

Upstream meeting RSB-COMP
New Competition Tool ('NCT')
10 September 2020

The purpose of RSB upstream meetings is for report authors and Board members to informally discuss questions concerning how to prepare the best possible report on the issue at hand. Board members give their advice in a personal capacity and advice is not binding for the subsequent Board meeting.

List of participants:

COMP: [REDACTED]
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JRC: [REDACTED],

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DG COMP explained ongoing work streams under the remit of DG CNECT and COMP aiming to ensure that competition functions in the context of digitalisation and market concentration.

The NCT initiative tackles structural risks or a structural lack of competition resulting from problems that cannot be addressed effectively under Articles 101 and 102 TFEU (e.g. monopolisation strategies of non-dominant companies; tacit collusion in oligopolistic markets where there is no direct coordination). It also tackles practices covered under existent rules but not in the most efficient way (e.g. leveraging strategies into adjacent markets). Similar tools exist in some Member States and non-EU jurisdictions. The aim is to ensure suitable and proportionate remedies or to prepare legislative action, but not to find breaches of competition rules that would result in the imposition of damages or fines.

The NCT initiative is complementary to the Digital Services Act package which includes an ex ante regulatory instrument for very large online platforms acting as gatekeepers. Public consultations ran separately for the two work streams. However, there is an imminent decision to be taken at Commissioners' level on whether there will be one single proposal covering both issues or two separate proposals.

Points raised in the discussion

- The decision on the merging of the two proposals (NCT and ex ante regulation under Digital Services Act package) will inter alia depend on the legal basis for the two issues.
- Whether to deal with these two initiatives in a single impact assessment or in two separate ones was discussed. If there is a single legislative proposal, it would be difficult to have two impact assessments. However, if the legislative proposals are not merged, it would be possible to either keep two separate impact assessments (one for each proposal) albeit with closely coordinated and aligned analyses, or to have one single impact assessment for both initiatives.
- Having a single impact assessment would increase the coherence between the two initiatives, explaining better the interrelationships between the two. In the case of two impact assessments, the context section should explain the interrelationships in detail.
- However, drafting a single impact assessment could pose additional challenges in the short time frame. DG COMP and DG CNECT would need to merge in a single impact assessment the problem description, the scopes, the options, the analytical approaches, concepts and the language used.
- The single impact assessment would need to clarify on which points the evidence gathered from the two separate open public consultations is consistent and on which issues it diverges, through a mapping of the different stakeholders consulted for the two initiatives.
- On the scope, the choice for structuring the options depends on whether the impact assessments are merged. In a merged impact assessment, DG COMP's analysis should focus mainly on the digital scope, with less details on the broader horizontal topic than if the analysis were to be conducted in a separate impact assessment.
- In a merged impact assessment, the DG COMP and DG CNECT options should be compared to see if they are complementary or not.
- In general, it is important to identify options that are real alternatives to each other focusing on political choices; sub-options should be presented where relevant.
- Independently of whether the impact assessments are merged, Board members advised that it should be clearly explained how the initiatives are interrelated, their respective scope and expected outcomes, and the different sources of evidence.
- The timing may be adjusted in case the proposals are merged, because the Digital services Act package is due to the board two weeks earlier than the NCT.
- The Digital services Act package will be more specific (about ex ante requirement) than the DG COMP proposal (about remedies), which aims to provide flexibility in order to be futureproof. The NCT initiative should define the process that will specify suitable and proportionate remedies in response to structural competition problems.
- The analysis should include an estimate of the burden for enterprises that would be investigated under the NCT, in particular for investigations that turn out to be undue.

JRC comments on the upstream meeting of DG COMP with the RSB on the New Competition Tool, 10 September 2020

The JRC.I1.CC-ME indicated that they have already discussed some aspects of this initiative with the COMP colleagues working on the New Competition Tool (NCT). The JRC.I1.CC-ME made the following additional comments in view of future monitoring and evaluation.

1. *What success would look like.* The Inception Impact Assessment (IIA) states in the problem definition that structural competition problems “ultimately result in inefficient market outcomes in terms of
 - a) higher prices,
 - b) lower quality,
 - c) less choice and
 - d) less innovation”

The proposed tool aims at correcting these adverse effects, in a proportionate manner. Are these the main outcome indicators foreseen for the monitoring and the evaluation of the NCT, if and when the tool will be used? For instance, is innovation going to be measured in terms of input (expenditure in innovation) or output (patent applications)? While these indicators need to necessarily be market-specific, it would be important to state in the IA what “success” would look like for the NCT and “how it will be measured”, at least along broad categories, such as a), b), c), d). Incidentally: is the NCT expected to have any “deterrence effect”? If so, is there a plan to measure this effect?

2. *Monitoring and implementation.* In the section “Preliminary assessment of expected impacts”, the IIA states that “these remedies would increase costs for the companies concerned. The proportionality of the costs incurred would be ensured by the fact that such remedies have to be limited to ensuring the proper functioning of the market under scrutiny.” Proportionality of behavioural or structural remedies may be better ensured if data on prices and price distortions due to structural competition problems are available. In this sense, monitoring and evaluation would be blended with the implementation details of the NCT. Is this what is foreseen? It would be important to state this in the IA.
3. *Cost and benefits.* The same section of the IIA states that “consumer benefits deriving from the timely intervention under all policy options should outweigh those costs.” This analysis seems to be relevant for the ex-post cost-benefit analysis. How are inputs for this exercise going to be collected?
4. *Synergies and complementarities with other initiatives in this area.* The present initiative appears well integrated and coordinated with other initiatives like the DSA of DG CNECT.
 - a) It would be important to understand how the present initiative complements and reinforces these other initiatives, also in its intervention logic, possibly towards the same expected outcomes.

- b) Moreover, the monitoring and evaluation plan for the set of these initiatives could benefit from a joint plan, where some data is collected / accessed via the *same* systems / procedures / technologies.
- c) Could this monitoring and evaluation plan be co-designed and shared with competition authorities in Member States?
- d) From the evaluation perspective, the above points would help to identify ways to measure the specific contribution of the present initiative towards common goals (a more competitive internal market), as well as if/how the present initiative may act as an enabler for benefits coming from other related policy initiatives (interactive effects).

JRC.I1.CC-ME would be happy to discuss or give further input if deemed useful.

