EuroCommerce for retail & wholesale

Position Paper

7 September 2020

Commission consultation on a New Competition Tool

Key messages

EuroCommerce shares the Commission's aim of ensuring that markets remain open and contestable for innovators, businesses, and new market entrants. Markets, and in particular digital markets, are developing fast and are expected to continue to do so, with new services and business models constantly emerging. It is therefore critical that any possible policy intervention aimed at addressing certain business practices or models does not unintentionally stifle innovation or the dynamism on the market and thus undermine the ability and incentives of European players to grow and compete.

To remain competitive and grow, retailers and wholesalers need a regulatory framework that provides legal certainty and a level playing field and gives incentives to develop their businesses online as well as offline. We ask the Commission to take these factors into account when conducting their impact assessments.

We wish to make the following main points, which we will detail further below:

1. We are**, not convinced that a New Competition Tool would contribute to creating such a framework**. Rather, we are concerned that this would represent a fundamental change in how markets are assessed, and competition policy enforced, by **focusing on market structures rather than on infringements**. We would ask the Commission to provide a much clearer justification for the development of a completely new tool, in any of the forms proposed.

2. **A new tool allowing the imposition of remedies without a finding of infringement could lead to a disproportionate interference in the market economy** and have a chilling effect on innovation, growth and investment.

3. In our opinion, **Articles 101 and 102 TFEU and the related EU competition law tools are sufficiently flexible to catch all new forms of conduct** that pose a threat to competition and the competition rules toolbox is under review, in particular to adapt it to digital developments. In addition, the Commission has the ability to undertake sector inquiries and regulate in cases of market failure.

4. We are also not convinced, that the legal basis proposed by the Commission is appropriate. **Neither Art. 103 TFEU nor Art. 114 seem to be an appropriate legal basis**.

5. We would welcome more detail on how the suggested approach could contribute to more competitive and innovative markets and consumer welfare. We also ask whether the same results could not be achieved by **adapting some of the existing competition law toolbox through the ongoing review or by exploring self-regulatory instruments**; and whether experience from other sectors can provide examples of successful alternative approaches.

6. If the Commission pursues this new tool we underline the importance of imposing proper **safeguards and due process,** and would recommend to limits its **application to areas where competition problems have been observed that cannot be solved by more proportionate means and have an appreciable effect on trade between EU member states that is not limited to national or regional markets within one member state.** Furthermore, the relationship with Art.101 and 102 would need to be clarified.

1. Legal basis

2. **Art. 103 TFEU does not seem to be an appropriate legal basis.** The scope of the authorisation to the Council to adopt all appropriate regulations and directives is determined by the content of Articles 101 and 102 TFEU. Regulations or directives must serve to implement these provisions but may neither amend nor supplement them. Art. 102 TFEU, for example, as interpreted by the ECJ in the Continental Can case (ECJ, Case C-6/72), prohibits a merger as abusive only if it leads to a strengthening of an already existing dominant position, but not if it first creates a dominant position. In this respect, it is highly doubtful whether the options which link remedies neither to an infringement of competition law nor to a dominant position can be based on Article 103 TFEU.

3. **Art. 114 TFEU will in all likelihood not be considered as a supplementary legal basis either**. According to the case law, Article 114 TFEU is the appropriate legal basis for approximation measures aimed at improving the conditions for the establishment and functioning of the internal market by removing or preventing obstacles to fundamental freedoms or distortions of competition. However, according to the Roadmap, the aim is not precisely to eliminate distortions of competition, but to eliminate so-called structural risks and deficits below the radar of competition law. Nor would the information and disclosure obligations for companies to "identify" risks, which the NCT would certainly entail, be covered by Article 114 TFEU, as the discussion on the establishment of a Single Market Information Instrument (SMIT) a few years ago showed. The latter failed not least because of the lack of a legal basis for the mandatory information and data collection rights provided for in the instrument.

2. Identifying structural market problems and scenarios

4. In the consultation questionnaire the Commission seeks stakeholder feedback on the characteristics of market conditions and scenarios where structural competition problems could potentially be identified: anti-competitive monopolisation strategies, oligopolistic markets, markets where pricing algorithms are prevalent, tipping markets and markets characterized by “gatekeepers”.

5. We agree, that in specific cases, these situations may give rise to competition concerns, especially where entry barriers, of a regulatory or non-regulatory nature, in a given market could limit competition from existing players and/or limit new entrants into the market**. However, we wonder whether markets tipping, dominance or network effects in themselves always require competition enforcement action**. These can be a normal result of successful growth strategies and scale efficiencies and can generate economic and consumer benefits. They may however give rise to concerns where they lead to restrictions of competition and limit entry into a given market.

6. The Commission already has powers to conduct sector inquiries and take follow up action where such concerns arise. As we have seen in many instances in the past, a sector inquiry constitutes an effective and proportionate tool to identify structural competition problems and their possible harm to competition and consumer welfare; they provide the basis for the Commission to take action as required (e.g. recommendations, enforcement action, legislation). **We therefore ask the Commission to focus on the effects on competition and consumer welfare rather than on market structures themselves and provide for these to be assessed individually on their merits and effects**.

7. A market structure approach runs the risk that it will necessarily have to be based on uncertain forecasts of future market developments and be open to broad interpretation, leading to considerable legal uncertainty and possibly false incentives for companies.

8. We support a **case by case approach**, rather than a one-size-fits-all new tool. Most retail and wholesale markets remain anchored in physical product markets where consumers pay for the products and services that they purchase. Providers compete on price, quality of service and innovation and consumers shop around for the deal that they consider the most attractive. There may be some exceptions where there are strong network effects (such as online search addressed in the *Google Shopping* case*)* and where it is harder for smaller rivals to compete because the service is offered free of charge to consumers and is monetised through ads. In such cases there may be multi-sided network effects that increase barriers to entry. We ask the Commission to assess whether such individual instances would warrant the adoption of a completely new tool or

could be included in the review of the existing tools, particularly by **updating the market definition notice to take the dynamics of such multi-sided markets better into account**.

3. Tackling structural competition problems in existing and/or sector specific law

9. Where competition issues arise, it is appropriate for the Commission to review whether existing law is fit for purpose or whether there is a need for change to address gaps in the present legislation.

10. A number of existing competition rules (the vertical and horizontal block exemption regulations and guidelines, the merger control regulation, the market definition notice, etc.) are under review to ensure that they are working properly and fit for the new digital environment. **EuroCommerce welcomes this review process and considers that this could capture many of the aspects the Commission is seeking to address with the New Competition Tool (NCT),** and that this review should be completed before pressing ahead with widely-drawn new powers under the NCT. For example, the existing tools could address potential gaps by:

    - Tightening the definition of markets e.g. in respect of product substitutability, developing a common methodology to assess multi-sided markets including zero-price markets, and take better account of channel substitutability.
    - Updating the existing guidance on abusive exclusionary conduct by dominant players[1] to reflect the digital environment.
    - Strengthening existing interim measures to ensure that infringements of Art. 101 and/or Art. 102 TFEU are suspended or reversed while DG COMP comes to a final decision.
    - Updating the horizontal guidelines on information exchange, particularly with regards to data sharing, signalling and the risk of collusion in the context of algorithmic pricing.
    - Including consideration of subsidies from foreign states to companies active in the internal market in the State Aid rules as well as the FDI Screening mechanism as suggested in the Commission White Paper on Foreign Subsidies[2], to avoid markets tipping due to state supported players leveraging their position in the home market to gain a privileged position on the internal market.

11. **We are concerned with the term "gatekeeper"** as referred to in section 18 of the NCT questionnaire. The term is largely undefined and open to potentially very wide interpretation, leading to legal uncertainty. This could risk creating disincentives for businesses to grow further (see our contribution to section III of the DSA consultation for further elaboration). We see the **Platform to Business Regulation** as an important tool to ensure an open and transparent business environment online. We ask the Commission to ensure that, if such an approach was deemed necessary, any further "ex ante" instrument should be clearly linked to that regulation. The Platform to Business regulation has however only been in application for a very limited time and should be allowed to demonstrate its effects on the market before adding further – potentially not needed - regulation on top of it – be it an ex ante instrument or the NCT.

12. In other areas such as the aftersales market for car repair and payment cards and services, **market failures** have been identified and sector-specific regulation introduced to seek to remedy these failures. EuroCommerce supports such interventions when clearly justified and encourages the Commission to keep monitoring the need for updating existing, or developing new, sector-specific legislation where market failure is evident or where it has become clear that the existing sector specific regulation is not working as intended.

13. As mentioned above the Commission already has the power to undertake **sector inquiries** "*when it believes that a market is not working as well as it should, and also believes that breaches of the competition rules might be a contributory factor*"[3] [4]. Sector enquiries have proven effective in uncovering anticompetitive behavior and in providing a basis for the Commission to take

[1] 2009/C 45/02 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings; This guidance sets out the practices that dominant players cannot engage in, but is very much based on the physical economy.

[2] European Commission White Paper on levelling the playing field as regards foreign subsidies, 17. June 2020

[3] DG COMP website here

[4] https://ec.europa.eu/competition/antitrust/sector_inquiries.html

enforcement and/or regulatory action. Examples include the Commission's e-commerce enquiry which led the Commission to take a number of enforcement actions (e.g. Nike, Sanrio, Guess, Phillips & Marranz, etc)[5]. The inquiry into roaming opened in 2000[6] led to the adoption of the Roaming Regulation in 2015. The inquiry concerning payment cards in 2006,[7] in addition to further enforcement action, was a step towards the 2012 Green paper and the Multilateral Interchange Fees Regulation adopted in 2015. Very recently the Commission also opened a sector inquiry into consumer IoT, looking into, amongst other things, the effects of voice assistance on competition[8].

14. This approach would be in line with current enforcement practice and in our view be sufficient and effective to address key issues identified by the Commission for the NCT[9], without developing a completely new tool. Furthermore, it would allow the Commission to gather solid evidence to base any legislative actions on, in line with the better regulation guidelines

15. We would also ask the Commission to take into account **the cumulative impact of the current wide set of initiatives[10]** as well as the ongoing implementation of the last legislature's 16 Digital Single Market initiative covering EU online markets, and to ensure **equal treatment** between EU and foreign-based operators.

4. Limited scope including case-by-case effects tests

16. We would hope that the Commission will address the concerns listed above before deciding to move ahead with a new tool. Any such proposal should have a clearly-defined scope, **focusing on areas where competition problems have been observed that cannot be solved by more proportionate means and have an appreciable effect on trade between EU member states that is not limited to national or regional markets within one member state.**

17. Given the novel nature of the enforcement powers proposed under the NCT, we consider it advisable, should the Commission proceed with the NCT, to ensure that all regulators and the market become familiar with its application initially in a limited area where the most serious competition problems have been identified. We further recommend that the Commission clarify that any instrument should be applicable only in cases where there is a **cross-border dimension**, and not to purely national cases.

18. A **case-by-case approach** based on the specific activities companies are engaged in online and offline, and their effects on competition and consumer welfare are, in our view, more appropriate than a one-size fits all approach. With regard to platforms, as defined in the stakeholder consultation, they cover widely differing types of operators offering diverse services with only their use of the internet in common – a marketplace, a social media platform or a platform hosting apps are operating in very different markets and any instrument or regulatory action needs to take those different circumstances properly into account. An approach based on **effects tests** rather than focusing on certain market structures would be in line with the recommendations made by the three experts' report to the Commission on "Competition policy in a digital era[11]".

5. Remedies and safeguards

19. **A new tool allowing the imposition of remedies without a finding of infringement could lead to a disproportionate interference in the market economy** and have a chilling effect on innovation, growth and investment. Therefore, it is important that any new tool should be accompanied by **appropriate safeguards, clearly defined rights of defense and due process**, e.g. as provided for

[5] Guess (AT.40428) and consumer electronics (AT.40181, AT.40182, AT.40465 and AT.40469)
[6] https://ec.europa.eu/competition/sectors/telecommunications/archive/inquiries/roaming/index.html
[7] https://ec.europa.eu/commission/presscorner/detail/en/IP_06_496
[8] https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1326
[99] see Commission IIA on a New Competition Tool here
[10] such as the industrial strategy, the development of a carbon border tax, a European instrument of reciprocity in public procurement, treatment of foreign state owned or subsidized enterprises, ensuring the effectiveness of European trade defense instruments with regard to subsidies, etc.
[11] Competition law in a digital era

in the UK by the Competition and Markets Authority under its market investigation tool[12].This should include a case-by-case analysis and a written statement of objections provided to the relevant addressees of any European Commission decision taken under the new tool. We would recommend that the Commission establish an **independent panel and clear rules on transparency and involvement of the parties** to ensure due process under any new tool.

20. We would ask the Commission to **fully assess the relationship between an NCT and Articles 101 and 102 TFEU**. The options set out in the NCT inception impact assessment appear to target exclusively or to a very substantial extent single firm conduct but without providing the substantive and procedural safeguards enshrined in Article 102 TFEU. Absent adequate safeguards, this could create an incentive to bring cases under the NCT instead of Article 102 TFEU. In particular, it should be made clear that Article 102 TFEU and not the NCT must be applied to any conduct caught by that Treaty provision to ensure that Article 102 TFEU remains the main EU competition law tool for addressing single firm conduct as contemplated by the Treaty.

21. Imposing remedies to avoid markets tipping is similar to imposing **interim measures, a tool which is already available.** The Commission appears to be concerned that it will not be able to intervene sufficiently quickly in markets such as online search to protect competition effectively. However, the *Broadcom case* shows that the existing toolbox enables the Commission to intervene quickly and tackle concerns with important issues such as exclusivity and prevention of multi-homing.

22. While we can see the merits of applying interim measures and understand the ongoing discussion over the standard of proof, **we do not believe that the burden of proof should be reversed**. This would fundamentally change EU standards of due process and create legal uncertainty, with a risk of reducing incentives for companies to invest and innovate.

23. Within the scope of proceedings under Art. 101 and Art. 102, the Commission can already influence market structures today, in particular through obligations on the part of the companies, if a competition problem has been identified beforehand and the Commission has provided evidence of an infringement by the part of the companies concerned. Merger control also allows a no-fault market structure control. **We therefore do not see the need for a new competition tool to achieve this.**

6. Relations with the ex ante instrument

24. The ex-ante instrument and New Competition Tool represent two new regulatory instruments aimed at achieving very similar objectives. We ask the Commission in its impact assessment to provide evidence that there is an overall need to establish a new mechanism whilst the existing competition rules are being adapted to address challenges arising from digitalisation and other market development, and substantiate the need for two different tools to address very similar issues. It would also be important to clarify exactly the interplay between the two instruments and avoid regulatory overlap. This would be in line with better regulation principles and commitments to limit regulatory intervention to what is strictly necessary.

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[12] Guidelines for market investigations: Their role, procedure, assessment and remedies