Brussels, XXX
[...] (2020) XXX draft

COMMISSION STAFF WORKING DOCUMENT

Annexes 1 - 5

Accompanying the document

Annex 1: Procedural information

1. **LEAD DG, DEcIDE PLANNING/CWP REFERENCES**

Three Directorates-General are in the lead for this impact assessment. These are the Directorate-General for Competition (DG Competition), the Directorate-General for Communications Networks, Content and Technology (DG Connect) and the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG Grow).

The impact assessment compiles information on two projects:

- Initiative for a New Competition Tool, led by DG Competition and registered in Decide as PLAN/2020/7913; and
- Initiative for a Digital Services Act package: ex ante regulatory instrument of very large online platforms acting as gatekeepers, led by DG CNECT and DG GROW and registered in Decide as PLAN/2020/7452.

2. **ORGANISATION AND TIMING**

The inception impact assessments for both initiatives were published on 2 June 2020. These inception impact assessments set out the background of the initiatives as well as their purpose and scope. The inception impact assessments also presented the consultation activities that would be conducted by the Commission (notably a public consultation, external support studies, exchanges with dedicated stakeholders and, for the New Competition Tool, a targeted consultation of the national competition authorities). The inception impact assessments also explained the data collection methodology that would be followed to gather relevant information for the purpose of the impact assessment.

The impact assessment was carried out in close cooperation with other interested Commission services. The inter-service steering group ("ISSG") set up for that purpose comprises representatives of the Directorates-General FPI, JRC, HOME, ENV, FISMA, AGRI, JUST, EAC, TRADE, RTD, TAXUD, ENER, MARE, SANTE, EMPL, MOVE, and ECFIN, the EEAS, as well as the Secretariat-General and the Legal Service, which are associated by default to any such initiative.

The impact assessment for the New Competition Tool, was carried out in close cooperation with the NCAs, which were consulted on the milestones for the evaluation study and the study on consumer purchasing behaviour. The different milestones of the evaluation phase are reflected in the table below:
### Timing

<table>
<thead>
<tr>
<th>Date</th>
<th>Step</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 June 2020</td>
<td>Launch of the initiative in the Commission’s Decide</td>
</tr>
<tr>
<td>2 June 2020</td>
<td>Publication of the Inception Impact Assessments (4-week comment period) and launch of the open public consultation (2 June until 8 September 2020)</td>
</tr>
<tr>
<td>3 July 2020</td>
<td>Upstream Meeting with the Regulatory Scrutiny Board on the Digital Services Act</td>
</tr>
<tr>
<td>10 September 2020</td>
<td>Upstream Meeting with the Regulatory Scrutiny Board on the New Competition Tool</td>
</tr>
<tr>
<td>6 October 2020</td>
<td>ISSG Meeting to consult on the draft Impact Assessment</td>
</tr>
<tr>
<td>8 October 2020</td>
<td>Publication of the following documents concerning the NCT pillar:</td>
</tr>
<tr>
<td></td>
<td>- Summary report of the public consultation</td>
</tr>
<tr>
<td></td>
<td>- Summary of the NCA consultation</td>
</tr>
<tr>
<td></td>
<td>- External support studies</td>
</tr>
<tr>
<td>30 October 2020</td>
<td>Quality check-list</td>
</tr>
<tr>
<td>4 November 2020</td>
<td>Consultation of the Regulatory Scrutiny Board</td>
</tr>
</tbody>
</table>

### 3. **EXTERNAL SUPPORT STUDIES**

3.1. **EXTERNAL SUPPORT STUDIES CONDUCTED IN THE CONTEXT OF THE DIGITAL SERVICES ACT (“DSA”) PACKAGE: EX ANTE REGULATORY INSTRUMENT OF VERY LARGE ONLINE PLATFORMS ACTING AS GATEKEEPERS (“GATEKEEPER INSTRUMENT”)**

- **Impact Assessment Support study commissioned by DG CNECT “Platforms with Significant Network Effects Acting as Gatekeeper”, run by Consortium composed of ICF (lead), WiK and CEPS, budget of EUR 597,850.00 [VIGIE 2020-00630]**

The study followed three objectives:

1. Providing a structured analysis of (i) the issues raised by digital platforms with strong data-driven network effects and (ii) analysis of the ability of current regulation (e.g. competition law; P2B regulation) to address these issues (regulatory failures).
2. Scoping the parameters of intervention which match the problem analysis (identify economic players in scope of the initiative, and criteria relevant to identify these players).
3. In agreement and cooperation with Commission services, help the identification of possible policy options, and provide evidence in analysing their impact.

- **Support study to the Observatory for the Online Platform Economy**, Commissioned by DG CONNECT and DG GROW and run by a consortium composed of PPMI (lead) with Open Evidence, IW and Rand Europe (SMART 2018/0034), budget: **EUR 830,000.00**.

The contractor produced the following analytical papers (AP):
3.2. **EXTERNAL SUPPORT STUDIES CONDUCTED IN THE CONTEXT OF THE NEW COMPETITION TOOL**

We commissioned expert advice reports by renowned academics to inform the most appropriate set-up of the NCT. This includes:

a. A study by Massimo Motta and Martin Peitz on structural competition problems in digital and other markets, as well as a possible intervention trigger for the NCT based on the commonalities between the scenarios identified;¹  

b. A study by Alexandre De Streel and Pierre Larouche on the interplay of the NCTs and sector-specific regulation, as well as possible ways to ensure complementarity between both;²  

c. A study by Heike Schweitzer on the institutional and procedural set-up of the NCT, with the aim of ensuring effective and timely intervention, while safeguarding the right to be heard and judicial review;³  

d. A comparative study by Richard Whish of existing market investigation tools, with a particular focus on the UK Competition and Markets Authority’s market investigation reference tool.⁴  

We also contacted three members of the Economic Advisory Group on Competition Policy (EAGCP), namely Gregory Crawford, Patrick Rey and Monika Schnitzer, who prepared an economic evaluation of the NCT.⁵

---

¹ Massimo Motta is a professor at the Pompeu Fabra University in Barcelona and served as Chief Competition Economist of the European Commission from 2013 to 2016. Martin Peitz is a professor of economics at the University of Mannheim.  
² Alexandre De Streel is professor of European law at the Universities of Namur and Louvain; Professor Larouche is professor in law and innovation at the Faculty of Law at the Université de Montréal.  
³ Heike Schweitzer is a professor in the Humboldt University of Berlin and was one of the special advisers authoring the “Competition policy for the digital era” report.  
⁴ Richard Whish is emeritus professor of Law at King's College London and one of the leading competition law scholars.  
⁵ Gregory S. Crawford is a professor of Applied Microeconomics at the University of Zurich; Patrick Rey is Professor of Economics at the Toulouse School of Economics; Monika Schnitzer is a member of the
These reports are referenced in Annex 5.1 to this document.

4. CONSULTATION OF THE RSB

[to be completed]

5. EVIDENCE, SOURCES AND QUALITY

Reports by the expert group for the Observatory on the Online Platform Economy

- Measurement of the Online Platform Economy
- Differentiated treatment
- Data in the Online Platform Economy

Published for feedback on 9 July

Studies supporting the P2B initiative with relevant input for this proposal

- ECORYS, Business-to-Business relations in the online platform environment FWC ENTR/300/PP/2013/FC-WIFO, 2017 (commissioned by DG GROW & DG CNECT)
- ERNST&YOUNG, Contractual Relationships between Online Platforms and Their Professional Users, SMART 2017/0041 (commissioned by DG CNECT)
- VVA, Data in platform-to-business relations, November 2017 (commissioned by DG GROW)
- GiK et al., Behavioural study on advertising and marketing practices in online social media, June 2018 (commissioned by DG JUST)

Research conducted by the Joint Research Centre

- JRC, An economic perspective on data and platform market power, 2020
- JRC, Market power in app stores, 2020
- JRC, Conglomerates & mergers, 2020
- JRC, Entry and Contestability, 2020
- JRC, Quality discrimination in online multi-sided markets, 2017
- JRC, Platform to business relations in online platform ecosystems, 2017
- JRC, The Competitive landscape of online platforms, 2017
- JRC, An Economic Policy Perspective on Online Platforms, 2016

Other data sources

German Council of Economic Experts and a professor of comparative economics at the Ludwig-Maximilian-University Munich.

6 [to be published]
7 [to be published]
8 [to be published]
9 [to be published]
- Dealroom economic report: Global platforms and marketplaces custom policy intelligence, April 2020
- Report on the Monitoring Exercise Carried out in the Online Hotel Booking Sector by EU Competition Authorities in 2016

CERRE reports and events:
- The role of data for digital markets contestability, September 2020
- Seminar of 4 March 2020, How should Europe address gatekeeping platforms
- Market Definition and Market Power in the Platform Economy, May 2019
- Implementing effective remedies for anti-competitive intermediation bias on vertically integrated platforms, October 2019
- Big data and competition policy, February 2017
- Internet Platforms and Non-Discrimination, December 2017

Sources from the Member States
- Dutch Competition Authority (ACM) Market Study into mobile app stores, April 2019
- Digital gatekeepers - Assessing exclusionary conduct – a study by e-Conomics commissioned by the Dutch government, October 2019
- Dutch position: Future-proofing of competition policy in regard to online platforms, May 2019
- Seminar on the regulatory challenges posed by “structuring platforms” organised on 24 February 2020 in Paris by the French government.
- Non-paper by the French Ministry of Economy and Finance: Regulating structuring digital platforms in favour of competition and innovation in the digital economy.
- French paper: Regulation of structuring platforms: the case of operating systems and app stores, “gatekeepers” of our devices.
- Position of French Competition Authority
- ARCEP’s working paper on the structuring platforms, December 2019.
- The Report by the German Competition Commission, 2020
- German report: A New Competition Framework for the Digital Economy, 9 September 2019

15 https://cerre.eu/events/designing-eu-intervention-standard-digital-gatekeepers
19
23 https://www.tresor.economie.gouv.fr/Articles/7690058a-00e4-44a7-8aed-9a2ee5a04d51/files/c888861f-5516-4e4e-b3ce-a96aaf66b3c34
24 https://www.autoritedelaconcurrence.fr/fr/communes-de-presse/lautorite-publie-sa-contribution-au-debat-sur-la-politique-de-concurrence
26 https://www.bmwi.de/Redaktion/EN/Downloads/a/a-new-competition-framework.pdf?_blob=publicationFile&v=2
- German Ministry for Economic Affairs and Energy Study “Modernising the law on abuse of market power” (2018).27
- Position paper by German telecom and competition authorities on monitoring digital platforms, May 2020.28
- Italian AGCM/AGCOM/DPA Report on big data and policy recommendations – 20 Feb 2020.29
  - Joint memorandum of the Belgian, Dutch and Luxembourg competition authorities on challenges faced by competition authorities in a digital world (2 October 2019).
  - Economic Affairs Ministries of DE, FR, PL: “Modernising EU Competition Policy”
  - Spanish National Commission on Markets and Competition (CNMC) contribution to conference “Shaping competition policy in the era of digitisation.”30

Sources from non-EU states and international organisations
- OFCOM, Online market failures and harms, An economic perspective on the challenges and opportunities in regulating online services, October 2019.32
- CMA, Online platforms and online advertising – Market study final report, July 2020.33
- Stigler Center Report, George J. Stigler Center for the Study of the Economy and the State The University of Chicago Booth School of Business, July 2019.34
- BEUC, The role of competition policy in protecting consumers’ well-being in the Digital Era, October 2019.38
- OECD, Rethinking antitrust tools in multisided markets, 2018.39

34 https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C
External expertise
The European Commission sought external expertise before drafting this Impact Assessment. Views of the experts have contributed to the problem framing and evidence collection strategy. Consultation of experts listed here below does not imply automatic endorsement on their side of the Impact Assessment report.

- JRC expert panel
- Philip Marsden, workshop of 29 January 2020.
- Paul Belleflamme, workshop of 29 January 2020.
- Francesco Decarolis, workshop of 29 January 2020
- Wolfgang Kerber, Updating Competition Policy for the Digital Economy? An Analysis of Recent Reports in Germany, UK, EU, and Australia, September 2019.\(^{40}\)
- Experts for the Observatory on the Online Platform Economy\(^{42}\)

\(^{42}\) [https://platformobservatory.eu/about-observatory/group-of-experts/](https://platformobservatory.eu/about-observatory/group-of-experts/)
Annex 2: Stakeholder consultation

1. THE STAKEHOLDERS ENGAGEMENT STRATEGY

This annex presents the results of the consultation activities performed in the context of the Impact Assessments for (i) the Digital Services Act package: ex ante regulatory instrument of very large online platforms acting as gatekeepers, and (ii) the New Competition Tool.

Given the breadth of the questions asked, both consultations were conducted separately and the results are presented separately below. However, since the outset, both consultations were aimed at complementary solutions by “ensur[ing] a joint analysis of the results”, “with a view to exploring synergies and ensuring consistency on the policy options pursued, in particular as regards possible remedies and enforcement.”

As presented in the initiatives’ Inception Impact Assessments, the objective of both consultations was to consult as widely as possible through various means in order to deliver an in-depth impact assessment of the different policy options and their perceived impact on the Commission’s ability to improve effective competition in digital markets.

As will be presented below, this objective was largely met. To illustrate this, it is worth noting that a total of 3051 respondents participated in both open public consultations. These respondents represented all possible categories of stakeholders.

In developing the stakeholder engagement strategy for the both initiatives, the stakeholder mapping included:

1. Businesses and their associations, including digital players (online intermediaries, other digital players, third parties involved in the ecosystem around digital services…);
2. Trade associations and labour unions;
3. Consumers, including users of digital services;
4. Civil society and consumer organisations;
5. National authorities including law enforcement, competition, data protection and consumer protection authorities, and other relevant regulatory bodies in Member States and, to the extent possible, in regions and municipalities;
6. Academics from the technical, legal and social science communities;
7. International organisations; and
8. General public, in particular through the open public consultations.

---

44 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool
45 Inception Impact Assessment of the New Competition Tool, at page 3; and Inception Impact Assessment for the Digital Services Act package: Ex ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union’s internal market, at page 4.
2. **Consultation activities in the context of the Digital Services Act (“DSA”) package: ex ante regulatory instrument of very large online platforms acting as gatekeepers (“Gatekeeper Instrument”)**

2.1. **Consultation on the Inception Impact Assessment**

The Inception Impact Assessment was published on 2 June 2020 with the deadline for comments running until 30 June 2020. During this period, 85 formal submissions were received from a variety of stakeholders (e.g. online platforms; business associations; telecom operators; media publishers; civil society; consumers).

The largest group of respondents were from the private sector, amounting to more than half of all respondents. Among the private sector, online platforms constituted the largest group of respondents (one third of all respondents).

Overall, a two-third majority of stakeholders expressed its (general) support of Gatekeeper Instrument, with a one-fifth minority explicitly opposing its introduction. Although most replies were of a preliminary nature, many focused on “option 3” with mixed support for and opposition to blacklisted practices and/or a case-by-case approach.

Online platforms are split on the issue, with the majority of large online platforms and/or their representative associations questioning the need for a Gatekeeper Instrument. On the other side, many small and medium sized platforms, in particular those that are business users of large online platforms, expressed their support for a Gatekeeper Instrument.

Market operators from some specific sectors (e.g. telecoms; financial services) have expressed equally strong support for a Gatekeeper Instruments and were specifically referring to the ineffectiveness of ex post competition rules in addressing some of the emerging issues. Having said that, some telecom operators referred to the relatively static nature of a blacklist/whitelist approach, which they therefore consider to not always be an appropriate and effective solution in a very dynamic online platform environment.

National Authorities expressed their support of a Gatekeeper Instrument and the need for an approach on an EU level to avoid regulatory fragmentation, whilst emphasizing the importance of involving the responsible national government representatives in the legislative project in advance.

Civil society and media publishers also strongly supported a Gatekeeper Instrument. Both called for an adequate degree of transparency in the market as well as the guarantee of a certain degree of media diversity and the respect of consumers' autonomy and choice.

2.1. **Consultation on the Impact Assessment**

The open public consultation on the Digital Single Act, including the Gatekeeper Instrument was launched on 2 June 2020 and open for feedback until 8 September 2020. During this period, a total of 2863 contributions were received, of which 2128 citizens,
621 organisations and 59 administrations represented stakeholders from across all Member States.

In terms of geographical distribution of respondents, the majority of answers came from respondents from Germany (28%) followed by the United Kingdom (21%) and France (14%). Other Member States represented in higher proportions are Belgium (9%), Netherlands (4%) and Austria (3%). Member States contributed with response rates lower than 3%. Among respondents originating outside the EU, the highest share comes from respondents from the United States of America (3%).

Among respondents, the vast majority fully agree (71%) and agree to a certain extent (20%) that there is a need to consider dedicated regulatory rules to address negative societal and economic effects of gatekeeper power of large platforms. The majority of stakeholders considers that, while some of the issues connected to gatekeeper powers can potentially be addressed by improving the efficiency of competition law enforcement through procedural and/or organisational changes, there are restrictions that cannot be overcome with competition law enforcement.

The vast majority of respondents (85% of those who replied to the relevant question) considers that dedicated rules on platforms should include prohibitions and obligations for gatekeeper platforms. Most of the stakeholders suggest that, rather than having certain practices categorically prohibited, the Commission should scrutinize certain practices and prohibit them on a case-by-case basis in circumstances when they are most likely to have detrimental effects. It is also suggested that remedies could be more procedural in nature rather than prescribing a given course of conduct.

According to the vast majority of stakeholders, the proposed list of problematic practices, or “blacklist”, should be targeted to clearly unfair and harmful practices of gatekeeper platforms; specific enough to avoid confusion of what is and is not permitted; adaptable to a dynamic, fast moving sector; and specific to certain gatekeepers as they would otherwise risk hurting smaller players trying to compete with them.

The unfair practices listed by the respondents cover exclusionary conducts, exploitative conducts and transparency-related problems, such as: self-preferencing; lack of data sharing and accumulation of data; limited data portability and data access due to lack of interoperability; imbalance on how the revenues are split between platforms and right owners in relation to user generated content; imposition of unfair and unilateral terms and conditions; imposition of exclusionary terms and conditions for attaining and/or retaining access; cross-financing and cross-subsidizing of otherwise unprofitable subsidiary companies; and default settings which adversely impact customer choice.

The respondents consider all the characteristics mentioned in the questionnaire (large user base, wide geographical coverage, large share of total market revenue, impact on a certain sector, exploitation of strong network effects, leverage of assets to enter new areas of activity, raising of barriers to entry, accumulation of valuable and diverse data
and information, lack of alternative services, lock-in of users) are relevant in determining the gatekeeper role of large online platforms.

Respondents among platforms show diverse views on what would define a gatekeeping position. Some platforms argue that incorporating different services into a platform’s offering says little about the strength of a platform, as it is also the case with the ability to leverage assets from one market to another. It is suggested that gatekeeper designations should be business model agnostic, gatekeeper assessments should be reviewed periodically, gatekeeper designations should apply to identified activities in specific markets, and some rules ought to apply on a sector-wide basis.

In general, stakeholders of all categories point out the need to ensure a high level of coherence and legal certainty, the criteria used should be transparent, objective and easily measurable. At the same time, stakeholders also state that a one-size-fits-all approach might be unfeasible, and that a merely cumulative approach might not be sufficient. Users mostly refer to a combination of both quantitative or qualitative criteria.

2.2. Summary of the targeted consultation of Member States

The e-Commerce Expert group was set up in 2005 to coordinate with Member States and exchange views on issues relating to electronic commerce and related services, facilitate the exchange of information, experiences and good practices in the area of electronic commerce in order to advise and assist the Commission in the preparation of legislative proposals and policy initiatives.

During the 21st meeting of the Expert group on 26 May 2020, the preparation of Digital Services Act package was presented in detail and discussed with the Member States. The Commission provided a presentation on the context and thinking behind the Gatekeeper Instrument, outlining possible options that might be elaborated in the Impact Assessment and emphasizing that the final options will need to be looked at very carefully.

Throughout the impact assessment, the Commission also met bilaterally with stakeholders that requested this, primarily in the context of the public consultation and the feedback period for the inception impact assessment. These meetings were requested by the parties concerned and aimed primarily at discussing the submissions made by stakeholders, either in the context of the public consultation or outside of it.

During the following Questions & Answers session, Member States welcomed the details provided by the Commission, mentioned ongoing national initiatives and discussions, and asked complementary questions on the possible scope of the proposed tool and evidence base.
2.3. Summary of targeted stakeholder workshops

2.3.1. EU Observatory for the Online Platform Economy

Workshop, January 2020
On 29 January 2020, the Commission organized a closed Workshop to support its policy making in the area of online platform economy. The participants included the experts from the expert group for the Observatory on the Online Platform Economy, the Commission Observatory staff from DG CNECT, GROW, COMP and JUST and invited external experts: both from academia (Paul Belleflamme, Francesco Decarolis); industry (Daniel Knapp, Stephen Adshead) and regulatory authorities (Philip Marsden).

The Workshop was devoted to two main topics: market power and transparency in online advertising. The presentation and debate that followed fed into the reports prepared by the expert group and evidence supporting this Impact Assessment.

Stakeholder Consultation
The progress reports by the expert group on: (i) Measurement of the Online Platform Economy; (ii) Differentiated treatment; and (iii) Data in the Online Platform Economy, were published for feedback on 9 July. The Commission received nine contributions from citizens, industry associations, platforms and regulatory authorities.

2.4. Other consultation activities

In addition to the above-mentioned consultations and targeted stakeholder exchanges, the Commission received a number of spontaneous submissions from stakeholders. Some of these contributions were submitted by stakeholders that had participated in the public consultation and were therefore intended to supplement their views with additional evidence. Other submissions were received from EU government bodies and business associations that had not participated in the public consultation. These submissions largely echoed the issues already raised in the different consultation activities.

Throughout the impact assessment, the Commission also met bilaterally with stakeholders that requested this, primarily in the context of the public consultation and the feedback period for the inception impact assessment. These meetings were requested by the parties concerned and aimed primarily at discussing the submissions made by stakeholders, either in the context of the public consultation or outside of it.

3. Consultation activities in the context of the New Competition Tool (“NCT”)

3.1. Consultation on the Inception Impact Assessment

The Inception Impact Assessment was published on 2 June 2020 with the deadline for comments running until 30 June 2020. During this period, 73 formal submissions were received. The largest group of respondents were businesses and business associations, amounting to more than half of all respondents. Among businesses, technological companies constituted the largest group of respondents.
Respondents generally agreed that there are structural competition problems that cannot be addressed under the existing competition rules, with some expressing explicit support for an NCT proposal. Respondents expressed different opinions as to whether competition problems should be tackled with competition-based or regulatory tools. Consumer associations pointed out that there is a need for the NCT to complement the current EU toolbox.

Regarding possible problematic sectors, most views referred to issues relating to digital markets. Most respondents argued that it was less clear which were the structural competition problems outside the digital area that could not be addressed by Articles 101 and 102 Treaty on the Functioning of the European Union (“TFEU”).

Given that most respondents did not appear familiar with the investigative processes of similar tools, they questioned how such a tool would work at EU level. Respondents expressing support emphasised that any new intervention tool would require a careful design to ensure legal certainty and procedural safeguards.

### 3.2. Consultation on the Impact Assessment

The open public consultation on the NCT was launched on 2 June 2020 and open for feedback until 8 September 2020. During this period, a total of 188 contributions were received, with 154 respondents representing stakeholders from 18 Member States.

Businesses (68) and their associations (54) represented more than 2/3 of respondents. Other respondents included NGOs, consumer organisations and academic/research institutions. Nineteen contributions were received outside the open public consultation, which largely echoed the issues raised in the contributions to the public consultation. The figures in this summary are based only on contributions to the public consultation submitted through the online questionnaire.

Respondents generally agreed that there are structural competition problems that Articles 101/102 TFEU cannot tackle or address in the most effective manner. Respondents also generally agreed that an NCT could help address the limits of the existing competition rules.

More specifically, respondents confirmed that certain market features may lead to structural competition problems. Respondents also confirmed that the examples of structural competition problems set out in the questionnaire, in particular leveraging and monopolisation strategies, as well gatekeepers scenarios and tipping markets, may raise competition concerns that Articles 101/102 TFEU are not suitable or sufficiently effective to address, and that the Commission should be able to intervene in such scenarios. Respondents considered that such structural competition concerns commonly occur in digital markets, while pointing out that there are indications that they are not limited to digital markets.

As regards the intervention trigger for the NCT, the majority of respondents that expressed a view in this regard considered that such a tool should focus on structural
competition problems, thus being applicable to all companies in a market, rather than only to dominant companies or gatekeepers or digital platforms. As regards the scope of application, the majority of respondents considered that such a tool should be applicable to all markets. A majority of respondents that expressed a view also indicated that the tool should not be limited to only markets/sectors affected by digitisation. However, a large number of those respondents who indicated that the tool should apply in all sectors and markets nevertheless provided explanations that mainly highlighted how the tool would be especially beneficial if applied to the problems found in digital markets.

As regards the interplay with other instruments and policy options, such as those included in the DSA package, there is general support for ex ante rules consisting of obligations and prohibitions for digital gatekeepers in order to address issues in digital markets raised by gatekeeper platforms. Most respondents emphasised that, in order to effectively address contestability issues in digital markets, there is a need for a combined approach, consisting of more than one policy solution. In those respondents’ view, this should include ex ante rules and an enforcement tool applicable to digital markets.

A more detailed summary of the replies received in the context of the open public consultation on the New Competition Tool can be found on DG Competition's website. A full list of supporting materials available on that website is also attached as Annex 5.1 to this document.

3.3. Summary of the targeted consultation of National Competition Authorities

In the context of the European Competition Network – a network bringing together the Commission, the EFTA Surveillance Authority and all the National Competition Authorities ("NCAs") of the EEA – the Commission submitted a questionnaire to gather the views on the New Competition Tool within the Network.

NCAs generally agreed that there exist certain features that may lead to structural competition problems that Articles 101 and 102 TFEU cannot tackle conceptually or cannot address in the most effective manner. The consultation showed a consensus among NCAs with relevant experience that there was a need for a new competition tool to deal with these structural competition problems. More specifically, NCAs pointed out that such a tool should enable the Commission to conduct investigations in markets with structural problems since a case-by-case enforcement against abuses of dominance is not sufficient in the increasingly fast-paced and interconnected economy.

NCAs with relevant experience were split as to the question in which sectors structural competition problems can occur. According to half of the respondents, structural competition problems may occur in all sectors/markets, whereas others argued that structural competition problems may occur in some specific sectors/markets, including

but not limited to digital sectors/markets. NCAs, however, suggested that digital markets were more prominently affected by structural competition problems than other markets.

NCAs with relevant experience also indicated that a new competition tool to tackle such structural competition problems would only be effective if it were accompanied with adequate and proportionate investigative powers, but also by soft and hard powers to deal with structural competition problems, including the possibility to impose structural remedies (e.g. divestitures or granting access to key infrastructure or inputs) where duly justified.

NCAs with relevant experience generally considered that not adapting existing competition law tools would be at most “somewhat effective”, meaning that an ex-ante regulation would in itself not be sufficient to address structural competition problems.

A more detailed summary of the replies received from NCAs in the context of their consultation on the New Competition Tool can be found on DG Competition's website. A full list of supporting materials available on that website is also attached as Annex 5.1 to this document.

### 3.4. Summary of targeted stakeholder workshops

Consultation activities have also included the participation of the project team in a number of exchanges with stakeholders across various sectors. Given the particular circumstances of the Covid-19 crisis, all these exchanges took place in a virtual environment.

First, as is the standard practice concerning pan-European competition policy matters, the Commission organised two meetings in the context of the European Competition Network in order to gather the views of NCAs as regards the New Competition Tool. These meetings were complemented by a series of questionnaires, whose replies are summarised in Section 2.3 above.

Second, bilateral calls were organised with a number of national government bodies and NCAs who requested additional information on the ongoing impact assessment. Upon their request, the Commission also introduced the impact assessment to working groups within the European Parliament and the Council of the European Union.

Third, the Commission also held extensive discussions with all EEA competition authorities (i.e. Greece, Romania) and non-EEA competition authorities (Mexico’s COFECE, South Africa’s Competition Commission and the United Kingdom’s Competition and Markets Authority) having similar tools.

Fourth, a virtual meeting was also held with the Body of European Regulators for Electronic Communications.

---

Fifth, exchanges were also organised, at their request, with consumer organisations (through BEUC), as well as with a number of private sector stakeholders in the context of events organised by trade associations (e.g. European Round Table for Industry).

3.5. Other consultation activities

In addition to the above-mentioned consultations and targeted stakeholder exchanges, the Commission received a number of spontaneous submissions from stakeholders. Some of these contributions were submitted by stakeholders that had participated in the public consultation and were therefore intended to supplement their views with additional evidence. Other submissions were received from EU government bodies and business associations that had not participated in the public consultation. These submissions largely echoed the issues already raised in the different consultation activities.

All such submissions are published on the dedicated webpage on DG Competition's website, except for a few submissions which stakeholders had asked the Commission not to publish for confidentiality reasons. The Commission used the latter to enhance its understanding of a particular stakeholder position and to complement its views on the issues subject to consultation.

Throughout the impact assessment, the Commission also met bilaterally with stakeholders that requested this, primarily in the context of the public consultation and the feedback period for the inception impact assessment. These meetings were requested by the parties concerned and aimed primarily at discussing the submissions made by stakeholders, either in the context of the public consultation or outside of it.

---

Annex 3: Who is affected and how?

1. PRACTICAL IMPLICATIONS OF THE INITIATIVE

1.1. Who is affected by the market investigation regime?

The market investigation regime will mainly impact businesses, including SMEs, Consumers and Regulatory authorities.

1.1.1. Businesses

The market investigation regime would benefit businesses in many different aspects.

First, the market investigation regime would allow the Commission to address emerging and existing market failures to ensure contestable and competitive digital markets. More open and competitive markets where companies compete on their merits enable wealth and job creation.

Second, and in accordance with the results of numerous empirical studies\(^{49}\), an improvement of market competition would result in higher productivity, which would translate into higher economic growth. These effects are expected to be particular relevant in digital markets where structural market features may lead or contribute to market failures, preventing healthy competition between market players.

Third, more open and competitive markets would provide more incentives for companies to innovate and offer a better range of high quality products and services. The economic literature shows that firms facing more competition from rivals innovate more than monopolies.\(^{50}\) Greater competition also drives efficiency in processes, technology and service and creates the conditions to make European's markets more attractive to investors.\(^{51}\)

Fourth, the adoption of a market investigation regime would lead to the creation of a more level playing field allowing SMEs to compete more fairly and grow throughout the internal market. In fact, by targetting the features of a market that give rise to market failures, an intervention under the market investigation regime would decrease barriers to the entry and expansion of smaller innovative players. Moreover, the market

---

\(^{49}\) OECD, 2014, Fact-sheet on how competition policy affects macro-economic outcomes.


investigation regime will facilitate access to digital markets to SMEs reducing the digital gap vis-à-vis larger companies.\textsuperscript{52}

Finally, companies may incur in costs, when undertaking administrative activities needed to provide information. These are however expected to be rather limited and more than off-set by the benefits of operating in a more level playing field. They may face additional compliance costs if remedies are imposed at the end of a market investigation, but this will be subject to a proportionality assessment.

\textbf{1.1.2. Consumers}

The market investigation regime will allow the promotion of more effective competition, resulting in lower prices, better quality, wider choice and innovative goods and services. Numerous studies confirm the benefits of competitive markets for consumers.\textsuperscript{53}

One important aspect to consider as regards the consumer benefits of the market investigation regime is the growing importance of digital markets for consumers. According to “Digital Economy and Society Index (DESI) 2020”, internet use has continued to increase year-on-year with 85\% of Europeans surfing the internet at least once per week.\textsuperscript{54}

\textbf{1.1.3. Regulatory authorities}

The market investigation regime will allow the Commission to have access to a more comprehensive competition-based enforcement toolkit, thus allowing it to make better ‘value for money’. The burden that would ensue from giving the Commission this toolkit is low compared to the benefits in terms of better enforcement and benefits for the economy.

\textbf{1.2. Who is affected by the ex-ante regulatory framework}

The ex-ante regulatory framework will have an impact on platforms (in scope and out of scope), business users depending on platforms (e.g. hotels), business users competing with platforms (e.g. another platform), competitors (e.g. innovative entrants), consumers, regulatory authorities.

\textsuperscript{52} According to a study from OECD countries, in 2015 only 20\% of SMEs engaged in sales through e-commerce, against 40\% of large firms.

\textsuperscript{53} See for instance Ahn, S. (2002), op. cit. See also for example, a study by the Commission on "The Economic Impact of enforcement of competition policies in the functioning of EU energy markets" (2015), which found that the Commission's decision finding an abuse of dominance by E.ON lead to a reduction in prices for both wholesalers and retailers to the benefit of consumers. See also the Note by the UNCTAD Secretariat (2014) "The benefits of competition policy for consumers".

2. SUMMARY OF COSTS AND BENEFITS

2.1. Market investigation regime

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>I. Overview of Benefits – Preferred Option</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Direct benefits</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Efficiency improvements</td>
<td>Consumer benefits per investigation: EUR 2 to 2.5 billion</td>
<td>The market investigation regime is expected to give rise to significant consumer benefits derived from more competitive markets in terms of lower prices and greater innovation, choice and quality of products and services. See Section 6.2.6 and section (a) below.</td>
</tr>
<tr>
<td>Macroeconomic benefits</td>
<td>Significant benefits to households, businesses and SMEs per investigation - not quantifiable, but expected to be significant (a 10% increase in CPI would lead to an increase of more than 40% in TFP growth).</td>
<td>The market investigation regime is expected to give rise to benefits in terms of economic growth and productivity as well as employment. It is however very difficult to estimate those expected benefits since the proposed changes are of a nature that is not easily quantifiable. Nevertheless, studies show the level of competition enforcement, measured by the Competition Policy Indicators (‘CPIs’) has a strong impact on growth in Total Factor Productivity (‘TFP’). TFP growth has had an important impact on GDP in the EU. See Sections 6.2.2 and 6.2.5.</td>
</tr>
<tr>
<td><strong>Indirect benefits</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>II. Overview of costs – Preferred option</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Direct benefits</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Compliance costs</td>
<td>Costs to businesses not quantifiable, but subject to proportionality criteria</td>
<td>The market investigation regime would not directly give rise to any additional compliance costs on stakeholders since it be based on a market-structure approach instead of businesses’ conduct. Nevertheless, stakeholders may face costs of adapting their business to the remedies determine by a given market investigation decision. These are not possible to quantify upfront as the requirements associated to any future intervention are now very speculative, but they would be more than off-set by the consumer benefits resulting from the intervention.</td>
</tr>
<tr>
<td>Administrative burdens</td>
<td>Costs to businesses per investigation &lt; EUR 3 million</td>
<td>The market investigation regime would introduce additional information obligations associated to an investigation. These would be in any case rather limited and more than off-set by the benefits of operating in a more level playing field. See</td>
</tr>
</tbody>
</table>
### Implementation of the legislative initiative

One-off marginal cost to the EU institutions

The market investigation regime is not expected to give rise to any relevant implementation costs. See Section 6.2.7.

### Costs of actual enforcement of the initiative

Costs to Commission per investigation:

<table>
<thead>
<tr>
<th>Costs of actual enforcement of the initiative</th>
<th>Costs to Commission per investigation:</th>
</tr>
</thead>
<tbody>
<tr>
<td>15 to 20 FTEs for 2 years</td>
<td>The main cost involved for the Commission would be with the FTEs running the investigation. Depending on the number of markets concerned and the complexity of the issues under investigation, per investigation a total of approximately 15 and 20 FTEs would be required. The reference for these numbers are the most complex Commission antitrust investigations, which generally occupy between 10 and 15 FTEs. A market investigation regime, focusing not only on the conduct of a dominant company but on the whole market structure, would likely require a higher number of FTEs.</td>
</tr>
</tbody>
</table>

### Monitoring costs

Costs to Commission per investigation:

<table>
<thead>
<tr>
<th>Monitoring costs</th>
<th>Costs to Commission per investigation:</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 to 3 FTEs for 5 years</td>
<td>For the purpose of remedy design and monitoring, additional resources would be required. Per investigation, a minimum of 2 to 3 FTEs would be required for 5 years, depending on the complexity of the issues identified and the remedies.</td>
</tr>
</tbody>
</table>

### (a) Consumer benefits calculations

The CMA publishes an annual report with the average estimates of financial benefits to UK consumers from its decisions adopted over the previous three financial years, covering the following areas of intervention: (i) competition law enforcement, (ii) merger control, (iii) market studies and market investigations, and (iv) consumer protection enforcement. In the case of (iii), the large majority of the benefits refer to market investigations as market studies often result in recommendations implemented by other authorities and thus the benefits are not recorded by the CMA.

The direct financial benefits to consumers include: (i) decrease in price, (ii) monetized improvements in quality, range and service, (iii) monetized time savings and (iv) benefits that consumers gain from making better informed choices about what goods to purchase. The estimate does not include potential impact of the CMA’s decisions on businesses. According to the CMA its estimates do not include several possible benefits which are not quantifiable, such as better product quality and wider choice as well as deterrence effects and the impact of increased competition on productivity.

Table 1 provides the respective financial benefits to the UK consumers extracted from the last 10 annual reports of the UK competition authority. Annual benefits range from GBP 345 million to GBP 887 million. The EU27 consumer benefits of the market investigation regime were estimated based on these figures following the below methodology.

---

55 Additional costs might arise for example in cases where external studies are commissioned for the assessment of certain aspects of the monitoring of remedies. This is, however, not possible to foresee at this stage.
First, the UK consumer benefits were converted from GBP to EUR using the ECB average exchange rate for the respective three years period. Second, the weight of the annual UK consumer benefits on UK GDP of the last year of the respective period was determined using the value of UK GDP at market prices as published by the Eurostat. Third, the annual weight of the consumer benefits calculated in the previous step was multiplied by the value of the EU27 GDP at market prices for each year, as published by the Eurostat. Finally, the hypothetical EU27 consumer benefits were converted to current prices using the parity ratio published by the Eurostat. The hypothetical EU27 consumer benefits of applying the market investigation regime would range between EUR 2.7 and EUR 6.3 billion.

Table 1: Average consumer benefits from market investigations in the UK

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>2008-2010</td>
<td>345</td>
<td>407</td>
<td>0.02%</td>
<td>2391</td>
<td>2730</td>
</tr>
<tr>
<td>2009-2011</td>
<td>479</td>
<td>549</td>
<td>0.03%</td>
<td>3252</td>
<td>3648</td>
</tr>
<tr>
<td>2010-2012</td>
<td>648</td>
<td>766</td>
<td>0.04%</td>
<td>4134</td>
<td>4669</td>
</tr>
<tr>
<td>2011-2013</td>
<td>437</td>
<td>519</td>
<td>0.02%</td>
<td>2846</td>
<td>3219</td>
</tr>
<tr>
<td>2012-2014</td>
<td>400</td>
<td>487</td>
<td>0.02%</td>
<td>2482</td>
<td>2763</td>
</tr>
<tr>
<td>2013-2015</td>
<td>577</td>
<td>727</td>
<td>0.03%</td>
<td>3360</td>
<td>3651</td>
</tr>
<tr>
<td>2014-2016</td>
<td>523</td>
<td>667</td>
<td>0.03%</td>
<td>3437</td>
<td>3661</td>
</tr>
<tr>
<td>2015-2017</td>
<td>887</td>
<td>1099</td>
<td>0.05%</td>
<td>6067</td>
<td>6293</td>
</tr>
<tr>
<td>2016-2018</td>
<td>772</td>
<td>897</td>
<td>0.04%</td>
<td>4996</td>
<td>5071</td>
</tr>
<tr>
<td>2017-2019</td>
<td>820</td>
<td>932</td>
<td>0.04%</td>
<td>5145</td>
<td>5145</td>
</tr>
</tbody>
</table>

The above UK consumer benefits refer mainly to the 13 market investigations finalised by the CMA between 2010 and 2019, resulting in an average consumer benefits of EUR 581 million per market investigation. Assuming a proportional impact on the EU27 GDP, the EU27 consumer benefits...

associated to one investigation under a similar market investigation regime could be as high as EUR 3 billion. This number is likely to overestimate the consumer benefits, as a part of the benefits estimated by the CMA is also associated to market studies. A more reliable figure for the EU27 consumer benefits of a decision under the market investigation regime would thus be between EUR 2 and EUR 2.5 billion.

2.2. Ex ante regulation

<table>
<thead>
<tr>
<th>I. Overview of Benefits – Preferred Option</th>
<th>Description</th>
<th>Amount</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct and indirect benefits</td>
<td>-</td>
<td></td>
<td>It is expected that here will be a substantial decrease in internal market fragmentation, as EU Member States will not need to introduce national legislations. The effect of market contestability on the internal single market is proxied by an increase in online cross-border trade and the indirect/spillover effect in terms of employment, economic growth, innovation and consumer surplus (see below).</td>
</tr>
<tr>
<td>Economic growth</td>
<td>Between EUR 43.7 bn and EUR 174.5 bn in opportunity cost over 10 years in comparison to the baseline scenario would be recovered</td>
<td>Secondary sources: If unlocking the full potential of the platform economy: between EUR 43.7 and EUR 174.5 billion from 2019 to 2029. Input-output microeconomic modelling: Higher investment in R&amp;D in the ICT sector in EU27 leads to an overall increase in the EU27 income between 0.09% to 0.17% of 2014 EU GDP, this is between EUR 12 billion and EUR 23 billion. Both impacts on growth and employment (below) are very conservative estimates because they result exclusively from an increase in R&amp;D investment. However, market contestability and more fair competition are expected to produce important spillover effects that result in higher innovation, increase in market size, increase of entrepreneurship within and beyond the platform economy and growth in other traditional sectors. Online cross-border trade is expected to be highly impacted by this virtuous dynamic. Therefore, this estimation is not taking into account further rounds of direct and indirect effects with positive loops in the long-term.</td>
<td></td>
</tr>
<tr>
<td>Employment</td>
<td>136,387 and 294,236 of additional jobs created</td>
<td>The preferred option is expected to increase the employment in the EU27 between 0.07% to 0.15% (in comparison to 2014 EU employment figures), that is, between 136,387 and 294,236 new jobs created thanks to the increase in R&amp;D spending (input-out microeconomic modelling)</td>
<td></td>
</tr>
<tr>
<td>Innovation</td>
<td>EUR 221 billion and EUR 323 billion over 10 years</td>
<td>Financial resources that could be invested in R&amp;D are diverted to mergers and acquisitions (M&amp;A), which results in higher market concentration instead of improvements in the quality and quantity of products and services for consumers. This pattern of innovation dedicated to competing 'for the market' has a detrimental impact.</td>
<td></td>
</tr>
</tbody>
</table>

22
In addition, the positive impact on innovation stemming from higher market contestability is not limited only to diversion of money from M&A to R&D. Other expected indirect effects include an increase in entrepreneurship and creation of new products and solutions meeting consumers' needs rather than focused on exploiting a gatekeeping position. This may have a multiplicative effect increasing the size of the European single market, and hence, GDP and online cross-border trade (see other impacts in this table).

| Investment in R&D | EUR 12 billion– EUR 23 billion | Higher investment in R&D in the ICT sector in EU27 leads to an overall increase in the EU27 income between 0.09% to 0.17% of 2014 EU GDP\(^6\), i.e. between EUR 12 billion and EUR 23 billion (input-out modelling). |
| Competition | Fall in HHI index 0.25 (user shares) and 0.11 (revenue shares) | It is expected that competition will improve substantially due among other to a substantial decrease in barriers to entry. Conservative estimate is no increase in the HHI Index, while upper bound means a fall in HHI index on for the user shares by 0.25 points and 0.11 for the revenue shares. |
| Online cross-border trade | EUR 450 billion to EUR 1.76 trillion after 10 years | Assuming the internal market fragmentation is fully addressed, the online cross-border trade would increase between EUR 450 billion to EUR 1.76 trillion after 10 years. Although it is hard to forecast with precision the increase in online cross-border trade, the impacts have been proxied by similar trends in offline cross-border trade resulting from market integration. The opportunity costs estimated here are very conservative as the assumed trends were linear and conservative growth rates. The fast change in the platform economy and interlinks with the rest of the economy suggests that online cross-border trade could see an important exponential growth if enhanced by market contestability, fair competition and virtuous patterns of innovation. |
| Consumer surplus | EUR 18 billion – EUR 44 billion | The higher level of competition may result in lower prices as companies could decrease spending on advertising and lower costs; such savings could be passed onto consumers (especially where (price) competition increases). The consumer surplus is therefore estimated to increase by EUR 18-44 billion. |

\(^6\) The most recent available input-output matrix is for 2014, yet the matrix does not change significantly across time.
Compliance costs | EUR 11.25 million – 12.55 million | The preferred option is expected to increase compliance costs by EUR 11.25 million – 12.55 million.
Annex 4 – Analytical methods

The teams at DG CNECT, GROW and COMP, as well as the contractor of the study supporting the Impact Assessment and JRC conducted calculations to estimate the impact of the unfair practices employed by platform and market failures.

The quantitative assessments relied on estimates available in empirical studies quoted in the Impact Assessment, correlation analysis was based on data from Statista and an Input-Output macro-modelling. The assessment was guided by the EU Better Regulation Guidelines.

1. Input-output model

1.1. Introduction

The input-output (I-O) model is the name given to a modelling approach developed by Professor Wassily Leontief in the late 1930s. As its name suggests, the I-O model assumes that there is a matrix that links transactions or flows recording payments to and from a sector within a year. Besides, the framework works on double-entry bookkeeping so that total gross output must equal gross input. Figure 1.1 below illustrates the model.

The row total represents the total produced (supplied) by a sector while the total column represents the total used (demanded) by such sector. Hence, any element $a_{ij}$ in each cell is what sector $j$ use from sector $i$.

Input-output transaction matrix

![Input-output transaction matrix](source)

*Source: Miller and Blair (2009)*

---

The model is built using observed economic data from national account statistics to show the flows of products going from each industrial sector seen as a producer to sectors seen as consumers. The grey area in Figure 1.1 above is the interindustry trade to which must be added the final demand columns and the value-added rows.

National account data will populate the matrix which will be used to estimate impacts out of exogenous shocks. For example, each $Z_{ij}$ in the matrix below (Figure 1.2) will be constructed from official statistics. Such matrix will be used to find a matrix with the multiplier effects to estimate how exogenous changes in one specific sector of the economic impacts in the other sectors, value-added, final demand and lastly in GDP.

Example of a two-sector economy

\[
\begin{array}{cccccc}
\text{Processing Sectors} & \text{Final Demand} & \text{Total Output (x)} \\
1 & Z_{11} & c_1 & l_1 & e_1 & x_1 \\
2 & Z_{21} & Z_{22} & c_2 & l_2 & e_2 & x_2 \\
\text{Payments Sectors} & \text{Value Added (v')} & l_1 & n_1 & n_G & e & L \\
\text{Imports} & m_1 & m_2 & m_C & m_J & m_G & m_E & M \\
\text{Total Outlays (x')} & x_1 & x_2 & C & I & G & E & x \\
\end{array}
\]

Source: Miller and Blair (2009)

The next section describes the implementation of the I-O model to this impact assessment.

1.2. Implementation of the I-O model for the impact assessment

In this Implementation of the I-O model for the impact assessment analysis, data was taken from the sources below:

- The 2014 world input-output table (WIOT) publicly available from the World Input-Output Database (WIOD, www.wiod.org),
- Employment (number of persons engaged) and compensation of employees obtained from the Socio-Economic Accounts (SEAs) of WIOD, and
- Private R&D investments in information and communication (and its subitems represented by NACE Rev.2’s Section J’s divisions and/or groups), obtained from Eurostat\(^{63}\).

The most recent data were available for 2014 (WIOD Release 2016), which explains the choice of the year in our impact assessments. The WIOTs and SEAs cover 43 countries and the rest of the world region, each detailed by 56 industries according to the International Standard Industrial

\(^{63}\) Business expenditure on R&D (BERD) by NACE Rev. 2 activity and source of funds [rd_e_berdfundr2], metadata accessible at: https://ec.europa.eu/eurostat/cache/metadata/en/rd_esms.htm
Classification Rev. 4. All tables adhere to the latest version (2008) of the System of National Accounts.

The incorporate the impact of market contestability and fairer competition in GDP and employment into the I-O model, we needed to assume that such market dynamic would result in higher investment in R&D in the platform economy, impacting in GDP and job creation. However, as the platform economy is still relatively new to the national account system there is not an exact code for such sector and we had to take some sub-sectors from the ICT sector as a proxy. 64

The results suggest that private investments in ICT sectors account only for roughly 0.10% of the EU GDP. The I-O modelling exercises show that these investments imply:

- An overall EU income increase from 0.09% to 0.17% (of 2014 EU GDP) and EU employment increase from 0.07% to 0.15% (of 2014 EU employment);
- At the EU level, most of the impacts are driven by one ICT subsector, consisting of Computer programming, consultancy and related activities and Data processing, hosting and related activities, web portal;
- The impacts are, however, heterogenous across the individual EU countries.

1.3. Limitations

One of the main limitations is the lack of exact code to identify the platform economy which may be underestimating the actual size of the sector and hence the contribution and links to the overall economy.

A second limitation is that it only incorporates the increase of R&D but there might be other exogenous shocks resulting from market contestability and fairer competition, including higher market size and higher online-cross-border trade. As it is difficult to know a priori the increase in market size and across which sector, incorporating this into the model proves challenging.

Other direct and indirect effects such as entrepreneurship, quantitative and qualitative changes in the patterns of innovation as well as lower prices to consumers resulting from market contestability are not included in the model for the same reasons as failing to incorporate change in market size.

Therefore, the estimations must be taken as conservative and lower bound.

64 The R&D expenditure data cover part of ICT services (but not ICT manufacturing), along with other subitems of Information and communication sector. These ICT services include Software publishing (NACE Group 58.2), Telecommunications (NACE Division 61), Computer programming, consultancy and related activities (NACE Division 62), and Data processing, hosting and related activities; web portals (NACE Group 63.1)
Annex 5 – Additional background information

5.1. Supporting materials concerning the market investigation regime

Table of contents of Annex 5

<table>
<thead>
<tr>
<th>Annex 5.1.1.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overview of consultations and expert advice reports conducted in relation to the market investigation regime</td>
<td>28</td>
</tr>
<tr>
<td>Draft report by the Economic Advisory Group on Competition Policy (EAGCP) (Gregory Crawford, Patrick Rey and Monika Schnitzer) on an economic evaluation of the NCT</td>
<td>30</td>
</tr>
<tr>
<td>Procedural matters concerning the market investigation regime</td>
<td>49</td>
</tr>
<tr>
<td>Steps followed in the evaluation of the impact of the market investigation regime</td>
<td>54</td>
</tr>
</tbody>
</table>

5.1.1. Overview of consultations and expert advice reports conducted in relation to the market investigation regime

The table below presents an overview of all consultations conducted and expert advice reports conducted in relation to the market investigation regime. All of these summaries and reports can also be found on DG Competition's dedicated website.\(^{65}\)

1. Inception Impact Assessment of the New Competition Tool:

2. Open Public Consultation on the New Competition Tool:

3. Consultation activities in the context of the European Competition Network (National Competition Authorities of the European Economic Area):

4. Expert advice reports commissioned in the context of the New Competition Tool:

a. Prof. Massimo Motta and Prof. Dr. Martin Peitz (2020), *Intervention triggers and underlying theories of harm*,

b. Prof. Pierre Larouche and Prof. Alexandre de Streel (2020), *Interplay between the New Competition Tool and Sector-Specific Regulation in the EU*,

c. Prof. Dr. Heike Schweitzer (2020), *The New Competition Tool: Its institutional set up and procedural design*,

d. Prof. Richard Whish (2020), *Legal comparative study of existing competition tools aimed at addressing structural competition problems, with a particular focus on the UK’s market investigation tool*:

5. **Report by the Economic Advisory Group on Competition Policy (EAGCP)**
   (Gregory Crawford, Patrick Rey and Monika Schnitzer) on an economic evaluation of the NCT

   a. Final report yet to be received and published on DG Competition’s website. A draft of the report (not to be cited or quoted) is provided as Annex 5.1.2 immediately below.
5.1.2. Draft report by the Economic Advisory Group on Competition Policy (EAGCP) (Gregory Crawford, Patrick Rey and Monika Schnitzer) on an economic evaluation of the NCT

An Economic Evaluation of the EC’s Proposed “New Competition Tool”

Gregory S. Crawford, Patrick Rey, and Monika Schnitzer66

v3.7, 9/23/20, 9:00 a.m.

Please do not cite or quote – work in progress

I. Introduction

On 2 June 2020, the European Commission (EC) announced an initiative to consider the development and introduction of a “New Competition Tool” (NCT) at the European level to “address structural competition problems in a timely and effective manner.”67 Commentators have drawn analogies between the NCT and the UK’s “markets regime,” which empowers the UK competition regulator, the Competition and Markets Authority (CMA), to initiate market studies and investigations to “[ensure] that competition and markets work well for consumers.”68

As members of the Economic Advisory Group on Competition Policy (EAGCP) of the EC’s DG Competition, in June 2020 we were asked by the Chief Economist to assess the economic merits of the proposed NCT. While our mandate was unrestricted, we were encouraged to review the UK’s markets regime and assess the economic foundations of the theories of harm investigated across a range of cases and whether they could apply in markets and/or sectors other than those specifically considered in a given case.

This is what we have done. In Section II below, we briefly review the “Inception Impact Assessment” describing the EC’s motivation for the NCT. In Section III, we describe the UK’s markets regime and survey some of the competition concerns the regime is intended to address. In Section IV, we provide a selective review of UK market studies and investigations to illustrate some of the ways these concerns have been explored. We also describe the remedies imposed or proposed (in the case of market studies or ongoing investigations). In Section V, we provide a critical

66 Dept of Economics, University of Zurich and CEPR, gregory.crawford@econ.uzh.ch; Toulouse School of Economics, University Toulouse Capitole, patrick.rey@tse-fr.eu; Dept. of Economics, LMU München, Schnitzer@econ.lmu.de.


evaluation of the functioning of the UK’s markets regime in light of this evidence and offer recommendations regarding the design of an EC-level New Competition Tool. A final section concludes.69

II. The Mandate for the NCT

The EC’s Inception Impact Assessment and accompanying press release provide the context and mandate for the proposed New Competition Tool, enumerate alternative policy options for its scope, and describe likely impacts (among other things). In this section, we summarize the salient elements of this proposal for evaluating the economic foundations of the tool.

The NCT seeks to “[address] gaps in the current EU competition rules and [allow] for timely and effective intervention against structural competition problems across markets.” In particular, the EC highlights “three pillars for the fair functioning of markets:” enforcing current EU competition law under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), potential ex-ante regulation of digital platforms, especially those that play a “gatekeeper” role, and the NCT for structural competition problems that either of the first two pillars cannot address or cannot address well.

The impact assessment emphasizes two types of structural competition problems. The first is where harm has already affected the market due to a “structural lack of competition” that prevents such markets from delivering competitive outcomes (e.g., due to its underlying economic structure or the conduct of firms in the market). Specific examples provided include markets with extreme concentration, entry barriers, consumer lock-in, lack of access to an essential input (e.g., data) as well as oligopoly markets with increased risk for tacit collusion, particularly those featuring increased transparency due to pricing and related strategies based on algorithmic decision-making.

The second type of structural competition problem identified is where harm “is about to affect the market,” that is, where there are “structural risks for competition” such that the economic structure and/or conduct of firms in the market create a threat to competitive outcomes (e.g., “tipping markets” where the economic fundamentals favor winner-take-most outcomes). Specific examples include markets with extreme economies of scale and/or scope, strong network effects, multi-sidedness, lack of multi-homing, and lock-in effects, where “the risks for competition can arise through the creation of powerful market players with an entrenched market and/or gatekeeper position, the emergence of which could be prevented by early intervention.” The EC also notes that “while these characteristics are typical of digital markets, they can also be found in non-digital markets” and that “with the increasing digitalization of the economy, more and more markets will exhibit these characteristics.”

The EC proposes four policy options for the limits of the proposed tool depending on two characteristics: (a) whether it would apply to all sectors of the economy versus just those sectors in which the structural factors identified above would be most prevalent (“horizontal scope” versus “limited scope”) and (b) whether it would apply to dominant firms versus all firms (“dominance-based” versus “market structure-based”).

Proposed remedies would be limited to what is necessary to ensure the proper functioning of the market and could include both behavioral and structural ones. Furthermore, remedies would be imposed without the finding of an infringement by any firm; hence, no fines would arise nor would there be the possibility of follow-on damages claims against firms in the affected sector. Rights of defense and judicial review would be respected, although no details were provided.

III. The UK’s “Markets Regime”

A. Introduction

Parts of the proposed New Competition Tool resemble closely the UK’s regime for market studies and market investigations (together the UK’s “markets regime”). As we will show in what follows, the first type of structural competition problem proposed by the EC, where harm has “already affected the market,” maps well to the UK’s markets regime once one allows for the potential addition of algorithmic collusion. In what follows, we briefly describe the mandate for the UK’s markets regime and the competition concerns the regime is intended to address.

B. Motivation for and structure of the UK’s markets regime

The UK’s markets regime was created by the UK’s Enterprise Act 2002. The regime was then amended by the general reform of UK competition law embodied in the UK’s Enterprise and Regulatory Reform Act 2013, which combined the separate responsibilities of the UK’s Competition Commission (CC) and Office of Fair Trading (OFT) into the newly-created Competition and Markets Authority (CMA). The CMA offers guidance for stakeholders in the markets regime via policy documents that we briefly summarize here.70

The CMA’s goal is to “[ensure] that competition and markets work well for consumers.” It seeks to achieve this by “promoting and protecting consumer interests throughout the UK, while ensuring that businesses are fair and competitive” (OFT519). To facilitate this goal, the CMA has the power to initiate market studies and, subject to various criteria being met, market investigations (both defined below). Market studies and investigations were previously conducted by the CC and OFT, respectively, and within the combined CMA there continues to be a separation of responsibility between those that conduct studies from those that conduct any subsequent investigation.

Market studies “are examinations into the causes of why particular markets are not working well for consumers, leading to proposals as to how they might be made to work better” (OFT519). They are “one of a number of tools at the [CMA’s] disposal to address competition or consumer protection problems, alongside its enforcement and advocacy activities.” What distinguishes market studies from these other tools is that it “can look beyond individual abuses of dominance, agreements that reduce competition, or breaches of specific consumer protection legislation, and consider all aspects

of market structure and conduct… Looking at the whole market also provides the opportunity to address factors that may affect productivity which are beyond the scope of enforcement tools.”

The CMA Board initiates market studies based on a range of sources, including complaints from consumers and/or businesses, enforcement actions, referrals from other government departments, including regulatory bodies, and their own research. The process of a market study is transparent with significant stakeholder engagement, clear milestones, and a statutory time limit (18 months). The CMA has formal investigative powers to conduct such studies. A range of outcomes are possible, from a clean bill of health to consumer-focused actions, to recommendations to businesses or the government, to individual enforcement actions, to a market investigation reference. If the CMA Board decides a market investigation reference is to be made, it refers the matter to the CMA Chair, who constitutes the “market reference group” that will make the investigation (with individuals different from those that conducted the market study and/or made the decision to refer it for a market investigation). There are three types of market investigation references: “cross-market references” (where a specific feature or combination of features existing in more than one market can be investigated without the need to investigate the whole of each market concerned), “restricted public interest references” (where the Secretary of State refers a matter to the CMA for investigation of competition issues while it investigates public interest issues for the same matter), and “ordinary references,” where neither of the previous two considerations apply.

The CMA Board may make a market investigation reference where “it has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts, or distorts competition in connection with the supply or acquisition of any goods or services in the UK or a part of the UK” (OFT511). Such a feature or combination of features constitutes an “adverse effect on competition” (AEC).

Market investigations are more detailed investigations into whether there is an AEC in the market(s) for the goods or services referred. If AECs are found, they also enable the CMA to impose remedies. Market features are broadly defined and include (1) the economic structure of the market, (2) the conduct of sellers in a market, and/or (3) the conduct of customers in a market. The CMA notes that “market investigation references are … likely to focus on competition problems arising from uncoordinated parallel conduct by several firms or industry-wide features of a market in cases where the [CMA] does not have reasonable grounds to suspect the existence of anti-competitive agreements or dominance.”

As for market studies, the process of a market investigation is transparent with significant stakeholder engagement, clear milestones, a statutory time limit (again 18 months), and comes with formal investigative powers. If the investigation finds an AEC, the CMA is obligated to consider how to “remedy, mitigate, or prevent” the AEC and either take action itself or recommend others (e.g. government) to take action. If it chooses to take action itself, it can accept “undertakings” (remedies) or issue an order. There are again formal procedures for the remedy stage of a market investigation, including a statutory time limit (6 months, extendible to 10) and duration and

---

71 For further discussion of the role of the UK’s market studies relative to these other tools, see OFT519, para 2.13-2.19.
72 Note that while a market investigation is usually preceded by a market study, it may also be initiated upon receipt of a “super-complaint” by a designated consumer rights organization (CMA3, para 1.12).
73 For further discussion of the role of the UK’s market investigations relative to these other tools, see FT511, para 2.2-2.8 and its (pre-Brexit) role relative to EC competition law, see OFT511, para. 2.9-2.18.
effectiveness considerations. The CMA may also impose interim measures, but only after the publication of the final market investigation report.

Parties may lodge an appeal of the findings of a market investigation within two months of the publication of the final report. This is done before the UK’s Competition Appeal Tribunal (CAT), a specialist “court” created at the same time as the markets regime for the purpose of hearing appeals of various CMA decisions (among other responsibilities).\textsuperscript{74} Appeals may only be made on grounds of “Judicial Review,” i.e. whether the CMA followed appropriate procedures in taking a decision, not on the merits of the facts and arguments on which the original decision was based.\textsuperscript{75} Further appeals against CAT judgements can, if permitted, go to the Court of Appeal and ultimately to the UK Supreme Court.

C. Market characteristics of concern

As described in the previous section, market investigations are initiated when the CMA has grounds to believe that characteristics of a market may cause an adverse effect on competition. These characteristics can be of three types: those arising from structural (economic) features of a market, those arising from firms’ conduct in that market, and those arising from customers’ (often consumers’) conduct.\textsuperscript{76} We briefly summarize the most empirically salient of these characteristics here; see OFT511, Chapters 5-7, for further details. In the next section, we survey a range of market studies and investigations that illustrate the economic harms that may arise from these characteristics and discuss the remedies imposed to address those harms.

Structural features of a market that may cause concerns about the effectiveness of competition in the market include high and stable market concentration (e.g. monopoly and oligopoly markets), the extent of vertical integration in the market, conditions of entry, exit, and market expansion, government regulations, and the extent of informational asymmetries between consumers and firms.

Aspects of firm conduct in a market that may cause such concerns include oligopoly conduct, especially but not exclusively tacit collusion, so-called “facilitating practices” (i.e., business practices like price announcements that might facilitate reaching tacit understandings among competitors), the “custom and practice” of firms in a market (e.g., a norm of all firms charging the same fee for underwriting or estate agency), and networks of vertical agreements (e.g. selective purchasing or distribution agreements).

The UK markets regime’s focus on competition and markets “working well” means that it also looks at aspects of consumer behavior that may inhibit good outcomes. Aspects of consumer conduct in a market that may cause concerns that it is not working well include consumers’ failure to act, for example due to search or switching costs, consumers’ susceptibility to “behavioral biases,” and/or that the costs of consumers obtaining the information necessary to make informed choices may exceed likely future benefits (e.g. for learning about firms’ privacy policies).

\textsuperscript{74} CMA3, para 3.63-3.64.

\textsuperscript{75} See \url{https://www.regulation.org.uk/competition-regime.html} and Fletcher (2020), \textit{op. cit.}, p12.

\textsuperscript{76} The first two of these categories may remind academics of the Structure-Conduct-Performance paradigm that governed Industrial Organization (IO) research through the 1980s. The markets regime does not presume that the chain of causality goes from structure to conduct to performance; rather it argues that all of structure, conduct, and performance may be factors that inform an investigation into the functioning of competition in a market.
We close this section with two comments on the scope of the UK markets regime. First, we note that while harms from many of these market characteristics or conducts surveyed above would often fall under the purview of a competition authority, others would often be considered under consumer protection rules. The UK’s combination of competition and consumer protection responsibilities in the CMA is therefore an important underlying foundation of this markets regime. Second, we note that, for those topics that indeed are competition topics, these market characteristics and/or conducts would not be likely to trigger investigations on the grounds of abuse of dominance or anti-competitive agreements. We return to both of these points in Section V below when we make recommendations for the EC’s NCT based on the UK experience.

IV. Economic harms in theory & practice: a selective review of UK market studies and investigations

In this section, we illustrate how a selection of the market characteristics, firm conducts, and consumer conducts surveyed in the last section have been investigated in specific UK product markets and describe the remedies adopted to address any adverse effects on competition.77

A. Tacit collusion

Tacit collusion is the practice of firms in an oligopoly coordinating their actions despite not having an explicit cartel agreement. Economic research has shown that if firms are patient, they can raise prices and profits above competitive levels using a range of dynamic strategies. Article 101 of the TFEU can deal with explicit collusion and associated facilitating practices but cannot address purely tacit collusion.

In its 2014 market investigation of aggregates, cement, and ready-mix concrete, the Competition Commission found evidence that the cement industry was prone to tacit collusion: there were structural factors facilitating tacit collusion (high market concentration), unilateral conduct enhancing market transparency (generic price announcements), indirect evidence of tacitly collusive behavior (supra-competitive return on capital and stable or increasing margins despite decreasing demand), and direct evidence of collusive strategies (tit-for-tat and cross-selling).

To address this issue, the Competition Commission imposed two types of remedies. First, to reduce the concentration, it imposed the divestiture of production capacity to a new competitor. Second, to reduce market transparency, it imposed a ban on generic price announcements: firms were required to stop addressing uniform letters to customers and negotiate instead on a bilateral basis. The 2011 market investigation into local bus services also found that the conditions existed for tacit collusion.

B. Demand-side problems (asymmetric info/behavioral issues)

The UK markets regime is empowered to look not only at the structure of economic markets and firms’ conduct in those markets, but also consumer behavior and its impact on yielding competitive market outcomes. Many market studies and investigations have found informational asymmetries between consumers and firms that plausibly increase search costs, as well as “behavior frictions”

77 All of the market studies and investigations cited here are available from the CMA’s “Markets” page at https://www.gov.uk/topic/competition/markets.
such as default bias and contextual factors that limit consumer engagement, plausibly increasing switching costs. Search and switching costs, in turn, limit the demand substitutability between alternative suppliers of products and services, raising prices relative to what they would be in their absence.

In its investigation of retail banking services started in 2014, the CMA concluded that the market was dominated by a small number of high street banks. While the investigation found no conclusive evidence that market concentration had an effect on competitive behavior, the CMA concluded that new entrants had a positive effect on the market by introducing new business models and innovative products. Yet, new entrants and smaller banks gained market share only slowly because customers switched very little even though switching would have allowed them to make significant savings. The investigation found that current (checking) accounts for both personal and business customers had complicated and opaque fee structures which made it difficult for customers to judge service quality and the true costs of an account and for businesses to find out the best lender.

To reduce this lack of transparency and overcome behavioral biases, the CMA imposed a number of disclosure and behavioral remedies. For example, banks were required to send occasional reminders to customers to review their banking situation, to develop and implement an open API (Application Programming Interface) standard to permit authorized intermediaries to access information about bank services, prices, and service quality, and to provide better information by publishing core indicators of service quality; this “Open Banking” initiative allowed banking customers to share their current account data with trusted third parties using this secure, standardized API, and permitted digital comparison tools to make customized pricing offers based on a secure and accurate view of a customer’s existing accounts and recent financial activity.

To avoid customers paying overly high overdraft charges, banks were required to alert customers when going into unarranged overdrafts, to grant a grace period when such events occurred, and to set a ceiling on unarranged overdraft charges in the form of a maximum monthly charge. To improve information for small businesses, the largest banks were required to develop online tools allowing small businesses to receive tailored information on eligibility and pricing for lending products.

The large number of market studies and investigations involving demand-side considerations has permitted the CMA to assess the effectiveness of remedies seeking to address these concerns. Published jointly with the Financial Conduct Authority and using examples from a host of market investigations, FCA and CMA (2018) found that the effectiveness of disclosure remedies to address demand-side problems in markets is mixed, with some improving consumer engagement while others being ineffective. Disclosure alone was found to not always be enough to influence consumers’ decisions. A concluding chapter usefully summarizes a set of high-level principles about the selection, design, and testing of consumer-facing remedies to maximize their effectiveness.

---

C. High and stable concentration and barriers to entry and expansion

One of the primary principles in economics is that concentrated markets typically result in prices in excess of those that would arise in competitive markets. In such settings, the competitive process provides incentives for rival firms to enter the market, expanding their business by undercutting existing incumbents and improving outcomes for consumers. When this does not occur, this suggests the possibility that potential new entrant face barriers to entry and expansion. High and stable concentration with limited entry and expansion is therefore a natural competition concern.

As described in section IV.B above, the CMA concluded in its investigation of retail banking services that new entrants and smaller banks gained market share only slowly because customers switched very little. While there was already a Current Account Switch Service (CASS) in place, customers were not always aware of it or did not have enough confidence in it, so that its introduction only marginally increased switching. The CMA’s remedies, in particular its introduction of the Open Banking standard, was designed to further facilitate switching by requiring banks to provide transparent information on their charges and service quality (see IV.B above), by allowing their customers to share their own bank data securely with third parties using this standard, and by extending the period during which payments are redirected in case of switching. [Adam Land said that new entrant market shares have increased – shall we chase with him the source of this view? Will reach out to him (gsc).]

In its 2009 investigation of the BAA airports, the CC found that BAA’s airports controlled 81% of London’s runway capacity and serviced 62% of UK passengers and concluded that there was no competition between the seven airports owned by the BAA. Based on this conclusion, the CC was concerned that BAA was investing too little and providing poor service at their London airports. To improve the situation, it required BAA to sell its London-area Gatwick and Stansted airports as well as Edinburgh airport, with the expectation that this would give the new owners greater incentives to respond to customers’ needs.

In 2015/2016, the CMA carried out an ex post evaluation of the remedies imposed. The evaluation found downward pressure in price and an improvement in customer service. The fact that post-divestment traffic increased more in divested airports than in other UK airports, controlling for long-term trends, was seen as evidence that consumers benefitted from the structural remedies in the form of improved connectivity and choice.

D. Restrictive contract terms

Article 101 of the TFEU addresses anti-competitive provisions in inter-firm agreements, and Article 102 deals with restrictive terms imposed by dominant firms to their customers, including final consumers; by contrast, restrictions imposes by non-dominant firms on final consumers fall outside the scope of these Articles, even though they can significantly alter the functioning of a market.

---

79 FCA (2015), “Making current account switching easier: The effectiveness of the Current Account Switching Service (CASS) and evidence on account number portability.”

In its 2006 market investigation of liquefied petroleum gas (LPG), the Competition Commission found that switching between suppliers was low, despite price differences among them and price discrimination by suppliers against their long-term consumers. Among the key impediments to customer switching identified by the CC were contractual tank replacement provisions requiring the physical replacement of tanks when a customer switched supplier and contractual restrictions on switching.

A first set of simple remedies, aimed at forbidding or limiting some of most restrictive provisions imposed changes to customer contracts (e.g., limiting notice periods to no more than 42 days and exclusivity periods to no more than two years). A more complex set of remedies were adopted to deal with the tank replacement practice. These included granting customers the right to request a tank transfer (of ownership) and giving incoming suppliers the right to buy the existing tank from an outgoing supplier, at a price negotiated by the supplier on behalf of the consumer, subject to an obligation on the outgoing supplier to sell for a maximum ‘backstop price’ determined by a specified methodology.

Market investigations have also found and sought to remedy significant contractual restrictions in the markets for groceries (restrictive covenants and exclusivity arrangements for land use), audit services (provisions in loan agreements restricting a company’s choice of auditor), and motor insurance (wide price parity clauses).

E. Complementary goods and vertical relationships

Markets for complementary goods and/or vertical relationships introduce the possibility that market conditions in one market may “spill over” into other “adjacent” markets. For example, the economic literature has found that tying and/or bundling of (esp. complementary) goods can exclude efficient entrants, particularly if there are increasing returns to scale in the potentially competitive market.81 Similarly, the economic literature has found that vertical linkages can provide incentives for firms with market power at one level of a supply chain to profitably raise rivals’ costs or refuse them supply or access, causing consumer harm.82

The 2009 Payment Protection Insurance (PPI) investigations dealt with (arguably) complementary goods. PPI is insurance that covers payments on credit purchased by consumers for a variety of credit products (e.g. credit cards, personal loans, and/or first or second mortgages) in the case of an adverse life event for the borrower (e.g. an accident or illness). PPI sales were often made at the point of sale of the credit product, with the credit distributor receiving a commission. There was concern over the size of these commissions (ranging from 40 to 80 percent of the gross premium paid by consumers), causing consumers in many cases to face a


combined (credit + PPI) annual percentage rate of interest between 1.3 and 2.9 times as large as that on credit alone.

The investigation found that distributors were not actively competing for customers, that customers were limited in their ability to obtain the information necessary to compare PPI costs across providers, and that there were barriers to switching. Remedies included significantly greater information provision, including a personal quote which incorporated PPI costs, recommendations to the FCA, and unbundling to foster greater consumer choice and competition. In particular, PPI could no longer be offered at the credit point of sale or within 7 days of the credit purchase.

The 2014 Private Healthcare investigation included concerns about vertical issues and potential conflicts of interest it can induce. The investigation focused on the provision of privately funded healthcare services provided by hospitals, particularly those in central London. It found high barriers to entry and expansion and weak competitive constraints, causing higher prices than would otherwise have arisen for both inpatient and some outpatient procedures. It also investigated the incentives provided by private hospitals to referring clinicians, finding that the value of some direct benefits in exchange for patient referrals (cash payments early in the period; equity interests later) and their lack of transparency were likely to adversely affect competition between hospitals. As a remedy, it imposed a range of bans and restrictions seeking to prevent there being any incentive for a clinician to refer patients to the sponsoring hospitals’ facilities for tests or treatments.

F. Essential inputs

Access to an essential input is a specific example of the type of vertical concern articulated above (i.e., a firm may choose to limit access to an essential input to impact competition in downstream markets). Article 102 of the TFEU can deal with access to an “essential facility” owned or controlled by a dominant firm, and Article 101 can deal with specific inter-firm agreements restricting competition by limiting access to key resources. However, these Articles are less well suited to address access issues resulting from the interaction of multiple agreements and market-wide practices.

In its 2014 market investigation of aggregates, cement, and ready-mix concrete introduced in Section IV.A above, the Competition Commission also found that two firms had monopolized one market segment (GGBS, a component for a particular type of cement obtained as a by-product of steel production). Lafarge Tarmac had secure exclusivity for the raw input (BS) from all British steel producers, and transformed into granulates (GBS), whereas Hanson had secured exclusivity for these granulates, which it ground to produce GGBS. As a result, Hanson was the sole supplier of GGBS in Great Britain.

To remedy this situation, the Competition Commission required both the divestiture by Hanson of one of its three active GGBS production facilities and that Lafarge Tarmac provide the acquirer with access to GBS on a secure and cost-effective basis, in such a way as to enable the acquirer to participate in any future expansion of the GGBS market.

83 The basis for this decision was revisited in a 2016 Remittal Private Healthcare investigation when the CAT found that the foundation for the conclusion regarding higher prices had been based on an analysis which had an error.
The 2011 buses market investigation also touched on access to essential inputs. While there were many local bus operators, 69% of services were provided by one of five large operators and local bus markets were frequently monopoly or duopoly markets. Among other AECs, the CMA found barriers to entry and expansion, customer conduct, particularly their purchase and use of single-operator multi-journey tickets, and operator conduct, including exclusionary behavior and tacit coordination, were factors limiting good consumer outcomes in the market. Remedies included recommendations to Local Transport Authorities and the OFT to design and implement multi-operator ticketing schemes (a form of interoperability) and requirements that operators provide access to bus stations to rival operators on fair, reasonable, and non-discriminatory terms.

G. Omnibus case: Online platforms and digital advertising

The most recent CMA market study on online platforms and digital advertising is particularly useful as it incorporates almost all of the competition concerns summarized in the previous six sections (IV.A- F). It also is unique among the UK’s market studies and investigations in that it analyzes digital markets characterized by significant economies of scale and network effects, key characteristics in the proposed design of the New Competition Tool. For both of these reasons, we survey it in some detail.

The digital advertising market study found that Google and Facebook have market power in search and social media, that consumers do not have adequate control over the use of their data by online platforms, and that a lack of transparency, conflicts of interest, and the leveraging of market power undermine competition in the market. It concluded that, as a result, consumers have been harmed due to reduced innovation, higher prices for goods and services passed on from higher advertising prices, inadequate compensation for their attention and use of their data, insufficient control over how their personal data were used, and that there have been wider social, political, and cultural harm via its negative impact on authoritative and reliable news media.

The study found that six characteristics of these markets “inhibit entry and expansion by rivals and undermine effective competition.” The first, network effects and economies of scale, is an important factor producing extreme concentration (concern IV.C above): Google benefits from significantly greater scale in the “click-and-query” data used to train search algorithms and Facebook benefits from significant direct and indirect network effects within and between users and developers.

The second characteristic is the nature of consumer decision-making and the power of defaults in this market (concern IV.B above). The study found that defaults impact both consumers’ initial choice of search engines as well as the ability of Google and Facebook to collect data about their users, concluding that these platforms’ “choice architecture” (i.e. the design of the ways in which consumers make decisions on their platforms) and use of defaults inhibits consumers’ ability to make informed choices.

The third characteristic is unequal access to consumer data. The study concluded that user data is highly valuable for targeting digital advertising, making it (in our words) an essential input (concern IV.F above). This data includes user demographics and interests, as well as the ability to track user actions both online (using analytical tools such as ad and click tags) and offline (using consumers’

84 Digital advertising market study, para 21.
locations). The study concluded that the inability of smaller platforms and publishers to access user
data creates a significant barrier to entry (concern IV.C above).

The fourth characteristic is lack of transparency. Given the complexity of real-time online
advertising decision-making, the study found that both publishers and advertisers find it difficult to
understand how decisions are made and to exercise choice effectively. The study concluded that this
lack of transparency can create or exacerbate competition problems, for example letting these
platforms overstate quality, limit the ability of publishers to evaluate the effectiveness of their
advertising, and undermine the ability of market participants to make informed choices (a guiding
principle of concern IV.B above).

The final two characteristics are the importance of “ecosystems” of complementary products and
services and vertical integration and conflicts of interests. When platforms with market power own
complementary services in potentially competitive adjacent markets, they have an incentive and
ability to leverage their market power into these markets (concern IV.E above), and the study
concluded that Google has done so in both the market for (advertiser) demand-side platform services
and throughout the “ad tech stack” (the online advertising supply chain).

Despite finding significant adverse effects on competition, the CMA chose not to initiate a market
investigation, preferring instead to recommend to the UK government that they create a “pro-
competition ex ante regulatory regime” through the creation of a digital regulator, the Digital
Markets Unit (DMU).\(^85\) That being said, the market study described in detail proposed remedies that
it concluded would be appropriate to address the AECs it found.

The recommended remedies consisted of an enforceable code of conduct and a range of pro-
competitive interventions. The code of conduct was based around three high-level objectives: fair
trading, open choices, and trust and transparency. Each objective further articulated principles of
platform behavior that would apply under that objective, including obligations for fair and
reasonable contract terms, non-discrimination requirements, and platform design and communication
strategies to enhance transparency and consumer choice.\(^86\)

The recommended pro-competitive interventions included (1) increasing consumer control over their
data (by requiring platforms give consumers the choice not to share their data and placing a duty for
“Fairness by Design”), (2) mandating interoperability (for Facebook/social networks), (3) mandating
third-party access to data (for Google/search engines and in online advertising markets), (4) lowering
data barriers to entry (by mandating data separation / data silos, introducing user and transaction IDs,
and enhancing data mobility), (5) restricting these platforms’ ability to obtain default positions and
introducing consumer choice screens, and (6) requiring separation (either operational or divestiture)
to address foreclosure and conflicts of interest concerns.

With the publishing of its final report, the market study stage of the CMA’s interest in the online
advertising market is finished. In partnership with the Information Commissioner’s Office, the UK’s
data protection authority, and Ofcom, the UK’s communications regulator, the CMA is now
considering further details about the design and implementation of the DMU via a Digital Markets
Taskforce, which will provide specific recommendations to the UK government before the end of
2020.

\(^85\) This was also the recommendation of the report of the Digital Competition Expert Panel sponsored by
the UK government and released in March 2019 titled “Unlocking Digital Competition.”
\(^86\) See paragraphs 7.74-7.89 for further details.
V. Recommendations

In this section, we provide recommendations regarding the merits and design of the EC’s proposed New Competition Tool based on a critical review of the UK experience summarized in Sections III and IV above. After providing a brief critical review of the selected case studies summarized above, we divide our recommendations into three parts: (1) for markets where harm has already affected the market due to a “structural lack of competition,” (2) for markets where harm has not yet occurred, but there are “structural risks for competition” due to economic factors that favor long-run concentration, and (3) procedural recommendations.

A. A critical review of the selected case studies

In our view, the case studies summarized in Section IV present convincing evidence of the merits of the UK’s markets regime. The competition concerns highlighted in each of the sections are both credible and outside of the scope of existing enforcement tools. Furthermore, the care and quality of the market studies and investigations provided evidence establishing that these concerns are not purely theoretical, but have caused harm to competition and consumers in the surveyed markets.

While there is limited ex post evidence on the effectiveness of the remedies imposed to address these competition concerns outside those addressing consumer-facing harms summarized in section IV.B (and here the evidence is mixed), we see considerable merit in the remedies imposed to address structural factors limiting competitive outcomes in the aggregates and airports investigations summarized in sections IV.A and IV.C, as well as the limitations on contractual restrictions, vertical conflicts of interest, and essential inputs described in the market studies and investigations covering the LPG, Private healthcare, Aggregates, and Digital advertising sections summarized in sections IV.D- G. They are well-supported by economic reasoning, well-targeted to address the specified concerns, and proportionate. This review of the UK experience suggests several recommendations for the New Competition Tool, which we present in the next sections.

B. Recommendations for markets where harm has “already affected the market”

We focus first on markets where, in the language of the EC Inception Impact Assessment (IIA), harm has already affected the market due to a “structural lack of competition.”

Recommendation 1: We see a strong case for the introduction of a New Competition Tool to address factors like those covered by the UK’s markets regime that prevent effective competition in markets. Having reviewed both the theory and practice of the UK markets regime, it is clear that there are sometimes factors that prevent markets from yielding competitive outcomes for consumers and that existing antitrust, regulatory, and consumer protection tools are too narrow in their scope to address all such factors. Antitrust enforcement under Articles 101 and 102 of the TFEU forbids anticompetitive agreements and the abuse of a dominant position, but many of the practices surveyed in Section IV above would not be addressable by these tools. For instance, this would be the case for tacit coordination due to high concentration and market transparency (concern IV.A above), demand-side problems (concern IV.B), restrictive provisions in customer contracts (concern IV.D), and the bundling of complementary goods (concern IV.E). Furthermore, while some of these practices (e.g., restrictive contract terms) may in principle be monitored by consumer protection
agencies, the objective of these agencies often fails to account for the impact of the practices on competition. A New Competition Tool would fill an important gap.

Recommendation 2: We see a strong case for a New Competition Tool with a broad scope within and across sectors (“Policy Option 3”). As summarized in Section II, the EC is considering four policy options for a NCT that vary in their sectoral coverage (“limited”/narrow vs. “horizontal”/wide) and the types of firms considered (“dominance-based”/narrow vs. “market structure-based”/wide). As discussed in Recommendation 1, one of the benefits of the New Competition Tool lies in its ability to address the conduct and practices of non-dominant firms; hence, we see no benefit to limiting its applicability to dominant firms. Furthermore, as market features like those surveyed in Section III could in principle apply in any sector of the economy, we similarly see no benefit to limiting its applicability across sectors. The presence of sectoral regulators in specific industries does not make the New Competition Tool superfluous. In the UK, the CMA may investigate markets where there exist sectoral regulators (e.g., energy, banking); indeed one reason to commence a market study or investigation is via referrals from sectoral regulators (who may not have capabilities comparable to those of a competition authority for evaluating and addressing competition issues within their sector).

Recommendation 3: We see a strong case for including a consumer protection mandate in the New Competition Tool. The CMA is both the competition and consumer protection authority in the UK and that naturally influences the scope and powers of their markets regime. We see a strong complementarity in the combination of competition and consumer protection mandates. A combined mandate allows market studies and investigations to focus not only on the economic structure of markets and the conduct of firms, but whether aspects of consumer behavior (e.g. asymmetric information and/or “behavioral” issues like default bias) are preventing effective competition in a market. It furthermore allows remedies to target both consumer protection and competition problems that may be complementary and would not be effectively addressed with separate and uncoordinated responsibilities. We acknowledge that including such powers in a NCT must be coordinated with the EC’s existing and proposed new consumer protection powers, as well as those of the member states, a point we discuss further in Section V.C below.

Comment on “algorithmic collusion”: The EC’s Impact Assessment speaks generally about the challenges facing competition policy due to increased digitalization and specifically about how algorithm-based technological solutions may facilitate coordinated strategies between firms even in relatively unconcentrated markets. There is recent academic evidence suggesting that such “algorithmic (tacit) collusion” is possible and that its price effects can be consequential. As such, it is important that competition authorities have tools to address the consequence of higher prices from such innovations if they were to arise. Given our understanding of existing EU competition law, we do not see how this would be possible with its current toolkit. As a natural extension of harms arising from tacit collusion more generally (concern IV.A above), however, it could be handled by a New Competition Tool along the lines we recommend above.

C. For harms “about to affect the market”

For the EC’s second category of potential harms, those representing “structural risks for competition” where harm “is about to affect” the market, we are on softer ground when it comes to making recommendations. In particular, this category falls outside the scope of the UK markets regime, where the focus is very much on harms in markets as constituted at the time of a market study/investigation. Furthermore, the market study of Online platforms and digital advertising, surveyed in Section IV.G, is the only one we are aware of in which the market had features such as those highlighted as being of concern (network effects, extreme economies of scale, consumer lock-in, vertical integration, and conflicts of interest). Furthermore, this market study recommended a regulatory solution, not a market investigation with remedies like that anticipated by the NCT.

That being said, the possibility of harms in markets characterized by features that the EC has highlighted are real and there is precedent beyond the UK markets regime. In particular, there is long-standing experience within regulatory economics to foster competition in markets where structural features encourage extreme concentration (so-called “natural monopoly” markets), as well as practical experience implementing these ideas in communications markets (e.g., via wholesale access regulation for telephone and broadband services).\(^{88}\) Furthermore, the remedies suggested in the Digital advertising market study, while meant to be passed to a digital platforms regulator, identify strategies well-suited in our view to applications in other settings where a market features winner-take-most characteristics.

As such, we agree with the Commission's concern about markets whose structural economic features foster concentrated outcomes in the long run and support the suitability of the NCT to address concerns in such markets. Where we are uncertain is whether a competition authority can credibly estimate when such markets may “tip;” furthermore, we feel that knowing this is inessential to the design of such a tool.

In forming our recommendations for markets whose economic fundamentals suggest possible future competition concerns, we adopt as an organizing principle the goal of ensuring that such markets are contestable, not only for existing competitors currently operating in the market but also, for future competitors who could displace whoever is that winner, particularly if the economics of the existing market suggest that there will necessarily be a “winner-take-most” outcome in the long run.\(^{89}\)

In fostering this goal of contestability, we focus on the merits of investigations, and potentially interventions, under the New Competition Tool that focus on two key principles of such markets: (1) facilitating customer choice and (2) preventing the entrenchment of market power. This leads to the following three recommendations.

**Recommendation 4:** We concur with the EC’s impact assessment that there are economic characteristics of markets that foster concentration in the long run. These include (but need not be limited to) economies of scale and scope, network effects, strong consumer lock-in effects

---


\(^{89}\) The same point is made in the EC’s expert report on shaping competition policy in the era of digitalization of Crémer, de Montjoye, and Schweitzer (2019),”Competition policy for the digital era,” available for download at [https://ec.europa.eu/competition/publications/reports/kdf0419345enn.pdf](https://ec.europa.eu/competition/publications/reports/kdf0419345enn.pdf).
(and switching costs more generally), multi-sidedness, and binding non-negativity price constraints (i.e., “no prices below zero”). We recommend that the EC identify markets with such characteristics and maintain a high level of awareness about their evolution. This awareness could be fostered by a reporting system allowing firms, customers, or suppliers in markets that are concerned about increased concentration to register these concerns with the EC.

**Recommendation 5:** For markets identified as having characteristics that may foster concentration in the long run, we recommend that the EC have a lower threshold for investigating whether the market is functioning well for consumers and suppliers and whether it is likely to continue to function well in the immediate future. If this threshold is surpassed, it should investigate the status of both consumer conduct and firm conduct in such markets. It should also investigate closely the importance of adjacent markets providing complementary services for the functioning of the market under consideration (including “ecosystems” if the set of such markets is large).

If the outcome of any such investigation indicates features that are impeding competitive outcomes, we offer two recommendations based on the competitive conditions in the market subject to factors that encourage long-run concentration. To fix ideas, let Market A indicate the market subject to factors that encourage long-run concentration and let Market(s) B indicate an “adjacent” market (or set of markets) (often) providing complementary services.\(^90\)

[Re: the above, it is not at all obvious how the EC should decide (via an investigation) that features are (or are likely to) impede competitive outcomes. Flag as an issue? Discuss in detail? Or leave as is?]

**Recommendation 6a:** *If the market subject to factors that encourage long-run concentration (Market A) has not yet achieved high levels of concentration and an investigation has found features that are impeding competitive outcomes, we recommend that the EC seek to foster competition “in the market.” In particular, in this case we recommend that the EC remedy any limitations on multi-homing on all sides of the market as well as limitations on customer and/or supplier switching behavior.* Examples of such limitations include (but are not limited to) asymmetric information, a lack of transparency, and contractual, behavioral, or design factors that increase search and/or switching costs. Examples of remedies to these features of the affected market include (but are not limited to) “data portability” and various types of “interoperability” between the firms offering services in Market A.\(^91\) Furthermore, in this case we recommend that the EC remedy any “offensive” leveraging of firms with market power in an adjacent market (Market B) into the market exhibiting factors that encourage long-run concentration (Market A). Examples of strategies firms with market power in Market B can take to impact competition in Market A include (but are not limited to) exclusive access to inputs, etc.

---

\(^90\) In the balance of this section, we refer to Market B as a single market, but it should be understood that there could be multiple adjacent markets that provide services complementary to Market A and that all these markets should receive consideration in an investigation into the status of competition and outcomes in Market A.

\(^91\) For example, see the remedies adopted in the Banking market investigation summarized in Section IV.B above and remedies proposed for the digital markets regulator in the Online platforms and digital advertising market study summarized in Section IV.G above. Crémer, de Montjoye, and Schweitzer (2019, Chapter 4) discuss various types of interoperability that might be considered depending on the structure of the market and the findings of the market investigation.
customers, or suppliers, tying and/or bundling (possibly combined with, or facilitated by, acquisitions in market A), and/or product incompatibility involving Market A products, Market B products, or combinations of them. Examples of remedies to these features of the affected market include (but are not limited to) interoperability, unbundled access, and mandated offerings on fair and non-discriminatory terms and conditions.\textsuperscript{92} We note that leveraging strategies from adjacent markets into Market A are likely to be particularly powerful when Market A is subject to factors that encourage long-run concentration as short-run advantages provided by foreclosure strategies are likely to turn into long-run advantages due to the economic fundamentals of such markets (e.g., economies of scale, network effects, etc.).

**Recommendation 6b:** If the market subject to factors that encourage long-run concentration (Market A) has already achieved these high levels of concentration and an investigation has found features that are impeding competitive outcomes, we recommend that the EC seek to foster competition “for the market.” In particular, in this case we recommend that the EC remedy limitations on multi-homing on all sides of the market as well as limitations on customer and/or supplier switching behavior. We recommend in this case that the EC remedy “defensive” leveraging of firms with market power in the concentrated market (Market A) into an adjacent market (often) providing complementary goods or services (Market B). Examples of strategies firms can take with respect to both of these factors are the same as in Recommendation 6a above, as are potential remedies to them. We note that competition for markets with factors that encourage long-run concentration (Market A) often come from adjacent layers of the supply chain in which Market A is a part and/or from complementary products which are combined with Market A’s products. As such, the EC should particularly seek to prevent the leveraging of the market power of firms in Market A into these adjacent layers.

[Add short discussion of tradeoffs between the goals of Recs 6a and 6b]

**Further considerations**

We acknowledge that empowering a competition authority with such tools gives it a quasi-regulatory role, but think that this is appropriate. The EC’s proposed regulation of digital markets, if implemented, will only cover “gatekeeper” digital platforms and may not pick up problems in markets which are either (1) still competitive even if subject to factors that foster concentration in the long run and/or (2) exhibit concentration in the present market configuration, but for which there could remain active competition for the market. We see regulation as being reserved for “natural monopoly” environments where there is high and durable market concentration.

Furthermore, we see an advantage of the NCT in that, if properly designed, it can seek to remedy competition issues in markets more quickly than a regulator could. This could be particularly important in markets subject to factors that encourage long-run concentration. To this end, we recommend empowering the NCT with the ability to impose Interim Measures based on

\textsuperscript{92} For example, see the interoperability remedies adopted in the Banking and Buses market investigation summarized in Sections IV.B and IV.F, the limits on bundling adopted in the PPI market investigation summarized in Section IV.E and recommended in the Digital advertising market study summarized in Section IV.G, and the FRAND terms adopted in the Aggregates and Buses market investigations summarized in Section IV.F.
relatively low procedural hurdles. While we recognize the costs this may place on affected firms, we perceive these costs to be significantly lower than those that may arise to disadvantaged firms and, ultimately, consumers if, in the absence of early intervention, the factors that favor concentration, partnered with consumer and/or firm conducts that merit investigation, indeed cause this concentration.

That being said, the Tool should have strict safeguards ensuring that it is applied in a competitively and technologically neutral way; competition authorities should avoid picking winners and losers in markets subject to these factors, especially including digital markets. Furthermore, the scope of the intervention should balance carefully the magnitude of the potential harm and the costs to firms of its imposition. For example, interventions that foster consumer switching are likely to be less invasive than are requirements for data standards, data sharing, and interoperability, which are in turn likely to be less invasive than requirements for unbundled access.

D. Procedural/Governance issues

Our final recommendation focuses on governance issues of a New Competition Tool.

Recommendation 7: While we see a strong case for the New Competition Tool, its implementation requires a careful design of its governance structure to safeguard appropriate checks and balances. In particular, the following concerns need to be addressed:

- Firms want legal certainty, that is, they want to be able to predict what to expect from competition authorities. A tool such as the new NCT, which by design is not restricted to address well-specified behavior (e.g., abuse of a dominant market position) but intended to address a broad range of issues, makes it more difficult for firms to know what to expect.
- A broad definition of the mandate of the NCT may give more role to the courts for its interpretation. Given the time court proceedings are known to take, this could introduce an unintended consequence of the tool. In order to limit these concerns, we recommend that the mandate for the NCT specify examples of the types of competition concerns that would call for a study or investigation, as well as examples of potential remedies that might be imposed to address those competition concerns. This would also help address firms’ concerns about legal certainty.
- The governance structure of the NCT will have to specify on whose initiative the opening of a case is considered and who decides whether the case should go forward. In particular, the role played by national sector regulators and national competition authorities in the referral procedure needs to be spelt out.
- The hybrid nature of the NCT, which potentially combines elements of competition enforcement, consumer protection, and regulation, may make it difficult for the authorities to decide and for firms to predict whether a potential case is dealt with by DG

93 Note that the UK’s markets regime only has the ability to impose interim measures after the conclusion of a market investigation, but that the CMA (1) has recommended enhancing these powers to move earlier in the process (Letter from Andrew Tyrie to the Secretary of State for Business, Energy, and Industrial Strategy (2019), available at https://www.gov.uk/government/publications/letter-from-andrew-tyrie-to-the-secretary-of-state-for-business-energy-and-industrial-strategy) and (2) has recommended in this proceeding that the EC adopt such a structure (CMA’s response to the EC’s consultations in relation to the DSA package and NCT (2020)).
Comp in the context of Art 101/102, by DG Connect in the context of regulation, or by DG Comp in the context of the NCT. Thus, clear rules need to be established about how such decisions are taken and by whom.

Moreover, the guiding principles of the NCT need to be specified. Is the aim of the NCT to maximize consumer welfare, as is the case in antitrust, or are other principles to be considered as well?

As part of a strong system of checks and balances, firms need to have access to a legal review of NCT decisions that addresses not just judicial considerations, as is the case for the UK markets regime, but also the factual foundations and economic merits of the case.

Another issue is to select an appropriate statutory time limit for cases considered under the NCT. The UK allows a time period of 18 months for market studies, an additional 18 months for a follow-up market investigation, and six months (extendible to ten) for the implementation of remedies. The time period chosen by the EU for the New Competition Tool should account for the fact that an investigation in an EU-wide context may be more time demanding. At the same time, for a case in the fast-moving digital economy the time period chosen should not be overly long.
5.1.3. Procedural matters concerning the market investigation regime

1. Description of market investigation regime

Based on the analysis provided in Sections 6.1 and Section 7.1 of the Impact Assessment, the preferred policy option to address emerging and existing market failures is a market-structure focused investigatory regime in digital markets, where the Commission has full discretion as to the content of the appropriate and proportionate remedy. The sections below provide a description of the market investigation regime which is inspired by similar and tested existing competition instruments, in particular by that of the UK.\(^\text{94}\)

2. Scope of application

The scope of application of the market investigation regime would be defined in a clear and predictable manner based on objective criteria to identify the digital markets to which it would be applicable. One possibility would be to define its scope by identifying a number of market characteristics that are specific to digital markets (e.g. two-sidedness, strong network and scale effects, data accumulation) and the provision of digitally-enabled services (e.g. services provided through the internet). The market investigation regime would rest on economic knowledge and methodology, in line with existing EU economic regulation, yet without being straitjacketed within specific competition law analysis.\(^\text{95}\)

Another relevant question concerning the scope relates to whether the market investigation regime should also be available at Member State level. In this respect, a number of National Competition Authorities also expressed an interest in either adopting national market investigation instruments or in being empowered to apply or to participate in the European one.\(^\text{96}\)

In the case where a pan-European tool were to be adopted, the European Competition Network could serve as a mechanism for the necessary discussion and coordination in the application and enforcement of the instrument.

3. Procedure

The market investigation regime would be set up with established proceedings and procedural milestones, enshrined in the main legislative act and detailed in implementing regulations and Guidelines. During the investigation, the Commission would investigate the market(s) at stake to identify emerging and existing market failures. At the end of the investigation, the Commission would decide, on the basis of its findings and of a clear legal test, whether there are emerging and existing market failures and decide whether to adopt remedies to address them. The

\(^\text{94}\) See R. Whish (2020), *The New Competition Tool: Legal comparative study of existing competition tools aimed at addressing structural competition problems, with a particular focus on the UK’s market investigation tool.*

\(^\text{95}\) See P. Larouche and A. de Streele (2020), *Interplay between the New Competition Tool and Sector-Specific Regulation in the EU.*

\(^\text{96}\) See Summary of the contributions of the NCAs to the impact assessment of the new competition tool.
Commission’s decision finding an emerging or existing market failure and imposing remedies would be subject to judicial review.\(^7\)

4. Opening decision

As is currently done with sector inquiries,\(^8\) the Commission would initiate an investigation under the market investigation regime by means of an opening decision. This decision would be preliminary and based on a prior informal scoping phase, during which the Commission would gather information. The decision would outline the potential competition problem the Commission aims at exploring in the relevant market and explain why the Commission has decided to use the market investigation regime.\(^9\)

5. Investigation and investigative measures

During the investigation, the Commission would gather information to investigate whether the structure and features of a market lead to emerging and existing market failures.\(^10\) In this phase, the Commission would use a broad range of investigative means. Stakeholders and NCAs generally agreed that in order to effectively assess structural market problems, the Commission should be able to rely on several types of instruments. Respondents to the open public consultation explained that in order to be effective, the Commission should have a broad set of investigative powers. In their view, without proper information gathering, the Commission would not be able to properly assess and address emerging and existing market failures. Respondents to the Commission’s open public consultation and NCAs also submitted that the market investigation regime would require adequate and appropriate investigative powers in order to be effective.\(^11\) They explained that adequate and appropriate investigative powers are crucial and indispensable to ensure the tool’s effectiveness, in order to gather relevant data and documents to properly assess the market situation and take appropriate measures. The investigative measures available to the Commission could include, among others: requests for information to companies, including an obligation to reply; penalties for not replying to requests for information or for providing incomplete or misleading information to requests for information; interviews to company management and personnel (with penalties for not submitting to interviews); the power to obtain expert opinions; the power to carry out inspections at companies and to impose penalties for not submitting to inspections at companies. H. Schweitzer (2020) argues for a similar approach to investigative measures – including the ability to impose sanctions in case of non-compliance – in order to ensure an efficient market investigation regime.\(^12\)

6. Binding legal deadlines

---


\(^9\) Ibid, at Chapter V, section 2, point c “The opening decision”.


\(^11\) See Summary of the Questionnaire to the NCAs on the New Competition Tool, section III.

\(^12\) See H. Schweitzer (2020): *The New Competition Tool: Its institutional set up and procedural design*, Chapter V - “The procedural design of the NCT”.

50
In order to ensure the effectiveness and speed of intervention under the market investigation regime in digital markets, proceedings under the market investigation regime would be subject to binding legal deadlines. Respondents to the Commission’s open public consultation generally argued in favour of binding deadlines. They explained that the inclusion of binding legal deadlines in the process would ensure expediency and legal certainty, notably for the businesses under investigation. Respondents suggested the introduction of deadlines for both the Commission for the major steps of the investigation (such as issuing the findings, testing remedies and for the overall duration of the investigation) and the businesses concerned. Respondents also added that deadlines would ensure a swifter outcome, which is all the more necessary, in particular in digital sectors, both for a swift resolution of the case and for providing sufficient legal certainty to the market. As regards binding deadlines for the businesses concerned, respondents argued that this would avoid risks of certain businesses slowing down the process with dilatory conducts, and that these deadlines should be coupled with the possibility of imposing fines for non-compliance to ensure speed and effectiveness. NCAs with relevant experience also generally considered that the market investigation regime should be subject to binding legal deadlines. They stressed that if the goal is to act in a timely manner, there should be a time limit after which an authority should decide whether intervention is warranted.

7. Procedural safeguards to respect fundamental rights under the EU Charter and the ECHR

Given the broad and potentially far reaching intervention powers that the Commission would have under the market investigation regime to address emerging and existing market failures, strong procedural rights and checks will be put in place, to ensure compliance with the EU Charter of fundamental rights.

The need for appropriate procedural safeguards was emphasised by stakeholders replying to the Commission’s open public consultation and by NCAs. The former emphasised the need for a clear procedural set up, with procedural safeguards, checks and balances, transparency, stakeholder engagement and judicial review. The latter commented that the market investigation regime should be subject to adequate procedural safeguards, including the right to be heard and judicial review. Some NCAs stressed the importance of transparency throughout the proceedings.

Given that under the NCT, the Commission would not find infringements by individual undertakings nor impose fines, the proceedings would be of an administrative rather than quasi-criminal nature. Consequently, the procedure would not qualify as quasi-criminal within the meaning of Article 48 of the Charter of Fundamental Rights and Article 6 of the European Convention on Human Rights (ECHR). The following provisions of the Charter would therefore not be applicable to proceedings under the NCT: the presumption of innocence (Article 48(1) of the Charter and Article 6(2) ECHR); the principles of legality and proportionality of criminal

103 Ibid.
104 See Summary of the Stakeholder Consultation on the New Competition Tool, Replies to the OPC, Section V.b.
105 See Summary of the Questionnaire to the NCAs on the New Competition Tool, section III.
106 See Summary of the Stakeholder Consultation on the New Competition Tool, Replies to the OPC, Section V.d.
107 See Summary of the Questionnaire to the NCAs on the New Competition Tool, section III.
offences and penalties and of ‘ne bis in idem’ (Articles 49 and 50 of the Charter); the rights of
defence in a criminal law sense (Article 48(2) of the Charter).  ^108

Nevertheless, the following guarantees would apply: the procedural rights of fairness as set out in
Article 41 CFR,  ^108  the right to be heard (Article 41(2)(a) of the Charter), a right of access to the
file (Article 41(2)b of the Charter), a right to careful and impartial examination,  ^110  a right to a
reasoned decision (Article 41(2)(c) of the Charter and Article 296 TFEU)  ^111  and a right to judicial
review (Article 47 of the Charter and Article 6 ECHR, wherever market actors are directly and
individually affected by a market investigation; the right to protection of business secrets and
other confidential information (Articles 7 and 8 of the Charter); the protection against arbitrary or
disproportionate intervention by public authorities in the sphere of private activities.  ^112

8. Remedies

Under Option II/B, at the end of the market investigation regime, the Commission would decide
to adopt remedies to address the emerging and existing market failures identified. Depending on
the exact features of the emerging and existing market failure, the Commission could choose to
adopt behavioural or structural remedies.

The remedies would need to be suitable to address the problems identified, and subject to the
principle of proportionality.  ^113  There are various conceivable remedies from waiving exclusivity
clauses, to providing data access, from imposing transparency obligations to imposing
interoperability obligations. Indeed, in line with the UK CMA enforcement practice, most of the
market investigations will likely be closed by imposing remedies that are behavioural in nature as
an appropriately designed remedy package will in most cases be sufficient to remedy emerging and
existing market failures identified. Under the Enterprise Act the CMA will seek to achieve a
‘comprehensive solution’ designed to bring about a well-functioning market in the future.  ^114
Nevertheless, the possibility cannot be automatically ruled out that in certain particular cases

108 See H. Schweitzer (2020): The New Competition Tool: Its institutional set up and procedural design,
Annex 5.3, p.5. The market investigation regime will not have a punitive or deterrent purpose, will not
rely on the finding of guilt, and no penalties will be imposed (apart from fines for the non-compliance
with procedural obligations), see European Court on Human Rights, Guide on Article 6 of the European
109 According to Article 6(1) TEU, the CFR “shall have the same legal value as the Treaties”.
110 Case C-269/90, Technische Universität München, EU:C:1991:438, at para. 14. From the Articles 101
and 102 TFEU case law see: Case T-371/17, Qualcomm and Qualcomm Europe v Commission,
111 Case C-269/90, Technische Universität München, EU:C:1991:438, at para. 14; Case T-394/15, KPN v
Commission, EU:T:2017:756, at para 49. From the case law on Articles 101 and 102 TFEU see: Case
C-39/18 P, Icap and Others v Commission, EU:C:2019:584; Case T-433/16, Pometon v Commission,
EU:T:2019:201, at paras. 348–394; Case T-371/17, Qualcomm and Qualcomm Europe v Commission,
112 See Article 7 CFR. For case law: Case C-92/09, Schecke, EU:C:2010:662, at para. 72; Case C-465/00,
Österreichischer Rundfunk, EU:C:2003:294, at para 86. From the case law on Articles 101 and 102
TFEU see: Case 46/87 and 227/88, Hoechst v Commission, EU:C:1989:337, at para. 19; Case C-583/13
P, Deutsche Bahn v Commission, EU:C:2015:404, at paras. 19–36; Case T-135/09, Nexans France and
Nexans v Commission, EU:T:2012:596, at para. 40; Case T-325/16, Ceske Dráhy v Commission,
EU:T:2018:368, at para. 34.
113 See H. Schweitzer (2020): The New Competition Tool: Its institutional set up and procedural design,
Chapter VI - “Remedies”.
114 See Richard Whish (2020), The New Competition Tool: Legal comparative study of existing competition
tools aimed at addressing structural competition problems, with a particular focus on the UK’s market
investigation tool.
when it is not possible to identify appropriate behavioural remedies to restore competition, the
authority shall impose remedies that are structural in nature, such as selling a business unit.

Respondents to the open public consultation generally agreed that a broad array of remedies
should be available to the Commission although when asked specifically whether certain
emerging and existing market failures can only be dealt with by structural remedies, such as the
divestment of a business, the views among respondents were mixed. NCAs with relevant
experience generally considered that the Commission should be able to impose structural
remedies.\(^{115}\)

As suggested by stakeholders and the NCAs,\(^{116}\) the Commission could also accept voluntary
commitments submitted by the undertakings active in the market at stake.

The Commission would market test the remedies, to gather feedback on their suitability and
effectiveness.

\section*{9. Judicial review by the EU courts}

As occurs in other jurisdictions with similar tools\(^{117}\) and in line with the right to judicial review
enshrined in Article 47 of the Charter and Article 6 ECHR, market actors directly and
individually affected by a market investigation will have the right to seek judicial review of the
Commission’s decisions to adopt remedies at the end of the market investigation.\(^{118}\)

Other decisions taken in the course of the procedure would not be subject to judicial review. In
particular, the opening of the proceedings would be an intermediate measure, as such not subject
to judicial review. Should the Commission decide not to open a market investigation, such
decision would not be subject to judicial review. Contrary to infringement proceedings, no
individual rights are involved in the proceedings. The use of the market investigation regime
would therefore be at the Commission’s discretion.

\* \* \* \*

\(^{115}\) Summary of the Stakeholder Consultation on the New Competition Tool, Replies to the OPC, Section
III 4.d.

\(^{116}\) See Summary of the Questionnaire to the NCAs on the New Competition Tool, section III.

\(^{117}\) See Richard Whish (2020), \textit{The New Competition Tool: Legal comparative study of existing competition
tools aimed at addressing structural competition problems, with a particular focus on the UK’s market
investigation tool}.

\(^{118}\) See H. Schweitzer (2020): \textit{The New Competition Tool: Its institutional set up and procedural design,}
Chapter II, section 2, “Administrative nature of the NCT, a more participative process and procedural
guarantees”.

53
5.1.4. Steps followed in the evaluation of the impact of the market investigation regime

According to the OECD, the main steps followed in the evaluation of the impact of a competition policy enforcement decision are:¹¹⁹

- Select the decision to assess: the Commission must select which decisions to assess with the aim of maximising the benefit it can obtain from these exercises. The most important factors to be taken into account in the selection of the decisions are: (i) nature of the decision, (ii) availability of data, (iii) learning opportunities, (iv) specific interests driving the evaluation, and (v) time elapsed since the decision was adopted.
- Choose the evaluation team: the team could be composed of Commission staff and/or external consultants. The selection of the team needs to take into account (i) the expected duration of the exercise, (ii) the predictability of the internal workload, (iii) skills required, (iv) cost of the resources, (v) confidentiality constraints, and (vi) the ability to retain the knowledge and experience.
- Identify the counterfactual: to determine the possible counterfactual for a specific decision it is necessary to understand the options that were considered when the case was originally examined. The counterfactual that should be taken into account in the evaluation exercise represents the most likely alternative to the decision that was finally taken. However, in some cases, it may be possible to consider more than one counterfactual.
- Select the methodology: the most commonly used methodologies in the ex-post evaluations of competition enforcement decisions are: (i) comparator-based methods, e.g. difference-in-differences; (ii) market-structure-based methods, i.e. simulations; and (iii) surveys and interviews. The determination of the most appropriate method depends on several factors, including (i) the goal of the study, (ii) the nature of the data available, (iii) the time available for the analysis, and (iv) the skills of the evaluation team. When no quantitative data is available, the effects of a decision can only be determined through a more qualitative assessment that relies on the views of market players and industry experts and on information on how the market has evolved collected through desk research of existing public and commercial sources.
- Determine the variables to study: to determine if a decision was the appropriate one to take the evaluation team should assess what has been its actual effect on the key market variables, such as prices, quality, variety, entry and innovation. Usually the focus of most evaluation assessments is on changes in prices, because data on this variable is easier to obtain. However, an important determinant should also be the nature of the remedies implemented as ultimately the main objective of the evaluation is to determine the effects of the remedies adopted with the decision.
- Collect data and information: there are a number of sources that can be used to collect qualitative information and quantitative data on how the market has evolved since the decision was made and on the possible counterfactual scenarios. These include: (i) firms active in the market assessed, (ii) industry experts, (iii) original files of the decision, (iv) commercial databases, (v) sector publications, (vi) market reports and intelligence, (vii)

official public statistical agencies, (viii) stock prices databases, (ix) accounting information, (x) press releases and articles, and (xi) information from other investigations.

- Perform the analysis: the way to assess the effects depends on the variables on which the analysis intends to focus and on the methodology chosen. It will in general involve (i) determining how the key variables have evolved following the decision (e.g. have prices decreased?, have the main features of the products been improved?, have new products been launch or less products been phased out?, have other firms entered the industry or contested some of the incumbents’ market share successfully?, has R&D spend increased or have companies registered more (high quality) patents?), (ii) ascertaining how the same variables would have evolved in the counterfactual(s), and (iii) concluding whether the decision led to a better outcome than the one that would have emerged in the counterfactual.

- Verify the robustness of the results: there are several statistical tests to check the reliability of quantitative results. When an econometric approach is used, one could perform the analysis with different specifications of the equations that are being estimated, or using different estimators or alternative control variables. This allows testing the sensitivity of the results to the specific structure of the analysis. When a more qualitative approach is used, the reliability of the conclusions can be checked by using a variety of sources of information and by ensuring that all the evidence supports the results.

- Draw conclusions and derive lessons: useful lessons can be drawn both from evaluations that show that a decision was appropriate, as well as from evaluations that show that a decision was not the most appropriate one. One needs also to take into account the specific circumstances of the case and determine to what extent these may have driven the results.

In relation to the most typical ex post evaluation methodologies, OECD describes them as follows:

- **Comparator-based methods** use data from actual transactions in markets, or time periods, that have not been affected by the decision to construct the counterfactual and compare it with actual market developments of the market affected by the decision. This method generally involves comparisons of the changes in the affected market before and after the decision with the changes that took place over the same time period in a comparable market not influenced by the decision – this approach is referred to as difference-in-differences.\(^1\)

- **Simulations** use an economic model that mirrors how the affected market works to simulate prices and quantities in the counterfactual scenario. The three key elements of a simulation are: (i) the definition and specification of the relevant economic model: demand, supply, and equilibrium condition; (ii) the estimation of the key structural parameters: demand elasticities and cost parameters; and (iii) the calculation of the counterfactual equilibrium.

\(^1\) In some cases the differences-in-differences analysis will not be possible given the absence of such alternative comparators or of data about those comparators. In these cases other methods can be used such as (i) comparisons of changes in the affected market before and after the decision – this approach is referred to as before-and-after, or (ii) comparisons of changes between comparable markets. Such methods are however subject to biases given that, as regards the former case, they do not account for changes that would have occurred within the same market even in the absence of an intervention, or, in the case of the latter, they do not consider the existence of potential unobserved differences between the two markets, leading to a persistent difference in outcomes even in the absence of the decision.
constellation based on the chosen economic model and estimated structural parameters. The simulation models will use parameters similar to what is used in the peer reviewed academic literature in order to ensure the quality of the results.

- **Surveys and interviews** are used to elicit factual information and data from market players and industry experts on how the market has evolved, as well as to obtain views on what they consider to be the actual effects of the decision and on what could have happened in alternative scenarios. This information can be employed to verify the results obtained through another methodology, can provide data that can be analysed through one of the methodologies listed above, or can be used directly to determine the effects of the decision when a more qualitative approach is used. It is important in any case to compare the results of the surveys with information from third parties, if available (e.g. market prices, reports from consumers associations or other independent entities, etc.).

---

121 The usefulness and reliability of the results of surveys and interviews depends to a large extent on their design and structure. The objectives of the survey (hypotheses to be tested) must be clearly established ex ante and the representativeness of the sample must be guaranteed. In addition, questions should be clear, do not provide any subjectivity, nor induce consumers’ response in a particular way, and it should be ensured that the range of response options provided is sufficiently comprehensive and appropriate to the choice of consumers. Responses should also be interpreted taking into account the possible conflict of interests that respondents may face, and which may bias their replies.
Annex 5.2 : Summary of the EU Observatory work supporting the initiative

The reports by the expert group for the Observatory on the Online Platform Economy

The Observatory for the Online Platform Economy supported by its expert group and the support study has produced a number of analytical papers and reports that confirm the international consensus on the need for new rules for digital platforms in order to complement the competition law enforcement.

Firstly, the expert group for the Observatory on the Online Platform Economy has produced 3 preliminary reports published for feedback on 9 July:

- Measurement of the Online Platform Economy
- Differentiated treatment
- Data in the Online Platform Economy
- Transparency in Online Advertising [still work in progress – to be added]
- Market Power [still work in progress – to be added]

This feedback will form part of the Final Report to be published by the end of 2020. It will also include two further reports: on the transparency in the online advertising and market power.

The Report on Measurement and Economic Indicators identified the indicators that could be used to monitor the online platform economy for the purposes of policy making and further regulation, (e.g. in order to identify platforms in scope of the regulation). The report breaks down the problem of observation into three broad areas that cut across policy domains.

The first is economic significance of platforms in the context of the broader economy. The report identifies three measurement indicators: volume of trade mediated by platforms; platform size and importance; and data on data. It offers suggestions as regards new, more conceptual approaches to measuring platform size and “data on data”.

The second area of observation is the platforms’ power over their users. The report identifies three indicators for measurement: business dependence on platforms; platform’s share of consumer attention; and acquisitions as a competitive strategy.

Regarding acquisitions as a competitive strategy, including so-called “killer acquisitions” designed to pre-empt future competition, the report suggests automated market intelligence data feeds and recommends to consider new obligations on major platforms to report M&A activities to the European Commission, for ex-post research and monitoring purposes.
The third area of observation covered in the Measurement report relates to the alleged effects of platforms’ power: how to measure platform volatility (e.g., continuous changes in terms and conditions or algorithms); platform transparency; and other potentially problematic and thus policy-relevant practices. The report stresses that platform transparency would benefit from further conceptual research to better understand the trade-offs between a public’s need for transparency of powerful actors vs. the legitimate private business interests of a platform company.

As for other potentially problematic practices, the report recommends that the data generated by the internal complaint-handling procedures, as mandated by the P2B Regulation, should be analysed with a view to identifying and assessing any need for further public policy intervention.

The Report on differentiated treatment focuses on differentiated treatment as a potential source of ‘unfairness’ in the relationship between platforms and their business users in the online platform economy. It distinguishes between practices of self-favouring, whereby a platform gives preferential treatment to its own vertically integrated activities over those of rivals, and more general practices of differentiated treatment where one or more business users are treated more favourably than others.

The report provides guidance on how to assess the impact of differentiated treatment by online platforms from a technical, economic and legal perspective. It also identifies areas requiring further scrutiny because of the particularly problematic nature of certain practices implemented by platforms. Given that instances of differentiated treatment are not necessarily limited to cases where a platform holds a ‘dominant position’ within the meaning of EU competition law, the report looks beyond the application and interpretation of competition law.

The report stresses that for assessing what practices can be considered “unfair”, more transparency and oversight are needed into the practices in which platforms engage. In this respect, the Platform-to-Business Regulation\(^\text{122}\) provides a good starting point to facilitate the more concrete identification of forms of differentiated treatment that can be considered unfair and might, as such, need to be regulated.

The report concludes that it is desirable to keep monitoring the sector closely and conduct focused studies to scrutinise the impact of problematic practices.

The Report on Data in the Online platform ecosystem provides a structured overview of how data is generated, collected and used in the online platform economy. It maps out the diversity and heterogeneity of data-related practices and expands on what different types of data require a careful examination in order to better understand their importance for both the platforms and their users as well as the issues and challenges arising in their interactions. The report concludes with a range of issues, which deserve, in the view of the authors, further policy attention and analysis in the light of the limited evidence available and/or the importance and impact they entail.

### Support Study for the Observatory

The consortium supporting the work of the Observatory composed of PPMI (lead), Open Evidence, IW and Rand Europe\(^{123}\) have produced the following analytical papers (AP):

<table>
<thead>
<tr>
<th>AP1</th>
<th>Differentiated treatment (IW)</th>
</tr>
</thead>
<tbody>
<tr>
<td>AP2</td>
<td>Platform data access and secondary data sources (PPMI)</td>
</tr>
<tr>
<td>AP3</td>
<td>Transparency in the business-to-business commercial relations in the online advertising market (Open Evidence)</td>
</tr>
<tr>
<td>AP4</td>
<td>Significant Market Status (RAND)</td>
</tr>
<tr>
<td>AP5</td>
<td>Business user and third-party access to digital platform data (PPMI)</td>
</tr>
<tr>
<td>AP6</td>
<td>Structure of the online platform economy post COVID-19 outbreak (Open Evidence)</td>
</tr>
<tr>
<td>AP7</td>
<td>The main obstacles and opportunities for multihoming (PPMI)</td>
</tr>
<tr>
<td>AP8</td>
<td>Developments concerning B2B platforms and emerging issues (RAND)</td>
</tr>
</tbody>
</table>

\(^{123}\) Support study to the Observatory for the Online Platform Economy, SMART 2018/0034

Analytical paper #1: Business user access to platform data and alternative data sources

The paper argues that online platforms create value by using data to facilitate interactions (for example, commercial transactions) between users. This means that data is at the core of the platforms’ business model and they use it to provide and improve their services.

Data in the possession of platforms allows them to understand the preferences of customers and their reactions to market signals, including changes in prices and product characteristics. This puts online platforms in a unique position as they are able to observe the functioning of the market in real time\(^{124}\). Data is thus a key source of market power. In other words, platforms’ decisions on what data to share, with whom, and under which conditions have far-reaching consequences to all the participants in the market.

Business users: data needs and access to data

In the paper the contractor identified three general dimensions of data relevant to platform business users:

- the type of data by object (customers, businesses, user behaviour, markets, transactions, etc.);
- whether the data is about an individual business which receives it, or other businesses on the platform (competition)/whole marketplace.
- by the level of data processing and its value, from raw datasets to insights guiding business decision-making.

The paper shows that the kinds of data provided or not provided by the platforms (Amazon, eBay, Google Play and Booking.com) are rather similar. Access to data as well as advanced analytics are granted to the extent that it could generate more income for the platform as well as the business users. In such a case the key question is whether the business users can take full advantage of the data provided to them. Further, a significant share of businesses signal that they are experiencing data access problems. This was very visible in interviews where businesses, especially the bigger or stronger ones, felt strongly about the data access. Their key concern was getting access to data so that they could use it to innovate and keep up with the competition. A recurring issue was also the power of the vertically integrated platforms and especially the extent to which such platforms may use data to develop their own competing products.

The paper explored firstly, the findings concerning taking advantage of the available data and, secondly, the evidence concerning data that is not shared with the business users.

The research showed that a significant share of business users express dissatisfaction with regard to the level of data access provided to them by online platforms. The business user survey showed that access to data possessed by online platforms is of concern to around a third of surveyed business users who reported that they cannot access at least some data that is essential to their business. Generally, although the platforms collect and analyse loads of data, only a fraction of this is provided to other players. The platforms do not share the raw big data on day-to-day activities, as well as detailed data on customers and competitors.

The paper identified three groups of concerns that business users express with regard to data sharing.

The first is related to lack of access to personal data, such as customers’ e-mail address. Some business users, especially in the hospitality and e-commerce sectors consider such data of key importance to them so that they could establish a more direct client relationship. Other personal data collected by platforms, but usually not provided to business users include, for example: telephone, address, credit-card data. As confirmed by our desk research and interviews with the platforms themselves, this data is not provided for a number of reasons. Firstly, this is not considered compatible with the platform’s business model as business users may use direct communication to bypass platforms in the future. Secondly, platforms consider that a consistent client relationship and data protection is part of the client experience. They are wary that direct access to the clients by business users may result in a surge of unwanted marketing messages (this argument was not supported by the interviewed business users). Finally, the personal data protection regulation (including GDPR) puts obligations on platforms in terms of data sharing and management, including the obligation of getting explicit consent from consumers to collect and share their data. According to the business user survey, legislative or regulatory restrictions is indeed acknowledged as the key reason for not getting access to data.
Secondly, business users need data that help them to stay competitive, innovate and develop their products and services. Partly this is related to data on, for example, search keywords, search volumes, consumer behaviour in reaction to different price signals. Platforms do share such data to a certain extent (e.g. three most important key words), however some interviewed business users felt that this does not give them sufficient level of detail. Partly, this is also related to data about competitors and their products and services. In this case however, both the interviewed platforms as well as business users expressed understanding that the level of detail is naturally limited as businesses would not want their individual business performance information to be made available to others.

The third concern is that platforms are taking advantage of data to promote their own products that are very similar to those offered by their business users. This is primarily pertinent to vertically integrated platforms with significant market power. So, in the business user survey, 58% of respondents reported that the platform itself offers the same (or very similar) goods or services to those that their businesses offer on the platform. Among these respondents, 55% argued that online platforms are favouring their own goods or services vis-à-vis the same (or very similar) goods or services offered by their businesses. Unique and comprehensive datasets on all the firms and their consumers operating in the marketplace can give a huge business advantage to the platform operators. The key ways of favouring include ranking, placement of advertisement, pricing and other – all of these are enabled by the data collected by platforms. Some interviewed business users argued that platforms (specifically – Amazon) are using data to monitor which goods have the best margins in the market and then move into offering such goods themselves.

The paper also analysed the role of data companies. The businesses that need more data than they can get from platforms pursue two broad strategies: (1) collect and analyse data themselves, from sources available to them; (2) rely on third party providers (data brokers). Four-fifths of the business user survey respondents (81%) indicated that they collect some data themselves; the most prevalent data type is identification details of own customers (57% of respondents collect this data), followed by business performance data (55%) and analysis of market trends/ developments (55%). Further, a third of the surveyed companies (33%) reported that they use third-party sources (data brokers). Most of the interviewees - especially in the e-commerce sector - reported that they use the services of third-party data and analytics providers.

Teikametrics, Terapeak) or hospitality (AirDNA, Beyond Pricing, Uplisting, Wheelhouse, Skift). Other data brokers, such as Similar Web and Zirra provide data on multiple sectors.

Data brokers use highly advanced technical methods to extract data, or they buy data from online and offline sources. A lot of data is scraped from the platforms. Another key source is crowdsourcing business user account data. Some third-party data providers ask online sellers to share their marketplace information, and then link the data of thousands of users to draw market insights. For example, Jungle Scout collects data from a large number of sellers (over 225,000) who have opted in to share their sales information. When merged with the data gathered by scraping the platform’s front-end (e.g., Best Seller rank on Amazon), this can yield quite precise estimations and extrapolations. Similarly, if AirDNA users wish to receive performance analytics, they will be asked to upload their Airbnb host IDs. After doing this, they can see their performance trends, comparative and financial analysis on all vacation rental listings.

The key value proposition of the data brokers lies in their ability to bring together a combination of sources as well as superior technical and analytical capacities, innovative tools and approaches. Data brokers allow their users to learn about their competitors, get a detailed market overview, obtain actionable insights. According to the analysis presented in this paper, this is the kind of information that is most in demand by the business users and/or platforms do not provide to a sufficient extent. Further, business users themselves do not need to invest into any analytics or IT, but rather buy products tailored to their needs.

For instance, as explained by several interviewed Amazon sellers, Jungle Scout and other providers, such as Helium10, AMZScout and Unicorn Smasher, supply them with comprehensive market insights and competitor overviews. Obviously, these data brokers provide estimations based on what data they could gather rather than exact information. Nevertheless, the estimations are said to be “spookily accurate”. Similarly, data providers for app developers, such as AppAnnie and SensorTower, offer comprehensive app market data, including performance of specific apps and markets. Interviewed app developers mentioned that they use the sources together with the app store data extensively. In the accommodation/ hospitality sector, companies such as AirDNA provide insights based on data that the OTAs do not share. For example, in late 2015 Airbnb stopped providing the overall real-time reservation data. AirDNA, in turn, uses an algorithm based on 16 indicators picked up in historical data to determine the reservation status for each listing. They argue that their algorithm has an error margin of only 5%.

---


The data companies’ market is very dynamic and fast-paced. This paper identified a number of issues, illustrating the key challenges and limitations of data brokers. Firstly, the data companies remain highly dependent on data sharing policies of platforms. For example, Amazon until recently provided exact and broad match search volume and product relevance data via one of its APIs. It was feeding several third-party software providers such as Viral Launch and Helium10 until late 2018, when the platform removed these metrics from the API. Another platform, Allegro made significant investment to develop new data products (Allegro Statistics) that are now provided to its sellers; this is endangering the business model of third-party analytics providers.

Secondly, the data needs of platform business users are often very specific and concern platforms that they use. Such data cannot be easily scraped or estimated by the third-party data providers. It includes information on real-time of activities on the platform (e.g. X currently has product Y added to the shopping cart), which would allow to effectively address the customer; transaction-related data about the customers, sales activities and listings of specific business user.

Thirdly, the huge amounts of data that data brokers collect, store, possibly re-personalise and disseminate and are of interest from the regulatory perspective, first and foremost due to privacy concerns. Most individuals or companies are unaware of what information data brokers collect on them or even that they collect information at all. Due to this asymmetry, the data broker industry has been often characterised as opaque, non-transparent, arbitrary, biased, unfair and unaccountable. Interviewees from the data brokers argued that they are taking actions to make sure they are compliant with data protection and privacy laws, such as the GDPR. However, other sources show that such compliance has not always been properly ensured. For example, a few months after the GDPR came into force, Privacy International filed a complaint against seven data brokers: Acxiom, Oracle, Criteo, Quantcast, Tapad, Equifax, and Experian. The main argument was their failure to comply with data protection principles (such as acquiring consent, providing detailed and transparent information for the data subject access requests) and exploitation of data in unknown ways.

As a final point, the analysis pointed out that some business users are exploring innovative approaches that would allow them to joint forces and be less dependent on big platform companies. One example includes cooperative marketplaces, such as Fairmondo.de, which belongs to its business users and employees. Through a cooperative

---

structure, the users can share the platform as a resource for mutual benefit and decide on the rules for data sharing and access.

Analytical paper #2: Differentiated treatment of business users by online platforms

Differentiated treatment of business users is one way in which online platforms can distort competition. It refers to the application of dissimilar conditions to (or preferencing of) similar business users, goods or services. Differentiated treatment can affect competition in two ways. First, if a platform’s differentiated treatment disadvantages certain business users, it influences competition between business users. Second, competition can also be influenced by so-called “self-preferencing” on the part of vertically integrated platforms. Such businesses not only operate the platform but are also business users of the platform – for instance, they sell their own products via the marketplace. Vertical integration is desirable for online platforms because it enables them to develop new revenue streams and exploit opportunities that arise from analysing data generated by the platform. The inherent danger of vertical integration lies in the opportunity it provides the platform to abuse its favourable position. Since the platform directly controls the ecosystem in which it competes alongside independent business users, it could employ the rules to its own advantage.

This analytical paper on differentiated treatment demonstrates that differentiated treatment by online platforms – defined as applying dissimilar conditions to similar business users – can occur for different reasons. On the one hand, the technical or regulatory framework can make such platform behaviour necessary. On the other hand, online platforms can use differentiated treatment to increase their revenues. This mainly includes platform behaviour that aims at increasing the benefits for the consumers, e.g. by offering individualized services or ensuring a high quality of the facilitated transactions. However, differentiated treatment can also aim at increasing revenue for the platform without benefits for the consumers. In such cases, differentiated treatment obstructs competition between the business users of online platforms and – in case of vertically integrated platforms – between business users and the platform itself.

According to the data collected for this paper, vertically integrated platforms seem to possess a stronger incentive to apply such behaviour than non-integrated platforms. However, based on the available evidence, differentiated treatment of business users is not widespread in the EU.

Reasons for the differentiated treatment of business users by online platform can generally be grouped in two categories:

Regulatory or technical necessities: the legal framework within which the platform operates, or the specific technical requirements of different business users (such as specific hardware or software) may give rise to differentiated treatment. In such cases, differentiated treatment may not constitute intentionally discriminatory behaviour on the part of the platform, but may instead be a response to these specific circumstances.

Increasing revenue: a platform may engage in differentiated treatment in an attempt to increase its revenue via a rise in market share or sales, or by expanding into other markets, improving its gatekeeping position, lowering its own costs,
increasing the fees paid by business users, as well as offering loyalty rewards or “mainstreaming”, i.e. adjusting content to match the preferences of the majority of users. These motivations can explain many types of differentiating behaviour, including: blocking listings or accounts; manipulating rankings or prices; restricting access to data or installing technical barriers to business users; and differentiated terms and conditions or customer support.

**Differentiated treatment of app developers**

Applications for mobile devices (‘apps’) are developed for a specific operating system and must be distributed to the users of mobile devices. The distribution of apps is to a large extent carried out via ‘app stores’. App stores and operating systems can both be characterised as digital platforms. Apple produces both the hardware and software for its devices, and hence has a great influence on the distribution of apps for its devices. In fact, the Apple App Store is the only (and hence dominant) app store for iOS. Every app that a consumer wishes to install must first be certified by Apple. Android, in contrast, has been developed through the cooperation of large manufacturers of mobile devices, among others. Accordingly, there exist multiple app stores for Android, e.g. independent app stores and app stores implemented by device manufacturers. Google Play Store, however, remains the dominant app store. The development of dominant platforms within the app store market is due to the reinforcing of positive indirect network effects. The more consumers use an app store, the more attractive it becomes for developers to distribute their apps through this store, and vice versa. High market shares, and the fact that the platforms offer their own apps, can make differentiated treatment a serious problem for individual app developers, as well as distorting competition and harming innovation.

Since Apple and Google offer their own apps in their app stores, both platforms are vertically integrated. Self-preferencing, as well as other forms of differentiated treatment, are therefore possible.

To gain qualitative insights into differentiated treatment for the analytical paper, 23 interviews were conducted. App developers and publishers accounted for 15 of these interviews; their respective associations accounted for six. The remaining two interviews were conducted with Google and Apple, as the largest providers of app stores. Small app developers in particular acknowledged the opportunities platforms offered them to distributing their apps to consumers. However, 16 interviewees mentioned problems with differentiated treatment by platforms. Among these 16 interviewees, 13 were app store businesses users. Furthermore, 12 interviewees claimed the platform favoured its own products or services. Ten of the interviewees that reported cases of platform self-preferencing were business users and two represented developer’s associations. Generally, app developers in the interviews feared being blocked by the

---

132 Five of these 15 business users represented businesses with less than 10 employees. Two interviewees represented a business with between 10 and 49 employees and three from a business with between 50 and 249 employees. Large businesses with more than 249 employees accounted for five interviews.

133 The two interviewed business users that did not experience differentiated treatment spoke for a company with less than 10 employees and one with between 50 and 249 employees, respectively.

134 Among the business users that experienced self-preferencing were five businesses with more than 249 employees, two with between 50 and 249 employees, two with between 10 and 49 employees and one with between 1 and 9 employees.
platform and, hence, losing customers. They also feared that the platform could enter and dominate their market. Other forms of differentiated treatment mentioned by interviewees included impeding business users that offer substitutes to the platform’s own products or services; denying access to data; or the mandatory use of platform services. Technical barriers, better customer support for large business users, and terms and conditions that favour the platform were also reported as issues. The interviewees generally claimed that larger businesses enjoyed greater opportunities to reach out to the platform in order to have their problems solved.

**Differentiated treatment of e-commerce business users**

Generally, two types of business models used by online marketplaces can be distinguished. Platforms can be either vertically integrated or non-vertically integrated. The former includes a retail arm in addition to the platform. In contrast, non-vertically integrated online marketplaces are pure platform businesses. While market shares are difficult to determine, vertically integrated Amazon is the most important online marketplace in several European countries, as well as the United States.

In the online survey, nearly two-thirds of e-commerce respondents stated that they were completely or very dependent on online platforms. However, a clear majority of all respondents 68% strongly agreed or agreed that the online platform which was most important for their business treated its business users in a fair and unbiased manner. This is in line with the results for the entire sample (see above). The statement “My business can easily access the data collected by the platform that is important for my business”, which focusses on data access as a specific type of differentiated treatment, yields a similar result. This result does not point to a widespread occurrence of differentiated treatment. Furthermore, around two-thirds of respondents strongly agreed or agreed that many other business users on the platform offered products similar to their own. Hence, competition among business users appears high.

Of those respondents who indicated that they had experienced differentiated treatment by a platform, the placement of advertising was the type most frequently cited (specified by around 62% of this group). The second most common type was the ranking of listings. The pricing of the platform’s services came in third. The interviews conducted with e-commerce business users confirmed the relevance of differentiated treatment in the form of manipulated ranking results, as well as a lack of access to data.

Vertical integration of e-commerce platforms can have an influence on differentiated treatment.Nearly 53% of e-commerce respondents in our sample whose main platform offered the same or similar products reported self-preferencing by the platform. While there are limitations to this result given the survey sample, it provides a strong indication of it in markets with vertically integrated online marketplaces. The e-commerce business users interviewed did not provide unified views on differentiated treatment of vertically integrated platforms, however. While some said they had observed self-preferencing, others stated that they had not.

According to the survey, conflicts sometimes occur between e-commerce platforms and their business users: 57% of the surveyed e-commerce business users had experienced a disagreement with the platform they most frequently used at least once. These conflicts range from disputes over technical problems or a lack of transparency in the platform’s data policy, to sudden price changes or discrimination through pricing. Many of the
business users affected, namely 47%, had complained to the online platform in order to resolve the problem. Overall, the survey showed that 87% respondents had the conflicts, experienced with e-commerce marketplaces, completely resolved. Challenges mentioned by the interviewees regarding the redress process generally centred on the standardised way in which platforms dealt with complaints or requests. Several interviewees mentioned that their complaints or requests were answered by automated systems instead of humans, the replies often not capturing the essence of the complaint or request completely.

Analytical paper #3: Transparency in the business-to-business commercial relations in the online advertising market

The paper focused on the perceived lack of transparency and accountability in business-to-business (B2B) commercial relations in online advertising. Transparency issues have been observed especially for ad exchanges and ad placements in programmatic advertising, as well as concerns about the gatekeeping role of large online platforms towards business users in the market.

The analytical paper analysed the level and means of transparency in the online advertising value chain, through collection of evidence and facts about various business models, advertising practices and stakeholders.

It identified three inter-related challenges affecting business to business (B2B) commercial relations in online advertising:

- **Significant imbalances of market power in the ad ecosystem**, resulting from the dominance of a few platforms that occupy strategic positions across the ad value chain and have the ability to act as gatekeepers with business users.
- **The transparency issues in B2B relations**, some of which are linked to the market power of platforms while others result from the complexity of programmatic advertising.
- The issues of **ad fraud**, exacerbated by the ad ecosystem opacity.

The paper argued that the distribution of digital ad revenue shows that the online market is increasingly dominated by a few large online platforms (Google, Facebook) that occupy strategic positions across the ad value chain and can take advantage of their vertical integration.

It further points out that Google, Facebook, and to a lesser extent Amazon benefit from a vast ad inventory on their own websites and operated services, which they can monetise to generate most of their ad revenues. They have extensive proprietary user data from their consumer facing services, which they can use to improve targeting but to which they restrict access. Platforms such as Google and Facebook can also benefit from network effects and economies of scale from their vertical integration in the ad supply
chain. As argued by the paper, due to these advantages, platforms have the ability to engage in potentially anti-competitive practices such as self-preferencing, leveraging of their market power to other markets, and they can act as gatekeepers with the ability to charge higher fees and set their own terms for access to businesses.

Secondly, the contractor analyzed the transparency of the online advertising environment. The paper concluded that this environment is characterized by opacity, partly linked to the practices of a few platforms, and to the complexity of programmatic advertising. On the one hand within walled gardens, online platforms can use their economic power to impose their terms and limit the disclosure of information on the costs, profits and effectiveness of placement of ads. This undermines the decision making of advertisers and publishers regarding spending and their ability to refine targeting. Privacy legislation has been considered as an additional driver to reduce data disclosure to advertisers and publishers. The authors also argue that the removal of third-party cookies will also affect advertisers’ ability to do audience targeting and may incentivise them to shift more to walled gardens where first-party cookies are still available, further decreasing publishers’ revenues. On the other hand on the open web, the sharing of information depends on the positions and strategies of players along the supply chain, which results in fragmented information but also in user data leakage in RTB.

In addition, there is a lack of transparency over the functioning and matching process of auctions, due to the use of algorithms and potential influence of vertically integrated platforms. Stakeholders also reported an opacity on the fees charged across the supply chain due to the number of intermediaries. The lack of transparency on money flows leads advertisers and publishers to question the efficiency of the online ad supply chain. The opacity of the ad tech value chain, including the reliance on algorithms and the vast array of service firms, also makes open programmatic advertising rife with fraud, at the expense of advertisers.

Proposed solutions

The contractor also suggests possible solutions to address these different issues at policy, industry and individual level. Potential regulatory responses to address transparency issues include focused monitoring and enforcement of existing legislation by specific regulatory units, international cooperation, the development of codes of conduct with the main online platforms and regulatory reform based on evidence-based recommendations from the different inquiries and market studies commissioned by regulatory authorities, that can include requirements for information disclosure and interoperability and structural remedies.
In addition, several industry initiatives offer solutions for more trustworthy, transparent and verifiable ad trading. These include standards and practices for ad quality and measurement, charters or guides, innovative solutions to increase transparency on fees and bidding data, and programmes on user privacy and consent. They note though that effectiveness of self-regulatory initiatives depends on their adoption and implementation across the industry.

Finally, the paper points to the academic literature that provides a range of methods and models to help advertisers and publishers mitigate programmatic advertising opacity by enabling them to take more informed decisions and optimize their strategy and revenue.

Overall conclusion is that no single regulatory, industry or individual measure in isolation may sufficiently address the various issues identified but that better implementation of the existing initiatives and a combination of the proposed measures could be more effective in tackling these issues.

**Analytical paper #4: Online platforms with significant/strategic market status**

This analytical paper examined the evidence in relation to better understanding the various issues, and strengths and weaknesses of emerging approaches to identify online platforms with significant/strategic market status.

The potential for these platforms to act as barriers to a competitive market, has resulted in an increasing need for new policy approaches to assess whether online platforms have significant or strategic market status. A key part of this discussion has focussed on whether traditional approaches, based around assessing market shares, are adequate. Increasingly, it has been thought that current policy approaches should be extended or adapted to consider the dynamic, varied, and constantly changing nature of the online platform economy ecosystem.

The findings from the research run by the contractor suggests that emerging approaches to assessing online platforms with significant/strategic market status could be generally categorised as follows:

---

Emerging approaches which draw on the traditional market share-based tests for application to online platforms; and

Emerging approaches which appear to be devised specifically for online platforms.

---

**Emerging approaches based on the traditional market share-based tests** include: revenue share; user share; barriers to entry; mark-up index; and network effects.

**Emerging approaches devised specifically for online platforms** include: gatekeeper power; leveraging power; information/data exploitation power; prevalence of positive feedback loops; prevalence of indirect network effects; and the extent to which single- and multi-homing exists in the market.
The paper argues that the key challenges to the use of emerging approaches based on the traditional market share-based tests include factors such as: the fact that user share can be identified in several ways; barriers to entry may be hard to measure; and a zero-price market poses challenges for assessing market power of online platforms.

Amongst the emerging approaches devised specifically for online platforms, the contractor examined two approaches in further detail: gatekeeper power and leveraging power. Available evidence suggests that gatekeeper power - the level of power a platform can exert on its users through acting as a ‘gatekeeper’ – is a dynamic phenomenon. The main challenge with identifying gatekeeper power is likely to be in effectively establishing where the ‘gates’ are in relation to online platforms. Additionally, it may not be possible to assess gatekeeper power without considering it with other emerging approaches. The evidence also highlights leveraging power – the ability of platforms to establish an advantageous position in a separate or ancillary market – as potentially important. However, experts suggest that leveraging is a common business practice and as a result leveraging power may not be a decisive indicator of market power on its own.

The main strengths of emerging approaches identified in the literature and suggested by the experts are that they seem to offer a more flexible instrument to market analysis and provide more dynamic indicators of market power suitable to the online platform ecosystem. The main challenges related to emerging approaches include a lack of reliable datasets to use some of the approaches and that due to their insufficient use in practice, the viability of these approaches is not yet clear. A comparison of traditional and emerging approaches suggests that traditional approaches appear to be more reliant on static indicators and stringent market definitions with a focus on single-sided market transactions. In contrast, emerging approaches may be more effective at recognising transactions on all sides of the market and thus better suited to the online platform ecosystem.

At present, the emerging approaches appear to be focussed on economic, regulatory, and competition aspects of the online platform economy. Experts suggest that the emerging approaches also need to consider broader social and political impacts of the online platform ecosystem when identifying whether an online platform has strategic/significant market status. When the systemic interdependencies within the online platforms are considered, a single emerging approach is unlikely to be effective in practice. Using the emerging approaches in conjunction with each other is likely to be more effective due to the complex, multi-sided interactions of the online platforms.

According to the paper, in order to identify whether an online platform has significant/strategic market status, policy makers would need to consider how the emerging approaches can be integrated into existing policy frameworks to adopt an open and flexible approach.
Analytical paper #5: Business user and third-party access to online platform data

This analytical paper investigated the state of the art of data sharing by digital platforms with third parties. The analysis covered three sectors of the platform economy: e-commerce, online tourism services and app stores. It was based on a detailed research of secondary sources, 61 interview and 15 platform-specific case studies that included Amazon, AliExpress, eBay, Google Play, Apple App Store, Booking.com and others. Specifically, the paper strived to answer the following questions:

— What data, collected and held by platforms, is important for their business users and other businesses active in their respective sectors?

The analysis concludes that all data types collected by platforms are or could be important for business users for re-use. This includes data about transactions concerning own products and services, own clients/customers, and own business performance. Next, information concerning the broader market trends is also of key importance. It includes listings of other businesses, their customers, performance of different businesses in a specific market. Further, customer characteristics and customer profiles are of interest to all businesses, for example, behavioural data, such as browsing habits, search terms, purchasing decisions. The businesses using OTAs and e-commerce platforms underlined the importance of getting access to customer identification details e.g. for direct marketing. Finally, many companies, especially the smaller ones, expressed their preference for data analytics and insights as they do not have sufficient infrastructure and skills to take advantage of raw data.

Some businesses also use platform data as an input to develop or improve data-based products or services (upstream process). In particular, the datasets of online platforms are of interest to two types of companies: app developers and data brokers or marketplace/app store optimisation companies. All types of data are pertinent to them, however they have a preference for granular and raw data that could be combined with other data sources and could be used to train algorithms, develop insights and provide value to their customers. More specifically, datasets and real-time data feeding into software and mobile applications can cover various areas and technologies, such as images for image recognition, audio files for speech recognition, weather or traffic data, health data, geolocation data and so on.

— What kinds of data do platforms provide and what data they refuse to share?

Analysis carried out for this study shows that platforms provide data to their business users, which is sufficient to process transactions and manage their business. The businesses receive detailed data about their own listings, prices, sales, transactions and business performance. Platforms also provide some data about direct customers. Further, most major platforms share some data about the broader market, including overall market
trends, best-selling products, customer profiles, although the type and granularity of such information differs from platform to platform. Overall, the major platforms compete for their business users and thus various metrics and dashboards are part of their value proposition. These metrics and dashboards are designed to help the business users to know their customers, monitor their own business performance, and understand the broader market trends.

However, some data usually is not provided by the platforms, despite demand from their business users. Firstly, this concerns customer nominal data and contact details (especially pertinent in e-commerce and for OTAs). Secondly, the granularity of data concerning the customer profiles is also often considered insufficient by businesses.

Businesses also demand more data about competing products and businesses on the platform. They also expressed a need for data about customer behaviour, such as search keywords, search volumes, buying patterns, responses to pricing signals. The platforms usually provide such data in a highly aggregated form and draw on it to develop analytics and insights that are offered or sold to business users. Nevertheless, many business users argue that such information is not sufficiently granular. Businesses that operate on the vertically integrated platforms (among online marketplaces, first and foremost, Amazon) also assume that the platform uses data from its marketplace to gain an unfair advantage over its own business users.

The analysis also revealed power imbalances among platforms that are reflected in data sharing arrangements. Google and Facebook have the central position in online marketing and advertising, to the extent that they are unavoidable trading partners, including other platforms from the analysed sectors. This puts them in a position to determine the terms and conditions of data access and data reuse. Whereas Google and Facebook receive data from platforms concerning their listings, customers and business users, they do not share detailed data gained through the advertising activities. Further, some platforms also signalled that data sharing arrangements put them at risk of being pushed out of the market by Google and Facebook that are developing their own business verticals in travel and e-commerce.

Finally, data brokers and online optimisation tool providers play an important role in data markets by offering data which is not accessible directly from the platforms. They usually pool platform data from multiple sources, including publicly available data, crowdsourced business user account data, data provided by platforms through APIs and data scraped from platform websites. The platforms that were analysed in this study argue that they do not have direct contractual relationship with the data brokers/online optimisation tool providers and thus are not responsible for quality or accuracy of the data. Nevertheless, the platforms see value in this market because it is useful for their business users; however, they may take action if, for example, they see that traffic from online optimisation tools providers start interfering with platforms’ services. Platform-specific case studies also revealed several examples when decisions by online platforms (e.g. changing APIs, development of their own analytical services) undermined the business model of specific data brokers/online optimisation tools providers.
Generally, all platforms claim that the only intended recipients for their data for re-use are their direct business users. Web-scraping is the main way to get access to platform data for all the other organisations interested in it. This is enabled by the fact that to generate transactions platforms must make a lot of information available for the customers on their websites.

What are the incentives and constraints for platforms to share data?

The analysis shows that when taking decisions to share or not to share data, online platforms must reconcile several competing and potentially conflicting imperatives. On the one hand, the success of the business users is important because it generates revenues for the platform. In this sense, online platforms have a strong incentive to provide access to data that could help businesses to understand their customers and to improve their product. On the other hand, online platforms must maintain trust of their clients (business users and customers of the business users), which means that they should avoid sharing data that these clients are unwilling to share, for example, personal information, sensitive business information.

Online platforms have also designed their terms and conditions to comply with the applicable regulatory frameworks, including P2B regulation, personal data protection, competition law, regulation forbidding trade in illegal and counterfeit products, and others. Generally, interviews with platforms revealed that they feel that they operate in an environment of legal uncertainty, which makes them reluctant to open more data. For example, they face different data protection regimes globally, as well as diverging interpretations of GDPR in EU member states. Further, whereas data sharing is usually considered as a measure to ameliorate power imbalances in the online platform economy, sharing seller-specific revenue information among sellers can be interpreted as providing a competitive advice under the national anti-trust law.

Several groups of players operate within the data ecosystem surrounding each online platform. These include other platforms, large and small businesses, customers of the business users, data brokers or companies providing online optimisation tools, regulatory and other public authorities. Sometimes these groups have diverging interests and competing demands concerning data access. As mentioned earlier, the platforms see personal data protection as part of their value proposition, however this claim is not always accepted by some businesses who argue that platforms use data protection as an excuse for not sharing important data. If platforms decide to open more raw data to business users, this could benefit large businesses at the expense of the smaller ones, because the big companies have the necessary infrastructure and know-how to take advantage of such information.

If a specific dataset is at the core of a platform’s business model, it is unlikely to be shared. Due to this reason platforms will be reluctant to share datasets that could be used to undermine their role as leading intermediaries in two-sided markets. Vertically integrated platforms are not likely to share detailed market-level data, which could help
the emergence of new competitors in their market. Yet these platforms also make internal decisions on what information from their marketplace/app store can or cannot be shared with the retail/app development division. Such decisions are of crucial importance to many businesses that compete with goods and services sold by the platform itself. Next, when taking decisions on data sharing, platforms consider the global competition. For example, several platform interviewees pointed out that they detect abusive bots originating from China, crawling their pages or trying to use their APIs. Platforms see Chinese marketplaces as serious competitors that are not competing on a level playing field as they are in the position to disregard many regulations that European companies must comply with.

Finally, the lack of technical interoperability between different platforms is also a constraint impeding data sharing and data portability. Introducing interoperability is costly, because it requires the development of common standards and revision of back-end code. From the perspective of platforms, investing into interoperability does not necessarily provide a clear commercial gain. Interoperability also has its downsides because it may make the system slower and limit the development of new or innovative products.

What are the possible solutions to address platform refusals to share data important to other users?

The paper concludes that there is a clear public interest to encourage more data sharing, to the extent it could promote competition, offer more choices to businesses and their customers, foster innovation and help alleviate the market power of big online platforms. At the same time, the principles of personal data protection, business secrets’ and intellectual property protection should also be taken into consideration.

Various solutions have been put forward by various stakeholders that could potentially facilitate data sharing. They include both public-sector led initiatives, as well as market-based ones, focusing specifically on the incentives and constraints for data sharing stemming from the analysis. Public sector led solutions include mandated access; mandated interoperability and data portability; prohibition of certain business practices (for example, mandatory “walls” prohibiting vertically integrated platforms from sharing data between their marketplaces and product development / retail departments); and reversal of the burden of proof (i.e. platforms may be required to demonstrate that their data practices are beneficial for their users). Market-based or self-regulatory solutions considered include offering access to data based on FRAND (Fair, Reasonable, And Non-Discriminatory terms) principles; data pools or data trusts; as well as company-led incentives for interoperability and data portability.
Annex 5.3: International consensus on the need to act

THE FURMAN REPORT (UK)

The Furman report reflects on the need to regulate platform companies with ‘strategic market status’, defined as those “in position to exercise market power or a gateway or bottleneck in the digital market, where they control others’ market access”.

Problems:
The report points out the following problems that should be addressed by new ex ante rules:

- A handful of powerful platform companies dominate a number of digital markets and this dominance is persistent. The position of the largest firms is getting stronger, and this strength and their positions are not imminently under threat. This means that they can exert significant market power over their users and are not required to deliver the same level of positive outcomes as they would if facing normal competitive market conditions.

- Lack of contestability: Due to the barriers to entry that exist in established digital platform markets they cannot generally be considered freely contestable. The significant amounts of data held by incumbent firms considered the single biggest barrier to entry in the digital economy.

- Gatekeeper position fostering dependency: The result is that one, or in some cases two firms in certain digital markets have a high degree of control and influence over the relationship between buyers and sellers, or over access by advertisers to potential buyers. As these markets are frequently important routes to market, or gateways for other firms, such platforms are then able to act as a gatekeeper between businesses and their prospective customers.

Impact on consumers
According to the report, in terms of impact on consumers, these market dynamics will lead to business users of platforms accepting worse terms than they would face if multiple platforms were competing with one another in each market. The consequences of these terms will ultimately feed through to consumers in the prices they pay, the quality they receive, and the range of innovative new products and services they are able to choose from.

Impact on innovation

The Report pointed to the stifling effect of the above practices on invitation. In particular it noted that to killer acquisitions by big platform companies “at best, absorb innovation to protect themselves from potential competition and, at worst, use acquisitions to kill off or distort innovation, creating a ‘killzone’ around their positions.”

**Who should be in scope**

**Platform companies with ‘strategic market status’,** defined as those in position to exercise market power or a gateway or bottleneck in the digital market, where they control others’ market access.

**Designation of platform companies with ‘strategic market status’**

According to the report, it would be up to the regulator (the Digital Markets Unit) to determine which markets have companies able to hold a strategic market status, where a high and enduring market share or other factors lead to market power. To do so the regulator **needs to develop a clear test for the characteristics of a company’s market position above which regulatory powers are appropriate.**

**Every 3 to 5 years the regulator would conduct a statutory review** of both markets and the companies with strategic market status.

Aspects of market power particularly relevant to platforms and their potential to act as a bottleneck should also be considered for incorporation: **economic dependence, relative market power and access to markets.**

**Solutions/Remedies**

The report argues that the use of ex-ante monitoring and enforcement of a detailed set of pro-competition rules should help to prevent negative outcomes before they occur. **Pro-competition policy tools** will tackle the factors that lead to winner-takes-most outcomes and to that position becoming entrenched. Pro-competitive rules and frameworks should be based on **three key pro-competition functions** that can deliver benefits beyond core competition:

1. **a binding pro-competitive code of conduct** promoting fair, pro-competitive conduct by platform companies with strategic market status

**Digital Platform Code of Conduct** should be based around **a set of core principles** that would be required for of digital platforms deemed to have strategic market status. For the business side of platforms with a strategic market status, the principles should ensure that business users are:

- provided with access to designated platforms on a fair, consistent and transparent basis
- provided with prominence, rankings and reviews on designated platforms on a fair, consistent, and transparent basis
- not unfairly restricted from, or penalised for, utilising alternative platforms or routes to market
2. personal data mobility (giving consumers greater control of their personal data, e.g. their profile, purchase history or content) and systems with open standards and

3. data openness

These pro-competition tools will be implemented by a digital markets unit, with powers to regulate and enforce these functions.

Implementation and Enforcement

The pro-competition digital markets unit is to be responsible for monitoring and enforcing of the pro-competitive rules and frameworks. Its new powers should allow it to impose remedies and to monitor, investigate and penalise non-compliance.

To avoid burdens on smaller companies, its enforcement powers should be focused on companies with ‘strategic market status’.

The unit’s approach should combine participation and consultation (with a wide range of stakeholders) with the scope for regulatory enforcement, necessary to overcome incentives against compliance and make its solutions operate effectively and quickly. It should only intervene where doing so is effective and proportionate to achieve competitive aims.

The Code should be set up to achieve fast resolutions (in multiples of weeks or months). This approach would be supported by strong powers to formally request information from designated platforms within tight deadlines set by law when it suspects a breach of codes. It would also need power to enforce legally binding decisions and penalties for contraventions of the code where a participative approach is not effective.

The Digital Markets Unit should also have the powers to implement (ii) personal data mobility and systems with open standards as well as pursue data openness as a tool to increase competition.

CMA study (UK)

The Competition and Markets Authority (CMA) Report on online platforms and digital advertising focused in particular on whether rival providers of search and social media services can no longer compete effectively with Google and Facebook because of their size, and a range of concerns in the digital advertising market, including in particular a lack of transparency and conflict of interest (self-preferencing).

Problems:

\[^{136}O\text{nline platforms and online advertising – Market study final report, July 2020;}\]

The report pointed to the following problems:

- **Conflict of interest**

The report points out that the extent of vertical integration by Google and Facebook that has taken place in the open display market raises numerous concerns as it may give result in the conflicts of interest and allow companies with market power at one stage of the value chain to use it to undermine competition at other stages. There are concerns whether Google can use its market power in inventory and data to advantage its DSP services and use its market power as an ad server to favour its SSP.

The extensive amount of data available to Google and Facebook provide these platforms with a competitive advantage and assist with entry into related markets. After entering the market, the role of Google or Facebook as a host or gateway then enables these platforms to advantage their own related businesses. Google and Facebook have the ability and incentive to favour a business with which they have an existing relationship (and through which additional revenue may be generated), such as websites that are members of their display or audience network or use their ad tech services. For example, when operating on behalf of the publisher, Google may have an incentive to favour bids coming through its own advertiser-side intermediaries, rather than those that are best for the publisher. When operating on the buy-side, it might have an incentive to channel advertiser’s spend to its publisher clients, rather than to the publishers that are best for the advertiser. Given the substantial market power of each of Google and Facebook, their presence in a significant number of related markets and the opacity of their key algorithms, there is significant potential for self-preferencing by Google and Facebook to substantially lessen competition.

- **Lack of transparency and asymmetric information**

The findings of the report identify a series of issues relating to lack of transparency and the data advantages of the large platforms which could limit competition in digital advertising:

- the large platforms’ processes for auctioning inventory are not transparent and there is limited ability to independently verify the effectiveness of advertising because of lack of access to data; and
- the data advantages of the large platforms in targeting advertising mean they can monetise their content much more effectively than other platforms/publishers, increasing their market power.

The lack of transparency exists mainly in the open display market where publishers and advertisers rely on intermediaries to manage the process of real-time bidding and ad serving. The CMA report points out that they cannot observe the actions of the intermediaries directly and do not see how the fees are charged along the supply chain. Hence, it undermines their ability to make optimal choices concerning buying and selling their inventory.

CMA believes that extensive data that is collected in the sector could address some of these concerns, but this data is held by a few parties, which leads to concerns on the asymmetric information. The report recalls the views of advertisers and publishers that Google and Facebook enjoy significant competitive advantages in both measuring
effectiveness and targeting because of their extensive access to user data. Google offers in-depth targeting options, driven by its unique and vast sources of data while Facebook has the advantage of providing the ability to target specific audiences based on demographic characteristics, interests and location. However, the two platforms do not allow independent verification of their inventory. Given the lack of transparency over fees and bids through the intermediation chain, there might be a legitimate concerns about any operator having positions on both the buy and sell side of the market, whether or not that operator is in fact acting in its clients’ best interests.

**Solutions:**

In terms of potential interventions it supports ex-ante regulatory regime to regulate the activities of online platforms funded by digital advertising and recommends a number of solutions. It also reflects on the need to launch market investigation on the open display advertising market, with focus on the conflict of interest Google faces at several parts of its vertically integrated chain of intermediaries.

The final report recommends that the UK Government establishes a new pro-competition regulatory regime with strong and clear ex ante rules for those firms deemed to have ‘Strategic Market Status’ (SMS), overseen by a Digital Markets Unit. CMA is now leading a Digital Markets Taskforce to consider the design and implementation of the procompetitive framework for digital markets.

The CMA’s Digital Markets Taskforce is currently considering the test which might be used to identify which firms may have SMS and therefore would be subject to additional rules. A variety of factors could indicate that a firm has a strategic position including:

- evidence of the ability of the firm to leverage one market position into a variety of other markets

- the firm’s size and scale; or

- its position as an access point to customers for businesses across a diverse range of markets.

It is when a firm has obtained such a position that the effects of its market power are likely to be particularly significant and existing tools are unlikely to be adequate in addressing this market power.

The new regime proposed in the market study would be comprised of two sets of tools:

- The first, an enforceable code of conduct to mitigate the effects of the market power of SMS firms by governing their behaviour.
• The second, a range of ‘pro-competitive interventions’ to tackle the sources of market power and promote competition.

The types of remedies that the market study outlines include data-related remedies, consumer choice and default remedies, and separation remedies.

**THE STIGLER CENTER REPORT (US)**

I. **Problem definition**

According to the report the general harm identified is **insufficient entry** (and therefore insufficient competition) in digital platforms.

Increased concentration levels, market power, network effects, and control over data and analytics have in many digital markets tipped the market in favour of the incumbents. Many digital markets feature **large barriers to entry**. Once the incumbent is established, entry into digital platform businesses is very difficult. The winner often has a large cost advantage from its scale of operations and a large benefit advantage from the scale of its data.

The role of data in digital sectors is particularly critical. The new entrant starved of data relative to a tech giant, is at a significant competitive disadvantage.

Problems arising in the digital markets:

• **Harms to investment and innovation**

By excluding competitors, dominant firms do not need to innovate as hard as they otherwise would be required to keep their customers. Likewise, when platforms do not face competition, they will be able to reduce quality, for example, by decreasing privacy protections, without losing customers or revenue.

• **Harms to entry, including disintermediation**

There is growing evidence that conglomerate digital platforms are in an advantaged position to stop or block entry by more focused rivals when compared to traditional businesses. A platform that has total control of demand can steer customers to content and complements it owns rather than to those provided by independent firms that might challenge its market power.

Platforms have bluntly moved to prevent disintermediation and have engaged in foreclosure to block potential rivals. For example, Facebook acted to suppress the growth video-capture-and-sharing app Vine when Vine attempted to link its users to their Facebook friends.

II. **Who should be in scope**
Companies with “bottleneck power” - meaning companies that have incentive and ability to develop and preserve a single-homing environment.

The Digital Authority should have the sole authority to define bottleneck power and should update the definition regularly or on an “as needed” basis.

Stigler report refers here to Furman report to explain the meaning of bottleneck power:

[O]ne, or in some cases two firms in certain digital markets have a high degree of control and influence over the relationship between buyers and sellers, or over access by advertisers to potential buyers. As these markets are frequently important routes to market, or gateways for other firms, such bottlenecks are then able to act as a gatekeeper between businesses and their prospective customers.

The finding of bottleneck power will employ consideration of the forces that tend to impede entry and lead to foreclosure. The Furman Report similarly explains that this single-homing foreclosure tends to happen when users experience high switching costs, such as loss of valued personal data or reputational indicators at the point of switching; contract terms that deter switching; technical barriers to switching, such as complex switching processes or a lack of interoperability between the old service and the new or second service; tying services, which can be by contract or technical; and the inertia of defaults.

III. Solutions/remedies

The reports proposes the following solutions:

- Improved antitrust enforcement:
  1) Reform of antitrust law to adequately deliver competition to consumers
  2) The establishment of a specialist competition court to hear all private and public antitrust cases

- Regulatory measures:
  3) A specialist regulator – the Digital Authority and
  4) new broadly applicable rules such as:
     a. data portability
     b. open standards to promote competition (in particular in micro-payments and digital identities)
     c. interoperability
  5) new rules applicable to companies with bottleneck power:
a. **mergers** - DA could be given merger review authority over all transactions involving companies with bottleneck power

b. **non**-discrimination and foreclosure

as discrimination is an important tool in a foreclosure strategy by a digital bottleneck market power

Platform strategies to prevent multi-homing are an important category for DA to include in its analysis of foreclosure. The DA could **promulgate regulations prohibiting the foreclosure of a competing content provider on a platform that is vertically integrated.**

c. **bundling**

A digital platform with bottleneck power may have a contract with complementors (e.g., retailers on an ecommerce platform) that bundles together access to their transaction data along with logistics services. This could have harmful anticompetitive effects. The business may also compete against those sellers on its e-commerce site, using the retailer’s data to learn about which products are selling well and expropriate the ideas and strategies of the seller.

The DA could establish **regulations that prohibit anticompetitive bundling by firms with bottleneck power.** Such a firm would be required to demonstrate that its bundle was on balance procompetitive if foreclosure was alleged. The DA could require unbundling and an offer to business customers of a choice of contracts in the case of anticompetitive bundling. The DA would need to enforce such contracts.

**DA- Enforced Remedies for Antitrust violations:**

When a company has been found liable for violating the antitrust laws, the regulator, in conjunction with the antitrust authority, could apply the following remedies in order to restore competition:

- data sharing,
- full protocol interoperability,
- non-discrimination requirements, and
- the unbundling of content from a platform.

**THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC): DIGITAL PLATFORMS INQUIRY**

The ACCC’s Inquiry focussed on the three categories of digital platforms: online search engines, social media platforms and other digital content aggregation platforms. A large
part of the Report focuses on Google and Facebook, reflecting their influence, size and significance as well as the fact that Google and Facebook are the two largest digital platforms in Australia. The Report focuses on the impact of the digital platforms on competition in the advertising and media markets and on advertisers, media content creators and consumers.

Chapter 2 of the Report sets out the ACCC’s views on the market power of the two leading digital platforms, Google and Facebook, with a focus on the markets most relevant to the Inquiry.

**Problem:**

The report considers that both Google and Facebook have substantial market power thanks to their advertising businesses, that are extended well beyond their core owned and operated platforms.

Google\(^{137}\) has *substantial market power* in the supply of general search services in Australia (95% of market) and in performing search advertising revenues in Australia (96%). It enjoys advantages of scope in accumulating data from consumers using its wide range of services (Google Search, Google Maps, YouTube, Gmail) and the Android OS, so it is able to track consumers on the more than two million websites that use Google advertising services. According to the report, *Google also benefits from its position as the default search engine on both the Chrome browser* (owned by Google), and the *Safari browser* (owned by Apple), which together account for more than 80 per cent of the Australian market for browsers. *The substantial amount paid by Google to Apple for default status on Safari (estimated at approximately US$12 billion in 2019) reflects the value of this default status.* Google Chrome is pre-installed on nearly all Android devices.

Due to the market dynamic – strategic acquisitions – Google has obtained further advantages of scope and reduced potential competition and his position on Australian market is very unlikely to change in the middle time. Report also recognises Google’s importance to news media businesses, which is an unavoidable trading partner, and presumes significant loss of revenue if Google users could no longer click on links to their website in search result. The *ACCC therefore considers that Google has also significant bargaining power in its dealings with these media businesses.*

The report also concludes that *Facebook* has substantial market power in the supply of social media services and display advertising services. This is caused by a fact that Facebook has three time larger audience that Snapchat has (the closest competitor to Facebook) and similarly as in Google case creates a significant barrier to entry and expansion of its (possible) competitors. It benefits from the fact that its consumers are

---

\(^{137}\) The ACCC has not undertaken a detail assessment of non-dominant markets where Google offers services (markets for advertising technology services or programmatic display ads, but it recognises that EC has found Google to be dominant in both mobile operating system and app store markets.
using another platforms owned by Facebook, mostly Instagram, Messenger and WhatsApp; other numerous strategic acquisitions are likely to even increase Facebook’s advantage of scope and market power. Regarding display advertising market, Facebook and Instagram’s combined share of the market is estimated to be 51% while the other suppliers don’t hold more than 5%. Also similarly to Google, ACCC considers Facebook to have substantial bargaining power over news media businesses; Facebook’s strength is in being a vital distribution channel for a number of media businesses targeting particular demographic groups.

**Implications of substantial market power:**

The Report concludes that a firm with substantial market power could damage the competitive process by preventing or deterring rivals, including potential rivals, from competing on their merits. That is, a firm with substantial market power could maintain or advance its position by restricting or undermining its rivals’ ability to compete, rather than by offering a more attractive product.

ACCC also recognises that there is a lack of transparency in the online advertising markets. In particular, it is unclear how Google and Facebook rank and display advertisements and the extent to which each platform self preferences their own platforms or businesses in which they have interests.

**Who should be in scope of the rules:**

- online platform with substantial market power in the [observed] market;
- market dynamic lowered by acquisitions of potential competitors due to which
- potential of new entry in the market is low.

**Rules/procedures to be applied:**

- ACCC recommends the merger framework in Australia to be updated to make it clearer so that acquisition of potential competitors and economies of scope created via control of data sets are taken into consideration in assessing whether an acquisition has the effect or likely the effect of substantially lessening competition.

- Currently the notification of M&A to the ACCC is voluntary in Australia, but ACCC considers it appropriate that the large digital companies would each agree to a protocol to notify the ACCC of proposed acquisitions that may impact competition in Australia.

- As regards addressing default bias, ACCC considers that offering Australian consumers the choice that Google is forced to implement in Europe after the EC
decision\textsuperscript{138} would have the effect of improving competition in the search services market and recommends that Google also implement these changes also in Australia.

- As regards the role of \textbf{data in market power}, the ACCC considers that opening up the data, or the routes to data, held by the major digital platforms may reduce the barriers to competition in existing markets and assist competitive innovation in future markets. This could be achieved by requiring leading digital platforms to share the data with potential rivals.

- One potential mechanism is the application of the Consumer Data Right, another is to require the platforms to provide interoperability with other services.

- Incentives for portability, privacy concerns and identification of the extent of data to be shared have to carefully considered.

- Particularly increasing portability of data held by digital platforms may deliver significant benefits to current and potential future markets, including through innovation and the development of new service. If data portability or interoperability would be identified to be beneficial in addressing the issues of market power and competitive entry or switching, the ACCC could recommend this to the Government.

- The creation of a branch within the ACCC to focus on digital platforms

- Proactive investigation, monitoring and enforcement of issues in markets in which digital platforms operate

- Inquiry into the supply of ad tech services and advertising agencies

Annex 5.4: Overview of laws and proposed legislation in Member States related to the initiative

This annex summarises existing and forthcoming regulation by the Member States addressing economic power of digital platforms. It then compares those frameworks with the aim to evidence the already existing and the forthcoming fragmentation as specified under Article 114 TFEU.

1. Notion of fragmentation

Article 114 (1) TFEU forms the basis to act at EU level where the approximation of provisions in Member States have as their object the establishment and the functioning of the internal market. The internal market objective is met where the EU act aims at abolishing obstacles to the freedoms of the treaty and/or to remedy the disadvantages resulting from disparities and different conditions of competition. This also covers the prevention of expected obstacles/prevent distortions to competition that may arise from expected action at MS level. Where reliance on Article 114 (1) TFEU is based on preventing forthcoming fragmentation it must be demonstrated that it is likely that the measures proposed at the level of MS will materialise. The threshold for fragmentation to be relevant under Article 114 (2) TFEU regarding the first alternative under Article 114 (1) - i.e., on obstacles to freedoms of the treaty - is met by the sole fact that there are diverging rules in place or likely to be put in place. There is no minimum quantitative level to be demonstrated as to the importance of those differences. This is because the differences in law are indicative for demonstrating obstacles to the freedoms. Regarding the second alternative under Article 114 (1) TFEU - i.e. on distortion of competition - the threshold to be met in order to justify intervention is that the distortion must be appreciable. The distortion is appreciable where the different national rules lead to different production costs or, where they affect the freedom of the treaties or systemic competition. Where the conditions of Art. 114 are fulfilled and where other provision of the TFEU could also possibly cover the objectives of harmonisation, there is no need to take those other legal basis into consideration.

2. Existing fragmentation resulting from divergences in the laws of Member States addressing economic power of digital platforms

Currently, MS already apply divergent frameworks to address the problems arising from the dependency of businesses on enterprises with relative market power and the resulting cases of unfairness. Those rules in most Member Stated of a horizontal nature, i.e., applicable also outside of digital platforms. For instance, in Belgium, the prohibition of abuse in dependency relationships was introduced by law of 4 April 2019 defining dependency by reference to absence of alternatives for the business and the possibility to impose conditions which could not be obtained under market conditions. Bulgaria introduced regulation against abuse of economic dependence providing that undertakings with “superior bargaining position” (“SBP”), are prohibited to act in a way which contradicts good faith business practices and harms or threatens the legitimate interests of the weaker contractual party and the consumers. In Cyprus, the Competition Act addresses relationships of economic dependency by qualifying the imposition of unfair trading conditions, the application of discretionary treatment, or of sudden and inexcusable interruption of long-term trade relationships as unfair. In France, currently the Commercial Code addresses unfairness in imbalanced B2B relationships.

In Germany, currently the Competition Act rules out certain practices of unfairness in cases of dependency of businesses. For instance, the enterprise with superior bargaining power in relation to an SME is prohibited to price below costs and placed under an internal non-discrimination obligation, i.e., it cannot offer services to itself at better conditions than to the SMEs, for example delivery. In Hungary the Competition

---

144 La loi du 4 avril 2019 modifiant le Code de droit économique en ce qui concerne les abus de dépendance économique, les clauses abusives et les pratiques du marché déloyales entre entreprise. Article I.6.4 Code de Droit Economique (CDE) defines dependency ; Article IV.2/1 CDE describes the types of prohibited abuses.
145 Article 37A Competition Act introduced by the amendment to the Protection of Competition Act of 9 July 2015.
146 Competition Act 2008 and 2014 Part 2, Chapter 6, para 2: Competition Act II 6 (2).
147 The key provision to regulate significant imbalance was introduced in 2008. It provides in Article 442-6-2 Code de Commerce, that any producer, trader, manufacturer or person recorded in the trade register who commits the following offences shall be held liable and obliged to make good the damage caused ...
2° Subjecting or seeking to subject a trading partner to obligations that create a significant imbalance in the rights and obligations of the parties;
see also the description of the "petit droit de la concurrence" on dealing with unfairness in dependency relationships and the cases dealt with by the DGCRF under Article 442-1 and Article 442-6-2 Code de Commerce, in Rapport d’information par la Commission des Affaires Economiques sur les plateformes numériques, présenté par MME Valeria Fauré-Muntian and M. Daniel Fasquelle, a l’Assemblée Nationale, 24 June 2020, Rapport No 3127, p. 42-44.
149 Article 20 (3) of the Competition Act provides that "Undertakings with superior market power in relation to small and medium-sized competitors may not abuse their market position to impede such competitors directly or indirectly in an unfair manner. An unfair impediment within the meaning of sentence 1 exists in particular if an undertaking 1 offers goods or commercial services not just occasionally below cost price, or 2. demands from small or medium-sized undertakings with which it competes on the downstream market in the distribution of goods or commercial services a price for the
Act prohibits abuse of superior bargaining position, the abuse consisting in fixing purchase or sales prices unfairly in business relations, including where general contract terms and conditions are applied; stipulating unjustified advantages by any other means; or forcing the acceptance of detrimental terms and conditions on the other party. In addition, the rules prevent undertaking with superior bargaining position from influencing the other party's business decisions for the purpose of gaining unjustified advantages; creating a market environment that is unreasonably disadvantageous for the competitors; or influencing their business decisions for the purpose of gaining unjustified benefits. In Italy, an asymmetric B2B law results from the extension of the protection under the unfair commercial practices law to cover also the protection of micro enterprises.

Those dependency and relative market power rules are divergent as to the threshold for intervention. For instance, the superior market power is often defined by reference to superior bargaining power, but not in all cases. Furthermore, the dependency rules also diverge as to the protected enterprises; those are not in all cases SMEs but also in some cases microenterprises (Italy). Finally, those rules also differ as to the specific prohibited abuses.

In conclusion, the current rules in place already create a certain degree of distortion of competition between Member States insofar as the rules on tackling unfairness in dependency relationships diverge as to the preconditions to intervene and as to the depth of intervention.

3. **Forthcoming fragmentation likely to emerge due to initiatives at MS’s level aiming at redressing unbalanced situations of businesses in relation to digital gatekeeper**

The divergences in regulation of economic power are likely to deepen due to the current initiatives at MS level to address specifically imbalanced relationships between digital platform and their business users. In a series of Member States legislative projects are under discussion and/or have been proposed within the legislative process.

In Germany, new ex ante rules, are likely to be imposed on undertakings with paramount significance for competition across markets. The proposed rules cover prohibitions/obligations in relation to discrimination, leverage, usage of data, portability, interoperability and information on quality and performance. The governmental draft bill for the 10th amendment to the Competition Act (GWB-Digitalisierungsgesetz) of 9

---

150 Hungarian Competition Actm Section 21 paragraphs b), c) and i).
September 2020\textsuperscript{152} contains profound changes to the Competition Act and introduce a set of ex ante rules specifically applicable to undertakings active to a significant extent on multi-sided markets or with networks. In order to extend the existing right of abuse and to partly prevent characteristical competition problems on digital markets the ministerial draft bill proposes two new prohibitions: Firstly the proposed § 19a GWB proses to impose ex ante regulation on “the big tech”; and secondly the proposed § 20(3a) GWB enlarges the scope of companies protected under the dependency rules, with the aim to prevent tipping.

Regarding the scope of the draft bill as to the platforms covered, §19a of the draft bill introduces regulation for “undertakings with paramount significance for competition across markets”. The Competition Authority would acquire the powers to issue a decision stating such status of a company. The criteria for paramount significance across markets are dominance in one or several markets, financial strength and access to other resources, vertical integration and activities in related markets, access to data relevant for competition, its importance for other companies in order to access sales and supply markets and its impact on their business activity. In the explanatory part to the governmental bill it is indicated “that the determination of a paramount significance for competition across markets can only be made for a few companies and the rule will therefore have a narrowly limited circle of addressees.”\textsuperscript{153}

As to the imposition of obligations, the draft bill §19a (2) GWB provides that the Competition Authority (Bundeskartellamt, BKartA, herein after:NCA) can impose specific ex ante prohibitions on digital platforms found to have paramount significance unless the behaviour is shown to be objectively justified, while the burden of proof relies with the platform. The NCA may, for instance, impose (1) a non-discrimination obligation, (2) a prohibition of exclusionary conduct in adjacent competitive markets, (3) a prohibition to use data collected in the dominated or other markets for the purpose of creation of market entry barriers or other exclusionary conduct and the imposition of conditions allowing for such a use, (4) a prohibition to impede interoperability of portability, (5) a prohibition to insufficiently inform users about quality and success of their services or obstruct their the possibilities of assessment of their performance by other means. Generally speaking, the new § 19a aims at preventing digital platforms to use their market position and the economic power in certain markets strategically to restrict competition in other markets. This is intended to address problems that may arise when certain companies establish anti-competitive structures, for example in new markets, without these companies necessarily being already dominant in all these

\textsuperscript{152} Gesetzesentwurf der Bundesregierung, Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer wettbewerbsrechtlicher Bestimmungen (GWB-Digitalisierungsgesetz), https://www.bmwi.de/Redaktion/DE/Artikel/Service/Gesetzesvorhaben/gwb-digitalisierungsgesetz.html

\textsuperscript{153} Governmental draft bill for the 10th amendment to the Competition Act of 9 September 2020 Explanatory part, p. 84.
markets. Given that the describe proposal modifies the German Competition Act (GWB= Gesetz gegen Wettbewerbsbeschränkungen) it seems important to stress that the proposed amendments – despite of their legislative context - nevertheless display the features of ex ante regulation.

The second set of key provisions, § 20 (1) (2) (3a) GWB, are part of the framework for prevention of unfairness in dependency relationships under § 20 GWB. While currently only small and medium sized companies may benefit from protection against unfairness in dependency relationships, the draft proposes to remove the SME-condition, thereby extending the protection to all companies independent of their size. This is based on the findings that also big companies may now encounter situations of dependency on gatekeeper platforms. A further novelty would be that the source of superior relative market power could also result from intermediation power. Finally, where competitors of companies with relative or superior market power are prevented by the gatekeeper from achieving economies of scale themselves, these practices are to be pursued as unfair impediments. This new prohibition under § 20 (3a) aims to prevent tipping.

In Germany, those proposed amendments of the Competition Act are likely to be adopted. The resulting fragmentation would then consist in the fact that, absent harmonisation at EU level, dependency situations of businesses on gatekeepers would be regulated in Germany as described and would be regulated differently in other MS or at all in other MS. This likelihood of adoption of the German project results from the fact that previous proposed amendments of the GWB aiming at remedying problems with competition and fairness in the digital platforms have passed the legislative process based on the evidence provided by the studies carried to support the proposed regulation. Finally, in Germany, the likelihood of adoption of legislation addressing economic power of digital platform is strengthened by a series of studies and reports arguing in favour of legislative action:

- The study carried out for the German Ministry of Economic Affairs and Energy argues that in platform to business context, when applying the concept of relative market power, the requirement that the dependent firm has to be an SME should be abolished. It introduces a new concept of “intermediation power”: apart from being gatekeeper benefiting from network effects, platforms are information intermediaries, e.g. by offering search functions, rankings and ratings, which implies information asymmetries between platforms and users.

---

154 Governmental draft bill for the 10th amendment to the Competition Act of 9 September 2020, Explanatory part, p. 83.
155 Governmental draft bill for the 10th amendment to the Competition Act of 9 September 2020, Explanatory part, p. 89.
156 Governmental draft bill for the 10th amendment to the Competition Act of 9 September 2020, Explanatory part, p. 94.
157 According to Article 6(1) Rome II Regulation each MS would then implement its own regulation on dependency on gatekeepers/or no regulation.
158 “Modernising the law on abuse of market power”(2018), by Heike Schweitzer / Justus Haucap / Wolfgang Kerber / Robert Welker.
Combination of traditional market power with information (manipulation) power increases market power of platforms, because they can influence the users with biased search results, rankings or ratings.

- The study carried out by the Commission of Experts on Competition Law 4.0 called for strengthening the institutional linkage between competition law and other digital regulation and recommended rules for dominant platforms. They also recommended the introduction of a voluntary notification procedure for novel forms of cooperation at European level. This would also give the European Commission greater insights into new market developments and forms of cooperation. In particular, the Commission ‘Competition Law 4.0’ believes that:
  
  o clear rules of conduct for dominant platforms must be introduced,
  
  o dominant platforms should be banned from giving themselves preferential treatment and
  
  o obliged to deliver portability of user and usage data in real time and in an interoperable data format.
  
  o legal certainty for cooperation in the digital sector must be enhanced;
  
  o the practical and actual power of consumers to dispose of their own data must be improved,
  
  o With a view to attaining these goals, the Commission has drawn up 22 specific recommendations relating to platforms, data access and digital ecosystems.

- The conclusions of the Report of the German Monopoly Commission 2020. The Report of the Monopoly Commission is referred to here in detail because it highlights the need to harmonise at EU level and to avoid parallel initiative at national/EU level. It also elaborates on the re-infocing effect of the COVID crisis on market structure

- This report concludes the following:
  
  o The Corona crisis (Covid-19 crisis) will change the German economy profoundly. In order to avoid permanent damage to market structures and to mitigate the consequences of the crisis for the labour markets, the

159 “A New Competition Framework for the Digital Economy of 9.9.2019”, set up by Peter Altmaier, Federal Minister for Economic Affairs and Energy, and chaired by Martin Schallbruch, Professor Dr Heike Schweitzer and Professor Achim Wambach, Ph.D., presented their recommendations and thus the final report to Minister Altmaier on 9 September 2019.

160 The Monopolies Commission is a permanent, independent expert committee which advises the German government and legislature in the areas of competition policy-making, competition law, and regulation. Its reports are published, see report referred to at: https://monopolkommission.de/images/HG23/HGXXIII_Gesamt.pdf#page36.
German Federal Government, the federal states and the municipalities are have been intervening massively in the economy through financial aid, guarantees and equity investments in companies. Moreover, the companies have shown a need for partly strengthened cooperation and coordination during the lockdown and reactivation phase. All of this will have an impact on competition. It is to be expected that there will be a rise in concentrations overall and in individual sectors of the economy, resulting in a decline in competition. The market power of the large digital companies will increase and direct State influence on the companies will grow. In Germany and the European Union, this will create pressure for action in order to secure competitive structures.

- With regard to cooperation between companies that aims to avoid shortages of supply, the European Competition Network has promptly provided guidance. Legal certainty was increased by rapid decisions of the competition authorities. However, it was also important in this context to ascertain that cooperation must not go beyond what is necessary to ensure supply. Agreements on prices, conditions and the allocation of customers or territories must remain prohibited even in times of crisis. Consumers must also be protected against abusively excessive prices of medical products or other goods that are essential but scarce during the crisis.

- It can be assumed that the push on digitalisation caused by the Corona crisis will lead to a further increase in the market power of the large digital companies. Against this background, the Monopolies Commission recommends that the German government should use its presidency of the Council of the European Union to introduce a platform regulation for dominant online platforms.

- During the Corona crisis, merger control rules should not be applied more generously than they have been so far. The applicable law enables the competition authorities to react appropriately even in times of crisis, for example with the concept of the failing company defence. The extension of the review periods for merger control, applicable from March to May 2020, should be prolonged until the end of 2020, as a renewed increase in the number of merger control notifications is expected in case of continued application of the Corona protective measures.

- During the Corona crisis, too, the control of State measures to support companies is indispensable in view of their potentially adverse effects on competition in the European single market. Measures that selectively support companies are particularly problematic. The Monopolies Commission agrees with the European Commission that the conditions and requirements in the case of State equity participations must be stricter than in the case of pure financial aid. In particular, a State participation should be accompanied by pro-competitive measures, insofar as it
concerns companies with a dominant position in one or more markets. In addition, the Monopolies Commission recommends that a committee of independent experts be set up to advise the German Federal Government on the development of exit strategies from crisis-related State participations.

- **With regard to competition problems related to market power**, the Monopolies Commission is concerned with several issues, namely the criteria for determining market power in the case of digital platforms, the necessary procedure in the case of conduct by which the market permanently tips in favour of a platform or by which more or less unassailable “ecosystems” are created, and the procedure in cases where the market structure has solidified permanently in favour of a platform. With regard to the criteria for determining market power in the case of digital platforms, the existing principles of Article 102 TFEU appear to be sufficient, notwithstanding the reforms currently underway at national level.

- With regard to the problem of tipping markets, a provision has been proposed in Germany (Section 20 (3a) ARC-E), pursuant to which the cartel authorities would be empowered to take action already when competition is endangered and independently of proof of concrete effects of the conduct in question. The provision in question could also be used to take action against European platform companies operating in Germany whose conduct may contribute to the collapse of markets. The Monopolies Commission therefore recommends that the German application practice be observed first and, if necessary, regulations for European law be considered on this basis.

- **With regard to the problem of “ecosystems”**, the prohibition of abuse in Article 102 TFEU seems to be sufficient in principle. The new abuse regulation proposed in Germany for companies of “paramount cross-market significance” for competition (Section 19a GWB-E) departs from Article 102 TFEU in several respects. However, from the perspective of EU law, experience with this new provision can be revealing under two aspects: In cases where the competition authorities of the Member States or national courts are obliged to apply Article 102 TFEU in parallel to national competition law (Art. 3 (1) sentence 2 of Regulation 1/2003), it remains to be seen whether the new German provision will facilitate or burden abuse control. Where the scope of application of the provision goes beyond Article 102 TFEU, it will be revealed whether it is suitable to effectively close any previously unrecognised regulatory gaps at EU level. Against this background, the Monopolies Commission considers it sensible to first gather practical experience in this respect as well before
introducing a corresponding supplement to the European regulatory framework.

- In view of the fact that the market position of large platforms can become permanently entrenched after a tipping of the market or as a result of the formation of ecosystems, proposals have been made in several expert reports. One proposal is to oblige dominant platform companies to prove that they do not commit any abuse within the meaning of Article 102 TFEU. Another approach is to subject dominant online platform companies to additional obligations and stricter monitoring. The Monopolies Commission considers the second approach to be particularly effective and makes proposals for a new Platform Regulation. This Platform Regulation should contain rules of conduct for dominant platforms. For example, it could provide for a ban on self-preferencing and for more stringent interoperability and portability obligations, which should be aligned with the experience in data protection law. The Regulation could also include remedies for abuses of market power with lasting effects on the market structure, and for breaches of the additional obligations of dominant platform companies laid down in the Platform Regulation. The remedies should then also specify the conditions under which the divestiture of parts of the business (including forced access to algorithms or data) may be proportionate and the necessary characteristics of those parts of the business (e.g., viability and competitiveness).

- In addition to the market power-related problems described above, information-related problems may arise in platform markets, making effective protection of competition more difficult in practice. First, an information asymmetry exists between platform companies and outsiders (public authorities or commercial/non-commercial platform users). Second, online marketplaces (e.g., trading/booking portals) have information problems in the relationship between traders and consumers.

- In the relationship between platform companies and outsiders, the Monopolies Commission sees a need for additional regulation, particularly with regard to the information asymmetry between platform companies and the authorities investigating the case. Although the authorities have extensive powers to collect information, they may encounter considerable difficulties when using their investigative powers in proceedings. The Monopolies Commission therefore recommends the tightening of the procedural obligations to cooperate in cases where the authorities have made all reasonable efforts to investigate. Companies can prevent the investigation of factual evidence – without the prohibition of self-incrimination under EU law coming into play – if they do not disclose information on their own initiative in such cases. In those cases, the
authorities should be empowered to draw conclusions from a lack of cooperation in the context of their free assessment of the evidence.

- With regard to the relationship between merchants and consumers in online marketplaces, it appears desirable to clarify the assessment criteria for automated pricing of online traders using pricing algorithms. The Monopolies Commission is in favour of focusing on the guidelines concerning the market definition in online marketplaces when the Commission notice on the definition of the relevant market is revised, in so far as price differentiation by dealers indicates that relevant markets are becoming fragmented. Furthermore, it recommends the introduction of a statutory presumption of damage in order to effectively protect consumers against harm caused by automatically fixed and unreasonably excessive prices within the meaning of Article 102 TFEU.

In France, a report has been submitted to the Parliament proposing to set the criteria to define platforms with structuring power ("platformes structurantes"), with a view of the establishment of a list covering those platforms and imposing on those platforms ex ante rules on transparency on algorithm for the purpose of audit, interoperability and portability, access to data with an essential facility feature, device neutrality for access to apps and a prohibition of self-preferencing.¹³

Although in France, a legislative proposal has not yet been tabled it seems likely that this will be the case in the near future. The political will to proceed in this direction is evidenced by a the fact

- that the French Ministry for the Economy and Finance has been calling¹⁶¹ for asymmetric regulation at EU level allowing for targeted and proportionate rules and obligations to complement competition law.

- According to the Ministry asymmetric regulation of structuring platforms should be enforced on a case-by-case basis, when competitive problems related to a platform appear to be structural and lasting, therefore requiring continuous intervention. Possible remedies could include obligations on data mobility and data portability to help reducing switching costs from one platform to another. Ultimate goal should be access to data potentially constituting barriers to entry (example: obligation to develop technical standards that facilitate interoperability of services and migration options for users).

- Designation of the most structuring platforms, to whom the new regulatory framework should apply, should be based on a set of economic characteristics and conditions that justify regulation. Mechanism to
identify companies and define obligations need to be sufficiently agile to react to the rapid development of tech companies and their practices.

- As regards oversight and enforcement, a dedicated entity at the European level, to be coordinated with the Commission’s existing series, could be created to implement this regulatory framework and establish supervision of structuring platforms.

- The French competition authority\textsuperscript{162} argues there is a need for a solution for structuring platform’s behaviour in markets where they are not dominant. They call for a new legal regime for “quasi-dominant” operators to impose on them enforceable obligations in terms of interoperability, non-discrimination and access to data. Relevant competition authority could thus, on a case-by-case basis, either accept commitments and make them mandatory, or order the company to modify its behaviour in response to the identified competition concern.

- As regards “killer acquisitions”, the competition authority report proposes the introduction of mandatory information requirements for every merger carried out by a structuring platform. The Autorité further proposes to assess whether substantive merger control rules should be adapted to digital challenges, especially in terms of potential competition, conglomerate effects, the relevant time scale of the analysis, and the impact of data and the creation of large user communities.

In Italy, the Competition Authority (AGCM), the Data Protection Authority (DPA) and the National Regulatory Authority AGCOM have issued a report on policy recommendations\textsuperscript{163}:

- the data-driven approach in the analysis of the platform economy, and the analysis of data gathering, management and profiling from a multi-purpose angle encompassing consumer protection, privacy and competition objectives.

- IT authorities stresses the risk of competitive barriers in existing and adjacent but also possibly completely new markets due to network effects and economies of scale/scope in data gathering, as well as in particular zero-pricing policies.

- They also stress the importance, but also limits of privacy rules to achieve an optimal competitive amount of data protection granted by platforms (due to high information asymmetries between consumers/individuals and platforms, costs in switching and porting).

- They indicate privacy and consumer protection breaches, including in particular lack of transparency on purpose of data gathering, as well as conglomerate effects

\textsuperscript{162} Autorité de la concurrence: Contribution of the Autorité de la concurrence to the debate on competition policy and digital challenges (2020)

\textsuperscript{163} https://www.agcm.it/dotcmsdoc/allegati-news/Big_Data_Lineeguida_Raccomandazioni_di_policy.pdf.
due to extent of data sources and analysis particularly relevant also for the analysis of antitrust breaches.

In the Netherlands, the Dutch government[^164] is calling for ex ante intervention in addition to competition enforcement in order to prevent anti-competitive behaviour by dominant companies acting as gatekeeper to the relevant online ecosystem (to prevent that ex post enforcement comes too late to keep markets competitive and contestable). By adding an extra tool to Regulation 1/2003, both at EU and national levels respectively, the new instrument will preserve the single market and national enforcement (to reflect heterogeneity of platforms/markets). Platforms in scope are platforms with gatekeeper role/bottleneck power, not necessarily dominant under competition rules but presenting risk of permanent dominance in the future due to ecosystem control (identifying factors: network effects, data collection incl. scale and scope effects, platform-of-platforms/ecosystems). As regards remedies, they propose SMP-type remedies to keep them targeted, such as platform access, data portability/sharing, non-discriminatory ranking. by adding an extra tool to Regulation 1/2003; both at EU and national levels to respectively preserve the single market and national enforcement (to reflect heterogeneity of platforms/markets). They call for the notification thresholds to be amended - possibly turnover and deal value.

Regarding studies carried out in the Netherlands supportive for action to be taken the following should are to be mentioned:

- The Dutch competition authority market study on app stores[^165] points in particular to bottleneck power over app providers and unilateral conduct of Google and Apple that can be used to expand their platform-ecosystems. As specific problems, they point to differentiated treatment, self-preferencing and lack of transparency.

- The report commissioned by the Dutch Ministry of Economic Affairs and Climate Policy on digital gatekeepers of October 2019[^166]

The Belgian, Dutch and Luxembourg competition authorities issued a position paper on the challenges faced by competition authorities in the digital world[^167]. Besides proposals to modernise the EU Merger Control Regulation and to (re-) introduce case-by-case guidance letters upon request, the three NCAs advocate for the introduction of an ex-ante instrument similar to Dutch government proposal.

- As regards addresses, they argue that the concept and interpretation of “dominance” under Art. 102 TFEU should be closely followed for reasons of legal certainty and predictability.

[^167]: 2 October 2019
- COM Guidelines should be updated, clarifying e.g. the role of data, consumer behavior and network effects.

- As regards nature of remedies, the new tool could be modelled along (1) UK CMA power to impose remedies following market studies and/or (2) MS’ telecom authorities to impose remedies on companies with significant market power.

- Only behavioural remedies should be used, e.g. platform access, data portability, data-sharing and on-discriminatory ranking.

- As regards procedural aspects, they argue for “voluntary” commitments similar to Art. 9 of Regulation 1/2003, but without intention by the Commission to adopt a decision and no accusation of any wrongdoing. Rebuttable presumption that remedies are proportionate.

- With respect to competent authorities, Commission is best-placed to impose remedies on EU-wide dominant companies. MS should enforce at national level in cases where company is dominant only in one MS.

In **Romania** on 20 June 2020 a draft law on relative bargaining power has been published for public consultation. The dependency criteria are defined by reference to the existence of an imbalance of power due to elements such as the considerably larger dimension or market position, the importance of the commercial relationship for the dependent enterprise and the difficulty.  

To summarize, the current legislative projects differ as to the threshold for intervention and as to the concept of scoping the services to be covered. While some project stay within the competition logic of market power within relevant markets and adjacent markets, some other proposals go for a larger intervention logic (Germany, France, relying on cross-market significance). More importantly, the proposed set of obligations differ with respect to the proposed prohibitions and obligations. For instance, regarding the proposed ex ante regulation on data, the French proposal is to provide access to data while the German proposal is only to prohibit cross platform usage. Another example for likely forthcoming discrepancies of obligations is illustrated by the fact that the French proposal contains further reaching obligations regarding device neutrality, while the German proposal does not contain such an obligation.

Against those divergences in the legislative projects it is foreseeable that the existing divergences between MS described above are most likely to deepen even if not all proposed concepts are going to be maintained within the legislative processes. First of all it is very likely that the national rules will be scoped differently as to the types of power of digital platforms captured and that therefore the list of platforms covered will

---

divergent. Finally, the legislative projects under way in MS will most likely result in the imposition of diverging ex ante obligations.

Finally it should be born in mind that although in some Member States (BE, NL, LUX) there is the political will and the supporting studies to address the issues covered by the present initiative those Member States prefer to support harmonisation at EU level rather than to proceed at national level. The arguments pleading in favour of such a political choice have been well explained in the submentioned report of the German Monopoly Commission. This means that absent Community action Member States are likely to start a legislative process with the resulting likelihood of further fragmentation.

Therefore, action at Community level is covered by Article 114 (1) TFEU also with the aim to prevent future fragmentation.
Annex 5.5: Cost of No-Europe

Gatekeepers may be legally established in one Member State and provide their services to almost the entire EU population. Given the intrinsic cross-border nature of platforms, measures at national level cannot be effective in addressing issues in the digital space. On the contrary, the proliferation of national laws would result in a range of different rules, which puts at risk the scale-up and competition capacity of smaller and start-up online platforms, thus further cementing gatekeepers’ entrenched position. Lacking any EU-wide regulation, national solutions are likely to lead to conflicting outcomes where they are implemented by platforms operating at a pan-European scale. A multiplication of national rules and a lack of coordination only benefits the largest companies that are able to deal with 27 different legal systems. At the same time, larger platforms would also be negatively impacted by a fragmented legal landscape since it undermines legal certainty and regulatory predictability. For businesses using online platforms it would be even harder to apply different set of rules within the EU so fragmentation would discourage them to trade across the EU.

Not addressing issues raised by gatekeepers would thus lead to stronger legal fragmentation undermining the potential of the Digital Single Market. As further explained under Section 6 on impacts, the online platform economy contributes heavily to EU cross-border trade and the EU economy as a whole. The top 50 online platforms represent 60% of the traffic share\(^\text{169}\) in Europe reaching revenues for about EUR 276 billion in 2018 and employing almost 600 000 people. In addition, the platform economy is expected to grow\(^\text{170}\) and represents an opportunity for EU platforms and businesses using their services. It is therefore necessary to address obstacles to a properly functioning online platform economy in order to ensure its positive contribution to the Digital Single Market. This is well illustrated by the following figures: cross-border e-commerce in Europe was worth EUR 143 billion in 2019. 59% of this market, i.e. EUR 84 billion, is generated by online marketplaces. Consequently, in an extreme scenario, where barriers between Member States are established that inhibit all cross-border sales by marketplaces, 59% of total turnover in 2019 would have been lost. Given that this figure is projected to increase to 65% in 2025, the lost cross-border sales would increase over time. Marketplaces with European capital represent 11% of the market.

The size of online cross-border trade in Europe reached EUR 108.75 billion of turnover in 2019, representing 14.4% annual growth compared to 2018. However, if there is no EU intervention there is a risk of fragmentation in the Digital Single Market which might reverse the positive trends in cross-border online trade.

Assuming a 10% decrease per year in online cross-border trade, the opportunity cost of the digital market fragmentation would be EUR 1.76 trillion after 10 years.

\(^{169}\) Traffic share is one of the most important proxies of the sector.\(^{170}\) The Commission study supporting this Impact Assessment (to be published) shows that the size of EU28 online cross-border trade in Europe for 2019 represents a 14.4% increase in comparison to 2018. Also, according to Cross-Border Commerce Europe 2019 study online marketplaces will represent 65% of cross-border online sales in Europe by 2025.