

Response to the European Commission's public consultation on the New Competition Tool

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With this submission, I would like to take the opportunity to respond to the European Commission's public consultation on the New Competition Tool.

My submission aims to convey the following main messages:

- Considering its far-reaching nature, there is a need to specify the modalities of the New Competition Tool upfront in legislation.
- While the New Competition Tool is a helpful complement to the existing competition toolbox, its eventual success requires investment in insights about the effective design of remedies.
- An area where the New Competition Tool can be particularly relevant is in order to address consumer exploitation.

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1 Need to specify the modalities of the New Competition Tool in legislation

Changes in market dynamics support the adoption of a New Competition Tool that would allow competition authorities to intervene in order to address structural market problems. Although we see such developments now mainly in markets for online platforms, few industries will remain unaffected by digitisation so that it will be hard to delineate the application of a tool to ‘digital’ or ‘online’ markets only. In order to capture concerns of algorithmic collusion, the tool would also need to apply without having to establish dominance of the market players involved. This implies that the only viable option for the New Competition Tool is the one outlined by the European Commission in its Inception Impact Assessment as option 3: a market structure-based competition tool with a horizontal scope.¹ As a result, the New Competition Tool would apply to the entire economy and can be triggered without having to establish a violation of the competition rules and without a finding of dominance.

This also means that the scope of the New Competition Tool is very broad and that the available remedies can be far-reaching. While such a wide-ranging tool is necessary to tackle the challenges of current markets, checks and balances need to be put in place to ensure the proportionality of the remedies and the accountability of the European Commission for selecting and designing remedies. For this reason, there is a need to specify and clarify the modalities under which the New Competition Tool would apply upfront in legislation.

A first remark applies to the need for adequate review of decisions taken under the New Competition Tool. Competition authorities from other countries that have experience with a similar tool, like the market investigation tool in the UK, face strong review of their decisions by the courts. It is unlikely that the EU Courts can be expected to serve a similar role towards the use of a New Competition Tool by the European Commission. An alternative or additional way to integrate checks and balances is to specify intervention thresholds in legislation. This can be done in a way that creates more clarity about how the tool will be used, without limiting its effectiveness.

Second, the interaction with ‘regular’ competition enforcement needs to be clarified in the legislative instrument introducing the New Competition Tool. In particular, the New Competition Tool should not stand in the way of the ability of the European Commission and national competition authorities to establish violations of the competition rules laid down in Articles 101 and 102 TFEU.

A final remark relates to the actors who should have the power to make use of the tool. While the Inception Impact Assessment seems to (implicitly) assume that the European Commission should have the sole power to use the New Competition Tool,² it is unclear why national competition authorities should not be able to benefit from the tool. In recent years, national competition authorities have become more proactive in enforcing the EU competition rules on their territories.³ As the resources of

¹ Inception Impact Assessment ‘New Competition Tool’, Ref. Ares(2020)2877634, 4 June 2020.

² Under option 1 (a dominance-based competition tool with a horizontal scope), the European Commission states in its Inception Impact Assessment that: ‘The goal of this tool would be to allow the Commission, **in close cooperation with the national competition authorities**, to identify competition problems and intervene before a dominant company successfully forecloses competitors or raises their costs’ (emphasis added).

³ Examples are the national investigations in various Member States into most-favoured nation clauses in the context of the hotel booking sector, as well as the 2019 decision of the German *Bundeskartellamt* against Facebook and the 2020 decision of the French *Autorité de la concurrence* to impose interim measures on Google.

the European Commission are limited, national competition authorities may continue to play an important role in developing EU competition law. The possibility to let national competition authorities make use of the New Competition Tool too, therefore deserves consideration.

2 The New Competition Tool is a welcome complement to the existing competition toolbox, but is not enough in itself

Although the New Competition Tool is a welcome complement to the existing competition toolbox, it is unlikely sufficient to address the key problem in current competition law: effective and timely enforcement. National competition authorities have referred to the need to adopt an ex ante instrument to allow them to intervene in order to prevent competition problems.⁴ It is a bit misleading to speak of an ex ante tool, because it gives the impression that one can intervene to address problems on the market before they occur. The use of the New Competition Tool would still require an investigation to see if the circumstances justify an intervention. A careful balance needs to be found between, on the one hand, situations where competition authorities can intervene to address foreseeable, structural competition problems and, on the other hand, situations where a competition authority would take the place of the market by preemptively picking winners or selecting the ‘best’ business model. Properly navigating this balance requires the identification of intervention thresholds in the legislative instrument introducing the New Competition Tool. The need to meet such an intervention threshold also means that the New Competition Tool can never be applied truly ex ante. The reference by the European Commission to ‘structural risks for competition’ and ‘structural lack of competition’ in its Inception Impact Assessment is therefore more suitable than the qualification by some national competition authorities of the instrument as an ‘ex ante tool’.

While the New Competition Tool would give competition authorities stronger abilities to intervene in markets, the question remains if one can really intervene more quickly as compared to the status quo. It will still take the European Commission (and national competition authorities, where applicable) time to identify the problem and design adequate remedies. The effectiveness of remedies may in fact be the most pressing issue in current competition enforcement that is not automatically solved with a New Competition Tool in place. While existing competition rules seem sufficiently flexible to address new anticompetitive behaviour (such as in the *Google Shopping* case for instance),⁵ a key concern is how to make competition interventions effective. A particular challenge is how to restore competitive conditions. The concerns about the effectiveness of the remedy adopted in the *Google Shopping* case illustrate the complexity of designing adequate remedies in dynamic markets.⁶

⁴ Joint memorandum of the Belgian, Dutch and Luxembourg competition authorities on challenges faced by competition authorities in a digital world, October 2019, p. 5, available at <https://www.belgiancompetition.be/en/about-us/publications/joint-memorandum-belgian-dutch-and-luxembourg-competition-authorities>.

⁵ Case AT.39740 *Google Search (Shopping)*, 27 June 2019.

⁶ See for instance, F. Yun Chee & V. Waldersee, ‘EU’s Vestager says Google’s antitrust proposal not helping shopping rivals’, *Reuters*, 7 November 2019, available at <https://www.reuters.com/article/us-eu-alphabet-antitrust/eus-vestager-says-googles-antitrust-proposal-not-helping-shopping-rivals-idUSKBN1XH2I8>.

The adoption of a New Competition Tool will not in itself solve these issues. In order for the New Competition Tool to lead to effective interventions, more insights need to be gained about the design of adequate remedies. Some national competition authorities have invested in hiring data scientists to support the regular legal and economic analysis in investigations.⁷ This is a welcome development in order to obtain more knowledge about the functioning of complex markets in which data-driven technologies play an increasing role. In addition, it remains important to integrate behavioural insights into the design of remedies to make sure that a remedy is really capable of addressing anticompetitive effects looking at the actual behaviour of consumers in markets.

3 Relevance of the New Competition Tool to address consumer exploitation

Recent competition investigations have focused on protecting businesses against practices of dominant firms. Think of the *Google Shopping* case, but also of the ongoing investigations against Amazon⁸ and Apple.⁹ These cases aim to create a more level playing field for businesses and thereby indirectly also protect consumers.¹⁰ However, the rise in market concentration and the growing availability of data-driven technologies to steer consumer preferences also increase the room for dominant firms to directly harm consumers by charging excessive prices, imposing unfair terms or exploiting vulnerabilities. While we have indeed witnessed enforcement actions against excessive prices in the pharmaceutical sector,¹¹

⁷ For instance, the Netherlands Authority for Consumers and Markets has started to hire data scientists and the UK Competition & Markets Authority has established a Data, Technology and Analytics (DaTA) unit.

⁸ Press release European Commission, 'Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon', 17 July 2019, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291.

⁹ Press release European Commission, 'Antitrust: Commission opens investigations into Apple's App Store rules', 16 June 2020, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073; and press release European Commission, 'Antitrust: Commission opens investigation into Apple practices regarding Apple Pay', 16 June 2020, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1075.

¹⁰ In the context of differentiated treatment, see also I. Graef, 'Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence', *Yearbook of European Law* 2019, p. 448-499, available at <https://doi.org/10.1093/yel/yez008>.

¹¹ At the EU level, see press release European Commission, 'Antitrust: Commission seeks feedback on commitments offered by Aspen to reduce prices for six off-patent cancer medicines by 73% to address Commission's concerns over excessive pricing', 14 July 2020, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1347. For relevant enforcement activities at the national level in Italy, UK, Spain and Denmark, see press release Italian Autorità Garante della Concorrenza e del Mercato, 'A480 - Price increases for cancer drugs up to 1500%: the ICA imposes a 5 million Euro fine on the multinational Aspen', 14 October 2016, available at <https://en.agcm.it/en/media/detail?id=1c53b769-446d-4e36-bfed-49e2f7454e03>; decision of the UK Competition and Markets Authority, Case CE/9742-13 Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK, 7 December 2016, available at <https://assets.publishing.service.gov.uk/media/594240cfe5274a5e4e00024e/phenytoin-full-non-confidential-decision.pdf>; decision of the Spanish Comisión Nacional de los Mercados y la Competencia to close its investigation opened in January 2017 into allegations of excessive pricing by Aspen after the Commission started an investigation, 20 July 2017, available at <https://www.cnmc.es/en/node/357734>; and press release Danish Competition and Consumer Authority, 'CD Pharma has abused its dominant position by increasing their price by 2,000 percent', 31 January 2018, available at <https://www.en.kfst.dk/nyheder/kfst/english/decisions/2018-cd-pharma-has-abused-its-dominant-position-by-increasing-their-price-by-2-000-percent/>.

other situations where consumers are directly exploited by dominant firms do not yet achieve a lot of attention of competition authorities – with the exception of the German *Facebook* case.¹² In particular, EU competition law is not so actively applied yet to address this type of behaviour in the platform or online economy. One area where the New Competition Tool could be particularly valuable (beyond the current focus on the protection of businesses against the practices of dominant firms) is therefore in the context of consumer exploitation in digital markets.

Some will argue that exploitation of consumers can be better addressed by other legal regimes, such as data protection and consumer law (see the discussions surrounding the 2019 German Facebook decision). However, competition law can also play a role in particular when it comes to the practices of dominant firms. EU data protection and consumer law apply to all data controllers and traders without tailoring the obligations to their market share or scope of activities. To reflect market reality where dominant firms have more scope to adopt potentially harmful practices and consumers are less able to switch, there is a need for more asymmetric and focused enforcement so as to impose stricter standards on larger companies.¹³ To achieve this, on the one hand, there is a need to strengthen the enforcement of data protection and consumer law. On the other hand, when exploitative behavior restricts consumer choice due to a lack of competition, concerns arise that require competition authorities to step in.

As long as there is little enforcement against powerful players under data protection as well as consumer law and competition law overlooks consumer exploitation, structural issues of consumer choice and diversity in the platform economy will not be effectively addressed. The adoption of a New Competition Tool is an opportunity to address these issues, which lie at the interface of competition, data protection and consumer law.

Concerns about consumer exploitation also seem to have formed one of the reasons behind the Commission's recent launch of a sector inquiry into the consumer Internet of Things.¹⁴ In this sense, the sector inquiry into the consumer Internet of Things could point at possible structural competition issues. With the adoption of the New Competition Tool, the Commission would be able to impose remedies to fix any such problems identified during the sector inquiry even if no violation of the competition rules can yet be established. At the same time, this does not solve the issue of the design of proper remedies to address or even prevent consumer exploitation, which would still require further experimentation by competition authorities.

¹² Case B6-22/16 *Facebook*, 6 February 2019, available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5.

¹³ I. Graef & S. van Berlo, 'Market Power and Special Responsibility in EU Competition, Data Protection and Consumer Law', *Digital Clearinghouse background note* July 2020, available at <https://static1.squarespace.com/static/5cb4d40365a7070cc7d2d1fc/t/5f10240dd5c9513edded70fe/1594893332153/Background+note+June+2020+-+FINAL.pdf>.

¹⁴ Statement by Executive Vice-President Margrethe Vestager on the launch of a Sector Inquiry on the Consumer Internet of Things, 16 July 2020, available at https://ec.europa.eu/commission/presscorner/detail/en/speech_20_1367.