Expert Paper

ERT Response to the Consultation on the New Competition Tool

September 2020

ERT on Competition Policy

ERT strongly believes in competition policy and enforcement to secure fairer markets and strong competition. These are fundamental to the functioning of the internal market and to the benefit of EU consumers.

As outlined in ERT's strategic paper launched in April 2019 entitled *Strengthening Europe's Place in the World*, companies led by ERT Members are committed to creating jobs and prosperity in Europe but call on policymakers to create the required framework conditions for European companies to compete successfully and at scale globally.

ERT voiced in its *Competing at Scale* publication (October 2019) its deep conviction in competition policy and enforcement to secure fairer markets and strong competition. ERT also welcomes the increasing focus in Europe (at both the Commission and NCA level) on the challenges posed by changing market demands, including the digitalisation of all parts of the economy.

As a leading competition authority, DG Competition sets an important global example, and its messages carry significant weight.

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1. Introduction

1.1 The Competition Policy Working Group of the European Round Table for Industry (hereafter 'ERT') welcomes the European Commission's willingness to ask challenging questions about whether the competition rules are effective in the context of digitalisation, the fast pace of innovation in many sectors of the economy, and the emergence of new sources of finance, business models and powerful platforms.

1.2 ERT generally agrees that the current competition tools should be refined to remain effective. For example, it is opportune to ensure that the ongoing reviews of the horizontal and vertical cooperation rules, and the market definition Notice are fit for the challenges posed by the modern economy, the particular characteristics of digital platforms and the challenges of meeting sustainability targets, without unduly harming innovation incentives.

1.3 The proposed New Competition Tool (hereafter 'NCT'), on the other hand, does not seem to belong to the EU competition toolbox. Unlike ex ante regulation, EU antitrust rules are traditionally applied once problematic conduct has been identified in the context of defined markets and where there is a case to argue that the alleged distortion impacts the competitive process. Digital platform markets have raised new challenges and a debate that suggests that the required solutions imply a less prominent role for market definition ("we should put less emphasis on analysis of market definition, and more emphasis on theories of harm and identification"[1]) or even firm conduct ("the challenges to effective competition in digital markets do not come about solely because of platforms' anti-competitive behaviour and acquisition strategies"[2]). ERT considers that an NCT which disregards traditional considerations of market definition and firm conduct is not the appropriate response.

1.4 ERT queries whether there is an adequate legal basis for an instrument as far-reaching as the NCT. More fundamentally, we strongly query whether there is actually any significant enforcement gap that needs to be filled. This question could also be posed for any ex ante regulatory instrument for large online platforms, the Digital Services Act (hereafter 'DSA').

1.5 If at all, any NCT would have to be a scope-limited complement to a possible DSA ex ante regulation and only a proportionate response to a clearly articulated problem. The NCT would also need to consider the appropriateness of any dominance-based tool or market structure-based tool.

1.6 Reliance on an NCT to shape markets is significantly more interventionist than typical infringement proceedings and the imposition of fines. Given the characterisation of competition law as quasi-criminal in nature, it is subject to robust rights of defence and evidentiary standards of proof and full judicial review by the Court of Justice.[3] An NCT that would allow the Commission to effectively redesign parts of the economy, including forced divestments likely below market value, without finding infringement or imposing fines as a means of avoiding the unlimited jurisdiction of the Court of Justice would be inconsistent with the fundamental principles that underpin the EU competition law framework. Even if the NCT would not lead to finding of infringements or the imposition of fines, it would still constitute a considerable intrusion into companies' freedom of trade and industry. It is therefore critical that the NCT – if it were to be implemented despite the reservations outlined below – be subject to the same standards of full judicial review. These safeguards cannot be short-circuited.

1 European Commission, 'Competition policy for the digital era - A report by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer' (March 2019) p. 3.
2 UK Digital Competition Expert Panel, 'Unlocking Digital Competition' (March 2019) p. 8.
3 Alexander Kornezov, Judicial Review of Commission Decisions and Judicial Protection, in EU Antitrust Procedure, Oxford University Press, 2020.

2. Is there a gap such that existing tools and traditional doctrines are manifestly insufficient?

2.1 The current proposal would confer on the Commission powers that are significantly more interventionist in the economy than the ability to impose fines or prohibit a prospective merger. We respectfully submit that the Commission should clearly define the circumstances in which it is unable to act (or can only act when it is too late) with the tools that it has today, especially if those tools are to be complemented by targeted ex ante regulation under the DSA (which would need to be scrutinised also).

2.2 From the list of situations the Commission seeks to tackle with the NCT,[4] it appears that the existing competition rules are sufficiently flexible to cover most of them (or will be sufficient once updated further in the context of globalisation and digitisation, in particular with regard to the ongoing reviews of the Horizontal and Vertical Guidelines and Notice on Market Definition). There are a range of ways in which they can be employed to capture attempts at monopolisation by gatekeeper platforms, tacit collusion, and even problematic unilateral conduct of non-dominant companies in a dynamic analysis.

(a) Articles 102 TFEU and the EU Merger Regulation (hereafter 'EUMR') have been interpreted broadly to capture competition problems caused by oligopolies. The Airtours case lays down very specific conditions for the finding of collective dominance: (i) each member of the oligopoly must know how the other members are behaving in order to adopt the same policy (monitoring mechanism); (ii) there must be a deterrence mechanism allowing firms to sustain collusion; and (iii) customers and competitors must not be able to jeopardise the collusion.[5] Other judgments (Irish Sugar[6], Compagnie Maritime Belge[7]) have aligned the 102 and EUMR tests, clarifying that structural links between the parties are not necessary for a finding of collective dominance.

(b) There is nothing preventing the Commission from developing its analysis of foreclosure incentives under Article 102 TFEU by drawing on its conglomerate effects analysis in the merger review context.[8] In fact, it may be helpful for the Commission to update its Article 102 Enforcement Priorities Guidelines to address this and certain other issues not currently covered.

2.3 Competition law intervention that tries to prevent the emergence of future market players with some sort of entrenched or gatekeeper function, where competition is for the market rather than in the market, may change incentives and deter disruptive innovation. It is highly speculative to try to diagnose the likely causes of a predicted tipping that would be sufficiently problematic to justify intrusive public intervention and to do so in a proportionate way.

3. There is scope for the Commission to make better use of the existing tools, for example more targeted investigations, interim measures, and sector inquiries

3.1 The Commission already enjoys powers that can be helpful to address the listed concerns in most cases:

(a) Sector Inquiries: where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted (Article 17 of Regulation 1/2003). Sector inquiries can be employed in a more targeted and nimble way and are more proportionate in terms of their potential consequences where market failures or inefficiencies are suspected;

(b) Behavioural or structural or hybrid remedies following a finding of infringement in the context of Articles 101 and 102 (especially once these tools are updated further to the ongoing reviews of the Horizontal and Vertical Guidelines and Notice on Market Definition) (Article 7);

(c) Interim measures (limited in time) and subject to a proper investigation and the existence of prima facie illegal behaviour (Article 8);

(d) Commitments (Article 9).

3.2 In addition, under the current rules, nothing

4 Situations listed are: markets where structural competition problems may arise due to repeated strategies by companies with market power to extend their market position into related markets, oligopolistic markets prone to tacit collusion in order to preserve/improve competition, markets where structural competition problems may arise due to anti-competitive monopolisation, markets where pricing algorithms are prevalent, markets where there is a risk of tipping, markets characterised by 'gatekeeper' platforms.
5 Case T-342/99 *Airtours plc v. Commission* [2002].
6 Case T-228/97 *Irish Sugar plc v. Commission* [1999]
7 Cases C-395 and 396/96 P, *Compagnie Maritime Belge Transports SA v. Commission* [2000].
8 See also the Commission's decision of 12 September 2016, Case AT.40265, Greek horse race betting (OPAP) based on Article 106 where the Commission looked into the ability and incentives of the Greek betting monopoly to leverage its position in horse race betting into other adjacent betting markets.

prevents the Commission from:

(a) Making non-binding recommendations to companies in a time-sensitive manner (e.g. proposing codes of conducts and best practices) - it has done so recently in the case of Covid-related comfort letters;

(b) Informing and making recommendations/ proposals to sectorial regulators;

(c) Informing and making legislative recommendations.

3.3 To address competition problems in a timely and effective manner (one of the stated purposes of the NCT), the Commission may employ the considerable armoury it already has available to it. It is able to ask questions to understand better how potentially problematic or fast-moving markets are developing, to open more cases and to test new theories of harm and should demonstrate a willingness to close investigations at an early stage when it transpires that there is no credible theory of material harm, and consider how to publicly share the learnings of such case closures [this point seeks to address the fact that we need more guidance in 101 and 102 cases].

3.4 There is nothing to prevent the Commission from testing the law before the courts with punctual decisions that target specific harmful conduct which constitutes an infringement of Articles 101 or 102 TFEU. Together with setting internal deadlines to close proceedings within a reasonable timeframe, more targeted decisions (formal and informal) decision (and guidance) could achieve the objective of more timely interventions.

4. ERT queries whether there is a sufficiently clear legal basis to justify the adoption of the NCT

4.1 The proposed legal basis of the NCT is the combined application of Articles 103 and 114 TFEU.

4.2 Article 103 TFEU does not appear to be an adequate legal basis because the NCT is not intended to give effect to the principles set out in Articles 101 and 102 of the TFEU but rather creates new competition enforcement powers that go beyond these principles. It will be applied in ex ante intervention that is not necessarily related to either the behaviour (misconduct) of the targeted company or any infringement by a firm that enjoys a dominant position in any given market which are the basis of any application of Articles 101 and 102 TFEU.

4.3 Article 114 TFEU is the legal basis for the Commission to propose any legislative tool aimed at harmonising law across Member States in order to avoid fragmentation of the internal market. However, according to the Roadmap, the purpose of a NCT is not to remove distortions of competition law but rather to eliminate structural risks and deficits that are below the thresholds of competition law. The need to harmonise national competition laws, consumer protection laws, or sectorial regulations would have to be demonstrated to justify the NCT.

4.4 A more appropriate legal basis would appear to be Article 352 TFEU (the "flexibility clause") for cases when "action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties", which requires unanimity of the Council and European Parliament's consent. Such Article shows how new Union powers require Member State support as well as democratic involvement.[9]

4.5 Finally, the NCT may address market-wide concerns that fall under consumer policy, which is a shared responsibility between the European Union and the Member States. We note incidentally that the UK Competition and Markets Authority ('CMA'), in applying its market investigation tool, has both competition and consumer powers.

5. Targeted regulation is a better solution to structural problems or market failures in sectors where competition law cannot effectively address the issues

5.1 Competition law driven regulatory provisions are also embedded in EU regulations covering other sectors of the economy (e.g. gas, power, telecoms, railway transport, financial and postal services, etc.), where, for example, unbundling and third party access regimes have been set in place to address concerns similar to some of those characterising new markets.

5.2 In those sectors, DG COMP and other competition authorities can and do make recommendations to regulators or legislators

9 See also the Protocol (No 27) on the internal market and competition: "*The High Contracting Parties, considering that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted, have agreed that: to this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union*".

to address concerns. This was essentially the conclusion reached by the UK CMA in relation to its probe of digital advertising. Despite considerable experience with and pride in its tool, the CMA declined to make a reference for a market inquiry and preferred to make recommendations to the Government on a regulatory reform (para 89 final report).

5.3 Ex ante regulations can be enacted for a period and adjusted to reflect market developments with due legislative scrutiny and democratic legitimacy. The EU regulatory framework for electronic communications, the Open Internet Regulation, the Platform-to-Business (P2B) Regulation, the Digital Content Directive and the revised Payment Services Directive (PSD2) are examples of regulation to tackle indirect network effects, customer acquiescence, information asymmetries and varying levels of dependency on key players.

5.4 The NCT would possibly overlap significantly with the DSA, in particular with respect to addressing concerns around gatekeepers and tipping. If the proposed DSA Package, were enacted, this new legislative tool would tackle market failures to ensure that the key concern identified to date by the Commission of markets characterised by large platforms with significant network effects acting as gatekeepers remain fair and contestable for innovators, businesses, and new market entrants.

5.5 Targeted regulation is often a more appropriate solution in some circumstances, coupled with the application of the existing competition rules, which still have the scope to evolve (for example in terms of extending the consideration of benefits to consumers in sustainability cooperations beyond focus on consumer prices) and in a more timely way. The need for an NCT should only be assessed if an enforcement gap is clearly established in relation to the abusive practices of hyper- or super- scalers / super dominant players in the digital arena.

5.6 As to other markets and sectors (including oligopolistic market structures), ERT considers that the existing competition law framework, and specific sectoral regulation when needed, have proven to be sufficient to address any potential competition issues. ERT also recalls that for European players to remain competitive on a global scale, it is important to avoid the chilling effects of adding extra layers of regulatory scrutiny on top of the already existing rules.

5.7 Adopting a broad horizontal tool primarily designed to tackle problems in one sector of the economy creates complexity with potential spill-over effects creating uncertainty in the broader economy.

6. EU competition framework is not suited for the adoption of a tool such as the UK Markets Investigation ('MI')

6.1 DG COMP cannot act as inquisitor, judge and jury in any NCT process. The Court of Justice's full judicial review is what makes the current EU system compliant with fundamental rights (KME Germany, Chalkor, Galp). If an NCT were to be adapted, robust checks and balances would be fundamental to its legitimacy, which would require substantial changes to the institutional structure of EU competition enforcement.

6.2 The UK MI tool embodies strong governance provisions with numerous checks and balances. It is triggered either by a reference from a limited set of external bodies, or following an own initiative study by the CMA. This market study phase is itself a burdensome exercise for the authority, such that embarking on any subsequent investigation is a serious undertaking.

6.3 The UK MI tool embodies a clear split between the decision to refer a market for investigation taken by the CMA Board, and the final MI decision that is made by an external panel of qualified experts who are non-political highly experienced independent members who are not CMA staff.

6.4 The UK rules provide for a highly transparent process, with the possibility for companies in the targeted market(s) to express their views throughout the whole process. The UK MI tool sets out a continuous dialogue between the affected firms and the CMA, mainly by means of formal hearings, published preliminary conclusions/ proposed remedies which the affected parties can comment on and remedies hearings when the Market Study turns to a Market Reference.

6.5 The CMA has published detailed guidance[10] on its approach to proportionality:

> (a) A proportionate remedy is one that: (a) is effective in achieving its legitimate aim; (b) is no more onerous than needed to achieve its aim; (c) is the least onerous if there is a choice

10 Market investigations guidelines: CC3 (2013)

between several effective measures; and (d) does not produce disadvantages which are disproportionate to the aim.

(b) Applying these principles to the circumstances of particular cases usually involves consideration of remedy options both relative to other effective measures as well as relative to taking no action.

(c) The CMA applies these principles to the evaluation of individual measures within a package of remedies as well as to the package taken as a whole.

6.6 The CMA has concurrent competition law and consumer protection law powers that position it better to take full account not only of regulatory and structural issues but also of consumer behavioural factors, privacy concerns and issues of fairness. Many market investigations in the UK result in recommendations to government or sector regulators to change the law or adapt regulation or how it is enforced rather than specific remedies. In addition, the UK has a system of concurrency between the CMA and these sector regulators that allow the latter to monitor and enforce any MI remedies. Sector-specific regulators are better placed to adjust remedies to fast-changing markets and to ensure adequate enforcement. These important attributes are not present at EU level.[11]

6.7 These unique aspects of the UK MI (two-stage process, transparency, difficulty of devising a remedy within the tight timeline, dual competition/consumer law jurisdiction) and the limitations of DG COMP acting as a de facto regulator in monitoring and enforcing remedies, show that there is no basis for the introduction of an NCT at EU level with a broad intervention scope.

7. The risk of greater uncertainty and increased politicisation of the competition rules globally

7.1 Companies are facing rising geopolitical tensions that have led to protectionist measures and the pursuit of industrial policy objectives under the guise of competition law enforcement in many parts of the world.

7.2 Most countries around the world rightfully look to the EU competition regime as a model to emulate. Should the EU enact the NCT, there is a real risk of a proliferation of such instruments that, in turn, will significantly increase the politicisation of the competition rules around the world. The potential for regulatory drag on global markets will increase exponentially.

The trend towards more intervention and more complexity reduces legal certainty and has a chilling effect on procompetitive initiatives and investments. The EU competition regime must remain a beacon of transparency, predictability and due process.

8. Need for procedural safeguards and conditions for any NCT

8.1 Only if it is established that the combination of the review of the current competition toolbox adapted to the digital economy together with a potential sector specific framework established by the DSA is likely to be materially insufficient, a limited NCT should only be a solution to address misconduct of hyper- or super-scalers / super-dominant gatekeeper platforms that threaten structural harm.

8.2 The NCT should then have strict limitations, clear definitions for the intervention scope and procedural rights of defence, including:

(a) Clear definition of "large digital platforms" is key with a focus on market dominance or gatekeeper status (for consistency, DSA definitions should be used in case this would be introduced);

(b) A focus on making (binding and/or non-binding) recommendations to policymakers, sectorial regulators, and voluntary measures agreed with by the targeted companies;

(c) Any NCT should be impact-tested for a limited period;

(d) Defined timelines;

(e) Transparency/access to information and the case team;

(f) Hearings to ensure constant dialogue with all relevant undertakings concerned throughout the procedure;

(g) Clear separation of investigation and decision-making roles with a review panel challenging the investigation team's findings; and

(h) Full judicial review by the Court of Justice, preferably on a fast-track procedure in the interests of legal certainty.

11 Amelia Fletcher, 'Market Investigations for Digital Platforms: Panacea or Complement?', Journal of European Competition Law & Practice (2020). ERT recommends considering the shortcomings flagged by the author.

9. Conclusions

9.1 For European companies to compete successfully at scale in today's fast-moving economy, they need competition policies that seek to create a global level playing field and that are sufficiently responsive to changing global market conditions, without undue complexity and legal uncertainty.[12]

9.2 ERT welcomes any initiatives to maintain European competitiveness and recognises that:

(a) The Commission could usefully increase the use of existing tools such as sector inquiries, interim measures, speedier and more targeted investigations to establish precedent in shorter timeframes;

(b) EU competition tools may be sharpened but are fundamentally sound. If these are considered insufficient, the possibility of supplementing them with ex ante regulation (focussed on very large dominant gatekeepers) deserves to be evaluated first;

9.3 Quick but targeted enforcement against abusive practices of hyper- or super- scalers / super-dominant gatekeepers via an NCT (where it has been clearly identified that the current competition rules are not adequate in terms of powers or timing) should only be implemented to the extent an enforcement gap is clearly established subject to any proposed DSA ex ante regulation, and subject to two critical caveats: (i) that appropriate procedural safeguards are built in, and (ii) that the new rules do not introduce legal uncertainty in the broader economy.

12 ERT, 'Competing at Scale – EU Competition Policy fit for the Global Stage' (2019) p. 9, available at https://ert.eu/focus-areas/competition-policy/.

The European Round Table for Industry (ERT) is a forum that brings together around 55 Chief Executives and Chairmen of major multinational companies of European parentage, covering a wide range of industrial and technological sectors. ERT strives for a strong, open and competitive Europe as a driver for inclusive growth and sustainable prosperity. Companies of ERT Members are situated throughout Europe, with combined revenues exceeding €2 trillion, providing around 5 million direct jobs worldwide - of which half are in Europe - and sustaining millions of indirect jobs. They invest more than €60 billion annually in R&D, largely in Europe.

This response is submitted by the Competition Policy Working Group of the European Round Table for Industry.

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