Response to European Commission Open Public Consultation

New Competition Tool

We welcome the opportunity to provide feedback to the European Commission's Open Public Consultation ('Consultation') on the proposed New Competition Tool ('NCT').

A) EXECUTIVE SUMMARY

We do not believe that there is a need for the NCT instrument 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, because the existing instruments in the European Commission's toolbox (enforcement of Articles 101 and 102 TFEU) are sufficient for this purpose. If at all, a smarter and more efficient application of the existing tools is required.

The introduction of the NCT instrument bears the inherent risk of creating legal uncertainty and causing unwanted side- and spillover effects which could have a chilling effect on the competitiveness of European companies. To the extent that digitalization really raises additional concerns that cannot be adequately dealt with by existing tools, these should at most be supplemented by measures focused on and tailored to very large, dominant digital platforms while maintaining and providing sufficient legal certainty for potentially affected companies.

B) No gap in current EU competition rules

In Section A of the Consultation, the European Commission notes that "*[t]he proposal for a New Competition Tool is one of the measures aimed at fulfilling this task [Commissioner Vestager's tasks in the mission letter] by addressing gaps in the current EU competition rules and allowing for timely and effective intervention against structural competition problems across markets*." The European Commission goes on to state that "*[t]he Commission's enforcement experience in both antitrust and merger cases in various industries points to the existence of structural competition problems that cannot be tackled under the EU competition rules while resulting in inefficient market outcomes.*"

The European Commission's further explanation of the types of situations that in its view require the introduction of the NCT instrument are clearly focused on digital markets, in particular those characterized by large platforms who become or have become gatekeepers for digital- and non-digital products and services. To justify the extension of the NCT instrument more widely, the European Commission merely states that "*[w]hile these characteristics are typical for digital markets, they can also be found in non-digital markets*", with only the thinnest of arguments that the increasing digitalization of the economy requires the NCT instrument to cover the whole economy.

In our view, this is manifestly not a sufficient basis on which to introduce such a profound change to the EU competition rules. We agree with the characterization of the NCT instrument by a well-known commentator: "*The impact of this "tool" on competition law and policy would be impossible to overstate. It would be likely to change competition law as we know it, and as developed over decades of thinking, debate, precedent and experience*[1]."

Most importantly, we do not see a gap in the current EU competition rules as argued by the European Commission and thus no justification for the immense impact that the introduction of an NCT would have on EU competition law and for companies affected by these rules.

[1] Chillin'Competition Blog, Alfonso Lamadrid, *„Can This Be the New Normal? 10 Questions on the Proposed New Competition Tool"*, last accessed on 19 June 2020 (https://chillingcompetition.com/2020/06/11/can-this-be-the-new-normal-10-questions-on-the-proposed-new-competition-tool/).

The currently existing tools (enforcement of Articles 101 and 102 TFEU) are sufficient to tackle abusive practices of very large online platforms. Complaints and the sense of an underenforcement against large technology companies is not so much related to the available tools but rather to the lengthy proceedings.

In addition, the European Commission's current power to conduct sector inquiries already allows the European Commission to conduct deep probes into specific industries. Even though the instrument of the sector inquiry per se does not give the European Commission the possibility to impose remedies, such remedies of course can be imposed if breaches of the competition law rules are revealed in the course of a sector inquiry. This shows that the current instruments are sufficient since there would not be any justification to impose remedies on companies that are not in breach of competition law.

For these reasons, we do not believe that there is a gap in current EU competition rules.

C) <u>No sufficient legal basis</u>

Articles 103 and 114 TFEU which are mentioned in the Roadmap are no adequate legal basis for the introduction of a NCT.

Article 103 TFEU allows the enactment of legislation to "give effect to the principles set out in Articles 101 and 102". However, the NCT, instead of giving effect to the principles set out in Articles 101 and 102 TFEU rather provides for an ex ante intervention without the requirement for a prior infringement of competition law. It therefore creates new competition enforcement powers for which Art. 103 TFEU is not a sufficient legal basis.

Article 114 TFEU is the legal basis for a harmonization of national laws of the Member States in order to avoid a fragmentation of the internal market. However, according to the Roadmap, the NCT does not aim at removing distortions of competition law but rather at eliminating structural deficits and risks that are below the thresholds of competition law. Therefore, also Article 114 TFEU is no adequate basis for the introduction of a NCT.

D) <u>NCT instrument would be disproportionate</u>

In Section A of the Consultation, the European Commission notes that the current EU competition rules enable it to enforce against anticompetitive agreements under Article 101 TFEU and against abuses of a dominant position under Article 102 TFEU. It then goes on to say that "*[t]he enforcement experience of the Commission and national competition authorities, and the reflection process on the fitness of the existing competition rules have helped 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. parallel leveraging strategies by dominant companies into multiple adjacent markets)*".

It is not obvious what the European Commission means by monopolisation strategies by non-dominant companies with market power – traditional competition law analysis would indicate that such strategies would be doomed to failure, and if the concerns relate to digital platforms, we refer to our comments in Section E below. Moreover, also from a competition law perspective, it is a legitimate interest of a non-dominant company to strive to attract as many customers as possible and thus to become dominant. Parallel leveraging strategies by dominant companies into multiple adjacent markets also appear to be primarily a concern relating to very large, dominant digital platforms.

The reason for, and the focus of, the current discussions and suggested changes to EU competition law are certain behaviors of very few, very large and dominant companies, that all have direct relations to consumers. This is a very specific area – best dealt with under the current 102 TEUF tool box - and the issues arising in this setting cannot readily be transferred to other scenarios, and in particular not to the B2B scenario where customers are significantly more sensitive about their data, often insisting on retaining control over their data and have considerable countervailing bargaining power.

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

opportunity to receive the best and most innovative products. In addition, it would further impede European platforms from closing the gap to their big US and Asian incumbents which do not face similarly strict regulations in their home markets thus hampering the desired level playing field which is so important for the competitiveness of European players.

Taking into account the very dynamic environment and development in the area of platforms, it is in addition very likely that the NCT instrument cannot be defined specifically enough to ensure that it will only apply to „very large online platforms". Thus, there will likely be spill-over effects to smaller players and emerging innovators and to traditional industries. The example of the market investigation tool in the UK and recent comments from Commissioner Vestager show that the application of such tools will hardly be limited in practice to the very large, dominant digital players but to all sort of companies. This is also shown by the Commission's quote mentioned above.

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

Furthermore, we believe it is important that the NCT instrument should not be used to lessen the procedural or evidential burden that the European Commission is subject to in proceedings under Articles 101 and 102 TFEU. We note with concern that the European Commission seems to suggest that the upside of the introduction of the NCT instrument would be to deal with some of the "problems" in traditional competition law enforcement: "*The Commission would continue to enforce Articles 101 and 102 TFEU on a case-by-case basis against anti-competitive conduct of individual companies. It would also continue to conduct sector inquiries, which, however, only empower the Commission to request information necessary for giving effect to Articles 101 and 102 TFEU and also do not allow the Commission to impose remedies outside the scope of individual infringement proceedings*." We would consider that the above-mentioned situation is not a "problem" to be dealt with by the introduction of a new instrument with extensive remedy powers without the need to show illegal conduct, but rather the reflection of the rule of law as it applies to EU competition law enforcement.

Finally, it is important to note that, despite comparisons being drawn between the NCT instrument and e.g. the UK market investigation regime, we are not aware of any jurisdictions that have both ex ante (mandatory merger control) and ex post (e.g. Article 102 TFEU) enforcement of competition law **and** an NCT-type tool. Therefore, any attempt to justify the NCT instrument as reflecting similar instruments at national level is not accurate.

E) If at all, any additional tool beyond Art 102 needs to be very limited

If despite the lack of a regulatory gap as well as a legal basis and the potential negative impact on business, innovation and market growth the European Commission still wishes to address the above-mentioned root cause of the concern, namely very large digital platforms, a very cautious and careful approach is key.

In our view it would be more appropriate to deal with these through the existing Art. 102 TFEU. If an additional instrument was to be introduced at all, it should be very limited in its application.

Either, the European Commission should consider following the German model of § 19a GWB-E (draft) and introduce specific rules for companies of paramount significance across markets. As in the German model, such additional rules should only apply to a company if the European Commission previously stated via a formal decision that the relevant company is such a "company of paramount significance across markets". In addition, any such specific rules should be clearly defined and limited as much as possible. This would help to create legal certainty for the affected companies.

An alternative could be an ex ante regulatory instrument focused on and tailored only to very large, dominant digital platforms. This means that the scope of application of such regulatory instruments should be clearly and narrowly defined to very large, dominant digital platforms with significant market power only. In addition, if such ex ante regulations were to be introduced at all, they should in any case be strictly limited to platforms with a strong focus on B2C relationships and therefore mere B2B platforms or industry platforms should in any case be exempted from such regulations. If one wants to opt for this path, we view the European Commission's Digital Services Act Package and related activities to be the

proper (and only appropriate) forum. Please see also our attached submission in relation to the Digital Services Act package – ex ante regulatory instrument of very large online platforms acting as gatekeepers.

8 September 2020

Annex

Response to European Commission Open Public Consultation

Digital Services Act package – ex ante regulatory instrument of very large online platforms acting as gatekeepers

We welcome the opportunity to provide feedback to the European Commission's ("EC") Open Public Consultation on the proposed Digital Services Act package – ex ante regulatory instrument of very large online platforms acting as gatekeepers.

A) EXECUTIVE SUMMARY

We do not believe that there is a need for an ex ante regulatory instrument 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, because the existing instruments in the European Commission's toolbox (enforcement of Articles 101 and 102 TFEU) are sufficient for this purpose. If at all, a smarter and more efficient application of the existing tools is required.

Any ex ante regulation bears the inherent risk of creating legal uncertainty and causing unwanted side and spill-over effects which could have a chilling effect on the digital efforts and competitiveness of European companies.

In case the introduction of such ex ante regulations is considered nevertheless, a very cautious and careful approach is key. A clear distinction between B2C- and B2B-relationships must be included. Any ex ante regulations must be strictly limited to platforms with a strong focus on B2C relationships and therefore mere B2B platforms or industry platforms must in any case be exempted from such regulations. Moreover, ex ante regulations should be clearly defined and tailored as much as possible to very large, dominant online platforms with gatekeeper function in order to be proportionate, to not create legal uncertainty and to avoid harmful side and spill-over effects.

B) General Comments

The high-level goals of the EC's intended proposal for a new Digital Services Act are "*to reinforce the internal market for digital services, to lay down clearer, more stringent, harmonised rules for their responsibilities in order to increase citizen's safety online and protect their fundamental rights, whilst strengthening the effective functioning of the internal market to promote innovation, growth and competitiveness, particularly of European digital innovators, scale-ups, SMEs and new entrants.*" While many of these goals are generally to be welcomed, it is noteworthy that very different aspects (some rather content-focused, others more directed towards consumer protection and others towards the functioning of the market) are brought together in this Digital Services Act.

Considering the fast developing and growing digital business, we support the EC's intention to update the current legal framework in the B2C area, especially the E-Commerce Directive (issued almost 20 years ago). There is a need for clear and proportionate rules to create safe and sustainable digital environments for consumers who usually lack the necessary information and choices to take an informed "consent" decision.

For example, consumers should be able to refuse the use of e.g. cookies without experiencing any disadvantages regarding the use of services. Consumers' rights to delete online footprints should be strengthened. Furthermore, platforms should more efficiently tackle illegal content.

However, in our main theses set out below, we will focus exclusively on the proposed ex ante rules aimed at ensuring that markets characterised by large platforms with significant network effects acting as gatekeepers, remain fair and contestable for innovators, businesses, and new market entrants.

C) Main theses

1. No gap in current EU competition rules

- Considering the immense impact that the suggested changes will have on EU competition law and policy and for companies affected by these rules, the most important question should be whether there is really a need to complement competition law enforcement through ex ante regulations.
- Generally, we do not see a necessity for an ex ante regulation of very large online platforms at this point in time (neither on EU level nor on national level) apart from the abovementioned consumer protection amendments to the existing E-Commerce Directive. The currently existing tools (enforcement of Articles 101 and 102 TFEU) are sufficient to tackle abusive practices of very large online platforms. Complaints and the sense of an underenforcement against large technology companies are not so much related to the available tools but rather to the lengthy proceedings.
- The description of the "critical" platforms included in the summary of the initiative is the following: "*A few very large online platforms account for a very large share of the digital economy in the EU. Their role as gatekeepers between businesses and consumers, with economic power and control over entire platform ecosystems, makes it all but impossible for rivals or new market entrants to compete.*" This shows that the measures should be targeted at dominant or even very large, dominant companies to which – without any doubt - the current tools in Art. 102 TFEU could be applied. Therefore, the current toolkit is sufficient. For example, if "gatekeepers" abuse their power (e.g. via unfair commercial platform-to-business practices including in the view of the EC self-preferencing, data leveraging and distortion of fair competition and fair-trading conditions within online platform ecosystems) we regard Article 102 TFEU as an appropriate tool to discipline such behavior.
- In addition, it seems to be early for such a massive intervention as the underlying legal and economic questions are still very controversial and by far not mature enough. Also, some member states, e.g. Germany, are in the process of significantly extending the scope of their dominance legislation to adapt them to the digital world. It would be wise for the European legislator to wait for the first results from these national "experiments" before acting.

2. An ex ante regulatory instrument will not solve the problem but create more problems

- The reason for, and the focus of, the current discussions and suggested changes to EU competition law are certain behaviors of very few, very large and powerful companies, that all have direct relations to consumers. This is a very specific area – best dealt with under the current 102 TEUF tool box - and the issues arising in this setting cannot readily be transferred to other scenarios, and in particular not to the B2B scenario.
- Any "ex-ante" intervention in markets (even via a broad list of restrictive Dos and Don'ts) could have a significantly negative impact on companies (e.g. slowing down innovation, giving wrong incentives and make so-called "free-riding" more attractive).
- New digital business models and platform solutions are continuing to emerge in Europe, and this innovation and development should not be limited by restrictive regulations. The introduction of ex ante regulations in this area would create a lot of legal uncertainty and likely lead to a limitation of development and innovation, in particular if highly innovative companies could later be "punished" for their success due to these regulations. This would be counterproductive for competition and thus for customers' opportunity to receive the best and most innovative products.
- Taking into account the very dynamic environment and development in the area of platforms, it is very likely that the suggested ex ante regulations cannot be defined specifically enough to ensure that they will only apply to „very large online platforms". Thus, there will likely be spill-over effects to smaller players and emerging innovators and to traditional industries. The example of the market investigation tool in the UK and recent comments from Commissioner Vestager show that the application of such tools will hardly be limited in practice to the very large, dominant digital players but to all sort of companies.

- In this context one should also bear in mind that there are many platform providers which do not have a significant market share and which operate in a way that neither has a negative impact on the market nor raises any other concerns and which might nevertheless be affected by the suggested ex ante regulations. At least in relation to such platform providers, the introduction of ex ante regulations would be disproportionate. This applies all the more for other traditional industries.
- In addition, such ex ante regulations might further impede European platforms from closing the gap to their big US and Asian incumbents which do not face similarly strict regulations in their home markets. This would be hampering the desired level playing field which is so important for the competitiveness of European players.
- In addition, it is very questionable whether the suggested ex ante regulation could really lead to the changes intended by these regulations. Many customers of the "very large platforms" are satisfied with the services and possibilities these platforms offer. Therefore, they will often have no intention to switch to other platform providers unless those other platforms offer innovative features that distinguish them from existing platforms. It is unlikely that ex ante regulations would have any impact on customer preferences and loyalty.
- A new legal framework would face several problems:
  - First – even stated by Commissioner Vestager – the term "gatekeeper" is tremendously tricky to define. If the term is defined too widely, it will hinder new entrants as well as smaller players from innovating and growing.
  - Secondly, how should a process be designed to implement measures against gatekeepers efficiently. It goes without saying that the respective players should have rights to defend and argue against any kind of ex-ante regulations.
  - Thirdly, even a generally applicable list of Dos and Don'ts needs to be very clear and understandable to avoid legal uncertainty (e.g. scope and extent of measures). However, digital business and "connected market disruption" are usually case-specific, so that a generic list of Dos and Don'ts would most likely not be of much help.

3. Minimum safeguards for potential ex ante regulatory effort

- If despite the lack of a regulatory gap and the potential negative impact on business, innovation and market growth, such an ex ante regulation was introduced nevertheless, several important factors need to be considered in the drafting of such ex ante regulation:
- Any regulation should be drafted very carefully and in a light-touch manner. It should be as clearly defined and as limited as possible in order to catch only specific behavior of very large, dominant digital companies and to ensure legal certainty.
- The definition of very large online platforms must at least be made in a very narrow, clear and distinct way. It must ensure that the application of potential ex ante regulations is limited to very large, dominant online platforms with gatekeeper function in order to avoid legal uncertainty and harmful side and spill-over effects. If IoT platforms in B2B-relationships qualify as very large online platforms subject to ex ante regulation (which even though a significant number of machines are connected to them, may still have a negligible market share), this would have no justification from a competition point of view.
- A clear distinction between B2C- and B2B-relationships should be included. B2C relationships function very differently from relationships in the B2B field. For B2B, customers are significantly more sensitive about their data, often insisting on retaining control over their data and such customers have considerable countervailing bargaining power. Therefore, the application of potential ex ante regulations must be strictly limited to platforms with a strong focus on B2C relationships. Mere B2B platforms and industry platforms must in any case be exempted from such ex ante regulations.
- It is unclear what ex ante regulation would mean in practice. Would "only" certain practices be blacklisted for very large online platforms, or could that new flexible framework amount to full blown ex ante regulation as e.g. in the telecoms sector, where also the prices charged to the other market participants, particularly competitors seeking access, are subject to regulation? We do not see any justification for such an extensive framework, since data is duplicable, the relevant infrastructure is freely accessible and there are no natural monopolies as in the telecoms sector.

- Even dominant companies should generally be able to treat their own services differently in comparison to third party services.
- Particularly with regard to the very large, dominant online platforms which are in the focus of the current discussions one needs to bear in mind that data is generally replicable and is provided by users voluntarily and free of charge.
- Any obligation to grant access to (machine) data would cause a chilling effect on innovation and investments and foster anticompetitive free-riding. This is not the case with data which is generated by public authorities and therefore could be shared.
- Requirements regarding data portability must acknowledge that the pure format in which data (e.g. machine data in the B2B relationship) is collected may already reveal business secrets and relevant IP or know how. In addition, no obligation to edit data in a specific format at the will of the requesting party must be imposed.

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