COMPLIANCE ANTITRUST, BANCASSURANCE & CONSUMER PROTECTION
CUSTOMER PROTECTION ADVISORY
GROUP CUSTOMER PROTECTION

Excerpt of UniCredit's answers to questions 9.3 and 11.3 of
Questionnaire for the public consultation on a New Competition Tool

9.3 Please explain your answer.

The current tools are effective against collusions, other restrictive conducts, as well as abuses by dominant firms. Particularly, art. 102 TFEU clearly identifies the prohibited conducts against freedom of competition in case of dominant position. The choice to limit the prohibition of these conducts to dominant undertakings lies in our view in the need to allow all undertakings, including the smallest one, to grow and actually compete on the market, also against the biggest ones, such us dominant undertakings. To that purpose (i.e. ensuring free and effective competition) only dominant undertakings bear the limitations of article 102 TFEU. Therefore, we believe that the possibility for the Commission to take actions for preventing non-dominant undertakings from growing should be avoided, provided that in case such growth leads to a dominant position, art. 102 TFEU shall apply.

In our view the fact that the NCT would broaden the Commission's scope for intervention in business activities of non-dominant players – that, up to now, is regarded as entirely legitimate and lawful – would clash with the well-established legal EU framework and case-law according to which holding or acquiring a dominant position is not per se unlawful under EU competition law, i.e. it is not an offence in itself for a firm to have a dominant position. What is offensive is to abuse of the position of dominance (see para 1 of the Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings). As is well known, the legal expression "dominant position" is a binary term: either an undertaking is dominant and therefore subject to art. 102 and the "special responsibility" not to hinder competition on the market that it entails; or it is not, in which case its unilateral behavior is not subject to competition law scrutiny at all. By imposing possible far reaching behavioral and/or structural remedies on non-dominant firms, the Commission would attribute to every market-player that "special responsibility" which has been routinely repeated in the judgements of the EU Courts and the decisions of the Commission on art. 102 and always attributed to dominant players only. The NCT could therefore become a notable departure from decades of competition law enforcement.

Furthermore, if EU competition rules are applied too aggressively, by making them over-inclusive (as the NCT seems to propose), firms might refrain from conducts which are pro-competitive. In this respect, action against any alleged detrimental effects on the market due to a lack of competition would have to take account of any risks related to over-enforcement and a higher likelihood of false positives.

Finally, acting against unilateral conducts of non-dominant firm would affect the ultimate function of the public enforcement of competition law, namely safeguarding the process of competition as a means of enhancing consumer welfare (see SPEECH/05/537 23.09.2005 of former Commission Neelie Kroes), which would turn into protecting competitors, including inefficient ones.

Needless to say, as for the agreements between competitors (horizontal) or between non competing undertakings (vertical), art. 101 TFUE and the Commission's communications and case law clarify already that those may be triggered not only by an actual contract or an informal arrangement between those undertakings. Even an exchange of commercially sensitive information, or a unilateral disclosure of such information may fall within the restrictions (and sanctions) set forth by art. 101 of the Treaty (and the subsequent sanctions). Therefore, it would be hard to understand in which extent such tools already prohibiting any kind of collusion between undertakings may be further enlarged.

Doubts may also be raised that the NCT, as proposed in the consultation, could be introduced based on the current rules of the Treaty (e.g. art. 103). In fact, some commentators noted that art. 103 TFEU cannot

be a legal basis for introducing new conducts, i.e. to punish behaviours falling outside arts. 101 and 102 TFEU: in fact, the NCT would go beyond arts. 101 and 102. As a result, if the proposed competition new tools have to be given to the Commission, arguably this will need an amendment to the Treaty.

As said above, any further power could be too undefined and broad and as such reduce the certainty and foreseeability of the application of antitrust rules.

Since, as said above, the proposed new rules, introducing the NCT, may leave room for uncertainty and unpredictability of the application of competition law, this could expose DG Comp to a lot of pressure from public and private powers. In fact, (i) it would be hard to understand, ex ante, which conduct is antitrust compliant and which is not, and (ii) in any case of alleged market failure, DG Comp would be called to “enter the arena” and fix it.
Competition law if not a tool for the optimization/fine-tuning of market outcomes: the proposed NCT could change this, having an impact on the nature itself of competition law. One could want this or not, yet it is necessary to understand that the introduction of such a tool could have this effect.

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11.3. Please explain your answer.

In our view, in certain markets it is quite hard to figure undertakings causing themselves "structural competition problems", which are not holding a dominant position on the market. Should such situation happen, i.e. non-dominant undertakings affect directly the market causing, or relying on, such "structural competition problems", we observe the following:

- in the lack of a dominant position, the commercial conducts of undertakings willing to extend their market position to related markets, increase their market power or market share, develop new or innovative products (also relying on new technologies), rely on economies of scale, or offering lower prices etc. which naturally harm competitors, should not be considered unlawful, as the will of market operators to grow and strengthen their business cannot be considered anti-competitive, unless this leads to the abuse of a dominant position pursuant to art. 102 TFEU;

- the opportunity envisaged by the Commission to impose behavioural or structural measures on undertakings in the lack of an abuse of dominant position pursuant to art. 102 TFEU appears to be an excessive remedy. On the one hand, such measures could affect the undertakings concerned beyond the intentions of the Commission, with the potential exclusion of efficient market players from the market; on the other hand such measures may advantage other undertakings, which could then be subject to the same measures, thus leading to extra-regulated market, to detriment of the principle of freedom of competition on the merits.

Therefore, we believe that art. 101 and 102 TFEU are effective to fight anti-competitive behavior without hindering the growth of non-dominant undertakings. Please also refer to par. 9.3 above

In addition, we remark that the enforcement of EU competition law by the Commission goes in parallel with the enforcement made by national authorities and local applicable laws to protect fair competition on the market. In this respect, we deem worthy to mention that in Italy the rules on "abuse of economic dependence" pursuant to art. 9 of the law n. 192/1998, already address those concerns raised by the NCT on abusive conducts put in place by non-dominant undertakings. In particular, this provision prohibits the abuse by one or more companies of the state of economic dependence, defined as "situation in which an undertaking is able to cause, in its commercial relations with another undertaking, an excessive imbalance of rights and obligations. Economic dependence shall also be assessed taking into account the real possibility for the party subject to abuse, to find satisfactory alternatives on the market. Abuse may also consist in a refusal to sell or a refusal to buy, the imposition of unjustifiably onerous or discriminatory contractual conditions, or the arbitrary interruption of existing commercial relations". The rules on abuse of economic dependence award to the Italian Competition Authority the power to activate its investigation powers and impose sanctions. According to the national case-law, the "abuse of economic dependence" has general application, suitable for including any asymmetrical negotiation relationship between companies, without the need to assess the existence of a dominant position.

Moreover, as said already, as for the agreements between competitors (horizontal) or between non competing undertakings (vertical), art. 101 TFUE and the communications and case law clarify already that those may be triggered not only by an actual contract or an informal arrangement between those undertakings. Even an exchange of commercially sensitive information, or a unilateral disclosure of such information may fall within the restrictions (and sanctions) set forth by art. 101 of the Treaty. Therefore, it would be hard to understand in which extent such tools already prohibiting any kind of collusion between undertakings may be further enlarged