as "gatekeepers" due to their exclusive control of infrastructure (most often physical infrastructure) that is indispensable for the provision of a given service (e.g. railway tracks, "local loop", ports, or electricity grids, among others). Some cases also exist in the media/broadcasting rights sector (certain broadcasting rights that have been considered as a sort of essential facilities for pay tv; for instance, some football matches)

18.3. Do you consider that gatekeeper scenarios are common in digital sectors/markets?

No.

18.4. Please explain your answer and identify the sectors/markets concerned.

The use of the term "gatekeeper" would need to be further defined, particularly to the extent that it may be invoked to justify an initiative of this relevance. The Questionnaire appears to consider a "gatekeeper" as particularly important intermediaries that enable business operators to reach customers. This definition may be used to impose a special legal regime upon companies who have been particularly successful at enabling trade, which is the business model of any offline or online platform. "Gatekeepers" will only exist if business operators have no other alternative means to viably access customers. In real life, however, business often have many channels to reach users, even when those channels may not be perfect substitutes.

In the recent *Airbnb Ireland* Judgment (C-390/18) for example, the CJEU observed at para.55 that "a service such as the one provided by Airbnb Ireland is in no way indispensable to the provision of accommodation services, both from the point of view of the guests and the hosts who use it, since both have a number of other, sometimes long-standing, channels at their disposal, such as estate agents, classified advertisements, whether in paper or electronic format, or even property lettings websites. In that regard, the mere fact that Airbnb Ireland is in direct competition with those other channels by providing its users, both hosts and guests, with an innovative service based on the particular features of commercial activity in the information society […]").

If the Commission seeks to define what a gatekeeper is and impose ex-ante obligations or subject them to intervention aside the procedures established under Article 102 TFEU, such a definition and characterization of companies should be subject to public consultation and the affected entities should have the right to provide alternative evidence and also to have the decision reviewed by the EU courts.

18.5. Do you consider that gatekeeper scenarios also occur in non-digital sectors/markets?

Yes.

18.6. Please explain your answer and identify the sectors/markets concerned.

As explained above, there is ample experience (notably in utility regulation, but not only) regarding companies that may act as "gatekeepers" due to their exclusive control of infrastructure (most often physical infrastructure) that is indispensable for the provision of a given service (e.g. railway tracks, "local loop", port operators, telecoms infrastructure, etc).

18.7. Please indicate what are, in your view, the features that qualify a company as a 'gatekeeper'. Please rate each of the listed features according to its importance.(0 = no knowledge/no experience; 1 = no importance/no relevance; 2 = somewhat important; 3 = important; 4 = very important).

-High number of users= somewhat important.

-Customers cannot easily switch= very important.

-Business operators need to accept the conditions of competition of the platform - including its business environment - to reach the customers that use the specific platform= some of the association members preparing this document consider it somewhat important whereas others consider it of no importance/no relevance.

18.8. Please explain your answer, indicating why you consider the indicated features relevant for qualifying a company as a gatekeeper. Please also add any other relevant features that qualify a company as a gatekeeper and rate their importance.

All of the factors identified in Q18.7 are relevant to identifying gatekeepers, but they are not sufficient. As explained above, the key criterion should be the absence of alternatives to viably reach users.

The fact that business operators need to accept the conditions of competition of the platform is inherent to most platforms, as well as to most distributors and business (see for instance an insurance or a financial entity as well any business with mass contracts with consumers). The ability to set "platform rules" is particularly important in multi-sided settings (either digital platforms or physical platforms: for instance auction operators such as Sotheby's, as a mere example).

Indeed, economic theory (e.g. Rochet and Tirole) shows that the role of a platform (and we do not see why a difference should exist between digital platforms and operators that connect offer and demand in off-line markets) is precisely to set rules capable of attracting all sides, maximizing value while preventing negative externalities. Competition law experience reveals that second-guessing the conditions of access to a given platform or asset is fraught with difficulties.

One of the features identified in Q18.7 refers to the need to accept the business conditions of the platform "to reach the customers that use the specific platform". The formulation of the question seems to conflate different questions (i.e. customers that use the specific platform with customers in the relevant market). The fact that a platform may somewhat have control over

(exclusive or not-exclusive) access to its customers is not in itself problematic or the source of concerns. Problems may only arise when the platform at issue controls an asset that is indispensable for rivals to operate viably in an adjacent market.

18.9. In your experience, what are the main competition concerns that arise in markets featuring a gatekeeper? Please rate each of the listed competition concerns according to its relevance.

-Gatekeepers determine the dynamics of competition on the aftermarket/platform= somewhat important.

-As customers/users cannot easily switch, they have to accept the competitive environment on the aftermarket/platform= important.

-Business operators can only reach the customers that use the specific platform/aftermarket by adapting their business model and accepting their terms and conditions=somewhat important.

18.10. Please explain your answers above. Please also use this space to mention any other competition concerns that arise in markets featuring a gatekeeper and rate them in importance.

Any successful platform must be able to exercise some degree of control over the competitive environment that it has created. Platform rules in these setting may be positive or negative from a welfare standpoint. Business operators may accept those conditions as the terms of access to the platform; they are likely to do so only when access to the platform would, overall, be advantageous to them.

When setting platform rules, platform sponsors need to balance the interests of all stakeholders in order to further the competitiveness of the platform as a whole. Asymmetric treatment (e.g. skewed pricing) is inherent to this business models and is often their distinctive feature. Asymmetric treatment should not be confused with discrimination. Similarly, the assessment of platform rules should consider their effects on all sides of the platform.

Whether a given rule or restraint is permissible or not should be assessed by reference to the competition that would exist in a realistic, likely and economically viable counterfactual and having regard to the economic and legal context at issue in every case. This would be consistent with the established case law of the EU Courts in cases involving multi-sided business models, such as *Cartes Bancaires*, *Mastercard* and *Budapest Bank*. Interventions should only challenge platform conduct that restricts competition that would have existed in their absence.

The main concern arising from genuine "gatekeeper" scenarios is that of "output foreclosure" (i.e. if business operators are prevented from accessing customers). This risk should, however be mitigated by the fact that it is generally in the platforms best interest to act as catalysts and create business opportunities for its stakeholders. Platforms should therefore generally have the incentives to create value for all of the members of the ecosystem.

As in the case of Q18.7, one of the features identified in Q18.9 refers to the need to accept the business conditions of the platform "to reach the customers that use the specific platform". The formulation of the question seems to conflate different questions (i.e. customers that use the specific platform with customers in the relevant market). The fact that a platform may somewhat have control over (exclusive or not-exclusive) access to its customers is not in itself problematic or the source of concerns. Problems may only arise when the platform at issue controls an asset that is indispensable for rivals to operate viably in an adjacent market.

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?

No.

19.1. Please explain your answer.

The European Commission should retain its current ability to intervene in gatekeeper scenarios and to apply the law on the bases of the analytical frameworks set by the EU Courts. For enforcement to be more effective and timely, we would call for competition authorities to enjoy greater resources. There are no clear "gatekeeper" issues that are currently not addressed either by the competition rules or by regulatory initiatives, including the GDPR and the Platform-to-Business Regulation.

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.

19.3. Please explain your answer.

Over the past few years competition authorities and Courts from all over the world have grappled with issues relating to network effects, multi-sided markets and platforms. In the EU we now benefit from a clear and balanced framework that factors in the relevant trade-offs in the application of Articles

101 and 102 TFEU. The Commission has succeeded in challenging platform restrictions in multi-sided settings in a variety of cases, including cases involving Microsoft, Google, and in a number of payment card cases. The adoption of a new competition tool on the basis of "gatekeeper" concerns would require the clear identification of real life-cases where Articles 101 and 1022 have fell short that currently do not appear to have been put forward.

Multi-sided platforms are mainly characterized by the complexity of cross-market interactions. This may be a challenge for competition enforcement as it adds an additional layer of complexity. However, as recently emphasized by the CJEU in *Budapest Bank* (C-228/18, para. 80), the complexity inherent to these settings does not justify relying on inadequate presumptions in either direction; restrictions, like efficiencies, must be established by reference to the relevant economic and legal context and a realistic counterfactual.

Moreover, if a new competition tool is finally established, it should be only for clear and undisputed cases where the accumulated experience (and EU courts as well have confirmed) shows that they give rise to a very high likelihood of anticompetitive effects. The approach would be similar to the concept of restrictions "by object" that are prohibited "per se" under Art. 101 TFEU even if the conduct did not have effects. If a conduct or a situation is ex-ante subject to possible intervention, and even more, to possible enforcement measures and remedies, it should be undisputed that this intervention is justified and has a preventive character of a loss for competition that will very likely take place otherwise.

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

Structural competition problems may occur in some specific sectors/markets (including but not only digital sectors/markets).

20.1. Please explain your answer and identify the sectors/markets your reply refers to.

Experience with sector inquiries at the EU level as well as the CMA's experience with regard to market investigations shows that concerns may exist across a wide variety of sectors.

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?

No.

21.1. Please explain your answer.

N/A

21.2. Do you consider that Articles 101 and 102 of the EU Treaty are suitable and sufficiently effective instruments to address these other forms of structural competition problems?

Yes – N/A

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.

22.1. Please explain your answer. If you replied 'no', please indicate the types of conduct and situations that in your view, Article 101 of the EU Treaty does not sufficiently or effectively address, and why.

As explained in other replies, Article 101 TFEU is built on imprecise legal concepts and has a remarkably wide scope. Beyond the examples offered in Q22, it has also been applied, for example, in cases involving platform rules (e.g. Microsoft, Visa and Mastercard cases), price signalling in oligopolistic settings (e.g. in the liner shipping sector), and in technological collusion scenarios (e.g. in Eturas, Case, C-74/14). The interpretation of this provision is flexible enough to accommodate any reality that may involve concertation or a meeting of minds. Under Regulation 1/2003, the Commission also enjoys very wide remedial powers to give effects to these provisions.

There is ample consensus among the members of the association that a new competition tool should not be used in a way that would lower the existing standards of intervention set by the case law of the EU Courts under Arts 101 and 102 TFEU. In particular, it would not be sufficient to show that there is a 'risk' of anticompetitive outcomes or that such outcomes are plausible. Such a threshold of intervention would in effect justify intervention in virtually any instance, thereby jeopardising the delicate balance between intervention in the public interest and companies' rights and freedoms. Some members have pointed to the need to ensure timely enforcement and proper remedy design.

22.2. Please explain in which markets the market situations and problematic conducts you have identified manifest themselves.

N/A

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.

23.1. Please explain your answer. If you replied 'no', please indicate the type of conduct and situations that in your view, Article 102 of the EU Treaty does not sufficiently or effectively address, and why.

Article 102 TFEU is based on imprecise legal concepts and has a remarkably wide scope of application. It is a provision that the Commission has successfully deployed to challenge a wide array of business practices in complex settings. Reliance on this provision going forward may, moreover, be facilitated in the near future following the ongoing review of the 1997 market definition Notice, which may facilitate the finding of intra-platform relevant markets.

Under Regulation 1/2003, the Commission also enjoys very wide remedial powers to give effects to these provisions.

There is ample consensus among the members of the association that a new competition tool should not be used in a way that would lower the existing standards of intervention set by the case law of the EU Courts under Articles 101 and 102 TFEU. In particular, it would not be sufficient to show that there is a 'risk' of anticompetitive outcomes or that such outcomes are plausible. Such a threshold of intervention would in effect justify intervention in virtually any instance.

23.2. Please explain in which markets the market situations and problematic conducts you have identified manifest themselves.

N/A

D. Assessment of policy options

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.)

No.

24.1. Please explain your answer. Please indicate which structural competition problems the new tool should tackle or address.

Most of our members believe that Competition law, and particularly Articles 101 and 102 TFEU, are effective and sufficiently broad and flexible instruments to fight against most competition problems – including structural ones - arising in all sorts of markets, from traditional to most innovative ones. In our answer to section C we have referred to many precedents affecting digital markets (e.g. *Microsoft, Cisco, Google* cases, current investigations on *Apple* activities, *Amazon Marketplace*, etc.) which show that market abuses and restrictive agreements (either horizontal or vertical) can be effectively tackled by using current legislation and enforcement tools by the European Commission and by national Competition authorities.

Moreover, in relation with structural competition conditions of any specific market, Merger Control mechanisms also play an important role, whenever a player tries to increase its power in any market by acquiring control over other companies (this is a very common way to proceed, as experience has showed in digital markets).

Hence, effective protection of consumers and players in new digital markets can be achieved through the enforcement of the currently existing rules; in particular, we believe that the currently existing rules can guarantee an appropriate balance between the principles of an open and free economy, legal certainty and the limits imposed to dominant players whenever they abuse of their market power (acting as gatekeepers, limiting access to essential facilities in new markets, imposing unfair trading conditions to entrants or other players in the market, etc.).

In particular, different legal tests have been developed by case law, especially in the field of abuse of dominance, to strike a delicate balance between i) the restriction of rights of (even dominant) companies under national constitutions and the Charter of Fundamental Rights of the European Union (the “Charter”), on the one hand, and ii) the need for public intervention to avoid a greater harm to the general interest in undistorted competition, on the other hand. An

illustrative example is provided by the essential facilities doctrine, which imposes stringent conditions (the so-called "exceptional circumstances") with a view to pondering an intense interference on dominant companies' freedom to conduct a business (enshrined in Article 16 of the Charter) as is the mandate to deal against the greater harm represented by the removal of effective competition in a market. We are, in general, afraid that a new competition tool may tamper with this careful balance by lowering the standard for intervention.

Additionally, although it is true that some structural problems may exist in markets where no dominant player can be identified, we believe this can be considered as an exceptional situation, as most markets where no dominant players – either individual or collective – can be identified offer competitive solutions to players and consumers.

As to the possible structural problems affecting specific markets, we believe that the use if the new competition tool is in general not justified in view of the specific *ex ante sectorial* regulation implemented by the European Commission. The existing ex-ante regulation could also be an effective tool, which could complement the current competition rules (most of them to be applied ex post, in case of infringement of the rules by companies) and ensure that access and operation in these markets by independent players is competitive enough. Again, there are many examples of successful combination of ex ante sectorial regulation with ex post enforcement of competition law in the telecoms, energy, postal, financial or transport markets. We believe this combination is an appropriate way to impose – if needed – some limits to players in the market, and at the same time providing them with legal certainty as to their rights and obligations. The new tool would lead to and additional and, hence, disproportionate limitation and above all, a source of legal and economic uncertainty in these sectors that may reduce incentives to invest in them in the EU.

At this point, and for digital markets in particular -which seems to be one of the main concerns and drivers of the proposed new tool- clearly the need for **the new tool cannot be analysed in isolation from the proposal of Digital Services Act package that is subject to a parallel consultation** (the "**Proposal**").

- The AEDC is not making specific comments to the Proposal, although [many/the majority?] of the members that participate in this paper consider that is not needed nor adequate for several reasons many of which coincide with the ones that leads us to believe that the new tool is not necessary either.

- Nonetheless if the Commission were finally decided to adopt such a legislative package, again, there would be a duplicity of tools and overlapping measures, whose combination and limits are very uncertain, for digital markets in general, and more particularly for online platforms that in the Commission's view, act as "gatekeepers" (the "Gatekeeper Rules").

- As a mere example, the Proposal mentions that for Gatekeeper Rules, it could be possible to impose remedies "*where considered necessary and justified following a prior assessment*". If this prior assessment process affects more than one company and is closer to a sectorial investigation, there is no real clear cut difference between this ex-ante new regulation and the scope of the new competition tool. Confusion, legal uncertainty and risk of duplicities and contradictory approaches between these two ex-ante measures (one of regulatory character and the other more optional but also of regulatory nature) should be avoided.

- Moreover, if the Commission follows the "blacklist option" for the Proposal, which would be the preferred one by the AEDC (if any), as it provides more legal certainty and meets the goal of ex-ante regulation (i.e., prior identification of prohibited acts and obligations in markets with structural problems), introducing additional uncertainty and burdens under the new competition tool would be unjustified and disproportionate. In fact, operators in digital markets would be subject to specific regulations with the goal to prevent ex-ante competition risks and also can be subject to additional ex-ante remedies and regulations even in cases of no infringement of competition laws (arts. 101 & 102 TFEU). This would be contradictory and a demonstration that the ex-ante regulation has failed. Instead of introducing through the back door ad-hoc remedies when the "ex-ante regulations" have not worked as they were not well defined or did not cover an specific new ambit, what the Commission should do is to review/revisit on a regular basis such legislative ex-ante legislative package and adapt it. However, the Commission should not use the new tool as a sort of blanket tool to correct the gaps of its ex-ante regulation.

- In this same line, and also concerning digital markets, the need for the new tool should be analysed taking into account other pieces of ex-ante regulation which seek directly or indirectly to ensure that digital markets remain competitive, consumers are not harmed and that operators (including the so called, gatekeepers and online platforms) do not incur into "unfair" practices (which is a test well below Art. 102 TFEU). Inter alia, we may refer to:

- Directive 2019/2161, amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council *as regards the better enforcement and modernisation of Union consumer protection rules*. This Directive addresses relevant aspects that were supposed to be "gaps" under the new competition tool, such as rankings of offers in on-line marketplaces and on-line search results (whereas 17 to 26), portability of personal data and of digital content...,

- Geoblocking Regulation 2018/302;

- Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services. This regulation establishes clear limits of possible "unfair practices" by online intermediation service providers, which can be assimilated to a large extent to marketplaces and digital platforms (see for instance, paragraph 2: "*Given that increasing dependence, the providers of those services often have superior bargaining power, which enables them to, in effect, behave unilaterally in a way that can be unfair and that can be harmful to the legitimate interests of their businesses users and, indirectly, also of consumers in the Union. For instance, they might unilaterally impose on business users practices which grossly deviate from good commercial conduct, or are contrary to good faith and fair dealing. This Regulation addresses such potential frictions in the online platform economy*". Article 10 addresses MNF clauses.

Furthermore, should the competition tool be finally adopted, it is worth noting that it entails a substantial restriction of the right to property and the freedom to pursue a trade or profession (enshrined in Articles 16 and 17 of the Charter, see *supra*). As such, it cannot be used to "fill the gaps", **but only as last resort** and in compliance with Art. 52 of the Charter. This implies, in particular, that it can only be used on condition that it complies with the **principle of proportionality**. Accordingly:

(i) if there are other less restrictive means to achieve the same objectives -including the new Proposal of ex-ante regulation for digital markets or an amendment of other already existing ex-ante regulations in other sectors (telecoms, energy, etc.)-, that address, in full or in part, the problems aimed by the new competition tool, the latter should not be enforced. Otherwise, the new competition tool may be incompatible with the proportionality and necessity test of art. 52 of the Charter;

(ii) the drafting of the new competition tool (if any) should clearly require the Commission to thoroughly analyse any other alternatives to the enforcement of the new competition tool and also to duly state reasons each time it wishes to apply it indicating why the Commission has discarded the other alternative tools at its disposal (as mentioned, i.e., adapting existing ex-ante regulation or introducing new one, soft-law recommendations, sectorial inquiries/investigations, commitment decisions under art. 9 of Regulation 1/2003, merger control (if applicable) and above all, procedures under Arts. 101 or 102 TFEU.

All in all, based on the above, the European Commission should carefully consider whether the new competition tool is indeed needed and, if so, clearly identify the so-called "gap cases" that cannot be effectively analysed under Article 101 and 102 TFEU -and in the worsk case scenario, for digital markets, also with the new Proposal if finally adopted- and would justify an intervention through this new tool. In particular, the European Commission should be cautious while intervening in markets prone to "tipping", which is one of the new competition tool's key areas according to the Inception Impact Assessment. In fact, tipping should not be regarded as anticompetitive per se and an early intervention, in the absence of dominance and a restriction of competition, could be detrimental for innovation and competition as well as problematic from a legal certainty standpoint.

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?

No.

25.1. Please explain your answer. Please indicate which structural competition problems the new tool should prevent.

As indicated in answer to question 24, we believe there is no real need for a new competition tool in order to effectively face most - if not all of them - of the specific problems of emerging new markets, as current Competition Law (in particular Articles 101 and 102 TFEU, but also Merger Control mechanisms), together with ex ante sectorial regulation, whenever needed (as it is the case in Telecoms, Energy, Postal, Financial or Transport markets), have demonstrated to be effective tools in order to tackle most structural and behavioural restrictions of competition, either unilateral (abuses of unilateral dominant position) or multilateral (abuses of collective dominant position and restrictive agreements between companies).

We must bear in mind that the European Commission could impose behavioural and structural remedies under the current regime and has the power to make them binding commitments under Article 9 of Regulation 1/2003. Article 9 does not require to establish a clear cut competition infringement (for instance a clear abuse of dominant position) but a reasonable theory of harm and likely risk of competition. Only if the company concerned is not wishing to provide remedies satisfactory to the Commission the latter would have to pursue a complete infringement case for imposing remedies. Nonetheless, Article 9 is indeed a well suited mechanism to address some of the concerns that the Commission is pursuing with the new tool.

In addition, merger control mechanisms have also proved to be an efficient way to impose some limits, ex ante, to companies preventing them from distorting competition not only in highly concentrated markets, but also in markets where structural competition problems may arise.

Structural problems have been identified in the past in relation with many markets. In some cases, this has motivated the establishment of ex ante regulation guaranteeing access and fair trade conditions in those markets (e.g access to essential energy or telecom networks and facilities which are essential for the provision of services in downstream / retail markets). In other cases, competition law has been applied whenever a dominant company has used its market power with exploitative or exclusionary purposes. Some of these cases have motivated the imposition of behavioural or even structural remedies to parties – not only economic sanctions – which are effective tools to redress some of the structural problems identified.

Structural and behavioural remedies are also very frequently imposed to companies in merger control cases in order to redress structural competition problems in specific markets even before a dominant position is identified or abuse is committed.

As we stated before, we understand that structural problems in markets where no dominant position by any player – either individual or collective - can be identified should not be that frequent.

In any event, those markets that are more prone to the sort of structural problems that come to mind when thinking of the new competition tool (platform-based digital markets) are characterized by ambivalent network effects. Depending on a complex case-by-case analysis of switching costs, indirect network effects may either create barriers to entry and expansion (i.e. positive feedback loop reinforcing strong brand effects and, in the worst-case scenario, customer lock-in) or make large market positions contestable (through multi-homing or one-click-away competition in the presence of

portability and interoperability). These effects may play out one way or another and, therefore, its assessment should be related to a specific theory of harm (be it abusive leveraging or merger-specific significant impediment to effective competition). However, we are, in general, uncertain that such effects can be judged undesirable in abstract as a matter of structural characteristics of the market and justify intervention through the new competition tool.

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

We refer to our answer to questions 24 and 25, which motivate why current Competition Law – together with sectorial ex ante regulation, whenever needed – could effectively tackle with most kind of structural competition problems arising in new and emerging markets.

In case that the European Commission considers it necessary to introduce a new competition tool, probably problems related to market access are those which should be the priority of such new instrument. In particular, the European Commission should ensure that i) there is an unavoidable (or at least very important) point of entry or bottleneck (as the market for client PC operating systems was deemed to be for access to the market for work group server operating systems in the Microsoft case – not to mention more recent cases still under debate); ii) there are significant and permanent barriers to entry and expansion in the bottleneck (even if the European Commission decides not to make dominance a requirement); and iii) effective competition either in the bottleneck market or for the adjacent market is distorted (e.g. dominant company's leveraging the in the bottleneck market or self-preferencing its business in the adjacent market, to put it in terms of dominance).

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

If adopted, respondents believe that 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) as far as the criteria mentioned in the response to the previous question or similar conditions set to establish certain distortion of effective competition, as a result of high and permanent barriers to entry and expansion, are met.

If you indicated "Other", please explain.

N/A

27.1. Please explain your answer. Please indicate what type of situations would be covered by the scope of application you suggested.

As indicated in our answer to the questions 24 to 26 above, respondents believe that no new competition tool is needed to tackle with most structural competition problems which could be identified in new & emerging markets, such as the digital or digitized ones.

Without prejudice of the above, respondents also believe that, should the European Commission consider it necessary to introduce such a new competition ex ante tool, it 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).

The reason why we propose that the new tool should be applicable to all companies is that we understand that Article 102 of the TFEU is an effective tool which can already be used to tackle with most kind of structural competition problems which arise in markets where a dominant player can be identified. In these situations, the investigation of possible abusive conducts can result in the imposition of behavioural or structural remedies to the dominant player which help to redress the structural problems (such as access to the market in fair conditions, lack of discrimination, control of potential excessive prices, control of potentially exclusionary conducts such as tying strategies, loyalty rebates, etc.).

As explained above, we understand that, if the European Commission were to conclude that a new competition tool is to operate regardless of dominance but on the basis of a vague notion of “market power”, it should still be subject to legally certain criteria based on distorted effective competition as a result of significant and permanent barriers to entry and expansion in strategically important points of access.

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

It shall be limited in scope to sectors/markets where clear structural competition problems are the most prevalent and/or most likely to arise. Such could be the case of, for example (but not limited to) multi-sided platforms or ecosystems where concentration is liable to stem from network effects, and, if these were to result in barriers to entry and expansion (which as mentioned above is not necessarily always the case), they would confer on certain companies gatekeeper powers to set the competitive conditions in the same or an adjacent market. It is important to note that respondents for not recommend a “sectorial” tool (for instance, only for digital, much less if the parallel legislative regulation ex-ante Proposal is adopted -see Q24 above). If the tool is finally implemented, it should have a horizontal character and be applied in general to sectors that present **permanent** (not transitory) and clear structural problems that competition dynamics and other tools at the Commission’s disposal (see answer to Q.24 above) cannot solve.

If you indicated "Other", please explain.

N/A

28.1. Please explain your answer. If you indicated 'limited in scope', please indicate what sectors/markets should be covered by the new competition tool, and why.

As previously indicated, we believe that Competition Law provides European authorities (administrative and judicial ones) with effective *ex ante* tools (merger control, state aid control) and *ex post* tools (prohibition of horizontal and vertical restrictive agreements, prohibition of abuses of dominant positions) in order to tackle most structural competition problems arising in many different markets. European and national courts of justice have developed - and still do - a complete case law which ensures that these rules are applied with due respect of citizens and companies' rights. This results in a good balance between administrative enforcement powers, on one hand, and the principles of legal certainty and free economy which govern our markets, on the other hand.

A new competition tool which would work *ex ante*, without the need of identifying any infringement of competition rules by any company, could represent a significant limitation to free economy and free development of the markets and may also affect fundamental rights (right to property in case of structural remedies, for instance). As mentioned in our response to question 24, from the legal point of view, respondents are, in general, afraid that a new competition tool could jeopardise the delicate balance between intervention in the public interest and companies' rights and freedoms by lowering the different standards that case law has developed for each type of infringement according to its potential harm to welfare. Also the proposal would lead to a divergent approach and possible interpretation of what is prohibited or not under competition rules, distorting the consistency in the application of Arts. 101 and 102 TFEU. From the economic point of view, type I errors could lead to unintended consequences in rapidly evolving markets where new business could be nipped in the bud.

This is why respondents believe that, should the European Commission consider it necessary to have such a new tool, it should have a limited scope. More specifically, if finally adopted, the new competition tool should be limited in scope to sectors/markets where structural competition problems are the most prevalent and/or most likely to arise, and fulfil certain criteria based on distorted effective competition as a result of significant and permanent barriers to entry and expansion in strategically important points of access.

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

No.

28.3. Please explain your answer, indicating what markets/sectors you would consider as affected by digitisation.

The European Commission has identified some structural problems which arise in markets affected by digitisation which apparently cannot be effectively tackled with currently existing competition laws and ex ante sectorial regulations.

Although respondents do not share that starting premise, it is true that new & emerging markets, with new distribution channels - such as apps, or online services – have characteristics which are quite particular, including the zero pricing, the relevance of personal data, strong network effects, etc. This is something typical from services which have been digitised. Nowadays, more and more services are being digitised; and we believe that, if finally adopted, the new competition tool should be applied in relation to any market where digital and online services are provided, provided that criteria are set in order to ensure that significant and permanent barriers to entry and expansion in important point of access may lead to distorted effective competition.

This notwithstanding, as indicated in our response to question 28.1 above, respondents believe that, if the Commission finally decides to adopt a new competition tool, the new instrument should be subject to certain criteria along the aforementioned lines (related to significant and permanent barriers to entry and expansion in important point of access), and it will be in practice essentially limited to digital markets (but without ruling out the possibility for other markets to also fulfil these criteria).

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?

Respondents understand that existing sector specific legislation provides very important legal certainty to players acting in the fields which are the object of such regulations (telecoms, energy, transport, financial or postal services). Because of the existence of written and objective rules, companies of any size (incumbent players and new entrants) acting in these strategic markets are perfectly aware of their rights and obligations.

If a new competition ex ante tool were to be introduced, it would be essential not to distort such legal certainty. Therefore, detailed guidance on the criteria of enforcement by the European or national authorities of any new competition tool should be provided to companies, especially if the new tool allows authorities to investigate behaviors where no infringements at all of the law can be identified.

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

• **Make non-binding recommendations to companies (e.g. proposing codes of conducts and best practices):** Yes, if at all.

• **Inform and make recommendations/proposals to sectorial regulators:** Yes, if at all.

• **Inform and make legislative recommendations:** Yes, if at all.

• **Impose remedies on companies to deal with identified and demonstrated structural competition problems:** No.

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

As indicated in our answer to questions 24 to 26, respondents believe there is no real need for a new competition tool in order to effectively face the specific problems of emerging new markets, as current Competition Law (in particular Articles 101 and 102 TFEU, but also Merger Control mechanisms), together with ex ante sectorial regulation, whenever needed (as it is the case in Telecoms, Energy, Postal, Financial or Transport markets), have demonstrated to be effective tools in order to tackle most restrictions of competition, either unilateral (abuses of unilateral dominant position) or multilateral (abuses of collective dominant positions and restrictive agreements between companies).

Without prejudice to the above, should the European Commission consider it necessary to introduce such *ex ante* new competition tool, we would suggest that authorities have quite limited powers when using such tool. Such powers could include issuing recommendations to companies, trade associations and governments on measures which would be appropriate to adopt in order to minimize the risk of foreclosure or distortion of competition in specific markets as a result of some structural problems. These recommendations could propose measures to ensure fair competition between players and welfare of consumers.

By contrast, respondents believe that the imposition of structural or behavioural remedies to companies by and administrative authority should definitely not be included as part of the powers of authorities using such new tool, much less if i) there is an *ex ante* sector specific regulation imposing clear obligations to companies aimed at protecting the competitive environment and ii) remedies are imposed by public authorities whenever an infringement of the rules (competition or the said ex-ante sectorial regulation) is identified, on a particular case.

From the legal point of view, the power to impose specific remedies to companies represents an administrative intervention which can significantly limit companies' freedom of behaviour in the market. Legal certainty implies the right of companies to know which are the strict and exact limits to their behaviour in the market. From an economic point of view, over-enforcement could disincentive new business models before they reach the point at which efficiencies are generated, while the accumulation of market power can be tackled by means of Competition Law or regulation at a later stage where harm to welfare is to manifest itself.

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?

• **Non-structural remedies (such as obligation to abstain from certain commercial behaviour):** No.

• **Structural remedies (for instance, divestitures or granting access to key infrastructure or inputs):** No.

• **Hybrid remedies (containing different types of obligations and bans):** No.

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

We refer to response to question 30, above.

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

No

If you indicated "Other", please explain.

N/A

32.1. Please explain your answer.

As explained in our answer to question 30 and 30.1, we understand it would not be reasonable nor appropriate that the European Commission might be able to impose any sort of remedies – either behavioral or structural – whenever applying a possible new ex ante competition tool, with no clear rules known by companies as to the limits of their behavior in the market. We have highlighted above the unintended consequences that these may bring about from both the legal and economic points of view.

Compulsory divestment of a business is a very serious matter, which limits the development of economic activity of any company in a free market economy, from the legal point of view, and may affect their incentives, from the economic point of view. We understand that such a measure should only be imposed on the basis of very clear and objective rules previously known by companies, e.g. in cases where a company has incurred in very serious infringement of competition law in the market (e.g. abusing its dominant position). The imposition of structural remedies is subject to strict proportionality limits and is the "last resort" when applying Articles 101 or 102 TFEU. Allowing a similar intrusive measure via "enforcement", not agreed with the company (for instance, some recent commitment cases under Article 9 of Regulation 1/2003 include this type of remedies) and with no previous infringement, would be unjustified and will face serious legal and even constitutional problems.

Structural remedies have also been imposed in cases where a new merger threatens the maintenance of effective competition in any market. In merger cases, divestment remedies can either be offered to competition authorities by merging companies themselves – which is a legitimate decision made by a company – or they can be imposed by the authorities, in which case the company has the right to decline and stop its merger project.

Most of our members understand that a competition new tool which could impose structural remedies such as compulsory divestment of business to any company which has not infringed any rules would threaten the principles of legal certainty and free economy and risk affecting disproportionately economic incentives to develop potentially welfare-enhancing business models. If the Commission finally decides to include it, it should establish strict proportionality tests and also ensure that all the procedural guarantees of Articles 101 and 102 TFEU are respected (including hearings, evidence and judicial review).

E. Institutional set-up of a new competition tool

Section E of the questionnaire bears the heading 'Institutional set-up of a new competition tool'. However, none of its questions (33 to 39) seek any views on the institutional framework that would apply this mechanism, as if it should be obvious that the Commission should be the sole enforcement authority.

The respondents to this Questionnaire would like to stress that, in their view, the NCT can only be understood as an instrument for the public interest. As such, it lacks a clear definition of principles and rules, being more concerned with empowering agencies than on setting limits from the outset which would confine those powers to their intended aim. There is additionally little mention of checks and balances. It is expected that this will be eventually debated along the legislative process.

In anticipation of that debate, we would suggest that the institutional scheme that would enforce the NCT should be open to the participation of Member States, including national competition agencies and national authorities with jurisdiction on digital regulation and neighbouring areas, irrespective of the balance ultimately reached between the NCT and eventual ex-ante regulation. True, this should be weighed against the efficiency of the scheme; but this is too important not to consider it carefully.

We address the specific questionnaire below.

*** 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.

33.1. Please explain your answer.

If there is to be a new competition tool to be managed by the European Commission (please see above, answer to question 11, Section C), there need be rules governing the exercise by the Commission of the necessary enforcement powers under Article 103 TFEU. It is apparent that Regulation 1/2003 would not automatically apply, as these powers may not fall strictly under Articles 101/102 TFEU, which define its scope, and therefore a new vehicle would be needed. This new vehicle should ensure that the parties' rights of defence and their right to appeal the decisions are preserved in a way similar to Regulation 1/2003, with a fair contradictory procedure, proper investigation, statement of objections/conclusions, monitoring systems, etc.

33.2. Please indicate what type of investigative powers would be adequate and appropriate to ensure the effectiveness of the new competition tool.

Please rate each of the listed investigative powers according to its importance.

	No knowledge /No experience	No importance /No relevance	Somewhat important	Important	Very important
Addressing requests for information to companies, including an obligation to reply					**X**
Imposing penalties for not replying to requests for information					**X**
Imposing penalties for providing incomplete or misleading information in reply to requests for information					**X**
The power to interview company management and personnel					**X**

Imposing penalties for not submitting to interviews					**X**
The power to obtain expert opinions			**X**		
The power to carry out inspections at companies		**X**			
Imposing penalties for not submitting to inspections at companies		**X**			

33.3. Please explain your answer. Please also list here any other investigative powers that you would consider appropriate to ensure the effectiveness of the new competition tool.

In contrast with other industrial or economic sectors, the amount and quality of publicly available information is limited and quickly degrades. In many cases, only market players have the information that is needed to understand what is happening. And they have little incentives to share that.

There are probably acceptable and questionable reasons for this. A part of the information is extraordinarily sensitive. In other cases, not even the players themselves have a clear use for data they retain but guess it could develop into something of value. Discussing their projects is difficult from a PR standpoint. There is a clear need for mechanisms to break those resistances.

At the same time, and partly for the same reasons, careful balancing in the intervention is essential. Forcing companies to cooperate, including through interviews with their management, are likely to be necessary. Dawn raids are unlikely to provide value and would most probably disrupt the necessary dialogue.

This dialogue might be reinforced with mechanisms ensuring constant access to data and projects as well as regular reporting. This can be enforced under general information access mechanisms and therefore no additional specific tools are advised at this stage.

As regards the powers to request information and to interview management and personnel, the respondents to this Questionnaire consider that the NCT should be somehow flexible in relation in particular to the length of the time periods granted for the companies to respond to RFIs. On the one hand, we understand the amount of data, not only in digital sectors/markets may be very significant and difficult to manage and process to respond to the Commission's potential questions within the tight deadlines typically imposed by the Commission in the context of Regulation 1/2003 and the EUMR; on the other hand, while there might be structural competition problems as the Commission points out, the NCT will not lead to the establishment of an infringement or the imposition of fines (according to question 25 of the present questionnaire) and, therefore, this is not a situation comparable to those in which the Commission sends RFIs in the context of infringement proceedings.

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

No.

34.1. Please explain your answer, including the resulting benefits and drawbacks. If you replied yes, please specify the type of deadlines.

It is understood that the question refers to binding deadlines for the agencies, like those under Regulation 1/2003 and the EUMR. That is likely to be counterproductive. The logic behind a deadline-based procedure is to return to a 'clearance' base situation soon. If adopted, the new competition tool should rather operate as a constant monitoring of digital markets, without any haste in terminating any specific procedure.

It is on the other hand understood that deadlines to respond to questions or provide information would be needed, without prejudice to the flexibility pointed out in the response to question 33.3 above.

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

No.

35.1. Please explain your answer.

Respondents are concerned about the possibility of imposing interim measures given the risk that such measures would disrupt the companies' business model and cause irreparable harm or at least an unjustified harm to entities not having found liable of any infringement, particularly if such measures are adopted by an authority whose powers would not be limited by law.

It is worth noting that despite the questionnaire using a term known in law for years, these measures would be fundamentally different from the provisional, conservatory measures that are known and used in infringement proceedings, which require not only an imminent risk of irreparable harm, but also an initial finding of contradiction with the law (the so-called *fumus boni iuris*). In contrast, the interim measures here considered would, by implication, require only a risk of irreparable harm, as by definition the conduct would not be illegal. This makes these initiatives quite dangerous, as the authority would not act upon limits set by law and its actions would constitute a severe interference in the right of freedom of enterprise, property and could also cause an unjustified harm to perfectly legal business models.

In these circumstances, respondents believe that it would be safer to maintain the possibility of interim measures for cases of clear infringements of Articles 101 and 102 TFUE, where the rights of defense and necessity of the measures would be considered.

In the event these new set of "interim measures" were accepted, against the opinion here expressed, the procedure should definitely provide for a fully contradictory procedure for the affected parties and also before the European Courts in order to minimize the risk of false positives.

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.

36.1. Please explain your answer.

The question, as formulated, is confusing. The NCT should indeed make provision for a dialogue with the undertakings operating in the market (it is unclear if the term 'companies' is used in that sense). As in other areas of competition law, commitments should be preferred to unilaterally imposed remedies. However, the reference to 'voluntary' is misleading in this context (there is hardly anything voluntary in receiving an invitation from an enforcement authority). Leaving this aside, their presentation as "commitments" appears to suggest an analogy with commitments under article 9 of Regulation 1/2003. That identification would be misplaced, as Article 9 concerns a way to avoid an infringement decision, not an amendment to an (initially legal) commitment initiative. That fundamental distinction would make it necessary to ensure that these measures are fully reviewable. For total clarity – undertakings should have the right to question their 'voluntary' commitments before the European Courts as well as have the possibility of adapt such commitments if the change of circumstances render them disproportionate.

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.

37.1. Please explain your answer.

It is understood that the question refers to 'market testing'. If so, that is a most useful mechanism that should be standard, not only to comment on the findings but also on the appropriateness of any solutions or remedies.

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?

No, as respondents understand that, if adopted, the new instrument should not allow for the imposition of remedies.

38.1. Please explain your answer.

Please see the response to question 37.1 above.

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

Yes.

39.1. Please explain your answer.

The NCT arguably needs stronger standards than when enforcing Articles 101 and 102 TFEU. The reasons are many: lack of defined standards, risk of interference with economic freedoms, risk of stifling technical and economic development, etc. In order to minimise enforcement errors (type I or II) hearing all interested parties in candidness will be essential, again arguably even more than with the classic prohibitions.

This should result in a close examination of the necessity and proportionality of any eventual commitments, even where offered by market players themselves. The logic of the Alrosa case-law (essentially, that parties are free to propose commitments that the authority may not need to justify as adequate or proportionate) is understood in an infringement setting, but should not be followed in connection with the NCT: any and all remedies should be justified as necessary and proportionate, and it should be possible to seek confirmation by the Courts that this is the case.