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Lawyers at Linklaters

In cooperation with

Economists at Compass Lexecon

Response to the European Commission's Consultation on a 'New Competition Tool'

1 Introduction and Executive Summary

Lawyers at Linklaters[1] in cooperation with economists at Compass Lexecon[2] greatly appreciate the opportunity to participate in the public consultation (the "**Consultation**") launched by the European Commission (the "**Commission**") on a proposed New Competition Tool ("**NCT**").

The introduction of the NCT would be the most significant structural reform to the EU's competition powers since the introduction of the EU merger regulation in 1989.[3] As such, it raises a number of fundamental institutional, legal, economic and policy questions. Indeed, whereas the existing rules focus on intervening to prevent proscribed anti-competitive conduct, the tool is intended to change the *'rules of the game'* to reinforce competition in markets in which competition is not working well or in markets prone to competitive harm before anti-competitive conduct occurs.

In this paper, we explain our views on the NCT. Rather than addressing all of the questions the Commission puts forward in its questionnaire, we have opted to focus in more detail on a more limited number of fundamental questions that the NCT poses in our view. These are intended to illustrate and explain our principal thesis, which is that we believe introducing a new competition tool could provide the Commission with a valuable tool to promote competition, provided that sufficient substantive and procedural safeguards are put in place.

The structure of this paper is as follows. **Section 2** provides an assessment of the issues which the NCT is intended to address. Drawing on this analysis, **Section 3** provides an evaluation of the suitability of the policy options (including existing competition rules) to address those concerns. After concluding that a broad NCT is most appropriate, **Section 4** then discusses the outer limits of this option and the problems it may not be suited to address. **Section 5** considers the legal test underpinning the NCT and the need for consistency and coherency with the existing competition law framework. **Section 6** addresses the remedial powers of the NCT. **Section 7** outlines the need for adequate procedural safeguards and what that may entail. **Section 8** discusses the importance of effective judicial oversight of the NCT and **Section 9** concludes with an assessment of the appropriate legal base for the NCT.

In **summary**, our views are:

- Based on an assessment of various issues, we conclude that there are gaps in existing competition law that could be addressed with an NCT focused on promoting competition, rather than dealing solely with anti-competitive conduct.
- To address these issues, we believe that a market structure-based instrument (Options 3 and 4) is the more appropriate tool, as it would allow for market-wide remedies which may be useful to address both unilateral conduct and structural competition problems. There are also good reasons why the tool should not be limited to certain sectors, notably that the boundaries between the "digital sector" and other sectors would be very difficult to define in advance.

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[3] See e.g. Pablo Ibáñez Colomo, 'My Feedback on the New Competition Tool' (*Chillin'Competition*, 30 June 2020) available here accessed 7 September 2020; BEUC, *Digital Services Act (ex-ante rules) and New Competition Tool - BEUC contribution to the Roadmaps* (BEUC-X-2020-059, 30 June 2020) available here accessed 7 September 2020; Matt Allison, *Vodafone Group feedback to the Commission's Consultation* (30 June 2020) available here accessed 7 September 2020; Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L395/1.

- However, the effectiveness of such a tool will critically depend upon designing the system properly. There would need to be a clear mandate and protection from the relevant safeguards:
    - **Scope:** The NCT should be designed to protect the integrity of the competitive process, not to pursue issues of consumer protection. It should not be considered broadly as a 'market failure tool', conferring the ability to intervene in markets where they are working poorly – for any reason. Whether competition policy is the right tool to address a market failure depends on whether there is a problem with the competitive process, and whether this can be successfully addressed by intervening to fix the competitive process. However, if the objective of the NCT is to fully address "structural competition problems", the Commission should be able to address concerns regardless of whether they stem from private or public conduct.
    - **Consistency:** The NCT should adhere to a legal standard for intervention consistent with the application of Articles 101 and 102 TFEU. Failure to ensure consistency with these existing provisions would, in practical terms, allow the NCT to be used to circumvent the application of the existing competition rules, potentially undermining decades of accumulated practice and jurisprudence. While the fact that the NCT would not result in the imposition of fines may allow more flexibility to create a new precedent, this does not mean that the rules set down by existing provisions and cases can be ignored. Importantly, there is a need for a priority rule to set out in what circumstances the NCT should apply. This requires a clear and predictable set of rules which dictates which of the legal tools – the NCT or existing rules – is applicable.
    - **Remedies:** Plausible remedies should be identified early in the investigative process. This allows the Commission to define the correct counterfactual and make a proper competitive assessment, and also ensures that investigations are not pursued where there is no plausible competition remedy. Remedies must be proportionate and must address the competitive process: where the Commission is unable to do so, it should not have broad powers to impose, for example, industry price regulation.
    - **Procedural safeguards:** The process must safeguard the rights of defence and ensure the powers under the NCT are not misused. The NCT should follow a two-stage process with clear legal tests for opening an investigation and pursuing an in-depth investigation, to avoid lengthy investigations without a clearly defined theory of harm or suitable remedies. Strict legal deadlines for each phase should apply. Moreover, affected parties should be provided with the opportunity to make submissions (both in writing and at hearings) on provisional findings concerning substantive issues and remedies. Indeed, the NCT provides an opportunity to strengthen the oral hearing safeguard, which has been criticised in the past as not sufficiently engaging key decision-makers (and as a result, the affected parties).
    - **Judicial review:** clear and judiciable legal tests must permit affected parties to challenge the findings of the Commission and enable the EU Courts to carry out a review of similar scope and intensity to decisions under existing competition tools.
    - **Legal basis:** In our view, it is doubtful whether Article 103 TFEU constitutes an appropriate legal basis for the adoption of the NCT. Article 103 TFEU refers to legislation *"giving effect to the principles set out in Articles 101 and 102 TFEU"*. However, a distinguishing feature of the NCT, particularly so in respect of the market structure-based Options 3 and 4, is that this tool would be detached from the discrete treaty prohibitions set out in those articles.

2 Evaluating the issues which the NCT seeks to address (Q8 – Q18)

2.1 Introduction

This section sets out the various possible competition concerns identified by the Commission under Questions 8 to 18 of the Consultation. These are repeated leveraging strategies, monopolisation, oligopolistic markets and tacit collusion (including algorithmic tacit collusion), tipping markets and gatekeeper scenarios.

In each case, we describe the underlying economics of the topic, with a particular focus on how economic harm might arise (primarily to consumers) as a result of failures of competition. We focus on where the gaps may arise within the existing framework of competition law, although a full evaluation of whether new tools are needed to address these concerns is left for the subsequent Section 3.

Gaps left by the enforcement of Article 102 TFEU?

For most of these issues, the obvious existing instrument is Article 102 TFEU (although Article 101 TFEU is also relevant, especially for the assessment of tacit collusion, as we discuss). A 'gap' in the enforcement of Article 102 TFEU could presumably arise in one or other of the following situations:

(a) Where the evidence is insufficiently conclusive to support a finding of abuse of dominance under Article 102 TFEU;

(b) Exclusion to a degree less than is currently understood by 'foreclosure';

(c) Exclusionary conduct by a non-dominant firm; or

(d) Actions that might not be considered abuse that nonetheless have the effect of creating a monopoly.

We do not, here, discuss (a) or (b) in detail. If the concern is just with the evidential weight and due process requirements of Article 102 TFEU itself, then a new competition tool is unlikely to be the right solution. Similarly, a lower threshold for intervention, below that of foreclosure (which as the Commission's prioritisation guidance establishes, in any case, does not require complete exclusion from the market), but in a tool focused on similar conduct to Article 102 TFEU should not require a new instrument. To do so would confuse firms exposed to both. Furthermore, if the Commission believes that significant competitive harm does, in fact, result from exclusion short of what is generally understood by 'foreclosure', the obvious solution is to increase the role of effects-based analysis in evaluating concerns within Article 102 TFEU itself. If, as a pragmatic matter, the Commission believes that some markets (such as those dependent on digital platforms) require a pre-existing set of rules to ensure faster treatment of concerns than the existing Article 102 TFEU typically provides, then the *ex-ante* regulatory tool proposed in parallel by DG CNECT may be a better approach than a new competition instrument.

This leaves exclusionary conduct by non-dominant firms and conduct that might not be considered abusive. Both do seem to us potentially to be gaps in the existing framework. We discuss abuse by non-dominant firms with a particular focus on repeated leveraging and monopolisation below.

However, before dealing with the specific concerns, it is worth setting out some more general thoughts on how and why anti-competitive exclusionary effects might arise that cannot be dealt with using Article 102 TFEU. Dominance is a precondition for Article 102 TFEU because it is generally assumed that only a dominant firm would have (a) the ability and (b) the incentive to attempt most forms of abuse. Furthermore, the competitive process presumes any firm will engage in conduct intended to increase its revenues partly at the expense of reducing rivals' revenues. This includes

conduct that is generally procompetitive and stimulates investments, including bundling, exclusive dealing, loyalty inducing rebates or refusals to deal. In principle, according to economic theory and empirical evidence, these practices may lead to foreclosure to the detriment of consumers only when a firm has significant market power (i.e. enjoys a dominant position).

The Commission's guidelines on enforcement priorities make clear that the test of such exclusion is 'foreclosure', which should not be understood to mean complete exclusion from the market but a significant competitive disadvantage (for example, by losing economies of scale and thus becoming less competitive) imposed on a competitor by the abusive behaviour. Many commentators, especially economists, would add 'to the detriment of consumers' to that definition, not least because such a rider helps distinguish anti-competitive behaviour which is against consumers' interests from pro-competitive behaviour. That has been the subject of much debate in recent years and we do not reprise that here.

In some circumstances, anti-competitive effects can arise when a *non-dominant* firm engages in conduct at one point in time that may allow it to acquire a dominant position in the future - not through competition on the merits, but through restricting or distorting the competitive process in a given market, or a set of related markets.

Take, for example, predatory conduct by a non-dominant firm with very deep pockets. Consider a market with very homogenous goods and easy customer switching. A firm with a 30% market share could cut its price below cost. If it had deep pockets to sustain the resulting loses for a long time, this may allow it to capture a large share of the market, perhaps even monopolise it. If rivals had exited the market and re-entry barriers were significant the firm may then be able to increase prices to monopoly levels and recoup the earlier (sacrificed) loses. At that point, the firm is already dominant, but the predatory conduct was initiated at a time which the firm was not. In principle, predation by a non-dominant firm cannot constitute an infringement of Article 102 TFEU unless and until it is clear the market has been monopolised. Even *ex-post*, it may be extremely difficult to distinguish aggressive price competition by efficient firms from predatory (below cost) pricing by relatively less efficient ones. Making the wrong determination in this context can have severe chilling effects on price competition. Yet arguably, firms that can extract excess rents in markets they dominate can finance predatory practices in other, even completely unrelated markets, to acquire a dominant position. Having done so, they can raise prices. This may harm consumers overall, even considering the lower prices during the sacrifice phase.

It is not clear how common this is: whether it is a serious concern in practice or merely an interesting theoretical possibility. Only if the exclusion is sufficient to drive competitors entirely from the market irreversibly because barriers to entry are high, could the strategy succeed. This is theoretically possible, but the Commission may want to consider whether the prevalence of this situation outweighs any economic harm that would result from abandoning the reassurance that the dominance threshold provides, for non-dominant firms. This applies particularly to evaluating concerns about repeated leveraging and monopolisation.

The same concerns potentially arise when considering tipping markets, but in such markets and (especially) in gatekeeper scenarios, the concern is also likely to be with point (d), above: when actions by firms with control over market conditions could have profound effects on the effectiveness of competition in those markets, even if such actions were not aimed at anti-competitive exclusion of rivals. We discuss that concern when we deal with tipping and gatekeepers, in sections 2.6 and 2.7 below.

2.2 Repeated leveraging strategies (Q8)

Leveraging occurs when a firm exploits its market power in one market to develop and/or strengthen its presence in adjacent market(s).

Leveraging could take the form, *inter alia*, of bundling, in which platforms can leverage their existing market power by requiring or encouraging the sale of their products in the adjacent market(s) with their existing services in their core market. Bundling can have anti-competitive or pro-competitive effects, depending on the extent to which it leads to foreclosure and efficiencies. For instance, platform providers often cite the benefits of more seamless user experience, directly benefiting users and perhaps allowing third parties such as app developers to use the platform's existing functionalities.

Leveraging can be 'offensive' (to generate more profits) or 'defensive' (preventing entry in the core market from an adjacent, often niche, market). Offensive leveraging is usually considered less of a competition concern than defensive leveraging. The former tends to increase competitive pressure and has positive effects on innovation in adjacent markets. The latter is often purely based on leveraging of market power and rarely has positive effects on innovation in adjacent markets.

A specific form of bundling in platform markets is 'envelopment' when a platform with market power enters a new market pioneered by a rival platform and forecloses it. If the enveloping platform can leverage its customer base from its core market to the adjacent market (by bundling its existing platform service with the new platform service), it can benefit from significant network effects when it enters the new market, making it more competitive in that market. In some cases, this advantage might make it more competitive than the incumbent platform, in others, it might merely put the two on a similar footing. Therefore, while in some cases, rivals might be foreclosed, in other cases envelopment can be efficient and pro-competitive, speeding up what might otherwise be a slow process of user adoption (resolving the 'chicken and egg' problem of how to generate network effects).

Leveraging could also take the form of self-preferencing: a platform gives preferential treatment to its products or services in competition with those provided by others. Again, competitive effects are ambiguous.

We understand that the Commission's concerns relate to possible leveraging by firms not currently dominant (as well as a practical concern as to whether existing tools efficiently address repeated leveraging, which we discuss when evaluating the tools, in Section 3, below). As noted in the introduction to this section, as a matter of economics, leveraging strategies can be successfully implemented by non-dominant firms with a certain degree of market power, even short of dominance. Market power can result from, *inter alia*, control over an essential facility or interface, superior access to information, and/or more general characteristics of the core market such as barriers to entry and customer lock-ins, etc. It can also emerge endogenously, through investments in R&D, advertising or direct and indirect network effects. By leveraging its market power, a non-dominant firm could impede competition just enough in an adjacent market to tip it in its favour.

As Article 102 TFEU applies only to dominant firms, such action would not be covered by existing competition law. However, this does not necessarily mean that there is a significant gap in enforcement that requires a new tool because (a) it would need to be demonstrated how common such non-dominant leveraging strategies are in practice and (b) identifying and effectively dealing with the conduct by a non-dominant firm could be difficult, as we discuss later. This assessment of conduct by non-dominant firms must also consider whether the conduct could be pro-competitive, just as (if not more so than) when assessing such conduct by dominant firms. For this, it is essential

to assess effects. A rules-based approach which is too rigid could lead to undue condemnation and restriction of efficient and even pro-competitive behaviour.

2.3 Monopolisation (Q10)

Monopolisation in this context refers to a market player rapidly increasing market share by placing its rivals at a disadvantage.

We set out a taxonomy of possible gaps in the existing framework of Article 102 TFEU, in the introduction to this section at 2.1. Here we consider two of those: monopolisation by a non-dominant supplier and conduct that might not be considered abusive that nonetheless leads to monopolisation.

Similar considerations apply to monopolisation by a non-dominant supplier, as we discussed above for non-dominant leveraging. Again, the Commission would need to consider both how common and serious the problem is, as well as the practical aspects of identifying and investigating non-dominant firms, as part of its evaluation. Furthermore, as noted above, it is essential to recognise that some conduct that leads to monopolisation may be efficient.

The Commission might be concerned about conduct that appears non-abusive, taken by dominant or non-dominant firms, in a nascent market's early days that may lead to monopolisation in the future. In practice, the breadth of scope makes it hard to see how intervention could effectively target those actions which turn out to have anti-competitive consequences further down the line, while not deterring those that turn out to be pro-competitive.[4] It is near-impossible to 'pick winners', particularly in markets based on technical standards in which network effects can create unstoppable momentum, based on tiny or even random initial differences in conditions. The Commission might have been concerned about the market-leading position or dominance of the Symbian O/S, for example – wrongly, in retrospect. Monopolisation after the fact is easy enough to recognise, but it is exceptionally difficult to identify which small innovator today might be the dominant firm of the future, let alone discriminate between conduct that would inevitably lead to monopoly power in the future and harm consumers to the point of offsetting the benefits brought about as the firm acquired its dominant position.

More generally, the prospect of acquiring significant market power and being able to exploit it in the future is often the most powerful incentive to take investment risks, roll out new ideas, develop new technologies, continue to improve upon existing products, and in effect, engage in dynamic competition. Interfering with this process can have the opposite effect intended by antitrust rules.

Consequently, although monopolisation can occur through actions or by players which might not be caught by the existing Article 102 TFEU provision, any action by the Commission should not seek to identify specific firms and actions in advance. We strongly advise against relying on the NCT to target specific acts of nascent or attempted monopolisation by non-dominant firms. There is no robust economic framework that can discriminate between monopolisation strategies by non-dominant firms that would, eventually, end up harming consumers, and competition on the merits

[4] The issues relating to tipping markets are very similar, as we discuss below, but when the firm under investigation is not (yet) dominant it seems particularly impractical to pick it out from what might be many contenders for market leadership.

driven by the prospect of future supra-competitive profits to cover for sunk, risky and uncertain investments.[5]

Rather, in applying either the NCT (most likely in one of the broader 'options' considered in the consultation – see below), or *ex-ante* regulation of the form proposed by DG CNECT, the Commission should focus on setting rules of the game in a way that is likely to promote competition, rather than specifically targeting firms and conduct, *ex-post*, as if it were applying an instrument analogous to Article 102 TFEU (and stopping conduct by specific firms that may be dominant in future).

2.4 Oligopolistic markets / tacit collusion (Q12)

The third area identified by the Commission raises very different issues from those at the core of existing competition law in the EU.

Oligopoly markets are pervasive across many sectors of the economy. In such markets there are relatively small numbers of firms who are interdependent and can each, to some degree, influence the market price. In recognition of these perceived interdependencies, profit-maximising firms in oligopoly markets will rationally consider their rivals' behaviour and anticipated reactions when setting prices and other competitive variables. When there is repeated interaction over time, oligopolists may sustain supra-competitive prices.

In some cases, oligopoly markets may exhibit an inefficient market outcome, which might be avoided were competition more intense. Although not necessarily covered by existing prohibitions, this might raise competition concerns. Market structures that could lead to inefficient high prices, for example, might take the form of:

(a) An oligopoly in which the suppliers do not compete vigorously with one another because customers face high switching costs or other barriers to switching timely or effectively;

(b) An oligopoly in which competition is weak because of tacit collusion: the suppliers, aware of the interdependence of their prices, forbear from vigorous price competition because their profitability would be lower in the more competitive market they expect when their rivals react to price cuts.

(c) An oligopoly upstream in which firms non-cooperatively select a common agent downstream, name output prices and choose a compensation scheme. In effect, the common agent aligns the incentives of upstream oligopolies and may lead to collusive outcomes, even in the absence of any explicit or tacit collusion.

The above situations may present superficially similar outcomes: a few firms, little price-cutting and weak competition – but they are very different in economic terms and are likely to require different remedies. The first 'market' could almost be characterised as several separate markets: each supplier behaves independently, perhaps because of customer inertia, technological lock-in or poor customer information. In the second and third scenario, oligopoly results in collusive outcomes even though participants' actions need not infringe Article 101 TFEU.

[5] The Sherman Act in the United States provides for an offence of 'attempted monopolisation", which has been applied by the courts to require anticompetitive conduct undertaken with "a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). However, it has also been interpreted to require "specific intent to monopolize." *Id.* The Supreme Court has explained that this offence "directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." *Id.* at 459. As a result, the intent element requires "a specific intent to destroy competition or build monopoly." *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 626 (1953).

These oligopolistic markets may be characterised as not working well, but for very different reasons, resulting in excessive pricing. Arguably, these firms can be considered to have a joint dominant position and to be exploiting it to sustain excessive prices: the conduct potentially falling under Article 102 TFEU. However, the same difficulties in establishing when a single dominant firm is engaging in excessive pricing are present and indeed exacerbated when considering excessive pricing by joint dominant firms. It follows that Articles 101 and 102 TFEU are not well suited to address these competition problems. Indeed, an attempt to legitimise existing antitrust rules to deal with the above problems would stretch both Articles 101 and 102 TFEU beyond their intended limits. This would not only generate significant legal uncertainty (since even non-dominant firms engaging in non-collusive behaviour could be subject to antitrust enforcement), but it would also restrict (or worse, punish) oligopolists' profit maximising conduct, which, in effect, is what drives the competitive process. Again, the chilling effects can be severe.

The question then is whether NCT could help tackle the problems resulting from competition not working well in tight oligopolies. In our view, provided that the NCT properly identifies and targets the cause of the problem (e.g. tacit collusion and its enabling factors such as barriers to entry) and not the consequence (i.e. excessive prices), one can improve upon outcomes in oligopolistic markets with appropriate remedies that would not harm competition in unintended ways.

For example, in markets prone to tacit collusion due to exogenous facilitating practices (e.g. a regulatory obligation that generates excess market transparency), a targeted remedy seeking to eliminate the relevant facilitating practice may improve competitive outcomes to the benefit of consumers.

2.5 AI and tacit collusion (Q14)

Algorithms and AI present a double-edged sword to competitive markets. On the one hand, they can enhance competition by facilitating rapid response to changing competitive conditions and customer demand. Enhanced price discovery and dissemination are likely to make markets more efficient and competitive. On the other hand, increased prevalence of algorithms and AI may facilitate (tacit) collusion and even make explicit cartels more stable.

Coordinated effects/tacit collusion by AI pricing algorithms have received much attention in recent academic literature and policy debates, although we are not aware of any actual studies or cases to date that have found such effects in the real world, as opposed to experimental settings. The concept is not inherently different from (tacit) collusion more generally. It is sometimes expressed as automation of price setting that potentially means that behaviour that could be considered a breach of Article 101 TFEU if carried out by humans is not necessarily such a breach. The concerns raised over potential collusion using pricing algorithms can be grouped into three scenarios:

(a) the use of automated algorithms to implement explicit collusive pricing agreements between competitors.

(b) "hub-and-spoke" scenarios where competitors (spokes) use a common third-party pricing algorithm (hub), which may lead to coordinated pricing; and

(c) unilateral use of self-learning autonomous pricing algorithms by competitors that may lead to supra-competitive prices through 'conscious' parallelism or tacit collusion.

Contrary to the economic approach, which considers collusion a market outcome, the legal approach focuses on the means used by competitors to achieve such a collusive outcome. Competition laws generally do not prohibit collusive outcomes as such, but prohibit anti-competitive agreements or concerted practices, or more generally an exchange of information that could facilitate collusion by

enabling competitors to identify a "common policy"; to monitor the adherence to this common policy, and to enforce the common policy by punishing any deviations.

For this reason, it is important to make a distinction between the three scenarios.

- In (a), algorithms merely amplify conduct which is already caught under the current legal framework and therefore Article 101 TFEU is in principle capable of dealing with these issues. The most obvious and simple role of algorithms as facilitators of collusion is in monitoring competitors' actions to enforce a collusive agreement. This role may include the collection of information concerning competitors' business decisions, data screening to look for any potential deviations and eventually the programming of immediate retaliation. Algorithms may also reduce the cost of initiating the collusion in the first place. Although signalling may be observed virtually in any market, it usually does not come without a cost. Whenever a firm increases the price to indicate an intention to collude, if most competitors do not receive the signal or intentionally decide not to react, the signalling firm loses sales and profits. This risk might encourage firms to wait for other competitors to signal, eventually leading to delay or even failure to coordinate. Algorithms might reduce or even eliminate the cost of signalling, by enabling companies to automatically set very fast iterative actions that cannot be exploited by consumers, but which can still be read by rivals possessing good analytical algorithms.

- In (b), algorithms also amplify conduct which is already caught under the current legal framework and therefore Article 101 TFEU is in principle capable of dealing with these issues. In particular, the widespread knowledge and use of common pricing algorithms by competitors may have a similar effect to information exchange in reducing strategic uncertainty. Furthermore, if competitors decide to delegate their pricing decisions to a common intermediary which provides algorithmic pricing services, this may also result in a hub-and-spoke-like framework emerging. The main issue in the assessment of such conduct is the determination of the level of knowledge of each company about the anticompetitive coordination taking place through algorithmic setting.

- In (c), algorithms create new risks related to behaviours not covered by prohibitions on explicit collusion. The most complex and subtle way in which algorithms can achieve collusive outcomes is through the use of machine learning and deep learning technologies, which may potentially enable a monopoly outcome even without competitors explicitly programming algorithms to do so. In other words, there is the risk that some algorithms with powerful predictive capacity, by constantly learning and readapting to the actions of other market players (who may be human beings or artificial agents themselves), will be able to collude without the need for any human intervention.

When considering the likelihood of this last concern arising and 'innocuous' profit-maximising algorithms learning to collude, the nature of price setting in the market is likely to be important. In markets with very frequent price-setting, the possibilities for experimenting with pricing strategies that collectively can result in collusively high, even monopoly pricing, is greater. Thus, the concern is as much with high-frequency pricing as with the AIs/algorithms as such.[6]

[6] Possibly very high frequency. One experimental study, for example, found algorithmic collusion to emerge after an average of 165,000 price-setting periods. This is equivalent to 13,750 years if firms change prices monthly or about 115 days if firms change prices every minute. Emilio Calvano et al, 'Algorithmic Pricing and Collusion: What Implications for Competition Policy?' (University of Bologna Working Paper 2018) available at <papers.ssrn.com/sol3/papers.cfm?abstract_id=3209781> accessed 7 September 2020.

Theoretical and experimental models of tacit collusion confirm that frequent interaction is necessary for successful collusion without communication to raise prices. Economists model tacit collusion as being enforced by the threat of price wars triggered by prices below the collusive level, so the ability to monitor and react quickly to rivals' prices is essential. Frequent interaction enables firms seeking to reach tacitly collusive outcomes to punish such 'defection' with price cuts and also to experiment by raising prices, without incurring large risks from doing so. Conversely, if rivals do not reduce prices, over time, even though they reconsider prices frequently, that builds trust among the colluding firms in one another's understanding of the 'collusion game' and commitment to it. Higher frequency price-setting makes all of this behaviour more likely, as (perhaps) does price setting across a large number of different products and markets, as it enables experimentation with pricing patterns on a small, low-risk scale. No signalling would need to be involved in any such outcome, so it seems unlikely to be caught by the existing provisions.

In summary: if an algorithm is designed to collude, as under (a) and (b) above, then that is not inherently different from companies giving sales staff instructions not to undercut certain rivals. That could be seen as a specific commitment to collusion, as a deliberate act by the company to (eventually) collude. More problematic is the case (c) when the algorithm has no instructions except to maximise profit and 'discovers' tacit collusion by itself through trial and error. This will only occur in markets with very frequent price setting. Some commentators have suggested that there are particular 'patterns' of behaviour that could be outlawed to make such outcomes less likely – for example, banning the use of rivals' past pricing data in setting today's prices. Thus, one of the main risks of algorithms is that they expand the grey area between unlawful explicit collusion and lawful tacit collusion, where firms could take steps to make tacit collusion more likely but without necessarily engaging in behaviour that is itself collusive or even (although this would be more borderline) concerted practices. Such behaviour may be a gap in the existing legislation (although as no such cases have been brought, to our knowledge, the question remains untested).

2.6 Tipping markets (Q16)

A 'tipping market' is one in which, under some circumstances (such as the emergence of a leading firm), normal (non-abusive) market processes can lead to monopolisation. Abusive behaviour can also lead to such monopolisation, but this may be covered by existing competition law (and we briefly discussed the issues involved in such behaviour by non-dominant suppliers, above).

There are several reasons for markets to 'tip' but most relate to some kind of feedback loops. If an increasing number of other users makes a product more attractive to an individual user, then there is potential for a runaway effect that leads to monopolisation or near-monopolisation.[7] Other factors are also relevant for the likelihood of market tipping such as economies of scale and scope; integration of products, services and hardware; behavioural limitations on the part of consumers; difficulty in raising capital; and the importance of brands.

The issue of "tipping" is not new, and it is not limited to digital platforms. Competition between standards often results in the market tipping towards a preferred standard (e.g. VHS, DVD, USB-C). It also occurs in financial infrastructure markets and various other markets with significant network effects. However, it is often argued that modern platforms are different, and that competition for the market cannot be counted on, by itself, to solve the problems associated with market tipping. Many of the dominant technology companies of the past seemed unassailable but then faced unexpected

[7] Although a market can 'tip' to a structure less extreme than monopoly and still be stable. Some have argued that this is the case for smartphone operating systems (see Timothy Bresnahan, Joe Orsini, and Pai-Ling Yin, 'Demand Heterogeneity, Inframarginal Multihoming, and Platform Market Stability: Mobile Apps', Stanford University (15 September 2015) available at <http://idei.fr/sites/default/files/IDEI/documents/conf/Internet_2016/Articles/yin.pdf> accessed 7 September 2020.)

competition due to technological changes that created new markets and new companies. Today, network effects and returns to scale of data appear to be even more entrenched and some markets may be more stable. Moreover, if the next technological revolution arises from artificial intelligence and machine learning, then the companies most able to take advantage of it may well be the existing large companies because of the importance of data for the successful use of these tools. New entry may still be possible in some markets, but this merely raises additional concerns about mergers that lead to such entrants being taken over by existing platform providers.

Timing is crucial if considering intervention in a market that could tip. Because the processes during the 'tipping' phase itself are in some sense 'natural', once the market is in the course of tipping, it may be too late to intervene. So, if it is an action by a supplier that creates the preconditions for tipping, then that action will occur before that market becomes monopolised, possibly even before it becomes obvious that it is heading that way. Consequently, regulatory intervention to prevent tipping may need to occur long before a supplier is dominant. Again, this raises questions of practicality: can actions that might lead to undue tipping be identified reliably, in a manner that does not catch so many actions as effectively to deter normal and innovative behaviour?

However, there is a more fundamental question to address: should a competition authority try to prevent 'tipping' at all? In most cases, tipping markets are driven by efficiencies. For example, it is simply more efficient to have common standards in many IT and other services and this will often be the outcome of free customer choice. Artificial intervention simply to prevent the growth of market shares could therefore result in inefficient outcomes (which may be better or worse for consumers than monopoly, depending on the effects of the residual competition in the inefficient oligopolistic market). In some cases, it might be possible to identify better remedies, such as those promoting interoperability, which may alter the economics of the market more fundamentally, so that it can maintain multiple providers without inefficiency.

2.7 Gatekeepers (Q18)

Gatekeepers in the traditional economy are owners of infrastructure assets to which other firms need access to compete. Today, gatekeepers are the owners of information systems and technology platforms that enable access to customers and data in many connected markets.

Gatekeepers achieve their status and position of strength due to their attractiveness to users on both sides of their platforms, as well as the existence of network effects, which limits the incentives of users to switch to rival platforms.

The primary competition concern concerning gatekeepers is that they may be able to leverage their market power and exclude or foreclose rivals in neighbouring markets, for example through refusal to supply or discrimination, both of which are abuses for which dominance is a pre-condition. As the Commission's description of potential concerns states, what sets gatekeepers apart from other platforms (and simply dominant firms) is their ability to control not just one market but entire ecosystems of unrelated markets (e.g. an operating system and a streaming service): "[l]*arge online platforms are able to control increasingly important platform ecosystems in the digital economy. Typically, they feature an ability to connect many businesses with many consumers through their services that, in turn, allows them to leverage their advantages, such as their access to large amounts of data, from one area of their activity to improve or develop new services in adjacent markets. These large online platforms also increasingly bundle a broad range of platforms and other digital services into a seamless, data-driven offer*." Concerns about the gatekeeper role have also been expressed concerning self-preferencing, a form of anticompetitive leveraging (e.g. Google Shopping).

The Commission's consultation document refers not only to the existence of gatekeepers but also to their emergence as an issue to be considered. The arguments around the emergence of gatekeepers are closely related to those concerning tipping markets discussed in the previous sub-section. Gatekeepers can emerge and achieve their gatekeeper status due to efficiencies, offering attractive products to users on both sides of the platform. Which of several rivals may ultimately achieve gatekeeper status cannot usually be easily predicted. The concerns here are very similar to those discussed above in relation to intervening in markets before they tip.

3 Suitability of existing rules and the NCT policy options to address concerns

This section evaluates the respective suitability of existing antitrust rules and the options the Commission has put forward for a new competition tool, to address each of the issues identified in Section 2 above. In summary, those options are as follows:

- Options 1 and 2 represent new 'dominance-based tools', focusing on unilateral conduct of a specific dominant undertaking (dominance-based), regardless of the industry in which it operates for Option 1; limited to specific industries (notably the digital sector) for Option 2.
- Options 3 and 4 allow the Commission to intervene when a structural problem that cannot be addressed through the enforcement of EU competition rules prevents a market from functioning properly, potentially imposing remedies on all market participants whether dominant or not. This tool would apply regardless of the industry for Option 3, or limited to specific industries (notably the digital sector) for Option 4.

We treat together those issues which seem to us to be closely linked together:

- repeated leveraging and monopolisation strategies, as our focus in both has been on abusive action by a non-dominant firm (concerns about monopolisation through tipping being dealt with below);
- oligopoly and tacit collusion in general and the specific concerns about algorithmic tacit collusion; and
- tipping and gatekeeper scenarios, in that both involve assessment by the Commission of conduct in a nascent market, at a time when identifying specific firms or specific conduct as likely to lead to competition problems, will be difficult.

3.1 Repeated leveraging strategies and monopolisation (Q9 / Q11)

Existing Antitrust Rules

Both anti-competitive leveraging itself and foreclosure leading to monopolisation more generally are largely within the scope of existing competition law. For a dominant firm, the conduct will often be within the scope of Article 102 TFEU. The Commission also considers whether the scope for anti-competitive leveraging from mergers and acquisitions is enhanced under horizontal, vertical or conglomerate theories of harm and could block or remedy a merger likely to give rise to a SIEC on those grounds.

However, existing competition law may occasionally not be able to deal with the underlying causes of the market power or the links between the monopolised and target markets that make monopolisation, whether through anti-competitive leveraging or otherwise, possible. Remedies in an Article 102 TFEU case (or merger control), being necessarily limited to the dominant firm itself, might not be ideal to resolve these underlying issues, which require a market-wide, quasi-regulatory solution.

Additionally, due to limited administrative resources, the enforcement of existing competition law may struggle to manage situations where a single dominant firm pursues multiple distinct leveraging or monopolisation strategies. This often results in the opening of multiple antitrust investigations in parallel (e.g. *Qualcomm (Predation, Exclusivity), Google (Shopping, Adsense, Android)*, *Apple (Music Streaming, Audiobooks)* which may be in some way related in terms of the strategy pursued by the dominant firm, but where differences in the alleged anticompetitive objective pursued require separate investigations to be opened, which may create a strain on resources and limits investigative efficiency.

Furthermore, similar conduct at different times could give rise to repeated investigations. We understand that the Commission may have concerns about repeated leveraging, against which an instrument such as Article 102 TFEU, focused on specific conduct, might not be effective. The Commission might find and penalise, a dominant firm abusing its strong platform to leverage into one market, for example, without this necessarily preventing subsequent leveraging into other markets (and much of the concern about large digital platforms is the ubiquity of their relevance to many different markets). This could point in favour of the use of a new tool that has a broader focus.

However, it is worth noting again that leveraging can have pro-competitive or anti-competitive effects, so a case-based approach often will be more appropriate, especially compared to some blanket prohibition on certain types of conduct by a platform owner. If recent leveraging precedents were taken as a broad prohibition on product integration, there would be an overdeterrence of pro-competitive leveraging strategies.

Furthermore, Article 102 TFEU allows for financial penalties, which are intended to have a deterrent effect, while the new tool would be more focused on remedial action. A tough stance in the application of Article 102 TFEU could therefore provide better reassurance against future anti-competitive leveraging by a dominant firm than would broad-based remedies with wider effects than the specific markets affected by leveraging. If existing deterrence is seen as ineffective, this might simply reflect the difficulty of clearly distinguishing, in broad terms, where leveraging is likely to be anticompetitive, and where it is likely to be pro-competitive. In light of these ambiguous effects, it may be harmful to platform innovation to address leveraging concerns using a broad-brush approach under the NCT.

Dominance-based NCT (Options 1 and 2)

Options 1 and 2 would enable the Commission to intervene generally against dominant firms, with a potentially broader scope for intervention than existing enforcement under Article 102 TFEU, which focuses on abusive strategies which pursue a single objective. Options 1 and 2 may theoretically allow the Commission to address multiple distinct leveraging strategies by a single dominant firm in one procedure.

Generally, the assessment of leveraging as conduct that can potentially breach Article 102 TFEU requires consideration of effects. It is however far from clear how multiple strategies, which may be in a form similar but whose effects may be different, can be evaluated. Each of the types of leveraging considered can have both pro-competitive and anti-competitive effects. It would, self-evidently, be absurd to prohibit the conduct of 'bundling' in itself, as almost every product or service is in some sense a bundle of component products and services. This applies to dominant firms as much as to non-dominant ones.

Accordingly, if the focus of an investigation of a leveraging concern is a dominant firm engaged in leveraging, it is hard to see how a tool with a lower threshold for intervention could be more appropriate than the existing Article 102 TFEU. Leveraging and bundling concerns are core concerns for Article 102 TFEU, so if the threshold for intervention against them needs to be lower,

that is an argument which goes to the appropriate interpretation of Article 102 TFEU itself and does not justify introducing a parallel instrument.

Similarly, it is hard to see that a new tool, with a lower threshold for intervention, would be the right approach to dealing with monopolisation through other means by dominant firms that are not currently prohibited by Article 102 TFEU. Monopolisation itself is a rather extreme outcome of abuse of dominance, so if there are any such situations not currently prohibited, this is presumably because they involve conduct that is not normally considered abusive, but which nonetheless leads to foreclosure of rivals and thus monopolisation. If Article 102 TFEU does not capture such conduct, the obvious solution is to place more emphasis on effects within the assessment of Article 102 TFEU cases, rather than either (a) to add additional specific forms of conduct to a form-based prohibition or (b) introduce a new instrument.

Market-structure based NCT (Options 3 and 4)

As described above, existing competition law may occasionally not be able to deal with the underlying causes of the market power that make monopolisation, whether through anti-competitive leveraging or otherwise, possible. Market-wide solutions may in some cases be more effective, for example:

(a) Barriers to entry and barriers to switching may arise from technical incompatibility. A dominant firm perhaps has the incentive to maintain its standards (and could be required to open its system as part of Article 102 TFEU remedies) but a market-wide regulatory solution might be more effective.

(b) Network effects can also create barriers to entry and switching, as when users would be reluctant to use a service for which their existing social network contacts are not existing users. Compatibility between networks and data portability can provide a solution but, again, while these are often primarily the responsibility of a dominant firm, a market-wide solution may be better.

In both cases, a market-wide remedy, not limited to any dominant firms as would be the case under Article 102 TFEU, can be more complete in its effects and also allow market-wide standards other than those of any existing dominant firm, forced to open its platform. It could also be more resilient to technological or market changes: dealing with the potential emergence of new leading firms without needing to subject them to a new investigation.

This should not be seen as an alternative way of investigating conduct by a specific firm. Rather, such market-wide remedies are more akin to *ex-ante* regulation, in that they should aim to promote competition by setting the rules of the game, rather than correcting the behaviour of individual firms seen as abusive. Their value is likely to arise more from forward-looking prevention of future conduct than correcting specific wrongs. As such, although the market-wide options 3 and 4 for the new competition tool may be able to produce such benefits, so might the *ex-ante* tool (focused on digital markets) proposed by DG Connect.

In short, in general, the existing framework of competition law is likely to be adequate to deal with traditional concerns about leveraging and monopolisation conduct by specified firms. However, there will be occasions when a market-wide remedy can establish a more pro-competitive market environment for the future. The new tool could be useful in such cases. However, we note that other mechanisms, such as the voluntary agreement of standards between non-dominant market participants following a finding of abuse of dominance against a platform owner, might also achieve such ends, as might the proposed *ex-ante* tool for digital markets.

3.2 Oligopoly and tacit collusion (including AI/algorithmic collusion) (Q13 / Q15)

Existing Antitrust Rules

Whether existing antitrust rules are sufficient to deal with the Commission's concerns concerning oligopoly and tacit collusion depends on how broad those concerns are. Some forms of collusion that fall short of explicit communication can nonetheless in principle be caught by Article 101 TFEU (to the extent there are concerted practices which lead to parallel conduct). Indeed, this may apply even to novel forms of collusion such as through algorithmic/AI pricing, if the competition authorities can identify features of the algorithm's design that seem intended to facilitate collusion. Such pricing does not inherently raise any new issues for competition authorities in identifying collusive behaviour. If a supplier has designed a pricing algorithm's workings or goals in a way that seems likely to give rise to collusive outcomes, then arguably that decision could be assessed as a concerted practice, even if the pricing 'decisions' themselves are not the conscious actions of the firm as a whole.

However, if the Commission believes it is necessary to take action against *pure* tacit collusion, or the conditions that cause it, in any market in which the effect is super-normal pricing, then Article 101 TFEU does not enable intervention where there is no agreement or concerted practice. For example, in some industries prices may 'naturally' be transparent, as in various online markets in which competitors can easily learn about their competitors' pricing in real-time. In other industries, prices might be much harder to observe accurately or on time. It may be possible to assess a scheme for publishing prices in the second kind of industry as a possible concerted practice under Article 101 TFEU, as it might be intended to facilitate collusion. However, it might not suit the Commission's purposes only to be able to take action in such a market but not in the former market in which prices are naturally transparent. To do so would require a tool focused on tacitly collusive outcomes, as such, not specific conduct.

Dominance-based tool

By definition, oligopoly necessarily involves more than one firm (unlike monopoly) and an outcome which is significantly affected by the behaviour of individual firms within the market (unlike a reasonably competitive market). Consequently, whether the concern is with tacit collusion or other oligopolistic interaction, a dominance-based tool would appear to be wholly unsuitable. First, there is no guarantee that any of the firms in the market will be dominant. Second, even if there were, an investigation and any remedies focused on only a dominant participant would not be effective or particularly meaningful. Even if the dominant participant's behaviour changed, that would not necessarily change the behaviour of other participants or remove the underlying conditions that made such behaviour possible.

This applies equally to AI/algorithmic collusion. Such collusion is generally assumed to arise from the interaction between algorithms setting the prices of competing products, so a focus only on a dominant firm would not be sensible.

Market Structure-based tool

It is in the area of oligopoly that a new market-wide tool potentially adds the most to the Commission's existing instruments. There is no obvious way to interpret Article 102 TFEU to cover situations in which an oligopoly acts in a manner that is against the interests of consumers, in the form of a 'collective dominance excessive pricing' case. An alternative, building on Article 101 TFEU, would be a tool which could deal with *pure* tacit collusion, without any evidence of an agreement or concerted practice.

However, we understand that the Commission's concern may also be broader, covering markets in which *'competition does not work well'*, to use a phrase that has sometimes been used to describe the focus of the UK's existing market investigation regime. In such markets, the outcomes reflecting a lack of effective competition might arise from behaviour that is a rational response to market conditions. In those situations, no prohibited conduct could be identified. So, a market-based tool that is intended to deal with 'features of the market that could have an adverse effect on competition' (to use wording from the UK legislation) may be more effective than any of the Commission's existing tools. That would cover features that could give rise to tacit collusion. However, it could also encompass a wide range of conditions, many of which are more closely related to consumer protection policy than to competition policy, which we do not believe should be within the scope of the NCT as we discuss in Section 4.1.

This type of broad-based instrument could cover a wide range of possible market conditions, as the CMA's track record in the UK demonstrates. While an individual discussion of each possible scenario is beyond the scope of this paper, we set out below a number of general points that should be taken into account in order to ensure that any such tool is effective in addressing markets with weak competition while leaving be those markets in which competition works reasonably well:

(a) Any assessment of excessive pricing and profits needs to be conducted with a significant margin allowing for prices to be 'high' and profits too, on most occasions, without attracting regulatory intervention. The existing prohibition on excessive pricing has rightly been applied, with caution, only to cases in which prices bear 'no reasonable relation' to competitive benchmarks and of course it can only be applied to dominant firms. A tool with a lower threshold for intervention, that could in principle impose price controls or other remedies in any markets, wherever the Commission detected prices higher than it thought right would substitute the Commission's opinion for that of the market, and lead to an excessive degree of state intervention, chilling innovation, investment and risk-taking.

(b) An adverse finding (of problems within an oligopolistic market) should be assessed against a well-defined counterfactual. If, for example, the Commission finds that market participants could compete harder against one another, it needs to be able to describe clearly what that would look like and demonstrate with evidence what the effects would be. For example, it would not make sense in a market in which fixed costs of operation were high, to assert that prices would be lower and consumers better off, were there simply more competitors if that is not compatible with fixed cost recovery. The counterfactual should be restricted to the set of feasible market conditions and not include purely fanciful alternative circumstances. One way to do that is to restrict the counterfactual to conditions that could be brought about by realistic remedies, as we now discuss.

(c) Any such investigation must involve consideration of feasible remedies, from the start (and before the start). If, for example, the Commission finds that a market is characterised by tacit collusion, it should be prepared to impose remedies that somehow change the ability of incentives of market participants to collude (for example by reducing barriers to entry, prohibiting certain price transparency practices and so on). Investigating to find and apply sanctions to participants is not appropriate, for a market-wide instrument (and it is not participants' behaviour that is the primary focus). We would suggest that if the Commission does not believe it can remedy the underlying causes of some weakness in competition (tacit collusion or otherwise) it should be very reluctant to intervene, as the most likely outcome is price control – which has great potential for economic harm.

This applies equally to AI/algorithmic collusion, though it is important to make a distinction between instances where algorithms amplify conduct which is already covered under the current legal

framework (where no change would be required) and algorithms which increase the risk of tacitly collusive outcomes, while not infringing current rules, as we discussed in Section 2. As we also noted there, the concerns about the second case are still very speculative. We are not aware of any specific concerns that a competition authority has expressed about algorithmic pricing and been unable to take action under current laws, so it cannot be regarded as proven that new instruments are required to deal with this hypothetical concern.

3.3 Tipping markets and Gatekeeper Scenarios (Q17 / Q19)

Existing Antitrust Rules

"Gatekeeper" scenarios and "tipping" markets are concepts which are familiar in the enforcement of Article 102 TFEU. However, these concerns may also relate to non-dominant firms which fall outside the scope of Article 102 TFEU, as discussed above. In general, the difficulties in dealing with gatekeeper scenarios and tipping markets relate to identifying the right moment and right way to intervene. When the concern stems from action by an existing dominant firm, such as a dominant platform owner restricting access or otherwise using unfair advantages to stifle competitors in a nascent market, existing competition tools are likely to be adequate to the task in principle.[8] However, such nascent markets often need quicker intervention if any abuse is to be addressed swiftly enough to preserve competition, before the market tips (and, for example, adopts compatibility with the dominant platform, as a *de facto* standard). There may therefore be a gap that a new tool could fill, even in dealing with cases where Article 102 TFEU could apply.

However, the more likely use of the new tool, as discussed above, is to deal with situations where markets tip not as the result of anti-competitive conduct by a dominant firm but as a result of conduct (or the existence of market features) that do not constitute abusive behaviour, by a dominant firm. Similarly, there may be situations of anti-competitive behaviour (or, again, innocuous behaviour that nonetheless leads to inefficient monopolisation) by a firm that is not dominant (or not dominant yet). Existing tools are clearly not designed or suitable to deal with such situations; so, a broader pro-competitive means of intervention would be needed.

Dominance-based tool

A dominance-based tool could potentially allow the Commission to intervene to prevent a dominant firm taking action to induce nascent markets to 'tip' in its favour, and/or to prevent a dominant firm from achieving gatekeeper status. The tool could therefore be used in particular to address concerns that dominant platforms could engage in conduct that might not in itself be considered abusive under Article 102 TFEU but could nonetheless cause markets to 'tip' to extend that firm's dominance to new markets.

A dominance-based tool would only be appropriate if the Commission believed (a) there are potentially many such cases in which such behaviour by dominant firms would not be caught by existing competition law (or, due to limited administrative resources, competition enforcement) and (b) there are few such cases which would require a broader-based tool that can also be applied to non-dominant firms.

[8] Some commentators argue that identifying dominance in platform markets is often difficult. For example, assessing the ability to price independently of competitive constraints can be more complex in two-sided markets than in traditional markets. However, this does not seem to us to be a valid reason to drop the dominance requirement, as it reflects ways in which platforms genuinely might differ from such traditional markets and the reason it is hard to establish dominance is often that there are additional reasons why dominance may not be present. It is important properly to assess those additional reasons, not simply ignore them.

The combination of the two propositions seems to us quite reasonable. In particular, there may be platforms which are clearly dominant in certain markets and can extend that dominance to other markets that could 'tip', because of network effects or other feedback loops (as discussed above).

The use of an investigative tool in such situations, however, implies that the Commission would be considering them on a case-by-case basis. It may be that identifying which markets could tip and how (and when and to whom) is too difficult for this to be a reliable exercise. If so, some broader-brush prohibitions that might be better-applied *ex-ante* by a regulatory instrument could be more effective.

Again, we note that the Commission should not assume that a market's tipping is necessarily a bad outcome, even if it reinforces the dominance of an existing platform provider. This could be the most efficient outcome of competition and it could be harmful to impose artificial prohibitions seeking to sustain two or more providers, or preventing genuine synergies emerging from the platform owner extending its activities to other markets.

It is helpful to distinguish between (i) intervention to prevent the emergence of gatekeeper status; and (ii) intervention in cases where a firm already has gatekeeper status.

The arguments for intervening to prevent the emergence of gatekeeper status are closely related to those just discussed in connection with tipping. The emergence of a firm with gatekeeper status could also be an efficient outcome of the competitive process. Attempting to predict whether and how to intervene to prevent the emergence of a gatekeeper could deter innovation or be prone to regulatory errors.

If a firm is already a gatekeeper, competition concerns relate to anticompetitive foreclosure and discrimination and are closely linked to those discussed above in relation to leveraging. For the reasons above, relaxing the threshold for intervention in Article 102 TFEU cases seems more appropriately a matter for the Courts' interpretation of Article 102 TFEU or, indeed, reform of Article 102 TFEU itself rather than justifying the introduction of a new competition tool expressly for this purpose.

Market Structure-based tool

As discussed above, we think it quite possible that action against dominant platform owners could help prevent markets from tipping unduly or to reinforce an existing dominant position, or to prevent a firm from becoming a gatekeeper. We also noted that an *ex-ante* regulatory tool might be more effective and also that markets will sometimes tip in a manner that is in the interests of consumers, even if it reinforces an already dominant platform owner.

A broader market-based tool has in principle two advantages over the dominance-based tools considered earlier. First, it could apply to prevent tipping to an existing, non-dominant firm. We suspect this would only rarely be useful. Its application would amount to picking (and trying to stop) winners, which seems unlikely to be effective or economically efficient. Second, the remedies can be market-wide. This seems more likely to be useful, particularly in cases in which the remedies can do more than simply resist the economic forces leading to tipping, but instead remove them altogether. For example, compatibility between different systems can reduce or eliminate the network effects that give rise to tipping. For example, if content can only be edited with a certain software package then the market may tip to that product; if many software packages can effectively edit the same file, then the pressure to tip is much reduced.

We, therefore, conclude that in assessing whether to use Options 1 & 2 or 3 & 4 for tipping markets or to prevent the emergence of a gatekeeper, the relevant question is not whether the Commission

needs a tool to use against non-dominant firms; rather whether it needs a tool that imposes market-wide remedies. Beyond the specific tool, one would have to address several important questions:

(a) At what point is a market sufficiently in danger of tipping to allow for intervention below the threshold of dominance? Network effects matter in terms of strength, symmetry, whether they are direct and/or indirect, and at what critical mass they begin to develop. The value and frequency of transactions also determine how likely users are to multi-home or switch platforms. These factors can serve as a starting point for assessing platform competition, but market-specific circumstances (such as behavioural biases) may also be important.

(b) How can actions that favour tipping be distinguished from desirable (albeit aggressive) competition on aspects such as quality or price? Some economists suggest that one way to identify an anticompetitive practice is to consider whether it is profitable only if a monopoly position is achieved in the long term (in line with the usual test for predation in proceedings against abuse of dominance). However, they acknowledge that some practices may be anticompetitive without being based on predation and that it is difficult to draw a clear line between the two.

(c) What the authorities can do if they miss the right moment to intervene and the market permanently tips in favour of the relevant platform? In this situation, imposing a fine may not be a convincing remedy.

From an economic perspective, the proposed intervention would make a difference in markets where firm behaviour can be pivotal in making the market tip. As such, it is important to get the balance in enforcement right. Over-enforcement could be particularly harmful if additional rules on platforms in markets that are unlikely to tip prevented firms from competing vigorously with each other, or if strategies that primarily enhance consumer welfare were mistaken for anticompetitive behaviour. It may be particularly hard to distinguish actions leading to vigorous competition from those causing tipping and monopolisation in nascent markets, so intervention should be undertaken with caution.

As noted above, the Commission's proposed platform-specific *ex-ante* regulation seems a potentially attractive way to address some of the underlying causes that may give rise to gatekeeper status or prevent the emergence of strong rivals to the gatekeeper. For example, if the status arises from access to specific forms of data, then this lends itself to a regulatory *ex-ante* solution to enable qualifying firms to access that specific data.

In cases where it is too late for *ex-ante* regulation to play a role, then a market structure-based competition tool may have a role to play – for example, to implement remedies relating to interoperability or guidelines to facilitate competition in neighbouring markets. Once again, the question of which tool is more appropriate comes down to whether the remedies that may be required are market-wide or firm-specific, with market-wide remedies supporting the introduction of an NCT.

3.4 The most suitable policy option to address the identified concerns

Above, we evaluated the effectiveness of existing and prospective new instruments in dealing with each of the various concerns the Commission has identified. We concluded that there are a number of potential gaps in existing competition law that could be addressed with an NCT focused on promoting competition, rather than dealing solely with anti-competitive conduct. We considered two broad areas of concern.

Unilateral conduct of dominant firms

If the focus of an investigation is unilateral conduct of a specific dominant firm, it is hard to see how a new dominance-based tool with a lower threshold for intervention (Options 1 and 2) could be more appropriate than the existing Article 102 TFEU. The conduct of dominant firms is a core concern for Article 102 TFEU, so if the threshold for intervention needs to be lower, that is an argument for the interpretation of Article 102 TFEU itself (or indeed theoretically its reform), not for introducing a parallel instrument. If there is any conduct not currently prohibited, this is presumably because such conduct is not normally considered abusive, even if it can lead to anti-competitive effects. If Article 102 TFEU does not capture such conduct, the obvious solution is to place more emphasis on effects within the assessment of Article 102 TFEU cases, rather than either to add additional specific forms of conduct to a form-based prohibition or introduce a new instrument.

A market-based tool (Options 3 and 4) could prove useful in some instances, even when the concern is with the conduct of a dominant firm. Market-wide remedies that are not limited to the dominant firm (as would necessarily be the case under Article 102 TFEU) can be more complete in their effects. Such remedies could also be more resilient to technological or market changes: dealing with the potential emergence of new leading firms without needing to subject them to a new investigation.

Structural competition problems

If the focus of an investigation is a structural problem that prevents a market from functioning properly, any kind of dominance-based tool – Article 102 TFEU or the new Options 1 and 2 - seems wholly unsuitable. First, there is no guarantee that any of the firms in the market will be dominant. Second, even if there were, an investigation and any remedies focused on only a dominant participant would not be effective or particularly meaningful. Even if the dominant participant's behaviour changed, that would not necessarily change the behaviour of other participants or remove the underlying conditions that made such behaviour possible.

A market-based tool (Options 3 and 4) that is intended to deal with features of the market that could have an adverse effect on competition may therefore be more effective than any of the Commission's existing tools. A broader market-based tool has in principle two advantages over a dominance-based tool. First, it could apply to prevent anti-competitive conduct by an existing, non-dominant firm. We suspect this would only rarely be useful. Its application would carry a significant risk of error. Second, the remedies available within such a tool can be market-wide. This seems more likely to be useful, particularly in cases in which the remedies can do more than simply treat the symptoms of weak competition, but instead remove the causes altogether.

Options 1 and 2, therefore, seem to add little to the existing instruments of competition law and, if they exist alongside those instruments, could result in confusion or even double jeopardy in a way that is more likely to produce economic harm than good. Furthermore, they are unsuitable for dealing with the most significant gaps in the current enforcement toolkit.

We have not considered at length the distinction between a tool that can be used in any market (Option 3) and one targeted on specific markets (Option 4). As a practical matter, it seems to us likely to be very difficult to define in advance the scope of the Option 4 tool and the markets to which it is applicable. For example, many of the concerns relate to digital markets, but these days it is very hard to define what might (or might not) constitute a 'digital market'. Structural competition problems could also potentially materialise in virtually any industry which possesses certain characteristics such as barriers to entry, customer lock-in, etc

For all these reasons, we believe that a broad market structure-based tool (Option 3 or Option 4) would be the most effective option to address the structural competition problems identified by the

Commission. There is also a good argument for why the tool should not be focused on specific sectors.

4 What this means for the scope of the NCT

Having identified a preference for the broadest of the new instruments under consideration by the Commission, an important question falls to be addressed: what are the outer limits of a market-structure based tool? While one could presumably identify a wide variety of market failures and dysfunctional markets, it does not always follow that the solution is *more competition.* The tool is intended to be a competition instrument: it deals with failures of competition; with situations that would be solved if only competition were more effective. The NCT is not a magic bullet and there must be outer limits to the tool, that is, problems which it is not designed to fix. With that in mind, we discuss two important limitations of the NCT below.

4.1 Consumer protection vs competition issues

We do not think that the Commission should wield a 'market failure tool', conferring the ability to intervene in markets wherever it believes they are working poorly, for any reason. Instead, the scope should be limited to the (already broad) range of competition concerns outlined above. Markets can fail for many reasons, including informational problems and consumer behavioural limitations, as well as problems of externalities such as environmental concerns. One could often imagine the world sufficiently different as to consider that 'if only' competition could work, then the market failure would be addressed, but this does not mean that in practice every market failure is a competition problem. For example, environmental issues can in principle be solved by the proper allocation of property rights and establishing markets, but this does not mean that this is the only solution or the best solution (considering distributional and other political issues) to the problem, nor that it is a problem for DG Competition.

Substantive case for focus on competition policy

To this end, we believe that the NCT should focus solely on competition policy and should exclude other policy objectives, notably consumer policy. Whereas competition policy is concerned with the protection of the integrity of the competitive process, and thus indirectly the welfare of consumers, consumer policy is designed to directly address negative outcomes for consumers. In practical terms, this would mean that if the NCT is intended as a competition policy tool, that is to improve the competitive process, it should address *structural competition problems* where the supply side is the source of the issue. In other words, it should exclude issues stemming from the demand side which do not relate to or affect the efficacy of the competitive process on the supply side.

That said, the boundary between supply-side and demand-side issues is sometimes blurred. Stucke and Ezrachi have made compelling arguments about how demand-side issues can undermine the value of the competitive process itself.[9] For example, while the internet has brought almost unlimited access to information, consumers nevertheless have limited capacity and willpower to process all this information. Therefore, they tend to seek heuristic information cues to simplify their decisions, for instance, favouring extreme positive or negative ratings as more useful than moderate ratings,[10] or - where decisions are too complex - sticking with the status quo.[11] In the presence of these

[9] See Maurice E Stucke, 'Is Competition Always Good?' (2013) 1(1) Journal of Antitrust Enforcement 162; and more recently Maurice E Stucke and Ariel Ezrachi, *Competition Overdose: How Free Market Mythology Transformed Us from Citizen Kings to Market Servants* (Harper Business 2020).

[10] See Sangwon Park and Juan L Nicolau, 'Asymmetric Effects of Online Consumer Reviews' (2015) 50 Annals of Tourism Research 67.

[11] Simona Botti and Sheena S Iyengar, 'The Dark Side of Choice: When Choice Impairs Social Welfare' (2006) 25 Journal of Public Policy & Marketing 24, 28.

consumer biases harm may occur where instead of competing on quality, firms compete to exploit these biases. Firms may, for example, adopt strategies targeted at artificially inflating product ratings instead of making genuine efforts to improve product quality. Alternatively, firms may seek to increase the complexity of decisions, making it more difficult for consumers to compare price and quality and choose the product that matches their preferences.[12] Whether competition policy is the right tool to address these issues depends on whether there is a problem with the competitive process, and whether this can be successfully addressed by intervening to fix the competitive process. On the other hand, if the intervention can only be truly successful if it directly addresses the negative outcomes for consumers (e.g. by price regulation) then competition policy is unlikely to be the correct instrument. In other words, competition policy should not be concerned with symptomatic or palliative treatment. Nor should competition be viewed as a cure-all, or an end unto itself: we must recognize that competition can be a tool to improve welfare but that we cannot solve all market failures by introducing competition.

Accordingly, we believe that the scope of application of any new tool should be limited to concerns that are typically and widely recognised as competition problems as opposed to, for example, consumer protection problems. This may well rule out addressing certain markets where competition is weak because of consumer behavioural issues. We pick on this case because it is difficult and borderline. Companies might exploit customer ignorance or unwillingness to consider alternatives, to create market power, they might also deliberately seek to increase those customer behaviours to entrench their market positions. In some cases, those will indeed be valid competition concerns (for example, because a prohibition on such conduct by the firms, or structural change in the market, might improve the situation).[13] In other cases, however, the sole cause of the problem might be consumer behaviour itself, in which case remedies would focus largely on educating customers, changing that behaviour or helping with, for example, defaults and 'nudges'. The latter type of investigation does not seem to us to be within the scope of competition policy or the mandate of DG Competition. It is more properly a matter of sectoral regulation and consumer policy.

Administrative and procedural case for focus on competition policy

There are also strong administrative and institutional arguments for limiting the scope of the NCT to competition policy issues.

The Commission is well equipped to deal with competition policy, supported by significant institutional experience and a well-understood policy objective. On the other hand, if the NCT were to expand into consumer policy, the Commission would be in relatively unchartered waters. Furthermore, were the NCT to pursue (at least) a dual mandate of competition policy and consumer policy the Commission would be faced with the task of complex regulatory trade-offs between the two. These would of course only occur in "hard" cases. However, the Commission would in such circumstances risk making decisions concerning issues of market efficiency vs. "fair" economic distribution within and between the Member States. These decisions are generally better left to politicians and legislators and would undermine the hard-won support for the EU's competition policy.

The UK's market investigation regime illustrates the difficulties of a market investigation tool that pursues both competition policy and consumer policy objectives. The CMA's energy market investigation struggled with the broad issue of *weak customer response* and lack of engagement with the domestic retail energy market. To address this problem, the CMA was forced to consider a

[12] See Chris M Wilson and Catherine Waddams Price, 'Do Consumers Switch to the Best Supplier?' (2010) 62(4) Oxford Economic Papers 647.

[13] We note, for example, that discriminatory conduct by dominant firms exploiting consumer biases may fall under Article 102 (a), when the necessary conditions are present.

range of solutions (including a temporary price cap). This, in turn, required a balancing act: weighing up the protection of passive consumers' interests, on the one hand, against the concern that intervention would result in long term damage to the competitive process (by disincentivizing consumers from driving competition).[14]

We, therefore, suggest that the Commission conveys - both through the design of the new tool and also through guidelines and eventually case practice - that it is intended to remedy *competition* failures, by promoting competition, not to deal with market failures in general and especially not to provide an additional instrument of consumer policy.

4.2 Private and public concerns

Another important consideration is whether and how the NCT will manage situations in the public sector or where there are public interest considerations (as envisaged under Question 30 of the Consultation). In the UK, the CMA can, for example, address market failures which stem from the public sector as well as the private sector and has in the past identified markets (e.g. Energy) where regulation was hampering the effective functioning of the market. The question of whether the NCT should address market failures which result from, or are impacted by, regulation or decisions of the State involves both policy and legal considerations.

In principle, there are two questions here: whether the NCT should concern itself with public objectives other than competition and whether remedial action taken under the new powers should encompass laws, regulation or other state action. The two are linked because a regulation that has an anticompetitive effect (that a Commission investigation might identify as an underlying cause of some competition problem) has presumably been put in place by some public body in furtherance of some public purpose. If the Commission were empowered to remove such regulation, then it would be necessary for it to assess whether the importance of the regulation in promoting that public purpose outweighs any malign effects on competition.

From a policy perspective, balancing conflicting laws may be relatively straightforward where they pursue similar values, such as economic efficiency (e.g. as antitrust shares with sector access regulation), but where they pursue different goals (e.g. sustainability, safety) it becomes difficult for a single institution to find the optimal balance. Similarly, it seems to us that in its role as competition enforcer, the Commission should focus only on competition goals in assessing conduct (public or private) when developing the new tool. Having multiple goals would not only detract from the Commission's main focus but also involves value judgments of incommensurate goals. In general, it is a sound principle of economic policy that a single policy goal should have one instrument to promote it, and problems of effectiveness, as well as legitimacy, can arise when an instrument aims to promote multiple social objectives.[15] Of course, some valued objective such as privacy can be harmed through a failure of competition – but equally, that objective can be harmed for reasons entirely unrelated to competition. If the concern is really about privacy, it would be perverse to act on harm to privacy when it arises from failures of competition but not from other causes. For all of these reasons, we believe the scope of the new competition tool should be limited to economic, competition objectives, particularly the consumer welfare standard defined narrowly in material terms.

However, we do not believe the Commission should avoid dealing with markets in which uncompetitive outcomes (or even anti-competitive conduct by market participants) are largely the

[14] See CMA, *Energy Market Investigation* (Final Report, 24 June 2016) available here accessed 7 September 2020, 15.43-15.48.

[15] See John Davies, 'Means and Ends in Competition Law' in Charbit and Ahmad (eds), *Standing up for Convergence and Relevance in Antitrust - Frédéric Jenny Liber Amicorum* (Institute of Competition Law 2018).

result of regulations or other state action. On the contrary, the European economy is likely to suffer as least as much from such anti-competitive regulation as from anti-competitive private conduct. It is a sound principle in a competition investigation to identify regulatory action that may be causing the problem, but then instead of assessing whether the competition problem outweighs the social purpose behind the regulation, to seek to identify less anti-competitive ways of achieving that social purpose.[16] For example, concerns to ensure professional standards are maintained in pharmacy or other markets concerned with health do not necessarily require restrictions on ownership that prevent the emergence of pharmacy chains, which can be highly pro-competitive.

Nevertheless, the Commission may also have to be circumspect about *direct* intervention where there are non-economic considerations at play, which indicates that recommendations to the legislator may be more appropriate than mandating something which conflicts with existing regulation. There are also questions of legal basis as regards direct intervention in the face of conflicting national rules (rather than EU regulation or laws). On the one hand, the Courts have consistently held that the Member States have a duty under the Treaties to refrain from enacting laws which could prevent the effectiveness of the rules of competition.[17] On the other hand, it is less clear how NCT decisions would interact with national laws which give rise to features which create structural competition problems. A law which creates a structural competition problem, to the extent that it does not require an infringement of Articles 101 and 102 TFEU, would not be inherently incompatible with existing EU laws. As such, the Commission will need to think carefully about the relationship between any powers conferred on the Commission in relation to public regulation and laws and both EU and national laws.

To summarise, if the objective of the NCT is to fully address "structural competition problems", the Commission should be able to address concerns regardless of whether they stem from private or public conduct. The NCT should not shy away from these issues, as the underlying causes of many competition problems may be state action. Nevertheless, it may be appropriate that the Commission's powers to deal with these types of problems are limited more to identifying the problems and suggesting less anti-competitive alternatives rather than being directly determinative.

4.3 Preliminary conclusions

We have established the appropriateness of a broad-based market tool to deal with the identified concerns in Section 3, and the outer limits of the tool in this Section. However, the effectiveness of such a tool will critically depend upon designing the system properly. In particular, there would need to be a number of important legal safeguards, which we discuss in turn in the remaining sections.

5 The Need for Consistency (Q25 and Q29)

The NCT consultation touches upon the need for a "smooth interaction" with sector-specific regulation. This is indeed a significant challenge, considering the risks of overlap, tension and direct conflict between an open-textured tool such as the NCT and sector-specific regulation that will often be applied by national regulatory authorities. However, there is an equally, if not more pressing need, for consistency of the NCT with the EU's existing competition policy.

The NCT poses a challenge in this regard. To some extent, the policy options would overlap with the Commission's existing competition tools: Options 1 and 2 for a "dominance-based" tool would, on its face, overlap significantly with Article 102 TFEU while Options 3 and 4 would potentially overlap with both Articles 101 and 102 TFEU as well as covering issues outside their scope (e.g. unilateral

[16] The approach recommended by the OECD in its Competition Assessment Toolkit, presented along with examples at https://www.oecd.org/competition/assessment-toolkit.htm.

[17] See Judgment of 3 March 2011, *AG2R Prevoyance v Beaudout,* C-437/09, EU:C:2011:112, para 24.

conduct by non-dominant firms). At the same time, one of the aims of the NCT is to enable swifter intervention[18], suggesting that the Commission has in mind a lower standard for intervention than is currently in place under the Commission's existing tools.

There are however good reasons for why the design of the NCT should ensure consistency with the Commission's existing competition tools.

5.1 The benefits of consistency for EU competition policy

The existing framework of competition law has developed over the years to ensure robust analysis of effects on competition, and the effects of doing away with parts of that framework should be carefully considered. For example, defining the relevant market is a challenging aspect of antitrust cases, in particular abuse of dominance investigations. However, it is also a crucial part of rigorous competition analysis, without which there is little frame of reference through which to assess effects on competition. Preserving consistency serves, furthermore, two key objectives in the effective administration of competition policy.

Internal consistency between the Commission's different tools competition tools is of significant practical importance as it avoids the creation of perverse incentives where market participants' behaviour is distorted to minimise the burden imposed by the regulatory system (for example, structuring joint ventures as "non-concentrative" to avoid scrutiny under EU merger control rules (or *vice versa* if market participants want greater legal certainty). It also avoids the temptation for competition authorities to frame conduct in one way or another in order to apply a legal test with a lower threshold for intervention. Failure to ensure consistency in this regard would, in practical terms, allow the NCT to circumvent the application of competition rules, potentially undermining decades of accumulated practice and jurisprudence.

More broadly, consistency is important for maintaining wide – and apolitical support – for EU competition policy. Over the past decades, significant progress has been made by the European Commission and the Courts in articulating an analytical competition law framework which is consistent in the assessment of mergers, agreements between undertakings and unilateral conduct of dominant companies. The reliability of the underlying analytical framework, which has been developed and stress-tested across a range of different contexts and on all market structures, has given credibility to competition law as an objective, fair and apolitical legal tool to ensure the proper functioning of markets. Undermining this credibility would be damaging not only to the development and implementation of the NCT but also to the Commission's administration of its other competition instruments.

5.2 Weak case for why consistency is not necessary for the NCT

Furthermore, the arguments put forward for why there is only a limited need for consistency between the NCT and the Commission's existing competition instruments are not compelling.

Lack of "infringement" under the NCT does not justify a different standard

Some have argued that the *sui generis* nature of a market investigation tool means that its introduction has limited ramifications for wider competition policy. In particular, because the NCT would not require a finding of culpability (as it does not result in the imposition of fines or infringement decisions), it is argued that there is little need to ensure consistency with the existing competition

[18] For example, Question 25 asks whether the NCT which 'would not establish an infringement by a company and would not result in fines' should be permitted to 'prevent structural competition problems from arising and thus allow for early intervention in the markets concerned?' The consultation document also notes that intervention in markets prone to "tipping" to prevent the 'emergence' of 'gatekeepers' could be achieved 'by early intervention'.

rules and that precedent can be eschewed.[19] Amelia Fletcher has, for example, drawing a comparison with the UK Market Investigation regime, observed that the lack of culpability means that there is (or should be) *'more freedom to carry out economic analysis without being unduly constrained by the policy approaches and precedent from past cases.'*[20]

However, there is a strong argument that the lack of "infringement" or "fines" under the NCT is not a sufficient ground for lowering the standard for intervention.

Fines under Articles 101 and 102 TFEU do not, as such, determine the content of these provisions but are rather an instrument to deter violations and resulting enrichment.[21] The content of antitrust prohibitions is, broadly speaking, determined by balancing the likely harms and efficiencies of the conduct at issue. Indeed, the costs considered by the Courts in determining the content of antitrust prohibitions have typically been the chilling effects on preventing efficient conduct.[22] Furthermore, remedies carry significant costs irrespective of whether firms can be fined or suffer the stigma of infringement. The Commission's Impact Assessment assumes that consumers will benefit from intervention under the NCT, and this will outweigh the costs of the remedy implementation.[23] This overlooks the fact that poorly designed or unnecessary remedies can themselves result in negative outcomes for consumers which, rather than counterbalancing, compounds the costs of remedy implementation. If there are no limiting principles on the NCT, the resulting legal uncertainty would likely have significant chilling effects on investment and innovation.

The lack of "infringement" or "fines" under the NCT also does not provide a strong legal basis for a different (lower) standard to Article 101 and 102 TFEU. In any event, from a practical perspective is very little "gap" between the potential "no-fault" NCT and the existing competition rules as Articles 101 and 102 TFEU to justify a lower standard for intervention. Article 101 and 102 TFEU are already highly flexible tools from a procedural perspective that already permit the "no-fault" intervention potentially envisaged by the Commission under the NCT. The Commission can, for example, opt to pursue relatively "novel" cases and not impose a fine, with the Commission enjoying *'a wide margin of discretion'* in levying penalties.[24] Besides, the Commission may also enter into commitments with firms to address potentially problematic conduct without a finding of either an infringement (or a fine). So, while the use of the commitments procedure is in the hands of the firms under investigation as well as the Commission, it offers a flexible means of intervention commensurate with the gravity of the potential infringement.

Earlier intervention can be achieved under the NCT or under the Commission's existing tools

In any event, we see no reason why the Commission cannot facilitate more timely intervention without undermining the consistency of EU competition policy.

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[19] Amelia Fletcher, 'Market Investigations for Digital Platforms: Panacea or Complement?' Centre for Competition Policy of University of East Anglia (6 August 2020) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668289> accessed 7 September 2020.

[20] *Ibid.*

[21] See Wouter Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) 29(2) World Competition 183. Nevertheless, as noted above, the content of the prohibitions must be sufficiently clear in order to justify fines.

[22] For instance, the requirement that in refusal to supply cases that it is unreasonably difficult to establish an alternative is clearly focussed on ensuring maintaining incentives to invest.

[23] Impact Assessment: *"…these remedies would increase costs for the companies concerned. 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."*

[24] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003 [2006] OJ C210/2, para 2.

By introducing a policy to address conduct and market features that are likely to give rise to structural competition problems (i.e. intervention so that markets can "self-correct" through improving existing market mechanisms), the Commission would be able to take remedial action without the need to establish dominance or a concerted practice. Thus, by its very nature, the NCT would presumably permit earlier intervention than would otherwise be permissible under the Commission's existing competition tools.

On the other hand, if the goal is to relax existing requirements under established case law, for example, the onerous refusal to supply standard or the requirement to define markets, the Commission should make these arguments before the Courts so that they can be resolved in a manner which is consistent with the existing framework under the Treaties. Moreover, if the Commission's principal concern is an inability to complete conventional antitrust cases before the harm has occurred, due to administrative inflexibility, it may be that reform of the "interim measures" regime would be a more effective way to achieve this purpose.[25] This would allow for a lower standard for intervention, subject to the caveat that a more complete analysis will ultimately be completed and harm, if any, from unnecessary remedies reversed.

5.3 Consistency between the NCT and the Commission's existing antitrust tools

The case for ensuring consistency for "overlapping" issues

Depending on which of the options is adopted, there will be a greater or less degree of overlap between the NCT and the existing competition law framework: Options 1 and 2 would result in the NCT significantly overlapping with Article 102 TFEU while Options 3 and 4 would partially overlap with both Articles 101 and 102 TFEU (as well as covering a range of additional issues).

Given the need for consistency of legal standard applied to the same conduct (i.e. same facts), this poses significant difficulties for Options 1 and 2 as their practical utility – as a form of alternative for intervening against dominant firms – would be limited. To this end, if the Commission is firmly convinced that the standard for intervention under Article 102 TFEU is too high, these are arguments to make before the Courts on the interpretation of Article 102 TFEU as this would avoid the confusion of introducing a separate legal regime. The same problem applies – albeit less acutely – to Options 3 and 4 with the need for the NCT to apply the same standard to the same facts as under Article 101 and 102 TFEU (as otherwise the Commission's existing competition instruments risk being rendered practically redundant).

More practically, there will be a clear need for a priority rule to set out in what circumstances the NCT should apply, and in what circumstances only the traditional application of Article 101 and 102 TFEU should be permitted. This is critical for ensuring coherence. This requires a clear and predictable set of rules which dictates which of the legal tools – the NCT or existing rules – is applicable. Effectively, this means clearly defined scenarios where existing competition rules are not "effective" and thus the NCT may kick into action. For example, the UK's market investigation regime is clear that a market investigation should only be pursued where (a) there are *'reasonable grounds to suspect' 'features'* of a market-distorting competition but there are not sufficient grounds to establish a breach of its conventional competition tools, or (b) conventional competition tools are *'likely to be ineffective.'*[26]

[25] Recently, the idea to make more effective use of interim measures, for example, has gained attention. See e.g Despoina Mantzari, 'Interim Measures in EU Competition Cases: Origins, Evolution, and Implications for Digital Markets' (2020) JECLAP.

[26] OFT, *Market investigation references – Guidance about the making of references under Part 4 of the Enterprise Act* (2006) available here, para 2.3.

If the NCT is adopted, the Commission should therefore issue guidance which clearly explains the scenarios in which conventional competition tools are likely to be considered ineffective (and thus where the NCT applies). In this regard, the effectiveness of existing rules to address certain conduct must not be conflated with the *ease* of intervention. The UK market investigation regime provides some example on the types of situations which may be considered. For example, the CMA's guidance states that single firm conduct will generally not be considered for market investigations, except where the conduct stems from market features which have negative effects themselves. In contrast, the NCT Impact Assessment seems to indicate that the NCT will address single-firm conduct. The Commission should therefore be clear on the circumstances in which (and why) it will consider certain single firm conduct cases under the NCT, and others under existing antitrust rules, as this is not currently clear. For example, will the NCT only be used for single firm conduct where the problem cannot be fully addressed by requiring that firm to change its conduct? Many similar questions will fall to be considered, and the Commission will need to address these clearly in guidance on the priority rule.

The case for consistency for non-overlapping issues

There is also a need, albeit more subtle, for consistency in the application of the Commission's existing tools and the NCT (even where there is no overlap between the two in a particular case) in order to preserve the overall coherency of EU competition policy.

As outlined in Section 2, the NCT would potentially cover a range of conduct and issues that are more or less likely to give rise to competition concerns. These issues then have the potential to translate into different legal tests depending on the relative likelihood of issues being "problematic". To preserve the coherency of competition policy, relative standards must be preserved notwithstanding the use of different instruments for intervention (e.g. under the NCT, Article 101 TFEU and Article 102 TFEU).

Taking a specific example, unilateral conduct of non-dominant firms is generally presumed to be less likely to have harmful effects on competition than conduct by dominant firms. In that context, it would be incongruous if the NCT were to apply a lower standard of intervention against unilateral conduct by non-dominant firms than applies to unilateral conduct by dominant firms under Article 102 TFEU. Perversely, this may result in greater regulatory intervention, due to the lower standard, in respect of conduct outside the scope of existing antitrust prohibitions, which is by its nature less likely to be harmful (and more likely to be efficient) than prohibited conduct.

6 Remedies (Q30 – Q34, Q36, Q38)

At the heart of the NCT, and what would set it apart from the Commission existing Sector Inquiry tool, will be its power to address the problems which it identifies. As the Consultation sets out, there is a range of imaginable forms of intervention from non-binding recommendations or mandated remedies, through to legislative or regulatory proposals. One of the principal challenges under the NCT will be to ensure appropriate and proportionate intervention. It is one thing to identify where markets "are not working well", but it is quite another to identify where intervention (and which type of intervention) would improve the functioning of the market.

In this section, we discuss three important issues which we consider should shape the boundaries of the Commission's remedial powers under the NCT:

(a) The central role which remedies play in the NCT process and the need to identify the potential remedies which address the potential (structural) competition problems early in the Commission's process.

(b) The scope of remedial powers

(c) The need for any remedies imposed under the NCT to adhere to the principle of proportionality.

6.1 The need to identify a remedy that addresses the competition concerns early on in the process

There is significant merit in the early identification of remedies. First, this allows the Commission to define the correct counterfactual and make a proper competitive assessment. Second, it ensures that investigations are not pursued where there is no plausible competition remedy.

The need for a counterfactual for a robust competitive assessment

While relevant for all competition policy matters, the counterfactual presents a particular challenge for market investigation regimes, where the scope of potential intervention is broad and possibly market-wide.

Under the merger control rules and Article 101 TFEU, the counterfactual is relatively straightforward. In the case of merger control, it is a world in which the merger will be prohibited (whether this is the status quo or an alternative scenario). In the case of Article 101 TFEU, it is the world without the restriction or, if the restriction is ancillary to an agreement, the world without the agreement. In the case of an abuse of dominance control under Article 102 TFEU, the situation is more complex. Again, the counterfactual is a world without the abusive behaviour but what such a world looks like will in part be determined by the remedy. An unbundling remedy will lead to a different counterfactual than a "must-carry" remedy – as the Commission has found out to its cost in *Microsoft I (WMP).* Failing to engage with the remedy counterfactual, and the need to balance this with the *status quo* thus risks ineffective remedies, which impose additional costs on businesses without the counterbalancing benefits to the competitive process.

The counterfactual in a market investigation is even more elusive. As there is no prohibited behaviour, the counterfactual cannot be defined by a world in where the unlawful behaviour has ceased. Instead, the counterfactual will be linked to an array of potentially problematic market features and conduct. In some cases, the counterfactual will remain straightforward: e.g. *but for* the relevant market feature (e.g. conduct prohibiting multi-homing) would the market be more competitive? However, in other cases, the market features are likely to give rise to uncertain counterfactuals as the new "normal" is not clear (e.g. whether a lack of interoperability is stifling competition). The Commission may be relatively in the dark as to the likely effects of intervention and will struggle to balance this against the *status quo.* Faced with the scenario, one might consider whether it is better to regulate *the devil you know* rather than mandate *the devil you don't*.

In any case, clear identification of the proposed remedy is a necessary starting point to even attempt to weigh up the costs and benefits of intervention. For example, if there is a perceived problem of lack of interoperability, is the appropriate counterfactual a scenario where partial or full interoperability is permitted and are all firms or only the dominant firm (if there is one) deemed to be providing interoperability? Absent clarity on the nature of the remedies, the Commission is likely to struggle to determine whether intervention is beneficial. The remedy and the counterfactual are inseparable, and the counterfactual is necessary to evaluate the *status quo*. As such, the Commission must be able to conceive of an alternatively functioning market before it can speak to the problems of the existing market.

This is illustrated by the UK market investigation regime, which imposes an obligation on the CMA to consider feasible remedies. This has led to decisions not to take a market investigation forward where no clear-cut remedies could be identified. For example, in *Private Motor Insurance*, the

Competition Commission found that it was unable to remedy the inefficiencies with the available remedies because they did not provide an effective and proportionate solution.[27] The Courts in the UK have also rejected market investigation remedies where the competition authorities failed properly to assess the impact of the remedies, and how consumers would respond.[28] It is not sufficient to merely assert that structural problems exist and assume that a specific remedy will correct them (without any unintended consequences). The UK market investigation regimein this way provides a helpful illustration of what can go wrong if the question of a suitable remedy is not being sufficiently thought through in advance.

The need to ensure plausible competition remedies exist to justify pursuing an investigation

Remedy design is complex, especially in fast-moving dynamic markets such as the digital sphere. An obligation to identify plausible remedies early in the process would aid the Commission in determining whether the NCT is an appropriate instrument to address the alleged structural competition problems. While the NCT may, in theory, be capable of identifying a large number of market imperfections and resulting concerns, not all of them can be effectively remedied nor are the countervailing costs of such remedies straightforward. To illustrate this, as discussed in detail in Sections 2 and 3, one of the Commission's key concerns is maintaining competitive pressure on market "gatekeepers" (i.e. quasi-dominant online platforms) and ensuring that markets do not unduly "tip" towards a single platform. There is a range of theoretical remedies for such concerns: e.g. facilitating multi-homing or prohibiting conduct designed to ensure incompatible standards. Remedies which ensure interoperability between different systems can reduce or eliminate the network effects that give rise to tipping. However, these remedies carry different costs and may be more or less feasible depending on the circumstances.[29] Indeed, interoperability may not always be economically or technically feasible. Moreover, even if full interoperability could be achieved, the nature and frequency of interaction with platforms may mean users are in any case unlikely to multi-home or switch platforms.

If a plausible remedy which addresses the competition concern cannot be identified, it makes little sense to pursue an in-depth investigation. A requirement to identify plausible remedies at an early stage would therefore ensure that the costs of an in-depth investigation would only be expended if there is a reasonable prospect of any concern (should it exist) being capable of being remedied (without the cost outweighing the benefits of intervention). This does not require the Commission to have decided on a remedy before conducting an in-depth investigation, but to at least have established the plausibility of some form of remedy for the alleged structural competition problems in question.

This approach would also be consistent with the UK market investigation regime which provides that the CMA should, *inter alia*, only consider launching a market investigation where (i) *the scale of the*

[27] CMA, *Private Motor Insurance Market Investigation* (Final Report 2014), para 12.17

[28] In *Payment Protection Insurance (PPI)*, the OFT at the time stressed the importance of obtaining empirical evidence of the likely effects of remedies on consumers when designing demand-side remedies, cautioning that the theory of behavioural economics needs to be supported with empirical evidence. In the ensuing market investigation, the CC considered that consumers may face behavioural biases at the point of sale in purchasing a primary product (e.g. a loan) and in choosing whether to buy an add-on product when it is offered (e.g. PPI). Part of the package of remedies proposed by the CC was to prohibit credit providers from selling PPI as an add-on at the point of sale of the primary product, and for up to seven days afterwards. However, the CAT rejected this remedy as the CC had provided insufficient evidence of how consumers would respond to it, whether it would benefit them, and how this would weigh against the loss of convenience to consumers. The CC subsequently undertook consumer surveys and a number of experiments to obtain further evidence, before confirming the point-of-sale prohibition. It is not enough to assert that biases exist, and that a specific remedy will correct them. In practice, such evidence might be obtained from the empirical literature, the experimental literature, by undertaking experimental analysis, or by undertaking other forms of 'road testing' of remedies.

[29] See the "topsy-turvy principle" outlined first by Jean-Charles Rochet and Jean Tirole, 'Two-Sided Markets: An Overview' (IDEI-CEPR conference on Two-Sided Markets, Toulouse, January 2004).

suspected problem, in terms of its adverse effect on competition, is such that a reference would be an appropriate response; and (ii) *'there is a reasonable chance that appropriate remedies will be available.'*[30] Potential remedies are now considered from the start of the process, and sometimes even (informally) before the launch of a formal Market Investigation. This creates valuable additional time compared to a scenario where remedies are only considered once adverse structural competition problems have been identified.[31] For example, the CMA opted not to take refer *Online Platforms and Digital Advertising (2020)* for a market investigation despite having identified *prima facie* concerns because the CMA did not, in part, have suitable remedial powers to address the relevant issues.[32] The procedure should also allow for sufficient time to design and test behavioural remedies (e.g. through controlled trials).

In summary, therefore, there is merit to having a legal test that requires a clear link between the harm (i.e. the structural risk or lack of competition under the NCT) and the remedy.[33] This would also guard against overenforcement or unnecessary intervention. It will also require the Commission to think through the impact of remedies, bearing in mind for example that consumers may make rational decisions not to engage in a market where this would provide little utility gain relative to the effort involved. Simply assuming that greater choice is desired by consumers will tend to result in ineffective and/or unnecessary remedies.

6.2 Scope of remedial powers (Q30 – 34)

The Consultation seeks views on the scope of the Commission's remedial powers under the NCT broadly distinguishing between "soft" remedial powers to recommend regulatory and legislative changes (see Question 30) and conventional remedial powers to require/impose behavioural and / or structural remedies from private undertakings (See Question 32).

The nature of remedies considered

Remedies can, in broad terms, be divided in two ways: first, between behavioural remedies (which require firms to change their conduct) and structural remedies (which require firms to divest assets or businesses); and, second, between remedies pertaining to the private sector (i.e. obligations on undertakings) and remedies pertaining to the public sector (i.e. obligations on, or recommendations for, public bodies including the EU itself). Remedies can also be conceived as either prohibitory (prohibiting certain types of conduct) or mandatory (requiring firms to take positive actions). In this regard, structural remedies are inherently mandatory (as they require firms to divest and / or separate part of their business) while behavioural remedies can be both prohibitory (e.g. a remedy requiring a dominant firm to cease using exclusivity rebates) or mandatory (e.g. an obligation to provide access).

The scope of the Commission's remedial powers for private undertakings should not, in principle, give rise to points of contention. The existing remedial powers under Regulation 1/2003 provide the Commission with the ability to impose any form of structural or behavioural remedy on private parties. In particular, the Commission is entitled to impose *'any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement*

[30] OFT, *Market investigation references – Guidance about the making of references under Part 4 of the Enterprise Act* (2006) available here (original text has been adopted unamended by the CMA).

[31] Amelia Fletcher, 'Market Investigations for Digital Platforms: Panacea or Complement?' Centre for Competition Policy of University of East Anglia (6 August 2020) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668289> accessed 7 September 2020.

[32] CMA, *Online platforms and digital advertising* (Market study final report, 1 July 2020) available here, see 9.30. The CMA's decision rested *"primarily on whether [a market investigation] is the most appropriate and effective mechanism for delivering the kinds of interventions we are proposing"*.

[33] This presupposes of course that the legal test requires clear identification of the harm (see section 5 above).

effectively to an end.'[34] While the market structure-based tool would cover a significantly wider range of issues and thus inevitably a wider set of regulatory solutions, the Commission's existing powers already provide significant flexibility. There is thus no need to expand or loosen the Commission's these already significant remedial powers.

The use of remedies in practice throws up, however, more far-reaching issues of how to achieve an appropriate balance between Type 1 Errors (under-enforcement) and Type 2 Errors (over-enforcement). This is because many of the issues that the Commission is proposing to address under the NCT – outlined in Section 2 – are likely to require mandatory remedies. For example, the access remedies entailed by interoperability would require the Commission to mandate undertakings to provide access on terms to be determined by the Commission. Mandatory behavioural and structural remedies require inherently more complex trade-offs than prohibitory remedies: in the case of the former, the "factual" is more complicated as this depends on the terms of the positive obligation while in the case of divestment there is a significantly greater risk of chilling effects given that such remedies undermine legal certainty. A robust proportionality standard, therefore, becomes critical, as discussed further below.

Remedies designed to address competition concerns

Also, there is a question about whether the Commission should have the power to impose remedies which fall outside the scope of addressing "structural competition problems". Logically, this ties in closely with our assessment in Section 4 on limits to the scope of the NCT.

As far as the balance between competition and consumer policy is concerned, this can be framed as a question of whether Commission can only address the cause of the potential structural competition problem (i.e. by improving the competitive process) or can also address the symptoms of structural competition problem (e.g. by prohibiting conduct that "exploits" the structural competition problem). As we outlined in Section 4.1, these types of decisions entail complex trade-offs and the balancing of a multitude of interests and rights. In practical terms: will the Commission have the power to price regulate or not? If so, this would confer on the Commission powers to which it is not best suited – given its focus on competition policy – and would undermine the overriding principle that EU competition policy is intended to ensure that markets are efficient rather than determine where markets themselves may not deliver optimal outcomes. It would require the Commission to know what the "right" outcomes for consumers are, and then deliver the "right" outcome whether or not the competitive process is capable of doing so. This strays outside the realms of competition policy. Accordingly, where the Commission is unable to improve the competitive process, it should not have broad powers to impose, for example, industry price regulation. Such measures are better left to sector-specific regulators and, if necessary, the Commission could make recommendations as such. This ensures consistency with the Commission's existing powers under Regulation 1/2003 (which are limited to ceasing the infringement) as well as ensuring that the Commission does not become a de facto sectoral regulator.

That is not to say that the NCT should not intervene on the demand side of the market. Indeed, even under existing antitrust rules, without understanding how consumers engage with a market and how they will respond to certain changes, it is extremely difficult to design effective consumer-facing remedies. Building on our assessment in Section 4.1, remedies could address demand-side issues where firms deliberately seek to leverage customer biases to entrench their market position. Examples might include failing to provide clear and comparable information, refusing to deal with

[34] 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 [2003] OJ L1/1, Article 7.

price comparison website services, including contractual terms that make switching costly or making the process of switching cumbersome. Firms could be required to make changes to their conduct in these areas. While these interventions may be designed to account for certain consumer biases, they can have very significant implications for competition, even in relatively unconcentrated markets.[35]

Finally, the Commission's potential powers to remedy competition "problems" created in part or in full by national or EU legislation or regulation give rise to complex questions of the Commission's role and, even more broadly, the EU's power to intervene to correct – or propose corrections to – national or EU legislation (see Section 4.2 above). There are, however, good reasons for the NCT to have at least some powers to bridge the public / private divide. At its most simple, this is so that the NCT can address market failures stemming from public regulation and legislation as well as market failures that stem from market structure or the conduct of firms. Indeed, where markets are effectively protected from competition by poorly designed regulation it is both more effective and ultimately less burdensome to remove those constraints than to seek to control the behaviour of firms within that market reacting in an economically rational way (for example by raising prices). While in some cases, regulations will have a conflicting social objective, the Commission could still recommend that the regulation be redesigned, if possible to promote that purpose without harming competition. Such remedies also have analogies with the Commission's existing powers which, for example, enable intervention where Member States maintain legislation, regulations or administrative measures which *'put public undertakings and undertakings to which they grant special or exclusive rights in a position which the said undertakings could not themselves attain by their own conduct'* without infringing Article 102 TFEU.[36]

6.3 The need for proportionality (Q31)

It is well established in the jurisprudence of the European Courts that any remedy imposed by the Commission under Article 7 of Regulation No. 1/2003 is subject to the principle of proportionality (in the broad sense of the word).[37] This key tenet of European law requires that "*measures adopted by the Commission do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the act in question*".[38] More specifically, the principle of proportionality implies a three-legged test:

- First, the remedy has to be 'appropriate' or 'adequate' or 'suitable' in the sense of actually addressing the harm at issue – and not some other kind of harm – and addressing it fully or effectively (i.e. the principle of effectiveness).
- Second, the remedy has to be necessary, in the sense that, where there are several appropriate measures, recourse must be had to the least onerous or burdensome (i.e. the

[35] Amelia Fletcher, 'Market Investigations for Digital Platforms: Panacea or Complement?' Centre for Competition Policy of University of East Anglia (6 August 2020) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668289> accessed 7 September 2020.

[36] Judgment of 13 December 1991, *Régie des Télégraphes et des Téléphones (RTT) v GB-Inno-BM SA*, C-18/88, EU:C:1991:474, para 20.

[37] Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, para 1258; Judgment of 27 June 2012, *Microsoft v Commission*, T-167/08, EU:T:2012:323, para 85; Order of 10 July 2001, *Irish Sugar v Commission*, C-497/99P, EU:C:2001:393, para 15; Judgment of 11 March 1999, *Eurofer v Commission*, T-136/94, EU:T:1999:45, para 271; Judgment of 10 April 2008, *Deutsche Telekom v Commission*, T-271/03, EU:T:2008:101, para 252; Judgment of 30 June 2016, *Cartes Bancaires v Commission*, T-491/07, EU:T:2012:633, para 440; and Judgment of 14 May 1998, *Gruber Weber v Commission*, T-310/94, EU:T:1998:92, para 172.

[38] 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 [2003] OJ L1/1, Article 7 and Judgment of the Court of 29 June 2010, *Alrosa,* C-441/07P, EU:C:2010:377, para 39.

principle of subsidiarity). To ensure this, the Commission can ask the undertaking concerned to propose remedies.

- Third, the disadvantages caused must not be disproportionate to the aims pursued. This is also known as "*proportionality stricto sensu*". Interestingly, this leg of the test is a fairly recent import in the area of EU competition law,[39] and even in the EU competition case law, it is not consistently applied. This is partly because it can conflict with the principle of effectiveness.[40] Indeed, although in the abstract this may be seen as good policy (as it is essentially a cost-benefit analysis), it is difficult to apply in the sphere of antitrust remedies because the costs and benefits are not borne by the same person (or at least by two groups of comparable importance). In an antitrust context, implementing the remedy is a cost for the undertaking (a private interest) while it benefits the public interest.[41]

As outlined above the intended subject matter of the NCT is inherently likely to involve more complex remedy scenarios such as mandatory remedy access remedies. This necessitates a wider and more complex universe of remedies. In other words, with a broader set of issues inevitably also comes a potentially broader set of remedies. The breadth of potential remedy types, and the ability and flexibility to develop a package of remedies, is likely to be especially valuable for the Commission under the NCT, given the complex set of drivers for the issues arising in many digital markets. However, while these powers are likely essential for the success of the NCT, it is imperative to ensure any remedies adhere to the principle of proportionality.

All else being equal, the more complex the remedies, the more difficult it is to properly establish their effects against the appropriate counterfactual and to determine whether the remedy is proportionate (i.e. the law of unintended consequences).

This complexity is, as such, not inherently problematic: remedies could, in theory, be tailored to address *any* concern. However, it is not always wise to do so. More complex trade-offs in behavioural concerns translate into more complicated trade-offs for determining effective remedies. Such concerns are most pertinent where remedies seek to re-engineer significantly the "how" of the competitive process. This raises the risk that remedies may be disproportionate to the competition concern. Indeed, while standard competition law remedies tend to be narrow and backwards-looking, remedies under the NCT can be forward-looking and market-wide, with remedies applying across the market, irrespective of individual firm market power, much like under the UK regime.[42] In sum, the more intrusive the remedy the more likely it will be to have unintended and negative consequences. More complex (behavioural) remedies, therefore, merit careful consideration and caution to ensure adherence to the principle of proportionality.

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[39] See, e.g., TI Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16(2) European Law Journal 158, 181: 'the final test of the proportionality principle, the stricto sensu test, has also been perceived as rather of an arbitrary nature'; M Wimmer, 'The Dinghy's Rudder: General Principles of European Union Law Through the Lens of Proportionality' (2014) 20(2) European Public Law 331, 338: 'The stricto sensu test is however not systematically conducted'; and W Sauter, 'Proportionality in EU Competition Law' (2014) 35 European Competition Law Review 327, 327: 'in most instances step four — balancing or proportionality per se — is often left out completely.'

[40] But see E De Smijter and L Kjolbye, 'The Enforcement System Under Regulation 1/2003' in J Faull and A Nikpay (eds), The EU Law of Competition (3rd edn, OUP 2014), 124: 'If one proportionate remedy is more effective than other available remedies, the Commission can impose the most effective one'; and ibid 125: 'The Commission is not obliged to choose a less effective behavioural remedy if a structural remedy is more effective'.

[41] Cyril Ritter, 'How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements?' (2016) 7(9) JECLAP 587.

[42] Amelia Fletcher, 'Market Investigations for Digital Platforms: Panacea or Complement?' Centre for Competition Policy of University of East Anglia (6 August 2020) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668289> accessed 7 September 2020.

7 Procedural Safeguards (Q33 – Q38)

To comply with the principle of sound administration in Article 41 of the CFR and the right to judicial review under Article 47 of the CFR, as well as to ensure that the NCT is not perceived as a shortcut to avoid the application of the strict standards of Articles 101 and 102 TFEU, there must be sufficient procedural safeguards in place whilst at the same time ensuring the NCT is capable of addressing the market failures in its scope.

7.1 Investigative powers under NCT (Q33)

To make conclusions on the functioning of the market in general, the European Commission will need to be able to request information from a variety of market participants. To this end, the Commission will require similar powers to request information as it has under the EUMR and Regulation 1/2003. In general, given the broad scope of investigations and to avoid placing unnecessary burdens on business where no wrongdoing is suspected, the Commission should favour issuing simple requests for information. However, given the need to conclude NCT investigations in a timely and efficient manner, it would be appropriate for the Commission to be empowered, where it has narrowed the scope of the investigation down to more clearly identified concerns, to issue requests for information by decision, setting time limits and periodic penalties, in the same way as under Articles 11(3) and 15 of EUMR and Articles 18(3) and 23 of Regulation 1/2003. The Commission should likewise be empowered to take statements and interview natural and legal persons to collect information, as under the EUMR and Regulation 1/2003.

However, one area of difference between the NCT and the EUMR and Regulation 1/2003 arises concerning the Commission's more draconian "powers of inspection" (i.e. dawn raids). Under the EUMR and Regulation 1/2003, the Commission is entitled to conduct all necessary inspections of undertakings premises in order to carry out its duties under those regulations. These powers of inspection are limited by the Courts under the CFR, the principle of proportionality and the requirement to state reasons. The EU Courts have recognised that the Commission's powers of inspection constitute *"a clear interference with the right to respect for privacy, private premises and correspondence".*[43] Indeed, in most national legal orders in the EU, such far-reaching interventions require prior authorisation from a court. To justify interference with this right and make it feasible to exercise judicial review (Article 47 CFR), the Commission must provide *inter alia* a statement of reasons for the inspection, including a description of the features of the suspected infringement.[44] Whereas the Commission may conduct inspections in the context of Sector Inquiries and has done so in the Pharma Sector Inquiry, there is some doubt as to when such inspections will be considered necessary and proportionate by the Courts.[45] The Court outlined in *National Panasonic* that such inspections may conform with the principle of proportionality provided that the sole purpose of an inspection is to enable the Commission to gather information needed to assess whether the Treaty has been infringed.[46] However, as NCT investigations would not entail any finding of a competition infringement, nor are they in a broader sense a tool for the Commission to investigate potential infringements of the Treaty (as Sector Inquiries have been typically used), there are serious

[43] Judgment of 6 September 2013, *Deutsche Bahn v Commission*, Joined Cases T 289/11, T 290/11 and T 521/11, EU:T:2013:404, para 65.

[44] Judgment of 8 March 2007, *France Télécom v Commission*, T 339/04, EU:T:2007:80, para. 59.

[45] See Helene Andersson, Dawn Raids Under Challenge: Due Process Aspects on the European Commission's Dawn Raid Practices (Hart Publishing 2018), ch 9 (Dawn Raids in Sector Inquiries) 254-265, who argues that the Pharma Sector Inquiry dawn raids, where companies were selected on the basis of size rather than any likely involvement in an infringement, could have been considered as in breach of Article 7 of the Charter and the principle of proportionality (though the decisions were not appealed). She further argues that the Commission's dawn raid powers in the context of a Sector Inquiry should be limited to where it has grounds to suspect competition infringements.

[46] Judgment of 26 June 1980, *National Panasonic v Commission*, C-136/79, EU:C:1980:169, para 30.

questions over whether similar inspection powers in the context of the NCT would ever be necessary or proportionate. Indeed, absent even a suggestion of wrongdoing, it may be difficult to justify the interference with fundamental rights. We do not, therefore, consider it to be necessary or appropriate to attach powers of inspection to NCT investigations.

7.2 Safeguards on investigative powers

A more pertinent question is how to safeguard against improper use of investigatory powers in the application of the NCT. NCT investigations will generate significant costs, both administratively and for the market participants involved. For example, under the existing framework, the Commission may undertake a sector inquiry in order to gather information generally about a market which it considers may not be working well. Specifically, Art 17 of Regulation 1/2003 states that Sector Inquiries may be opened *"where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market"*. This is necessary to avoid arbitrary decisions, fishing expeditions and enable judicial review of the legality of the decisions.

However, NCT investigations are also likely to generate significant additional costs associated because of the associated remedial powers. The possibility of remedies will cause companies subject to incur significant cost and business disruption making their case as to why the remedies considered are unnecessary/disproportionate. Given these concerns, it may be advisable to split the NCT investigation into two phases. The first phase could focus on establishing the existence of a *prima facie* structural competition problem (and whether an NCT investigation is the appropriate response). This will also allow the Commission, where it concludes that the identified problems are not structural in nature and could be addressed under the existing framework, to conclude the NCT investigation and if necessary, launch investigations under Article 101 or Article 102 TFEU. The second NCT phase would then be focused on determining which (if any) remedies are appropriate and proportionate to the identified structural competition problem. The affected parties should, however, be able to offer voluntary commitments at the end of Phase I, to avoid lengthy Phase II investigations where simple solutions are available.

The separation of two phases would be efficient as this structure would provide for an efficient screen to focus on those cases which merit detailed levels of information gathering, in-depth investigation and rigour. For example, the first phase would likely have a much broader scope, with more participants actively involved, such that issuing detailed information requests to all businesses in the sector may be disproportionate. A two-stage process would not be new to the EU framework, as it exists under the EUMR, and it would also be similar to the UK market investigation regime where the "market study" has become a *de facto* Phase I, which – if the requisite legal test is satisfied – may result in a market investigation reference ('Phase II').

A clear legal test for the opening of a Phase I investigation will be necessary to ensure that the Commission does not engage in "fishing expeditions", launching lengthy NCT investigations without a clearly defined theory of harm or potential remedies considered. Moreover, the likelihood of market-wide remedies associated with a Phase II investigation will likely push the affected undertakings to incur significant additional costs to ensure that the remedies adopted (if any) are appropriate. A separate and stricter legal test for the opening of a Phase II NCT investigation, similar to the "serious doubts" test for Phase II investigations under Article 6(1)(c) EUMR would therefore be appropriate. This test should ensure that the Commission is required to provide sufficient explanation of the nature of the investigation, as well as the potential remedies being considered, so that affected undertakings can properly make their defence. This will also help to ensure that there are feasible remedies in contemplation before incurring the cost of an in-depth investigation.

7.3 Timing safeguard (Q34)

A time-limit on the market investigation is necessary for two reasons. First, it supports the aims of the tool: a clear time limit is in keeping with the "early intervention" rationale of the NCT and should ensure that sight of this goal is not lost as the tool develops. Second, it contributes to the efficiency of the tool: given the substantial cost and frustration associated with lengthy investigations, time limits guard against unnecessary costs and will help to ensure that NCT investigations are focussed and efficient from the start.

Following the approach of the UK's market investigation regime, for example, a time limit for each phase of the market investigations could be adopted. For example, at the end of a legally binding deadline for Phase I, the Commission could be required to decide whether to continue with an in-depth NCT investigation (if the legal test is satisfied) or close the investigation (and potentially open antitrust cases if evidence of potential infringements has been found). Subsequently, a second-time limit could be applied for Phase II of the NCT investigation by which point the substantive findings must be made and any remedies determined. The definition of remedies must be included in the time limit, as remedies are the critical defining element of the NCT and there must be an impetus to consider and develop these from an early stage, as discussed above.

The effectiveness of the time limit must, however, be protected. Firstly, the Commission should not be allowed to use other investigatory powers which are not subject to time limits as a *de facto* "pre-NCT" phase. Secondly, the Commission should not be able to "restart the clock" by reopening a new investigation in the same market/issue following the closure of an NCT investigation.

7.4 Separation of powers (Q37 – Q38)

Under the UK market investigation regime, there is no overlap of personnel between those who decide to refer a market investigation and those who conduct, and ultimately make decisions in, the market investigation. This ensures that the market investigation is run independently and looked at with a "fresh pair of eyes". This model is reflective of the institutional history of competition in the UK and stems from the previous split between the OFT and the Competition Commission. The benefits of this approach have been summarised as follows: "*As well as limiting confirmation bias, this two-stage process is also valuable for avoiding the Market Investigation process becoming a depository for unpopular political issues that no one else wants to tackle*."[47]

The "fresh pair of eyes" approach may, however, be out of place in the administrative model of antitrust in the EU. Questions 37 and 38 of the NCT consultation – which ask whether those affected by an investigation should have the possibility to comment on (a) the finding of a structural competition problem and (b) the appropriateness and proportionality of envisaged remedies – hint at the alternative. Under the European model, the most effective form of procedural safeguard would be something similar to an oral hearing. This procedure has however faced criticism (including by the OECD) as the ultimate decision-makers are not required to attend, and perhaps for that reason, many defendants do not exercise their right to an oral hearing.[48] The NCT presents the Commission, in the context of a new process, with the opportunity to strengthen this procedure or develop new safeguards, which could be road-tested for use in existing competition procedures.

For example, in antitrust and merger control, the oral hearing comes at a relatively advanced stage. To increase its effectiveness, in an NCT investigation, the oral hearing procedure could be used at multiple stages. Logically, flowing from Questions 37 and 38, this would be before the decision to

[47] Amelia Fletcher, 'Market Investigations for Digital Platforms: Panacea or Complement?' Centre for Competition Policy of University of East Anglia (6 August 2020) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668289> accessed 7 September 2020.

[48] OECD, *European Commission – Peer Review of Competition Law and Policy* (2005).

open an (in-depth) NCT investigation (i.e. on the finding of a structural competition problem) and, later, before the decision to impose remedies (i.e. on the appropriateness and proportionality of the envisaged remedies). Both of these decisions are likely to have significant cost implications for the affected undertakings and should therefore be subject to an effective procedural safeguard. Moreover, it is logical that these hearing should be split, since the concern very different issues on which market participants are likely to have diverging views and interests.

8 Judicial oversight (Q39)

The final safeguard, and perhaps one of the most important for the legitimacy of the NCT, relates to the rights of affected firms to challenge the Commission's findings (and remedies) before the EU Courts.

The investigative tools at the disposal of the EC according to the NCT require a judiciable legal test that is sufficiently clear and does not afford too much discretion to the Commission as to when intervention is permissible (consistent with Article 101 and 102 TFEU and the merger regulation). Absent a judiciable legal test, the EU Courts will struggle to be an effective check on the Commission's power. This would be incompatible with the right to judicial review in Article 47 CFR.

In this section we take this one step further, focussing on the standard of judicial review. In our view, clear and judiciable tests must be designed which allow the EU Courts to conduct the same intensity of judicial review as for antitrust and merger control decisions and do not afford the Commission too great a margin of discretion over complex economic matters. Facilitating a full and substantial legality review would increase the legitimacy of the NCT as an apolitical, objective instrument for market regulation.

As in other aspects, valuable lessons can be learned from the UK regime. The UK regime provides for the possibility of an appeal before the CAT. The appeal procedure extends to: (i) the CMA's decision as to whether or not to refer a market for investigation, (ii) the CMA's findings following a market investigation, or (iii) any remedies agreed or imposed following a market investigation. The CAT performs only a limited "judicial review" standard and does not conduct a full 'merits review' of the decision under appeal.[49] This is in keeping with the standard of judicial review for merger control decisions but lower than the full merits review standard for antitrust cases in the UK.

In our view, the breadth of a market investigation regime (both in terms of scope of and potential remedies) and discretion awarded to the regulator should be compatible with the standard of judicial oversight. Indeed, there is a trade-off between the discretion afforded to the authority at the administrative/enforcement level and the standard of judicial oversight. The more discretion is awarded, the more stringent judicial oversight should be. Similarly, the broader the scope and possibility of remedies being imposed, the more extensive the judicial oversight should be.

In the UK, the lack of a merits review standard under the market investigation regime has set a high bar for applicants and in practice precludes all challenges on substance. Indeed, one of the most striking features of the challenges over the last decade is, first, the CMA's success record and, second, the lack of head-on challenges to the CMA's findings (by parties subject to a market investigation).[50] The judicial review standard, in short, militates against substantive challenges – given the burden of demonstrating manifest error – and incentivises challenges to the CMA's process

[49] Judicial review in the UK is limited to challenging the decision on four established grounds: *illegality*, *irrationality*, *procedural irregularity* and *the principle of proportionality*.

[50] *Private Healthcare* marked the sole successful substantive challenge to an adverse market investigation, stemming however from a manifest factual error which forced the CMA to withdraw its final report before it was overturned by the CAT (while two challenges relating to other substantive issues were dismissed).

for decision-making. The consequence is that the market investigation regime in the UK is comprised of a triad of features which limit legal certainty: the breadth of the regime, the CMA's discretion to determine the markets to investigate and limited judicial oversight. A comparison with the UK's merger control regime exposes the lack of balance. While both regimes share the judicial review standard for challenges to the CMA's decisions, the UK merger control regime has, in contrast, a precise scope and limited CMA discretion: first, there must be a precisely defined positive act – a notifiable transaction – and, second, the CMA may only investigate where the notifiable transaction satisfies the jurisdictional turnover or share of supply tests.[51]

In this regard, it should be recalled that the NCT seems to be premised on a great degree of confidence that one can, for example, (i) anticipate what markets can be expected to tip; (ii) determine the reasons for that tipping and whether it is, on balance, problematic; (iii) devise some sort of public intervention that will prevent/correct tipping; (iv) do this in a proportionate way that does not compromise welfare-enhancing elements or incentives. As such, the breadth of the NCT and the potential of (extensive) remedies being imposed warrant detailed and intense scrutiny by the EU Courts.

The importance of intense judicial review not only stems from previous experience under the UK regime, but it is also supported by fundamental principles underlying EU law. This goes to the core of the rules purporting to establish checks and balances while attributing powers to the legislature, the administration and the judiciary. Indeed, the principle of effective judicial protection is enshrined in Article 6(1) of the ECHR, which corresponds to Article 47 of the Charter of Fundamental Rights of the European Union. Notably, Article 47 of the Charter does not distinguish between civil and criminal heads.

In particular, legal certainty as a general principle of EU law warrants that the right balance is struck. Although as a legal principle, it may be ubiquitous throughout EU case law, it is inextricably intertwined with the rule of law and fundamental rights.[52] Effective judicial oversight is an important element of legal certainty. As Pablo Martin Rodriguez has put it:

> *"[L]egal certainty answers to a logique politique in the sense that promotes and protects the full effectiveness of enacted rules and legal decisions, but also to a logique subjective in the form of setting limits and individual guarantees actionable against those rules and decisions. This dialectical character is consubstantial to the rule of law and should be embraced instead of rejected*."

It should be noted that, while the General Court has unlimited jurisdiction on fines, the *scope* of its review of the legality of EU competition decisions is more limited, as it is not entitled to substitute the Commission's judgment with its own. The *intensity* of this legality review nevertheless requires the General Court to scrutinise in meticulous detail the cogency of the Commission's findings. This has been demonstrated on a number of occasions, most recently in *CK Telecoms UK v Commission,* where the General Court annulled the Commission's decision to prohibit the merger between Three and O2 in the UK, where the Commission's theories of harm were criticized as too vague to support its conclusions and failed to show a "strong probability" of a significant impediment.[53]

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[51] Christian Ahlborn, 'Market Investigations and Market Studies' in Angus MacCulloch, Barry Rodger and Peter Whelan (eds), The UK Competition Regime: A Twenty-Year Retrospective, (Oxford University Press 2020).

[52] Pablo Martin Rodriguez, 'The principle of legal certainty and the limits to the applicability of EU law' (2016) 52(1) Cahiers de droit européen 115.

[53] Judgment of 28 May 2020, *CK Telecoms UK Investments Ltd v European Commission*, T 399/16, EU:T:2020:217, para 118.

Indeed, in recent years, it has often been observed that the EU Courts have demonstrated an increasing willingness to deal with complex economic matters.[54] More specifically, the Court of Justice has made clear in both merger[55] and antitrust[56] cases that, notwithstanding the margin of discretion that the Commission may enjoy with regard to economic matters in areas involving complex assessments, the EU judicature must "*not only establish whether the evidence put forward is factually accurate, reliable and consistent, but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it*."[57] As the Court of Justice has repeatedly stressed in this regard, "*the EU judicature must carry out its review of legality on the basis of the evidence adduced by the applicant in support of the pleas in law put forward and it cannot use the Commission's margin of discretion as regards the assessment of that evidence as a basis for dispensing with the conduct of an in-depth review of the law and of the facts*."[58]

The fact that the NCT does not provide for fines or infringements should not impact the intensity of the judicial oversight of the General Court, and the legal tests must not be designed to frustrate proper review as a result of that difference. Indeed, the intensity of the General Court's review of the legality of Commission decisions does not notably vary between *quasi-criminal* antitrust decisions and merger decisions (which similar to the NCT, have no fines or infringements attached).[59] Moreover, intense scrutiny of the NCT decisions would help rather than weaken its effectiveness as a tool, as the scrutiny encourages rigour in the analytical process and helps to sharpen the Commission's internal decision-making process. Finally, as the NCT would have no clear precedent to draw on, an active role for the Courts will be necessary to shape the boundaries of the tool, and in order to ensure the consistent application of EU law.

9 Legal base

The Commission's Impact Assessment states that the legal bases for the NCT would be Article 103 TFEU in combination with Article 114 TFEU. In our view, however, it is doubtful whether Article 103 TFEU constitutes an appropriate legal basis for the adoption of the NCT. Article 103 TFEU refers to legislation *"giving effect to the principles set out in Articles 101 and 102 TFEU"*. However, a distinguishing feature of the NCT, particularly so in respect of the market structure-based Options 3 and 4, is that this tool would be detached from the discrete treaty prohibitions set out in those articles.

The Impact Assessment itself recognises that the purpose of the NCT is to address *"gaps in the current EU competition rules"* to address *"structural competition problems*". Structural competition problems are defined, in the Impact Assessment, as *"market characteristics that have adverse consequences on competition"*. By contrast, Articles 101 and 102 TFEU address competition

[54] Bernard van de Walle de Ghelcke, 'Economic Reasoning before the European Union Courts in Competition Law' (2018) Bruges European Economic Policy Briefings 44/2018.

[55] Judgment of 15 February 2005, *Commission v Tetra Laval*, C 12/03 P, EU:C:2005:87, para 39; Judgment of 28 May 2020, *CK Telecoms UK Investments Ltd v European Commission*, T 399/16, EU:T:2020:217, para 76.

[56] Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paras 87-89.

[57] Judgement of 8 December 2011, *Chalkor v Commission*, C-386/10P, EU:C:2011:815, para 54; Judgment of 10 July 2014, *Telefónica and Telefónica de España v Commission*, C-295/12 P, EU:C:2014:2062, para 54; Judgment of 11 September 2014, *Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, para 46; Judgment of 8 September 2016, *Lundbeck v Commission*, T-472/13, EU:T:2016:449, para 113.

[58] Judgement of 8 December 2011, *Chalkor v Commission*, C-386/10P, EU:C:2011:815, para 62; Judgment of 10 July 2014, *Telefónica and Telefónica de España v Commission*, C-295/12 P, EU:C:2014:2062, para 56; Judgment of 11 September 2014, *Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, para 45.

[59] Some have even argued that, in light of judgments in *Airtours, Tetra Laval,* and *Schneider Electric,* that the EU Courts have been more prepared to comprehensively review the economic analysis in merger cases than in antitrust cases. See Ian Forrester, 'A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review' (2009) European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 28.

concerns brought about by the conduct of undertakings, i.e. collusion (Article 101 TFEU) and abusive unilateral conduct of a dominant undertaking (Article 102 TFEU). Competition concerns created by "market characteristics" that may distort competition in the internal market fall outside the scope of the existing treaty provisions.

Moreover, it is equally important to take account of the fact that Articles 101 and 102 TFEU amount to statutory prohibitions: the treaty itself defines certain conduct as "incompatible with the internal market". Indeed, the preparatory works show that the drafters of the treaty went to great pains in delineating the scope of these prohibitions.[60] The NCT, however, would entail bestowing prescriptive powers to the Union institutions: the idea is to empower the Commission to define a required standard of conduct without being bound by the treaty prohibitions.

It is submitted that these limitations: (i) addressing competition concerns created by the conduct of undertakings (as opposed to structural competition concerns) and that (ii) statutory prohibitions (as opposed to a standard of conduct prescribed by the Commission), constitute basic principles of the EU competition law regime in Chapter 1 of Title VII of the TFEU. They no doubt reflect a conscious choice of the drafters of the treaty.

Accordingly, to deviate from these principles and confer new, prescriptive powers to the Commission arguably does not fall within the purview of Article 103 TFEU. This provision is not intended to deal with situations in which the drafters of the treaty did not afford the Commission with the legal instruments necessary to meet the treaty's objectives.

As mentioned, the Impact Assessment does not refer to Article 103 TFEU alone, but to this provision in combination with Article 114 TFEU regarding the harmonisation of national rules:

> "*Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market*."

Nevertheless, in our view, the applicability of Article 114 TFEU is equally debatable. It is true that this provision has been interpreted broadly and that it may, under certain circumstances, be invoked to confer powers to an EU sector-specific regulator to adopt binding, individual decisions addressed to an individual or natural or legal persons.[61] However, the ECJ has clarified that Article 114 TFEU does not create *"a general power to regulate the internal market"* since this would be irreconcilable with the principle that *"the powers of the Community are limited to those specifically conferred on it."*[62] According to established case-law, legislation adopted based on Article 114 TFEU must, first, comprise a measure for the approximation of the provisions laid down by law, regulation or administrative action in the Member States and, second, has as its object the establishment and functioning of the internal market.[63] Also, case-law clarifies that the applicability of Article 114 TFEU *"falls to be assessed […] on the basis of objective factors such as main or predominant purpose of the measure and its content".* If the primary aim of the measure pertains to a different policy area and only incidentally falls under the internal market policy, this provision does not apply.[64]

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[60] See e.g. Reiner Schulze and Thomas Hoeren (eds), *Dokumente zum Europäischen Recht: Band 3: Kartellrecht (bis 1957)* (Springer 2000).

[61] See Judgment of 22 January 2014, *United Kingdom v Parliament and Council*, C- 270/12, EU:C:2014:18.

[62] Judgment of 5 October 2000, *Germany v Parliament and Council*, C-376/98, EU:C:2000:544, para 83.

[63] See Judgment of 22 January 2014, *United Kingdom v Parliament and Council*, C- 270/12, EU:C:2014:18, para 100.

[64] Judgment of 22 October 2013, *Commission v. Council*, C- 137/12, EU:C:2013:675, paras 53 and 76.

However, the problem identified in the Impact Assessment is not divergent national rules, but the inadequacy of the powers conferred to the Union's institutions under Articles 101 and 102 TFEU (i.e. the "gap" identified in the Impact Assessment). This is very different from e.g. the EU Damages Directive[65] (adopted on the basis of Articles 103 and 114 TFEU) which harmonised national rules of civil law.

In our view, it is therefore highly doubtful whether the NCT can be classified as a "harmonisation measure" in the meaning of ECJ case-law. Adopting the NCT arguably has little to do with the *"approximation of the provisions laid down by law, regulation or administrative action in the Member States"* as required by case-law. Indeed, *"establishing of the competition rules necessary for the functioning of the internal market"* is an exclusive Union competence according to Article 3(1)(b) TFEU, and it would be unlawful for the Member States to act. It is also assumed that the NCT would leave the current national competition laws unchanged.[66]

As discussed, the treaty itself already contains carefully drafted competition law prohibitions (in fact, most Member States' national competition regimes mimic the prohibitions set out in Articles 101 and 102 TFEU). If the view is taken that the drafters of the treaty "got it wrong" and that Articles 101 and 102 TFEU fall short of *"ensuring fair and undistorted competition in the internal market"*, it would be odd to characterise the conferral of additional powers to the Union's institutions to fill such perceived "gaps" as a "harmonisation measure". In this respect, it is important not to lose sight of the principle of conferral of powers enshrined in Article 7 TFEU.

Filling such "gaps" is arguably beyond the scope of Articles 103 and 114 TFEU. Indeed, the treaty contains a specific provision to deal with similar situations: the so-called "flexibility clause" in Article 352(1) TFEU:

> "*If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures*."

The flexibility clause (then Article 235 EEC) was invoked, in combination with Article 103 TFEU (then Article 87 EEC), when the EC Merger Regulation was adopted in 1989.[67] The equivalent provisions in the EC Treaty (Articles 308 and 83) were also invoked when the EC Merger Regulation was recast in 2004.[68] Just like with the NCT, Articles 101 and 102 TFEU were, according to the recital to the 1989 EC Merger Regulation, deemed *"not sufficient to cover all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty"*. This is strikingly similar to the reasoning set out in the Impact Assessment and one would therefore expect Article 352 TFEU to be invoked as a legal basis also now. Indeed, to adopt the NCT would amount to a reform of the existing EU competition rules which is of similar significance as the introduction of the EC Merger Regulation in 1989. While the European Coal and Steel Community, which served as a

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[65] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.

[66] See Judgment of 2 May 2006, *European Parliament v Council*, C-436/03, EU:C:2006:277, para 44 ('*In those circumstances, the contested regulation, which leaves unchanged the different national laws already in existence, cannot be regarded as aiming to approximate the laws of the Member States applicable to cooperative societies […].*').

[67] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L395/1.

[68] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1.

blueprint for the EEC Treaty, contained a merger control provision (Article 66), there is no precedent in Union law for an NCT-like instrument. It is an entirely novel type of legal tool.

We see no valid legal argument for taking a different view today. The relevant treaty provisions have not changed since 1989 and 2004. Indeed, it would be difficult to ascertain any meaningful limit to Article 103 TFEU and to find any relevant role for Article 352 TFEU if such a major reform as the NCT could be adopted without recurring to the latter article. We appreciate that the fact that the Council has to vote unanimously under Article 103 makes the legislative process more challenging, but a broad consensus would at the same time be helpful: it would solidify the legitimacy of the Commission's new tool from the outset, as was the case with the merger regulation, and avoid unnecessary legal challenges.

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