

September 2020

Developers Alliance's feedback to the public consultation on a New Competition Tool

1. General considerations

The technology industry represents an essential part of the economy today. Software development and the consequent digital transformation have expanded exponentially, permeating all other sectors. The challenges of the dynamic markets associated with this expansion triggered regulators' scrutiny, mainly with concerns about abuse of a dominant position. Of particular note, digital markets exhibit an inherent network effect, where natural competition (no anti-competitive behavior) tends to produce only one or two companies of scale - until the next inevitable market disruption occurs. Competition enforcement has already addressed concerns related to digital markets, including issues invoked by the inception impact assessments for both proposals - ex-ante regulation, and the New Competition Tool (NCT), respectively.

We emphasize the need for a coherent and future-proof regulatory approach. European entrepreneurs need a predictive and stable regulatory environment. The future legislative proposals should respond to the objective of promoting competition, innovation and consumer welfare.

This position paper is complementary to our comments on ex-ante regulations for online platforms, part of the response to the public consultation on the Digital Services Act.

Issues mentioned in the consultation that are specific to certain sub-sectors, specific markets, or companies, call for targeted intervention. Ex-ante regulation doesn't allow for a sound intervention in these specific cases. Competition policy, instead, represents

the best approach for these problems. A case-by-case assessment and intervention against anti-competitive unilateral conduct should remain the solid basis for competition enforcement. The NCT's role would be to augment the toolbox and provide a more insightful approach to digitally enabled dynamic markets.

2. On structural competition problems

The Commission seeks to gather information not only on the types of market characteristics that may result in structural competition problems, but also "on gaps in Articles 101 and 102 of the EU Treaty". While we understand the rationale of the first aim, we disagree with the latter. The new regulation setting up the NCT, with art. 103 and 114 of TFEU as its legal base, should "give effect to the principles set out in Articles 101 and 102". There is no clear evidence, in our opinion, that the current framework is not effective in addressing such issues. However, we observe the need to strengthen antitrust enforcement by more effective organisational and procedural means to tackle dynamic markets.

There is no single feature that is particularly unique to the digital markets where software developers are active. Some characteristics may be prevalent in digital markets. In certain cases, a bundle of them may pose difficulties to competition enforcement, as they require a more insightful assessment.

Sections 6 and 7 of the questionnaire, listing market features and scenarios, present false assumptions. The mere presence of one or more of these characteristics shouldn't serve as a "ready to make recipe" for intervention in a market, without establishing anti-competitive unilateral conduct.

As an illustrative example, **strong network effects** don't necessarily impede innovative services to enter the market, and recent evolutions in the videocommunications market prove it.¹ There are relevant elements that contribute to the success of a better product despite the presence of strong incumbents. The number of users in a platform is not necessarily predictive of market power and network effects

¹<https://truthonthemarket.com/2019/04/24/what-zoom-can-tell-us-about-network-effects-and-competition-policy-in-digital-markets/>

are not always positive, but can be negative². Therefore, regulators should carefully assess the impact of direct or indirect network effects and mind the possibility of disruptive innovation. What might sound cliché, that competition is a click away, reflects the reality of digital entrepreneurs, which are always alert for opportunity. Also, assessing the network effects can prove a difficult exercise; an in-depth economic analysis is recommended in order to avoid misunderstandings³.

Furthermore, the assumption that “customers typically use one platform (i.e. they predominantly **single-home**) and cannot easily switch” is incorrect. Usually a faithful user base indicates that the online platform or the digital product or service is satisfying certain needs and offering a user experience that other products don’t. There are areas where consumers prefer single-home, (for reasons of cost or convenience), but in other areas, like social networks, multi-homing is widespread. Single-homing cannot be considered as problematic in itself and definitely cannot (at least alone) indicate a structural problem in the market. In this context, the gatekeeper scenarios, as described in section 7 - “situations where customers typically predominantly use one service provider/platform (single-home) and therefore the market dynamics are only determined by the gatekeeper” doesn’t make sense.

Another relevant example of a false assumption is the “**zero-pricing**” characteristic. Ad-based business models that offer free or low-price access to different online products and services, brought enormous benefits for their customers and allowed many startups and innovative small companies to thrive. Software developers, in particular, have capitalized on such business models, which have driven various media industries for over 100 years. The free and freemium price-models are the prevailing choice for mobile app developers, giving them the opportunity to reach an audience which is not open to pay for a new and unknown product, and also to put in place efficient marketing at a low cost to grow their user base and achieve scale. Moreover, the zero-price environment makes multi-homing easier.

All listed scenarios can represent “a source or part of the reasons for a structural competition problem”, but at present, apart from regulatory barriers, we don’t perceive

² <http://sites.bu.edu/tpri/files/2018/07/tucker-network-effects-antitrust2018.pdf>
³ Varian, Hal R., Use and Abuse of Network Effects (September 17, 2017)
<https://ssrn.com/abstract=3215488> or <http://dx.doi.org/10.2139/ssrn.3215488>

any of them as problematic for the markets relevant for software developers. Articles 101 and 102 of the EU Treaty are suitable and sufficiently effective to address those market situations, excepting the above mentioned regulatory barriers which need to be further tackled by EU and national regulators.

The regulatory barriers are related to the persistent fragmentation of the Single Market, especially in areas such as data protection and privacy, content regulation and services. These are discouraging ambitious entrepreneurs to start or keep their businesses in the EU. Even large online platforms struggle with 27 different compliance policies. We are looking forward to the revision of the e-Commerce Directive which offers the opportunity for harmonized rules and more legal clarity. We remain concerned nevertheless of the unintended effects of the data protection and privacy regulations and announced regulatory initiatives (such as on artificial intelligence). Interference between competition policy and other policies is also an issue of concern.

With regard to **algorithmic collusion**, Article 101 remains a solid legal base for tackling all scenarios where algorithmic pricing can raise competition issues. More research in this area is needed, in order to better understand the possible consequences of the behaviour of pricing algorithms⁴. One could observe lately valuable analysis related to new types of collusion (e.g. blockchain-based collusion, particularly when it involves the use of smart contracts)⁵

We recommend caution in an early intervention in “**tipping markets**”. This could have many unintended consequences, as the impact of remedies could drastically change the course of those markets. Digital markets are naturally prone to tipping, but inherently transient. It is also difficult to see tipping risks as inevitably negative in many digital services markets, as there are various offers co-existing and competing, and the point where scale builds is often driven by accelerating efficiencies and consumer benefits. Product differentiation is key in having a competitive advantage and all companies, big or small, are striving to offer the highest quality, solutions and functionalities, design and user experience, and customer services. The differentiation relies on hard work and innovation rather than on scale.

⁴ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3304991

⁵ <https://jolt.law.harvard.edu/digest/the-fundamental-unimportance-of-algorithmic-collusion-for-antitrust-law/>; <https://thibaultschrepeel.com/en/publications/>

Tipping markets should not be considered an a priori problem, as they are inevitable for many digital segments, with or without intervention. Of course, intervention is required when a firm is strengthening its market position through exclusionary behaviour, and Article 102 serves its purpose well. Nevertheless, we acknowledge that the NCT could serve as an instrument of vigilance for tipping markets with players that are not dominant within the meaning of Article 101 and 102. It would not only allow an insightful understanding of the market dynamics, but also would help in finding the appropriate remedies when intervention is found to be necessary.

In both consultations, the notion of “**gatekeeper**” is unclear. According to section 18, it comprises the following elements:

- access to a high number of customers
- single-homing
- “business operators need to accept the conditions of competition of the platform - including its business environment - to reach the customers that use the specific platform”
- may not necessarily be ‘dominant’ within the meaning of Article 102 of the EU Treaty,

and raise the following concerns:

- “Gatekeepers determine the dynamics of competition on the aftermarket/platform”
- “As customers/users cannot easily switch, they have to accept the competitive environment on the aftermarket /platform”
- “Business operators can only reach the customers that use the specific platform/aftermarket by adapting their business model and accepting their terms and conditions”.

These elements cannot serve as a criteria for such significant interventions leading to ex-ante remedies, or more problematic, ex-ante regulation. We are concerned by the lack of legal accuracy (what represents a “high number of customers”?) and false assumptions (see the above comments about multi-homing).

As a further matter, there could be a structural problem if online platforms wouldn’t control their business environment and set out uniform rules and guidelines for their customers, business users and/or consumers. This is valid also for offline marketplaces.

Any disproportionate behaviour would automatically trigger customers disapproval and will ultimately force the online platform to respond to their complaints, to minimise the risk of losing customers or provide an opening for a disruptor.

The EU Regulation 2019/1150 on platform-to-business relations ('P2B Regulation'), which started to apply as from 12 July 2020, provides important rules for online platforms' ecosystems. The transparency requirements represent an insightful tool for business users and consumers, but also for relevant authorities (e.g. competition authorities) to understand the outcome of certain mechanisms/processes, like ranking. At the same time, increased transparency obliges online platforms to enhance their awareness of the needs of their users. The regulation also sets important obligations for online intermediaries services intended to ensure fair commercial practices (e.g. notice periods, specific contractual terms, internal complaint systems). The current framework under Article 102 is suitable to address problematic unilateral conduct in the situation of a dominant position involving such scenarios.

It is impossible to draw a one-size-fits-all solution, a general definition of "gatekeeper". Instead, the NCT should focus on an efficient case-by-case assessment, on the exercise of market power by dominant and non-dominant market players, without imposing a disproportionate and illegitimate standard. In this regard, we recognize the merits of the NCT's scrutiny role compared to an unfitting regulatory framework.

3. On policy options and the institutional set-up of a new competition tool

As mentioned in the general remarks, the NCT should enhance the enforcement toolbox, allowing a more in-depth assessment and flexible ex-ante approach when tackling digitally enabled dynamic markets.

We emphasized in our feedback⁶ to the Inception Impact Assessment that the NCT should not be used to distort markets on purpose, according to an industrial policy agenda. The proposed options raise legitimate concerns related to a discretionary approach and the significant impact of the outcomes (if remedies are to be imposed).

⁶<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool/F535300>

The irreversible path that the NCT could lay down⁷ calls for extreme caution and a rigorous impact assessment.

An ex-ante intervention could be effective if it is principles-based, hence future proof, tailored to the specific situations arising in each market. In this sense, an approach in the form of a code of conduct, would provide principle-based solutions and useful flexibility to encourage companies to adjust their behaviour. Codes of conduct should involve all affected players participating in the market under scrutiny. This approach, recommended by the UK Report of the Digital Competition Expert Panel⁸, could be complemented by specific ex ante-guidance for digital and other fast-moving markets, as proposed by the Joint Memorandum of the Benelux competition authorities⁹.

NCT should have a broad scope, and not be limited to digital markets. The rapid pace of digitisation is transforming many economic sectors and the limits of digital markets are increasingly difficult to delimit.

There are some **critical aspects** to consider when designing the framework for NCT:

- risks of overlapping with ex-ante regulation and enforcement based on Articles 101 and 102 TFEU, the current sector enquiry regime, but also with regulatory and competition interventions at national level. There is a strong need for clear boundaries in order to avoid legal uncertainty.
- risk of derogating from the fundamental principles established by the Treaty and the relevant jurisprudence of the European Courts. The new tool should enhance antitrust enforcement, not set out new competition rules.
- ensuring the proportionality of intervention and a sound legal test. The legal framework for NCT should provide an evidence based approach, with appropriate checks and balances and adequate procedural safeguards, including full rights of defence and judicial review. Relevant case-law could guide the evidentiary standards and burdens of proof.

⁷<https://chillingcompetition.com/2020/06/11/can-this-be-the-new-normal-10-questions-on-the-proposed-new-competition-tool/>

⁸https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf

⁹<https://www.belgiancompetition.be/en/about-us/publications/joint-memorandum-belgian-dutch-and-luxembourg-competition-authorities>

- a cautious approach in imposing remedies, in order to avoid unintended consequences, especially for smaller players. The significant impact of remedies based on rebuttable presumptions, without finding an infringement, can act as a disincentive to invest¹⁰.

It is crucial that **all the concerned participants in the markets be able to provide their input during the proceedings**. Early intervention in a market requires a delicate touch and should strictly pursue the objective of ensuring a climate of fair competition. If all market participants are involved, it is easier to avoid unintended consequences, based on a deep understanding of the dynamics of that particular market and solid empirical evidence.

The NCT should be also an instrument of **enforcement cohesion within the Single Market**. The new enforcement procedures should have the central presence of DG COMP, supported by enhanced cooperation with and between Member States competition authorities and other national authorities (especially on data protection and consumer protection).

A hasty intervention on digital markets could have a chilling effect on entrepreneurship and innovation in the EU. It is almost impossible to predict market evolution or technological transformations and the competition policy should stay anchored in its fundamental principles instead of engaging on a speculative path¹¹.

Therefore we see the NCT as a flexible and agile tool for participative antitrust, more suitable for ex-ante scrutiny than a rigid approach through ex-ante regulation, which risks to set a Procrustean bed for European digital markets.

¹⁰"(...)the imposition of potentially far reaching remedies without finding an infringement raises questions as to the legitimacy, proportionality, and effectiveness of such remedies as well as to the potential to undermine incentives to invest."
<https://www.covcompetition.com/2020/06/the-new-normal-eu-commission-prepares-a-new-competition-enforcement-tool-aiming-at-structural-competition-concerns/>
¹¹<https://www.cato.org/publications/policy-analysis/time-different-schumpeter-tech-giants-monopoly-fatalism>