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New Competition Tool

Observations in the context of the Commission's Public Consultation

1. Introduction

1.1 On 2 June 2020, the European Commission (***Commission***) launched a public consultation on a proposed New Competition Tool (***NCT***).[1] Freshfields Bruckhaus Deringer LLP (***Freshfields***) welcomes the opportunity to provide its observations on the Commission's NCT proposal, further to the comments submitted in response to the Inception Impact Assessment (***IIA***) published by the Commission.

1.2 According to the IIA, the NCT is aimed at addressing purported '*gaps in the current EU competition rules and allowing for timely and effective intervention against structural competition problems across markets.*'[2] The IIA distinguishes between two forms of '*structural competition problems*' depending on whether harm is about to affect or has already affected the market:[3]

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

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

1.3 Although the Commission's NCT proposal was announced along with the Commission's Digital Services Act (***DSA***) package, its scope does not appear to be limited to digital and/or digitally enabled markets. The NCT proposal envisages a significant expansion of the Commission's existing powers, potentially including the power to impose extensive behavioural and structural remedies absent an infringement decision. The NCT will empower the Commission to change the structure of a market even where the players active on that market behave in full compliance with the legal requirements of Articles 101 and 102 TFEU as well as with merger control rules. The introduction of the NCT is therefore bound to have far-reaching implications – going far beyond those of established investigation and sector inquiry tools – and is likely to result in a paradigm shift in EU competition law enforcement.

1.4 Against this background, our observations in this submission are focused on a number of key questions and open issues that we would urge the Commission to consider carefully in deciding whether to proceed with, and if so, designing

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

[2] Commission, NCT IIA, 4 June 2020, Section A.

[3] *Ibid.*

the NCT, should it decide to go ahead with its proposal. As the consultation questionnaire published by the Commission (***Questionnaire***) is largely focused on obtaining factual observations about industry characteristics, we consider that it is more appropriately answered by companies which operate on those markets. Our observations in this submission therefore address the following more fundamental issues with respect to the NCT proposal:

(a) General observations on the need for an NCT as proposed by the Commission (**Section 2**);

(b) The NCT's legal basis under the Treaty of the Functioning of the European Union (***TFEU***) (**Section 3**);

(c) The NCT's relationship with Articles 101 and 102 TFEU and the DSA package (**Section 4**);

(d) The need for a clear legal test (**Section 5**);

(e) The applicable threshold for the imposition of remedies (**Section 6**);

(f) Procedural considerations and the establishment of a fair process that safeguards companies' rights of defence and rights of appeal (**Section 7**); and

(g) Conclusion (**Section 8**).

1.5 Given that there are still many uncertainties around the shape of the future NCT, we would welcome the opportunity to contribute to a further public consultation once the contours of any new NCT instrument are more developed.

2. General observations on the need for an NCT as proposed by the Commission

2.1 In assessing and designing the NCT, it is imperative that the Commission considers and clearly delineates the scope of the NCT and its relationship with existing competition rules. It is crucial that the Commission clearly defines in concrete terms the scope of the issues the NCT is seeking to address and any alleged enforcement gap to prevent this tool from jeopardising the credibility and quality of the current globally respected competition infrastructure within the EU.

(a) The alleged Enforcement Gap

2.2 There is a powerful argument to be made that Articles 101 and 102 TFEU (and their predecessors) have stood the test of time, operating effectively as the cornerstones of EU competition law and policy for more than 50 years, and have proven to be sufficiently broad and malleable to address a host of evolving economic trends and technological developments over that time. Indeed, the existing legal structure has been adaptable and able to address novel issues, in particular in the technology space. For example, the application of the 'tying' doctrine in cases involving *Microsoft* and *Google/Android*,[4] the development of

[4] Commission, Cases AT.40099 and AT.39530.

self-preferencing/leveraging theories of harm in *Google Shopping*[5] and innovation theories of harm in merger control[6] – these are all instances that would suggest that there is no enforcement gap.

2.3 We recall the statement of Executive Vice President Vestager which underlined the sufficiency of existing enforcement tools in a recent speech, noting: '[…] *that's not to say that we need fundamental changes to the rules themselves.* […] *The fundamental motives, like greed and fear, that tempt companies to harm competition are the same as they've ever been – and the competition rules are still well designed to deal with them*'.[7]

2.4 The Commission should therefore exercise considerable caution in deciding whether the NCT is actually needed and, if it is, carefully consider and identify any potential 'gap cases' in clearly defined circumstances that cannot be addressed by existing rules. In this context we also note that the 2019 report by the Special Advisers to DG COMP calls for the application of existing tools of EU competition law enforcement to be refined and adapted to the challenges of the digital age but does not advocate for something of the calibre of the NCT.[8]

'Tipping markets' and unilateral strategies by non-dominant companies to grow their market position

2.5 The idea that certain markets are prone to 'tipping', where the 'winner takes most', stands out as a particularly speculative basis for the introduction of new legislation. While this 'phenomenon' has been discussed, among others, in the Furman Report[9] and the Special Advisers' Report, we question whether market 'tipping' – and the extent to which it does in fact take place – has been sufficiently analysed to legitimise the Commission's far-reaching and highly intrusive NCT proposal. Indeed, there is hardly any enforcement practice relating to 'tipping', let alone case law from the Court of Justice of the EU (***CJEU***).

2.6 It is also said that in digital markets 'extreme returns to scale' favour the incumbent. Yet, strong scale effects as a result of high fixed and low marginal costs are equally prevalent in the (old) utility and infrastructure industries. The previous qualification of such industries as natural monopolies has been largely abandoned and a combined application of Articles 101 and/or 102 TFEU with

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5 Commission, Case AT.39740.

6 Commission, Case M.8084.

7 Executive Vice President Vestager speech, *Defining markets in a new age*, 9 December 2019, https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defining-markets-new-age_en.

8 Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition policy for the digital era* (***Special Advisers' Report***), 4 April 2019, https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

9 Jason Furman, Diane Coyle, Amelia Fletcher, Derek McAuley, Philip Marsden, *Unlocking digital competition: Report of the Digital Competition Expert Panel*, March 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

sector-specific regulation has yielded significant progress in terms of enabling new market entrants and appropriately controlling market behaviour.

2.7 Even if it were possible to predict when a market is prone to 'tipping', it remains unclear what intervention an NCT would achieve. Absent the use of intrusive remedies (such as 'market share caps') to maintain a particular market structure (which would be rather draconian and have unknown and likely negative consequences), any intervention would risk a regulator simply picking the 'winners' and 'losers' in a market in an arbitrary fashion.

2.8 Similarly, the IIA and the Questionnaire identify '*unilateral strategies by non-dominant companies to monopolise a market*' as a type of conduct that could be tackled by the NCT. Again, this seems rather speculative and there is no evidence (or examples) provided of what this type of conduct would entail or why it is considered unambiguously detrimental. Indeed, such 'unilateral strategies' seem to be another way of describing companies seeking to grow their market position; it is unclear why this is conduct that would merit intrusive intervention via the NCT.

2.9 Although Article 102 TFEU, in contrast to Section 2 of the Sherman Act 1890, does not cover attempts to dominate/monopolise a market, its scope is in practice just as broad (if not broader) given that dominance can be (and has previously been) found by the Commission at market shares lower than 40%.[10] Moreover, Article 102 TFEU has proven particularly versatile and flexible in being able to deal with attempts by dominant companies to abusively exercise their market power in vertically-related or adjacent markets (see for example *Tetra Pak II*[11]). Recent infringement decisions (such as *Google Shopping*) and ongoing investigations by the Commission (such as the investigation into Amazon Marketplace) illustrate that Article 102 TFEU is already an effective tool available to the Commission to tackle a wide range of practices relevant to perceived 'tipping' concerns.

2.10 Moreover, premature or untargeted intervention risks causing substantial harm to competition and innovation. The types of conduct mentioned by the Commission appear indistinguishable from successful organic growth as a result of innovation and competition on the merits. Given the importance of scale and network effects in some of the markets targeted by the NCT, seeking to intervene in a speculative and unpredictable fashion risks stifling competition between companies (including European firms) in evolving and innovative markets. Absent further experience, placing 'structural risks for competition' at the centre of the NCT's aims is unjustified.

2.11 The harm to competition and innovation that would be caused by the heavy-handed use of an NCT cannot be downplayed, bearing in mind the strong empirical evidence that digitalisation and innovation in digital markets have benefited consumers, businesses and the wider economy. A recent BCG report

[10] Monopolisation cases under Section 2 of the Sherman Act generally require evidence of market shares exceeding 70%. Even for attempted monopolisation cases, market shares exceeding 50% are typically required.

[11] CJEU, Case C-333/94 P.

on the most innovative companies in 2020 demonstrates how online platforms and other tech / digital players continue to display high levels of innovation. In the 14 years since it began to produce its Most Innovative Companies report, only eight companies have made the list every year and seven of these are tech companies. Similarly, a recent report by PwC found that '*digitization clearly has a positive impact on economic advancement, societal well-being, and government effectiveness.*'[12] Digitisation has brought enormous benefits to consumers across a continuously expanding field of products and services. A new generation of companies seeking to take advantage of digitisation have also been created in the B2B space, from Stripe (payments processing) and Shopify (ecommerce solutions) to Xero (accounting) and Flexport (digital freight forwarding), enabling business to be conducted more effectively across the global economy. Digitalisation of the broader economy is key – in 2018, the McKinsey Global Institute found that US$13 trillion could be added to global GDP by 2030 through digitisation, automation and artificial intelligence.[13]

Oligopolistic markets

2.12 The IIA and Questionnaire refer to oligopolistic markets as being a target of the NCT where there are structural market failures.

2.13 The debate about the ability of Articles 101 and 102 TFEU to address tacit collision is long running, yet there is limited evidence that an NCT would be effective in dealing with alleged competition concerns in oligopolistic markets. Indeed, the UK Competition and Markets Authority (the ***CMA***) has had limited success when using its market investigation regime to investigate oligopolistic markets. For example, there appears to be little robust evidence that its recent market investigations in the retail banking and energy markets resulted in material changes to their respective market structures that were not occurring already as a result of developing market conditions or the decisions of other regulators.

2.14 Competition agencies have been able to use other tools such as Article 101 TFEU and similar provisions to deal effectively and innovatively with collusion problems. This is particularly the case in digital markets, as is illustrated by the *Eturas* case[14] and the CMA's infringement decision against online sellers of posters and frames.[15]

2.15 We question how the Commission has come to identify an enforcement gap which cannot be remedied under the existing rules. Indeed, there is no lack of widespread and forceful enforcement activity against digital or digitally enabled companies and issues such as self-preferencing are at the heart of some of the recently concluded and ongoing investigations by the Commission. As many of these investigations are either not yet concluded by the Commission or now *sub iudice* before the EU Courts in Luxembourg, there is a fundamental question

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12 See https://www.strategyand.pwc.com/m1/en/reports/maximizing-the-impact-of-digitization.pdf.

13 See https://www.itu.int/dms_pub/itu-s/opb/gen/S-GEN-ISSUEPAPER-2018-1-PDF-E.pdf.

14 CJEU, Case C-74/14.

15 CMA, Case 50233, https://www.gov.uk/cma-cases/online-sales-of-discretionary-consumer-products.

about the appropriateness of introducing a new tool which would allow the enforcing agency to intervene in companies' market conduct and impose far-reaching remedies without having to establish to the required legal standard the illegality of the companies' conduct or any clear detriment to consumers or the competitive process.

(b) The types of conduct set out in the IIA and Questionnaire do not seem suitable for an NCT

2.16 The IIA and Questionnaire refer to different types of structural risks for competition. However, there is a lack of evidence that any of these risks are actually present and, even if they are, whether the benefits of intervening through the NCT would outweigh the harm to competition and innovation or other unintended consequences from such intervention.

2.17 The IIA explains that the NCT is aimed at tackling '*structural competition problems*' that Articles 101 and 102 TFEU '*cannot tackle (e.g. monopolisation strategies by non-dominant companies with market power) or cannot address in the most effective manner (e.g. parallel leveraging strategies by dominant companies into multiple adjacent markets).*'[16]

2.18 To justify the introduction of the NCT, the Commission needs to identify clearly how any '*structural competition problems*' that constitute so-called 'gap cases' arise and why they cannot be effectively addressed under Articles 101 and/or 102 TFEU. In this regard, as noted by the Commission in the IIA, there is an ongoing debate and no clear consensus as to whether there any enforcement gap exists.[17]

(c) Timely intervention

2.19 If the goal is to enable the Commission to act swiftly, the NCT is unlikely to be an effective solution. It takes time to adopt new legislation at the EU level and there will likely be legal challenges throughout the process. There is now rich jurisprudence in the case law of the European Courts on the application of Articles 101 and 102 TFEU which provides the Commission with a solid legal basis to develop its enforcement priorities with legal certainty. By contrast, even following the enactment of any new law, its scope and application can be expected to be rigorously tested in the courts since there will be no similar body of case law or decisional practice against which any decisions under the NCT can be assessed. This can be expected to *increase* rather than speed up, the time taken for investigations and any remedies to be implemented. Furthermore, as described below, the UK markets regime shows that market investigations are time-consuming, resource-intensive and take a long period to achieve their intended outcome (if achieved at all). This is in stark contrast with the power to impose interim measures already available to the Commission when carrying

[16] Commission, *Single Market Performance Report 2019*, 17 December 2019, document: SWD (2019), 444, final.

[17] *Ibid*.

out enforcement action under Articles 101 and 102 TFEU (as deployed in the *Broadcom* case).[18]

2.20 It therefore seems unlikely that the NCT would, in practice, provide a route for enabling '*timely and effective intervention against structural competition problems across markets*.'[19]

(d) Experience from the CMA markets regime

2.21 The UK has long had a markets regime. Market investigations are detailed examinations into whether particular features of a market give rise to an adverse effect on competition and, if so, what remedial action may be appropriate. Similar to the proposed NCT, the markets regime sits separately to the CMA's competition enforcement powers and enables the CMA to investigate a market without needing to find that a firm (or group of firms) has infringed competition law.

2.22 The CMA (and its predecessor the Competition Commission) has carried out market investigations in relation to a wide range of sectors, including groceries, retail banking, energy, investment consultancy and fiduciary management services, statutory audit services, private motor insurance, private healthcare, and movies on pay TV.

2.23 However, the CMA's markets regime is largely untested in the key areas where the NCT's use is envisaged by the Commission. In particular:

(a) With regard to digital markets, with which the NCT is particularly concerned, the CMA has recently conducted initial market studies into: (i) online platforms and digital advertising; and (ii) digital comparison tools. However, in both cases, the CMA decided not to open a market investigation. Instead the outcomes of these market studies were primarily a series of recommendations to the UK Government and other sector regulators in the UK which the CMA considered would be more effective than acting itself under the market investigation regime.

(b) While the CMA has previously utilised market investigations to attempt to tackle some of the issues set out in the Questionnaire around a '*structural lack of competition*' (e.g. markets displaying certain structural features, such as high concentration and entry barriers), it has not been used in any meaningful capacity to address so-called '*structural risks for competition*' as described in the IIA. Therefore, the Commission should exercise caution in using the UK's markets regime as a basis for justifying the use of the NCT to address so-called '*structural risks for competition*'.

2.24 Further, the impact of remedies flowing from market investigations has been mixed. For example, the CMA's two-year long investigation into the UK energy

[18] See https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6109.

[19] Commission, NCT IIA, 4 June 2020, Section A.

market[20] has been criticised by commentators for failing to bring significant change to the UK energy industry. Remedies imposed in the banking industry have been time-consuming and extremely onerous for industry participants. Indeed, the costs imposed on the industry likely outweigh the financial implications of fining decisions taken by the CMA to date under existing competition law. Likewise, the effectiveness, timeliness and appropriateness of the CMA's recent actions in its investigation of statutory audit services is widely debated in the UK. What is beyond doubt is that each of these inquiries was onerous and resource intensive for the CMA and the industries involved. A further limitation of using market investigations as the legal basis for a pro-competition approach is that its remedies are largely static. Binding orders cannot be revised and updated as the nature of fast-developing markets and/or potential solutions evolve.[21]

2.25 More generally, there are good reasons to doubt the effectiveness of structural remedies imposed by an agency or court in improving performance in a market. Concerns may exist as to whether such remedies can be timely (given the length of time required for any investigation or proceeding to conclude and the market changes that may occur during that period) or adequate due the complexity and difficulty of crafting appropriate remedies (at least outside the merger context). Such remedies are, in any event, available to the Commission under Regulation 1/2003, both when adopting an infringement decision or a commitments decision.

2.26 The experience from the UK markets regime is that a meaningful fact-finding inquiry takes close to three years before the CMA is in a position to order the types of remedies being envisaged with the NCT. For example, the CMA commenced its market study work into retail banking in June 2013, and it took over three years before the CMA published its final report for its retail banking market investigation in August 2016 (with the remedies still in the process of being fully implemented to this day).[22] This timeline indicates that significant time is required to conduct a proper fact-finding inquiry. While the CMA has recently sought to streamline the process, the CMA's investigation into the investment consulting sector still took 15 months to complete (and was on the back of an earlier market study by the UK's Financial Conduct Authority that lasted around one and a half years).[23] Given the consequences that flow from the use of the UK's markets regime, a thorough exercise of fact-finding and engagement is essential to ensure that the rights of parties are safeguarded.

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[20] See https://assets.publishing.service.gov.uk/media/576c23e4ed915d622c000087/Energy-final-report-summary.pdf.

[21] See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf for more details, para.2.108.

[22] See https://assets.publishing.service.gov.uk/media/57ac9667e5274a0f6c00007a/retail-banking-market-investigation-full-final-report.pdf.

[23] See https://assets.publishing.service.gov.uk/media/5c0fee5740f0b60c8d6019a6/ICMI_Final_Report.pdf .

2.27 After considering these issues in the round, there is little evidence that the NCT would be effective in tackling the alleged issues raised by the Commission.

3. The NCT's legal basis under the TFEU

3.1 As currently provided for in the IIA, the legal basis for the NCT Regulation would be a combination of Articles 103 and 114 TFEU. In our view, Articles 103 and 114 TFEU – which also formed the legal basis for the EU Damages Directive 2014/104/EU – appear insufficient to support the Commission's far-reaching proposal for an NCT, raising serious questions as to the constitutionality of the Commission's initiative, as currently proposed.

3.2 Article 103 TFEU enables the adoption of legislation to '*give effect to the principles set out in Articles 101 and 102*' and address restrictions of competition. The NCT is however aimed at creating new competition enforcement powers that may be used '*without any prior finding of an infringement*' of Articles 101 and/or 102 TFEU. Hence, the NCT cannot be said '*to give effect to the principles set out in Articles 101 and 102'* as reflected in Article 103 (1) TFEU. In contrast, the EU Damages Directive codified the EU legal framework of established case law on the private enforcement of Articles 101 (and 102) TFEU since the *Courage and Crehan* case law of the CJEU,[24] and therefore clearly fell within the ambit of Article 103 (2) (e) TFEU.

3.3 Article 114 TFEU forms the legal basis for the EU to adopt legislation to harmonise national laws of the Member States that may hinder free movement of goods, services, capital or people and therefore obstruct the internal market. Whilst Article 114 TFEU is traditionally regarded as a broad legal basis for the EU to take legislative action, we question the validity of Article 114 TFEU as a legal basis for the potential introduction of an NCT as proposed by the Commission. Whilst certain Member States have, or are in the process of, enacting new laws to adapt the application of their competition legislation to digital markets, these proposals relate to infringements of Articles 101 and 102 TFEU and their national equivalents, as opposed to purportedly problematic market structures. As such, there does not appear to be a need for the approximation of divergent national laws via the NCT pursuant to Article 114 TFEU, nor are there prospects of such divergence in the foreseeable future.

3.4 We understand that Greece and Romania already have legislation providing for an investigation instrument similar to the markets' regime in the United Kingdom. We are however not aware of any enforcement practice by the relevant authorities in Greece and Romania which may have impeded the proper functioning of the internal market. Similarly, the proposed amendments to the competition laws in some Member States such as Germany and France envisage addressing perceived competition problems in the platform economy by changing the law on abuse of dominance and on merger control. Again, the situation appears different compared to the situation that existed at the time of the introduction of the EU Damages Directive – which also relied on Article 114 TFEU as a legal basis – when there was a perceived need to

[24] CJEU, Case C-453/99.

approximate the laws of civil procedure of the Member States to facilitate the private enforcement of Articles 101 and 102 TFEU.

3.5 We therefore consider that the legal basis for the proposed NCT should be reconsidered. During the preparation of the EUMR there was also a debate[25] about the appropriate legal basis for this new legislative tool and in the end the predecessor of Article 352 TFEU was chosen. Article 352 TFEU may also form an appropriate legal basis for the proposed NCT as envisaged by the Commission. Given the far-reaching nature of the NCT, having the full support of all the Council members and the involvement of the national parliaments as reflected in Article 352 (2) TFEU would lend appropriate authority and support to any new instrument conferring such far-reaching new powers on the Commission. The German Monopolies Commission recently opined that the appropriate legal basis for any *ex ante* platform regulation would be Article 352 TFEU in conjunction with Article 103 TFEU, as such a platform regulation would supplement the existing platform-related regulatory framework that the EU has already adopted.[26]

3.6 We would therefore encourage the Commission to carefully reconsider the appropriate legal basis for the introduction of the NCT, both as a fundamental constitutional concern and in order to avoid legal dispute post-adoption of any NCT legislation.

4. The NCT's relationship with Articles 101 and 102 TFEU and the DSA package

(a) Overlap with Articles 101 and 102 TFEU

4.1 The IIA suggests that there could be a material overlap in the scope of the NCT and Articles 101 and 102 TFEU, if the Commission considers that issues cannot be addressed by existing tools '*in the most effective manner*'.[27] Further, the IIA notes that the NCT will have a role in '*allowing for timely and effective intervention against structural competition problems across markets*' (emphasis added).[28] This highlights the importance of defining a properly scoped role for any NCT. If the Commission could intervene using the NCT in any instances where it perceives that Articles 101 and 102 TFEU could be applicable but may not address the Commission's concerns '*in the most effective manner*', this could effectively render Articles 101 and 102 TFEU redundant.

4.2 Furthermore, before making proposals creating extensive changes to the law, it is incumbent on the Commission to explain why it cannot address perceived timeliness issues by means of more effective case management under the existing rules. In our experience as one of the leading advisers on antitrust

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25 Anand Pathak, *EEC Concentration Control: The Foreseeable Uncertainties*, ECLR [1990], 119, 122.

26 German Monopolies Commission, XXIII Biennial Report '*Competition 2020*', para. 90, https://monopolkommission.de/images/HG23/HGXXIII_Gesamt.pdf.

27 Commission, NCT IIA, 4 June 2020, Section A.

28 *Ibid.*

investigations before the Commission, there may indeed be considerable scope for gains in that regard which could be more effective than a change in the law.

4.3 Further, if the Commission is proposing that it may use the NCT in many instances where it will enable the Commission to address perceived structural risks and problems in a timelier manner than under the current rules, this would amount to a radical expansion of the Commission's powers. If the Commission need only prove that a perceived competition problem will be dealt with more quickly through the NCT than under the current regime, the legal safeguards inherent in Articles 101 and 102 TFEU may be freely circumvented in the name of speed, disregarding the necessary due process.

4.4 In this context, it should also be borne in mind that a wide overlap between the scope of the NCT and established enforcement rules would lead to legal uncertainty and unintended consequences for competition in the EEA. It will be especially important in that regard to ensure that the NCT could not be used in such a way as might circumvent the evidentiary standards and procedural safeguards applicable in relation to Articles 101 and 102 TFEU or the jurisprudence of the CJEU.

4.5 It would also be undesirable to be in a situation where the legal instrument used by the European Commission became a moving target (or rather a moving tool). If one were to think of an investigation in a complex market which is initiated under Article 101 TFEU, the NCT should then not be used as a fall back to resolve the case if a violation of Article 101 cannot be established on the evidence by the European Commission. This applies even more so under Article 102 TFEU, where the outcome of an investigation by the Commission is even more dependent on a proper assessment of the factual and economic evidence against the appropriate legal standard. Any inability to identify and prove to the required legal standard a theory of harm in an investigation based on Article 102 TFEU should not encourage the Commission to recycle the issues in the investigation under the NCT with a view to imposing remedies or 'extracting' some commitments on the basis of a factual and economic record which would not have justified intervention under existing competition law.

(b) Overlap with the Digital Services Act package

4.6 Similarly, whilst the IIA asserts that the NCT is complementary to the Commission's '*ex ante regulatory instrument of very large online platforms acting as gatekeepers*' (***Ex Ante Gatekeeper Regulation***) which forms part of the Digital Services Act package,[29] the two legislative initiatives seem to significantly overlap. In determining its approach to tackling any perceived issues in digital markets, the Commission should ensure that this overlap is not manifested through over-legislation and/or conflicting provisions. The relationship between the NCT and the Ex Ante Gatekeeper Regulation would

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

therefore need to be carefully managed and separated to avoid fragmentation and guarantee legal certainty for market participants.

4.7 Another issue is that under the proposed Digital Services Act, the approach and strategy taken by the European Union towards gatekeeper companies would be bifurcated between the *ex ante* legislation proposed by DG CNECT and the intervention chosen by DG COMP. Indeed, DG CNECT proposes to change and expand the existing internal market P2B Regulation (EU) 2019/1150. Once this has been achieved, digital companies will face two sources of intervention: (i) legislation and the updated Regulation 2019/1150; and (ii) additional discretionary intervention under the powers of DG COMP which may deviate from or complement the tools provided for by the legislator in the new Ex Ante Gatekeeper Regulation. This would hardly seem a desirable result from a legal certainty standpoint.

4.8 The inadequacy of overlapping legislative regimes is evidenced in the area of telecoms regulation, which is regulated by a mixture of parallel enforcement tools – namely *ex ante* telecoms regulation law and *ex post* competition law. In this field, the Union Courts developed an untidy solution in the *Deutsche Telekom* set of cases, whereby the CJEU broadly concluded that '[…] *it is only if anti-competitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their party, that Articles* [101 and 102 TFEU] *do not apply.* […] *Articles* [101 and 102 TFEU] *may apply, however, if it is found that the national legislation leaves open the possibility of competition which may be prevented, restricted or distorted by autonomous conduct of undertakings.*'[30]

4.9 The CJEU has upheld the decision previously handed down by the General Court in case T-271/03, *Deutsche Telekom v Commission*, which stated that Deutsche Telekom's liability for margin squeeze under Article 102 TFEU holds even if national law '*encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct*'[31] and even if the incumbent's prices had first to be approved by the national regulatory authority.[32] Even where the national regulatory authority had approved the access tariff under the telecommunications regime, Deutsche Telekom was not shielded from a decision that this tariff was still considered to be an unlawful margin squeeze under Article 102 TFEU.[33]

4.10 While the principle that the Commission may intervene using existing competition law and take a different view of decisions approved by a national sectoral regulator has been established by the courts, the possibility of

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30 CJEU, Case C-280/08 P, para.80.

31 General Court, Case T-271/03, para.89.

32 *Ibid*., para.107.

33 Indeed, the General Court followed this approach in *Telefónica* (Case T-336/07) where it was held that prior price approval by the national regulator, even if granted after an *ex ante* examination of the possibility of a margin squeeze, could not exempt Telefónica from consideration under Article 102 TFEU.

conflicting decisions taken at the European level under parallel European regimes would be unfortunate and create legal uncertainty.

4.11 Besides, to provide an example from the analogue business world, the NCT could enable the Commission to take a different approach towards enforcing parallel trade restrictions. We submit that it would be inappropriate if the Commission sought, for example, to apply the NCT to pharmaceutical wholesalers whose arrangements reflect existing case law relating to parallel imports and the grey market. Changing accepted arrangements that have been recognised as valid under the law by the Union Courts in this area would in our view not be an appropriate object for an intervention under the NCT.

4.12 The two proposed regimes subject to the Commission's current considerations in the modernisation of EU competition law (the Ex Ante Gatekeeper Regulation and the NCT) are EU secondary law instruments and are, as such, differentiated from the relationship between EU primary and secondary law that arose in the *Deutsche Telekom* case. Given both regimes constitute EU secondary law, based on the application of the hierarchy of norms, a decision under one regime has equivalent status to a decision under the other. However, it would be worthwhile for the Commission to establish a safe harbour specifically delineating this point, whereby an assessment and/or finding by it under one regime would preclude the Commission from further assessment under the other regime. Such a safe harbour would provide clarity and legal certainty for undertakings.

5. Need for a clear legal test

5.1 The IIA does not meaningfully address the critical issue of the relevant legal test, limiting itself to noting that '*similar to already existing competition tools of this kind,* [the NCT] *would be based on a test allowing the Commission to intervene when a structural risk for competition or a structural lack of competition prevents the internal market from functioning properly.*'[34]

5.2 Clarity on the applicable legal test for intervention is essential to safeguard the rule of law and ensure that companies enjoy the requisite legal certainty already provided by Articles 101 and 102 TFEU.[35] A clear definition of the notions of a '*structural risk for competition*' and a '*structural lack of competition*' and the requisite standard of proof in establishing the existence of '*structural competition problems*' is necessary. Additionally, the Commission would need to consider and issue clear guidelines detailing how it would identify '*structural competition problems*', including the prevailing characteristics in such purportedly problematic markets and how it would benchmark against competitive markets. Any effective public consultation on the NCT must address these core points in detail and we look forward to commenting on these

[34] Commission, NCT IIA, 4 June 2020, Section B.

[35] The principles of legal certainty and the protection of legitimate expectation as such constitute general principles of EU law, see CJEU, Case C-184/14, para.30; Opinion of Advocate General Nils Wahl, Case C-194/14 P, para.87.

points further in any future consultation in which these important issues are addressed.

5.3 The NCT could empower the Commission to pursue its industrial policy objectives by changing the structure of certain markets or by requiring law-abiding companies to modify their competitive behaviour on the market. Given that the NCT - as currently proposed - does not focus primarily on unlawful behaviour, the NCT may empower the Commission to reshape an industry in the same way as would normally be achieved by internal market legislation adopted through the legislative process. This has occurred in many conventional, notably utility, industries such as energy, telecommunications and rail. The NCT could provide the Commission, and in particular DG COMP, with a shortcut to intervene in a market in a manner which historically in the European Union has been the reserved domain of legislation emanating from the Council and the European Parliament. This could increase the perceived democratic deficit in the enforcement of European competition law seen in the State aid field and in cases where, as a result of enforcing Articles 101 and/or 102 TFEU, the Commission accepts far-reaching remedies from the companies involved under Article 9 of Regulation 1/2003.

5.4 Of course, the NCT itself would be adopted by the Council and the European Parliament. Once adopted, however, it is entirely for the Commission to target specific companies or sectors and to select the remedies which it considers appropriate. In this there seems to be a tension between the normal prerequisites of a parliamentary and democratic legislative process and the extraordinary powers the European Commission would acquire under the NCT.

6. Threshold for the imposition of remedies and need for robust effects-based analysis

6.1 The NCT must equally ensure that there is a clearly defined evidential bar for the imposition of behavioural or structural remedies and adopt an effects-based approach. This would help ensure that any remedies imposed are necessary, proportionate, properly designed and capable of addressing any perceived issues. Again, these core issues are not addressed fully in the current consultation and we look forward to considering them further in any future consultation which sets out a fuller proposal in this respect.

6.2 The IIA states that the Commission's intervention through the NCT will have limited economic impact on the undertakings concerned, noting that '*the Commission would not make any finding of an infringement of the EU competition rules, nor impose fines and thus not generate rights to launch damage claims*'.[36] This is a surprising and counter-intuitive statement in light of the wide-ranging nature of the proposed powers which would be conferred on the Commission. The economic impact of behavioural and/or structural remedies can be vast and indeed has the potential to be much greater than the impact of a monetary fine, resulting in radical changes to undertakings' business models and/or the restructuring of entire industries. Indeed, the NCT proposal

[36] Commission, NCT IIA, 4 June 2020, Section B.

appears to be motivated by a desire, at least in part, to have a greater economic impact.

6.3 Additionally, the IIA states that '*the proportionality of the costs incurred would be ensured by the fact that such remedies have to be limited to ensuring the proper functioning of the market under scrutiny. Consumer benefits deriving from the timely intervention under all policy options should outweigh those costs.*'[37] In this regard, robust effects-based economic analysis is required, balancing the potential anticompetitive effects caused by the '*structural risks for competition*' and/or '*structural lack of competition*' identified in the market in question, with the consumer benefits generated. This is particularly the case given the importance placed by the CJEU on the robustness of the Commission's effects analysis in the *Intel*[38] and *Hutchison*[39] judgments.

7. Establishing a fair process that safeguards companies' rights of defence and appeal rights

7.1 The IIA does not provide any details as to the procedural aspects and decision-making process that the Commission will follow to determine whether intervention is warranted and how appropriate remedies will be designed. It is imperative that the Commission ensures its process provides for appropriate checks and balances to minimise the burden imposed on the companies involved and safeguard their rights of defence, good administration and of appeal.

7.2 The Commission will need to consider carefully what appropriate procedural safeguards will ensure the independence of the decision-making body determining the existence of a '*structural competition problem*' and the remedies to be imposed, from the case teams undertaking investigations and proposing the remedies. In this regard, we note that other regimes which have market investigation procedures, e.g. the UK CMA, are bound by safeguards designed to ensure procedural fairness and independence of decision-making. The need for separation between the decision-makers who decide to commence a market investigation and those who reach the final conclusions at the end of a market investigation has been acknowledged in the UK to be important in order to safeguard the independence and robustness of market investigations.[40]

7.3 In particular, careful thought will be required to address issues such as: (i) the transparency of the process; (ii) that parties are given access to decision-makers and the evidence collected by the Commission; (iii) that parties receive a fair hearing on the evidence of the case; and (iv) that parties are afforded sufficient time to respond to requests for information and/or intermediate steps in the investigation (e.g. interim reports, statements of objections, etc.). Furthermore, it will be essential that any decisions taken under the NCT, given their far-

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37 Commission, NCT IIA, 4 June 2020, Section C.

38 CJEU, Case C-413/14 P.

39 General Court, Case T-399/16.

40 Amelia Fletcher, *Market Investigations for Digital Platforms: Panacea or Complement?* [2020], p.11-12, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668289.

reaching implications, are subject to timely and effective judicial review before the European Courts.

7.4 Ultimately, the legitimacy of Commission actions under antitrust law, and the regard in which the Commission is held internationally, derives, in part, from the legal regime which clearly defines the scope for the Commission's powers and the European regime of effective judicial protection for parties subject to those procedures. Given the potentially far-reaching implications of the Commission's NCT proposals, investigated parties' procedural rights and entitlement to judicial protection cannot be watered down. As noted by the President of the General Court Marc van der Woude: '[…] *where the contested conduct of the public authorities is repressive in nature, it is hard to conceive, at least in free democratic societies, that citizens and firms can be condemned on the basis of estimates, approximations or guesses, even if they are informed ones. Uncertainty must then be balanced against the requirements of the presumption of innocence.*'[41] The Commission should therefore ensure that any moves towards remedy-based outcomes does not conflict with the fundamental legal protections afforded by the EU legal order.[42]

8. Conclusion

8.1 The introduction of the NCT as currently proposed by the Commission is bound to have far-reaching implications and is likely to result in a paradigm shift in EU competition law enforcement. As the Commission's thinking around the scope of the NCT evolves, it is crucial that it clearly defines in concrete terms the scope of the issues the NCT is seeking to address and any alleged enforcement gap which the NCT is designed to fill. Should the Commission decide to move ahead with the introduction of the NCT, it is of paramount importance that clarity is provided on the applicable legal test for intervention, the threshold for the imposition of remedies and the procedural safeguards for the companies involved, to safeguard the rule of law and ensure that companies enjoy the requisite legal certainty already provided by Articles 101 and 102 TFEU.

8.2 We would urge the Commission to engage openly with interested parties in the next steps of its consultation in developing its further thinking on whether any, and if so what, steps should be taken to address any perceived enforcement gaps while maintaining Europe's reputation for a clear legal framework and effective judicial protection, which underlines the legitimacy of Commission actions in the realm of antitrust.

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[41] Marc van der Woude, *Judicial Control in Complex Economic Matters*, Journal of European Competition Law & Practice, Volume 10, Issue 7, September 2019, p.415–423, https://doi.org/10.1093/jeclap/lpz037.

[42] In accordance with Article 6 of the European Convention of Human Rights and Articles 47 and 48 of the EU Charter of Fundamental Rights.