September 8, 2020

European Commission's public consultation on the proposed New Competition Tool

Position paper by the Italian Association of European Jurists (*Associazione Italiana Giuristi Europei*)

The Italian Association of European Jurists (*Associazione Italiana Giuristi Europei*, "AIGE"), welcomes the opportunity to participate in the public consultation process launched by the European Commission (the "Commission") on a proposed New Competition Tool, providing feedback and responding to the related questionnaire.

Established in 1958, AIGE is affiliated to the International Federation for European Law (*Fédération Internationale pour le Droit Européen*, "FIDE") and, in accordance with its Statute, promotes knowledge of European Union law through conferences, debates, cultural, training, and research activities, also developing international relations with similar associations.[1]

AIGE's members include law professors, judges, lawyers and legal practitioners in general who wish to deepen and contribute to the knowledge and development of European Union law.

The opinions expressed herewith are attributable to AIGE only and do not bind the individual members in relation to any positions held by them.

1. INTRODUCTION

We refer to the public consultation that the Commission launched on 2 June 2020 on a proposed New Competition Tool ("NCT").[2] According to the Inception Impact Assessment (the "Commission's NCT Impact Assessment") published by the Commission, the NCT is aimed at addressing purported "*gaps in the current EU competition rules and allowing for timely and effective intervention against structural competition problems across markets.*"[3] The Commission's NCT Impact Assessment differentiates between two forms of "*structural competition problems*" depending on whether harm is about to affect or has already affected the market:[4]

(i) Structural risks for competition. Scenarios where certain market characteristics (e.g. network and lock-in effects) and the conduct of the companies operating in the markets concerned create a threat for competition (e.g., markets perceived as prone to 'tipping'); and

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1 Further information on AIGE is available on its website: https://www.aige.it/.

2 Commission, *Proposal for a Regulation: Single Market – new complementary tool to strengthen competition enforcement*, 2 June 2020, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool

3 Commission's NCT Impact Assessment, 4 June 2020, Section A.

4 *Ibid*.

(ii) Structural lack of competition. Scenarios where a market is not working well and not delivering outcomes due to its structure (e.g., an oligopolistic market structure with an increased risk of tacit collusion).

Although the Commission's NCT proposal was announced along with the Commission's Digital Services Act ("DSA") package,[5] its scope is not limited to digital or digitally enabled markets. The NCT proposal envisages a significant expansion of the Commission's existing powers, including potentially the power to impose extensive behavioral and structural remedies absent an infringement decision. Against this background, the introduction of the NCT is bound to have far-reaching implications – far beyond those of established investigation and sector inquiry tools – and is likely to result in a paradigm shift in EU competition law enforcement.

AIGE's preliminary comments relating to the NCT concern: the questionability of the need for a new tool in light of the sufficiency of the existing competition rules (Section 2); the need for appropriate checks and balances (Section 3); the need for clear legal and evidentiary standards for the imposition of remedies and for robust effects-based analysis (Section 4); and the risk of proliferation of overlapping enforcement tools (Section 5).

As the NCT draft text is not available, AIGE's specific comments are necessarily limited to the Commission's NCT Impact Assessment and the Questionnaire for the public consultation on the NCT (the "NCT Questionnaire"). These documents identify a range of policy measures that express the Commission's intention to address concerns about the operation of digital markets and the Commission's ability to intervene. AIGE looks forward to expanding on these ideas and continuing to engage on these important and timely topics as the Commission advances a draft text of the NCT.

2. THE NEED FOR A NEW TOOL

The Commission's Impact Assessment asserts that the NCT is intended to address "*structural competition problems*" that Articles 101 and 102 of the Treaty on the Functioning of the European Union (the "TFEU") "*cannot tackle (e.g. monopolization 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).*"[6] It is therefore paramount to assess whether or not the NCT is actually needed and, if it is, to consider carefully any potential 'gap-cases' that cannot be effectively addressed by existing rules.

On this point, the Commission refers to the current debate on the potential need to expand the Commission's current toolkit in order to capture potential established forms of anti-

[5] Commission, *Proposal for a Regulation: Digital Services Act package – ex ante regulatory instrument of very large online platforms acting as gatekeepers*, 2 June 2020, available at: https://ec.europa.eu/info/law/better- regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers

[6] Commission's NCT Impact Assessment, 4 June 2020, Section A.

competitive conduct that allegedly fall within a gap in the law,[7] and it acknowledges that no clear consensus has been established in this regard.[8]

As a general remark we believe that past cases demonstrate that Articles 101 and 102 TFEU have proven to be sufficiently broad and flexible to tackle a wide range of new and sophisticated economic phenomena that have informed competition analysis and policy in the last fifty years. This is also the case with regard to the competition challenges that may arise in relation to the digitization of the economy, such as two-sided markets, zero-price factors, and innovation theories of harm, as emphasized by Commission Vice President Vestager.[9]

In particular, the existing competition law framework has proven extremely flexible in refining the notion of 'relevant market' in sectors characterized by the emergence of data as an asset for market players operating in the digital economy: instead of simply relying on market shares, the Commission is increasingly taking into account 'potential competition' in its assessment of dominance in dynamic markets. This notion is particularly valuable because it highlights that potential competition may serve as a disciplining device for dominant firms.[10]

For example, in relevant markets defined around data, it is essential to identify an objective criterion to attribute value to data. The turnover generated by a provider through the monetization of data, by licensing information to third parties, delivering targeted advertising services or offering other paid products and services to customers on the basis of the collected data, may provide an indication of its competitive strength in a potential market for a particular type of data. Lacking any data-related revenues, 'potential competition' may represent an additional proxy to evaluate market power or even dominance. This enables the Commission (and the CJEU) to assess a form of rivalry whereby market players do not only compete in existing relevant markets for end products or services but also in a potential market for data used as an input to launch innovative future products and services.[11]

Along these lines, in its *Microsoft/Skype* merger decision, the Commission contended that market shares only offer an incomplete indication of competitive strength in the context of the market for internet consumer communications services because of the dynamism of the sector as a result of which market shares can change quickly within a short period of time.[12]

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7 The Commission's Special Advisers' Report was a useful contribution to this debate. *See* Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition policy for the digital era*, 4 April 2019, available at: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf

8 Commission's NCT Impact Assessment, 4 June 2020, Section A.

9 *See* the statement of Executive Vice President Vestager which underlined the sufficiency of existing enforcement tools in a recent speech, noting: '*that's not to say that we need fundamental changes to the rules themselves.* […] *The fundamental motives, like greed and fear, that tempt companies to harm competition are the same as they've ever been – and the competition rules are still well designed to deal with them*'. Executive Vice President Vestager speech, *Defining markets in a new age*, 9 December 2019, available at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defining-markets-new-age_en

10 *See generally*, I. Graef, *Market Definition and Market Power in Data: The Case of Online Platforms*, World Competition Law and Economics Review, 2015, Volume 38 Issue 4, pp. 473 – 506.

11 *Ibid*..

12 Case No COMP/M.6281 – *Microsoft/Skype*, Commission Decision of 7 October 2011, para. 78.

In its *Cisco* judgment – in which the legality of the decision of the Commission to approve the *Microsoft/Skype* merger was evaluated – the General Court confirmed this finding of the Commission and held that "*the consumer communications sector is a recent and fast-growing sector which is characterized by short innovation cycles in which large market shares may turn out to be ephemeral*".[13] The Commission and the General Court concluded that the concentration would not raise competition concerns because of the dynamic character of the sector and the existence of sufficient alternative providers to which consumers could easily switch.[14] In its *Facebook/WhatsApp* merger decision, the Commission referred to and relied upon the statement of the General Court that high market shares do not necessarily point towards market power in the market for consumer communications services.[15]

Arguably, an analogous reasoning may be applied in prospective matters concerning online platforms, e.g. e-commerce platforms, social networks, and search engines.[16]

Additionally, the existing competition law regime has successfully stood the test of time in relation to the notion of dominance. In particular, to the extent that the proposed NCT would apply to unilateral conduct, no evidence that existing competition law tools are unable to address these issues can be detected at all. EU competition law currently bestows the Commission with clear powers to tackle two distinct scenarios: agreements and concerted practices between independent undertakings (Article 101 TFEU), and unilateral conduct which may be caught by Article 102 TFEU. The case-law developed by the Court of Justice of the EU (the "CJEU") has consistently held that unilateral conduct only falls within the scope of EU competition law if the company at issue is dominant.[17] To date, there has been no evidence-based claim that the EU competition law framework allows for a significant enforcement gap with respect to anti-competitive unilateral conduct.

The Commission's decision-making practice and the CJEU case law demonstrates that the current framework for EU competition law enforcement is flexible enough to address novel theories of harm, including new leveraging strategies (*i.e.* better positioning and

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13 Judgment in Case T-79/12, *Cisco Systems Inc. and Messagenet SpA v. Commission* [2013], not yet reported, para. 69.

14 Case No COMP/M.6281 – *Microsoft/Skype*, Commission Decision of 7 October 2011, paras 120-132 and Judgment in Case T-79/12, *Cisco Systems Inc. and Messagenet SpA v. Commission* [2013], not yet reported, paras 68-95.

15 Case No COMP/M.7217 – *Facebook/WhatsApp*, Commission Decision of 3 October 2014, para. 99.

16 *See generally*, I. Graef, *Market Definition and Market Power in Data: The Case of Online Platforms*, World Competition Law and Economics Review, 2015, Volume 38 Issue 4, pp. 473 – 506.

17 Joined Cases C-2/01 P and C-3/01 P, *BAI and Commission v Bayer*, paras. 100-101 ("*the existence of an agreement* [prohibited by Article 101(1) TFEU] […] *can be deduced from the conduct of the parties concerned. However, such an agreement cannot be based on what is only the expression of a unilateral policy of one of the contracting parties, which can be put into effect without the assistance of others* […] [this] *would have the effect of confusing the scope of that provision with that of Article* [102 TFEU]."). On this point, it should be remarked that there are solid legal and economic reasons why Article 102 TFEU primarily focuses on actual or potential harm caused by specific ongoing practices by dominant firms: (i) competition law recognizes that acquiring a dominant position can be the consequence of significant investments and innovative behavior, a reflection of the efficiencies, and value created and shared with business partners and consumers; and (ii) undertakings in a dominant position can behave independently of consumers and competitors and can as a result dictate the limits of competition.

display);[18] pre-installation through, e.g., tying;[19] exclusivity requirements;[20] and, most-favored-nation clauses.[21] These precedents show that Article 102 TFEU already allows to carry out a nuanced and evidence-based assessment, centered on the dominance framework. Article 102 TFEU is enforced case-by-case, based on a careful valuation of the facts, and the requirement to find an infringement guarantees that obligations to change market conduct are grounded on established legal principles and thorough scrutiny. Indeed, under Article 17 of Regulation 1/2003, the Commission must initiate antitrust investigations in order to address findings in a sector inquiry that competition in a particular sector is not functioning well.

The Commission's NCT Impact Assessment asserts that the proposed NCT would allow the Commission to address alleged structural market failures, or risks for competition – in particular in 'tipping markets' – that despite being anticompetitive, do not amount to an infringement of the current EU competition rules, and therefore cannot be tackled relying on the existing competition law regime, because no market dominance can be established. However, this assertion is questionable:

(i) first, dominance has been interpreted elastically and more widely than the Commission's NCT Impact Assessment suggests: the thresholds used to find dominance are roughly those that are used under US antitrust law to run a case of attempted monopolization under section 2 of the US Sherman Act, because under the EU system, Article 102 TFEU applies to firms with the power to exclude, and not just those who have the power to exploit;

(ii) second, Article 102 TFEU can and has previously effectively been applied to instances of economic dependency or relative market power (e.g. see cases C-26/75, *General Motors Continental NV v Commission* and C-241/91 P and C-242/91 P, *Magill*).

Moreover, the Commission does not seem to offer in its proposed NCT concrete evidence of specific situations where existing competition law tools do not suffice. While we are aware that the consultation documents are preliminary and we are confident that the Commission will spell out these specific situations in a future draft text of the NCT, it is worth noticing that the Commission's NCT Impact Assessment lists several types of conduct that are already captured under Article 102 TFEU, when engaged in by dominant companies. Given that such evidence is essential in order to demonstrate the need for and the scope of any new enforcement tool, the Commission's assessment is a particularly speculative basis for the introduction of a new tool. In particular, there is a lack of compelling evidence to demonstrate that the existing competition rules and instruments cannot efficiently address legitimate competition concerns, or that these cannot be reviewed accordingly. The establishment of the NCT is therefore disproportionate.

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18 Case AT. 39740 – *Google Search (Shopping)*, Commission Decision of 27 June 2017.

19 Case AT.40099 – *Google Android*, Commission Decision of 18 July 2018; Case M.8124 – *Microsoft/LinkedIn*, Commission Decision of 6 December 2016.

20 Case AT.40099 – *Google Android*, Commission Decision of 18 July 2018; Case AT. 40411 – *Google AdSense* (Commission decision not yet published).

21 Case AT.40153 – E-*book MFNs and related matters (Amazon)*, Commission Decision of 4 May 2017.

Irrespective of the final language of the NCT, and assuming it will be adopted, the principle of proportionality should be the cornerstone of this new enforcement tool, as it represents the principle "*which has most influenced the development of public law across Europe*".[22] It applies to most, if not all, actions taken by the Union, and constitutes a ground for review of EU acts,[23] as well as of acts by Member States within the scope of EU law,[24] stemming from the common traditions of the Member States.[25]

In particular, in identifying specific situations where current competition tools do not – allegedly – suffice, the Commission should build on the principle of proportionality as it takes the role of a safeguard against the use of public powers in the system of competition in the EU, by imposing limitations and procedural requirements upon competition authorities, including the Commission. Therefore, any measures introduced by the NCT should be fully aligned with proportionality, which typically entails that (i) a legitimate objective is being pursued by the measure concerned, and that the measure itself is i(i) suitable, (iii) necessary, and (iv) proportional *stricto sensu* to achieve the objective.[26]

On a different note, the NCT also seems to suggest that the current competition law framework does not provide a sound and sufficiently flexible basis for protecting competition *vis-à-vis* potential competition concerns stemming from the widespread use of pricing algorithms in the digital ecosystem.

Conversely, we believe that the contemporary legal framework, in particular Art. 101 TFEU and its accompanying jurisprudence, allows competition authorities to efficiently address possible competitive concerns. In fact, competition authorities already have dealt with a certain spectrum of cases involving algorithms, which have not raised specific legal difficulties. Three different scenarios can be envisaged:[27]

(i) in the first scenario, pricing algorithms are used as mere facilitators of collusive agreements that occur in person. In this case, the involvement of an algorithm does not raise specific concerns, as a prior agreement or concerted practice exists which may be assessed under Article 101 without requiring further analysis of the algorithm;

(ii) in the second scenario, a third party provides market operators with an algorithm that facilitates similar behaviors between competitors. In this case, the third party's role might be assessed under the "hub and spoke" doctrine;

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22 *See* A. Young and G. de Burca, *Proportionality*, in S. Vogenauer and S. Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart 2017), p. 133.

23 T. Tridimas, *The General Principles of EC Law* (OUP 1999), p. 90.

24 *Id*., p. 124.

25 W. Sauter, *Proportionality in EU Law: A Balancing Act?*, (2013) 15 Cambridge Yearbook of European Legal Studies, p. 442; Tor-Inge Harbo, *The Function of the Proportionality Principle in EU Law* (2010) 16(2) European Law Journal, p. 159.

26 P. Craig and G. de Burca, *EU Law: Text Cases and Materials* (5th edn OUP 2011), p. 526.

27 On this point, *see* Joint study on "*Algorithms and Competition*" by the Autorité de la concurrence and the Bundeskartellam, November 2019, pp. 26-59.

(iii) in the third scenario, competitors use individual algorithms that facilitate an alignment in their market behavior. In this case, it is not yet clear how and to what extent the parallel use of algorithms can lead to collusive outcomes when there is no prior or ongoing contact between firms. Article 101 does not prohibit conscious parallel behavior between undertakings, therefore, in order for this scenario to be caught under Article 101, a certain degree of "algorithm communication" must be found. However, it currently seems to remain an open question whether an alignment of two or more pricing algorithms can likely arise that can actually lead to perfect parallel behavior between companies or if such algorithm-organized parallel behavior can lead to supra-competitive prices.[28] On the contrary, it has been shown that the increased market transparency caused by algorithms can favor price competition and new entrants.[29]

Finally, if an enforcement gap actually existed, the creation of an *ad hoc* regulatory framework could, on the one hand, help close the gap without changing the applicable rules; on the other hand, however, such a framework could also act as a barrier to entry and hinder innovation. Therefore, any additional intervention should be explored only following an in-depth understanding of the competition concerns caused by algorithms.

In sum, the open-textured language of the existing competition law rules afforded them a ductility that has allowed competition law to address new economic learning and new market contexts. Therefore, a cautious approach when taking any action to meaningfully redraw competition law is warranted and consistent with the principle of proportionality..

This is all the more important because traditionally the CJEU has adopted a careful approach as to the scope and intensity of its own review of the Commission's decisions in complex economic matters. In particular, the CJEU has always been most reluctant to replace its own assessment of facts for the complex assessments of an economic nature made by the Commission, and has never withdrawn from the strict conception of its powers of review on appeal.[30] However, as more sophisticated economic analysis has been developed to fully grasp the impact of the conduct of undertakings on the market, the EU courts have progressively felt the need to strengthen their scrutiny in competition cases. The recent judgment in *Intel* is an important step, albeit limited, in this regard.[31]

3. THE NEED FOR APPROPRIATE CHECKS AND BALANCES

The proposed NCT advocates wide-ranging reforms introducing potentially sweeping discretionary enforcement powers. In particular:

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28 *Ibid*., p. 52. *See also* Pierre Honoré and Guillaume Fabre, *Algorithmic Pricing under Article 101 TFEU*, Global Competition Review, 2019.

29 *See generally*, OECD, *Algorithms and Collusion* - Background Note by the Secretariat, DAF/COMP(2017)4.

30 See J. L. da Cruz Vilaça, *The intensity of judicial review in complex economic matters—recent competition law judgments of the Court of Justice of the EU*, Journal of Antitrust Enforcement, Volume 6, Issue 2, 2018, pp. 173–188.

31 Judgment in Case C-413/14 P *Intel Corp. v Commission* [2017].

- the Commission would not have to establish dominance and/or an abuse under Article 102 TFEU in order to act against unilateral conduct, and it would have the power to impose far-reaching structural and behavioral remedies;

- the Commission would have mostly unfettered powers to intervene not only in "*markets displaying systemic failures,*" but also to make an "*early intervention*" on a prognostic assessment in markets wherever it considers that there is a "*threat* [to] *competition.*"[32]

In light of the potential implications of the Commission's NCT proposals, investigated parties' procedural rights and their entitlement to judicial protection under the EU's legal order, pursuant to Article 6 of the European Convention of Human Rights and Articles 47 and 48 of the EU Charter of Fundamental Rights, cannot be diluted. This calls for careful consideration of meaningful adequate procedural and substantive safeguards to provide oversight of how this broad regulatory discretion is exercised in order to determine whether intervention is warranted and how appropriate remedies will be designed, as well as reduce the burden imposed on the undertakings involved to ensure their right to good administration, right of defense and their right to judicial review.

On the contrary, the Commission's NCT consultation documents leave undeveloped any details on the procedural aspects that the Commission will need to conform to and do not contain any clear limiting principles or measures designed to ensure procedural fairness and independence of the decision-making process. In fact, the Commission's NCT Impact Assessment merely refers briefly to the importance of "[taking] *into account the rights of defense and the right to judicial review,*"[33] while the Questionnaire simply asks respondents to provide suggestions on whether the NCT "*should*" be subject to "*adequate procedural safeguards, including judicial review.*"[34]

There is an inescapable need to identify measures that would be appropriate to counterbalance the envisioned new enforcement powers. Robust procedural safeguards are essential to secure a fair process and, ultimately, better decision-making. As noted by the President of the General Court Marc van der Woude: "*where the contested conduct of the public authorities is repressive in nature, it is hard to conceive, at least in free democratic societies, that citizens and firms can be condemned on the basis of estimates, approximations or guesses, even if they are informed ones. Uncertainty must then be balanced against the requirements of the presumption of innocence.*"[35]

In detail, adequate checks and balances should be targeted at guaranteeing parties' rights to:

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32 Commission's NCT Impact Assessment, p. 2.
33 Commission's NCT Impact Assessment, p. 4.
34 NCT Questionnaire, Section 39, p. 44.
35 Marc van der Woude, *Judicial Control in Complex Economic Matters*, Journal of European Competition Law & Practice, Volume 10, Issue 7, September 2019, pp. 415–423.

(i) transparency of the Commission's decision-making process;
(ii) access the evidence collected by the Commission;
(iii) receive a fair hearing on the evidence of the case;
(iv) appropriate access to the decision-makers and sufficient time to respond to requests for information and other intermediate steps throughout the investigation, such as interim reports and statements of objections; and
(v) judicial review, which is particularly important to ensure protection of rights where remedies are imposed, but also whether the Commission would be required to issue an appealable decision following complaints and/or at other preliminary stages.

By clearly delimiting the scope of the Commission's powers and the regime of effective judicial protection for parties subject to those procedures, such safeguards will strengthen the legitimacy of the Commission's actions under any new regime.

4. THE NEED FOR CLEAR LEGAL AND EVIDENTIARY STANDARDS FOR THE IMPOSITION OF REMEDIES AND FOR ROBUST EFFECTS-BASED ANALYSIS

The NCT seems to envision a lowering of the legal and evidentiary standard for intervention so as to allow the Commission to intervene and impose remedies *vis-à-vis* unilateral conduct "*without any prior finding of an infringement pursuant to Article 102 TFEU,*"[36] by undertakings that are not dominant on a relevant market.[37]

We understand that, to some extent, the justification for easing the legal and evidentiary burden appears to rest on a supposed ability to foresee developments in ever-moving and dynamic markets, and in which outcomes are fundamentally unpredictable. However, there is a real risk that the Commission's proposals, if enacted, would result in a significant deviation from the legal and evidentiary standards for intervention as established by fundamental European Union law and the CJEU case law, which foster an evidence-led approach that is subject to clear standards and judicial review.

On this point, we believe further analysis is needed on the appropriateness and desirability of allowing the Commission to impose remedies on companies. An alternative may be to limit the Commission powers to making non-binding recommendations to companies, as well as to inform and make recommendations and proposals to sectorial regulators, and to make legislative recommendations. Such an alternative could avoid or reduce the risk of a disproportionate interference with the free market economy that could have a detrimental effect on the EU economy and consumers, as it could potentially stifle innovation, growth and investment.

This risk is heightened by the vagueness of the NCT's proposal. For instance, the NCT Questionnaire makes reference to an imprecisely-defined concept of "tipping markets" – which constitutes one of the NCT's key focus areas – and to cases where "*a (not necessarily dominant) company* [is] *relying on large amounts of data*" "*to extend its market position to*

36 *See* NCT's Options 1 and 2, Commission's NCT Impact Assessment, p. 3.
37 *See* NCT's Options 3 and 4, *Id*.

related markets".[38] However, the available consultation documents do not contain a prescriptive list of scenarios for intervention. Therefore, the notion that certain markets are prone to 'tipping,' whereby the 'winner takes most,' appears to be a particularly speculative ground for the introduction of a new far-reaching and highly invasive enforcement tool, especially because there is scarcely any enforcement practice relating to 'tipping,' let alone case law from the CJEU. Conversely, the NCT seems to conflate 'tipping' with successful organic growth as a result of competition on the merits and innovation.[39]

In light of this, imposing remedies to avoid markets tipping would seem unjustified and premature, ultimately resulting in a reversal of the burden of proof that would fundamentally change EU standards of due process and create legal uncertainty. This in turn would reduce companies' incentives to compete, invest and innovate. However, if, despite the described shortcomings, the Commission decides to move forward with this new tool, it should be accompanied by appropriate safeguards, rights of defense and due process, as set out above[40] and by a robust effects-based analysis ensuring that any remedies imposed are absolutely necessary, proportionate, properly designed and capable of addressing any perceived issues.

Indeed, despite the fact that "*the Commission would not make any finding of an infringement of the EU competition rules, nor impose fines and thus not generate rights to launch damage claims*"[41] the Commission's intervention through the NCT could have a vast economic impact on the concerned undertaking. Indeed, the imposition of behavioral and/or structural remedies can have a much greater impact than a pecuniary fine, resulting in radical changes to undertakings' business models and/or the restructuring of entire industries.

Moreover, the Commission's NCT Impact Assessment states that "*the proportionality of the costs incurred would be ensured by the fact that such remedies have to be limited to ensuring the proper functioning of the market under scrutiny. Consumer benefits deriving from the timely intervention under all policy options should outweigh those costs.*"[42] This calls for a vigorous effects-based economic assessment in order to achieve a trade-off by weighing the evidence of the extent and nature of any perceived anticompetitive effects caused by the "*structural risks for competition*" and/or "*structural lack of competition*," against the impact on various types of consumer benefits from a particular course of conduct, and then assessing the costs/benefits of any intervention. A detailed analysis of this nature would sharpen the identification of potential areas of concern and ultimately improve the legitimacy of any enforcement intervention, also in light of the heightened standards prescribed by the CJEU on

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38 NCT Questionnaire, Section 8.1, p. 19.

39 Conversely, as explained in our response to the NCT Questionnaire (see answers to Question 17.1), we encourage the Commission to focus on markets that have already tipped, ensuring that dominant companies in those markets are not abusing their position to impose unfair conditions or extract monopoly rents, as well as talking into account on a case-by-case basis the efficiency gains resulting from network effects.

40 *See* Section 3.

41 Commission's NCT Impact Assessment, 4 June 2020, Section B.

42 *Ibid*., Section C.

the robustness of the Commission's effects analysis in the *Intel*[43] and the recent *Hutchison*[44] judgments.

5. PROLIFERATION OF OVERLAPPING ENFORCEMENT TOOLS

In a press release on the proposed NCT, the Commission announced that the proposal would be "*without prejudice to existing sector-specific regulation*" and the "*existing competition tools currently available to* […] *the national competition authorities of the EU Member States*" while being "*complementary to the* […] *initiative on platform-specific ex ante regulation.*"[45] Despite this wishful statement, the NCT seems to overlap with and, to a certain extent even duplicate existing and expected enforcement tools at the EU and Member State level. In particular the following three overlaying areas can be detected.

A. Overlapping with the proposed Commission *ex ante* regulatory tool

On 2 June 2020, in parallel to the launch of the NCT public consultation, the Commission launched a public consultation regarding a proposed "*ex ante regulatory instrument of very large online platforms acting as gatekeepers"* (the "*Ex Ante* Gatekeeper Regulation*"*) which forms part of the DSA package.[46]

In spite of the fact that the Commission's NCT Impact Assessment clarifies that the NCT is "*complementary to the Commission's new initiative on platform-specific ex ante regulation, which seeks to provide a fair trading environment for the platform ecosystems,*" [47] the two initiatives appear to substantially overlap. In detail, the proposed Ex Ante Gatekeeper Regulation would specifically target "*large online platforms*" supposed to be "*acting as gatekeepers*" benefiting from "*significant network effects.*"[48] The NCT, by the same token, ascertains market positions of "*entrenched dominance,*" "*gatekeeper position*[s]" and "*network and scale effects*" among the structural anticompetitive issues to be tackled by the NCT.[49]

The parallel proposals as a result generate a risk of fragmentation and absence of clarity as to competence, legal certainty, inconsistent enforcement and a duplicative compliance burden for the businesses concerned. Consequently, the Commission would need to carefully manage the two tools – if adopted and in whatever form ultimately adopted – by defining the scope of each prior to their adoption (if any) and regulating which tool will take precedence in scenarios in which they could hypothetically apply in parallel.

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43 Judgment in Case C-413/14 P *Intel Corp. v Commission* [2017].

44 Judgment in Case T-399/16 *CK Telecoms UK investments Ltd v Commission* [2020].

45 European Commission press release, Brussels, 2 June 2020; Commission's NCT Impact Assessment, p. 2.

46 Commission, *Proposal for a Regulation: Digital Services Act package – ex ante regulatory instrument of very large online platforms acting as gatekeepers*, 2 June 2020, available at: https://ec.europa.eu/info/law/better- regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers

47 Commission's NCT Impact Assessment, p. 2.

48 *Ex Ante* Gatekeeper Regulation, p. 1.

49 Commission's NCT Impact Assessment, pp. 2-5.

B. Overlapping with expected national legislative initiatives

The Commission's NCT Impact Assessment recognizes that "*several EU Member States have called for changes* […] *to the existing competition rules*" and that some "*have prepared legislative proposals for amendments*"[50] to their national laws. Nonetheless, the NCT does not provide any practical guidance on how the division of competence between the Commission and Member States will operate in practice. Appropriate consideration should be given to this aspect as several domestic initiatives feature a regulatory nature or aim at addressing unilateral conduct beyond the scope of Article 102 TFEU and, as a consequence, would fall outside the allocation of competence set forth in Regulation 1/2003.[51]

Moreover, according to the concept of subsidiarity,[52] the Commission's initiative should recognize and address the central role of national competition authorities and sector-specific national regulatory agencies as effective enforcers, since for some levels of the market, the national authorities are better placed to deal with the enforcement of EU rules while respecting national specificities. In this respect, cooperation between the Commission and the national competition authorities in all EU Member States through the European Competition Network ("ECN") is central in order to create an effective mechanism to counter companies which engage in cross-border practices restricting competition.

C. Overlapping with other initiatives and policies

To guarantee a coherent approach across all sectors, the Commission should also give proper consideration, not just to the existing legislative framework, but to the process of revising competition law provisions, in particular adapting them to a digital environment (the Horizontal and Vertical Block Exemptions Regulations and Guidelines, as well as the review of the Market Definition Notice and the Merger Control Regulation), the ongoing review of the E-Commerce Directive as part of the DSA, the Commission's data strategy[53] or additional regulation being considered concerning Artificial Intelligence[54] as well as assessing, in due time, the effects of the EU Regulation on platform-to-business relations (the so-called P2B regulation).[55]

In sum, the multiplying of somewhat duplicative enforcement tools involves a considerable burden to business and intensifies the risk of inconsistent outcomes. Given that

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50 *Ibid.,* p. 2.

51 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

52 See Article 5 TEU.

53 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *A European strategy for data,* Brussels, 19.2.2020, COM(2020) 66 final.

54 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *Artificial Intelligence for Europe, Brussels*, 25.4.2018 COM(2018) 237 final.

55 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, PE/56/2019/REV/1, OJ L 186, 11.7.2019, p. 57–79.

many market participants now have pan-EU business models, the NCT should aim at attaining a degree of harmonization of the various Member State initiatives, thus effectively stimulating a well-functioning Single Market.

6. CONCLUSIONS

AIGE supports the Commission's efforts to ensure competition in the Single Market can properly work to the benefit of consumers. In this respect, we favor a framework providing the Commission and national competition authorities with robust enforcement powers, while fostering coordination between the *ex ante* and *ex post* enforcement regimes as they operate and interact within a unique institutional dynamic in the EU.

In our view, potential competition concerns are sufficiently addressed via existing competition rules. Given the current debate on the sufficiency of existing enforcement tools and the absence of clear consensus that there is any real 'gap' in that regard, a cautious attitude in taking any actions to reform competition law is warranted. The recent track record of the Commission before the CJEU suggests that the Commission has an adequate room for intervention against properly defined dominant market players, including in markets that are 'tipping', or to impose restorative and positive remedies once it has thoroughly weighed the effects of the conduct in question.

We would, therefore, encourage the Commission to leverage the existing tools and maximize them, rather than try to coordinate them with new ones. In this context, our concrete proposals are the following:

(i) updating the existing guidance on abusive exclusionary conduct by dominant players to adapt to the digital environment;
(ii) addressing some of the issues with establishing dominance and market power, by further tightening the definition of markets and developing a methodology to assess zero-price markets; and
(iii) relying on existing interim measures to guarantee that infringements of Article 101 and/or Article 102 TFEU are suspended or reversed while the Commission comes to a final decision;
(iv) ensuring that any new competition law enforcement tool will be aligned with the fundamental principles of EU law, especially proportionality of the intervention, due process, procedural check and balances, legal certainty, subsidiarity and coordination between the Commission and national competition authorities, as explained above.

AIGE therefore welcomes further discussion and reflection on the fitness of the Commission's enforcement powers, once the draft text of the NCT will be advanced.

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