

## INCEPTION IMPACT ASSESSMENT

Inception Impact Assessments aim to inform citizens and stakeholders about the Commission's plans in order to allow them to provide feedback on the intended initiative and to participate effectively in future consultation activities. Citizens and stakeholders are in particular invited to provide views on the Commission's understanding of the problem and possible solutions and to make available any relevant information that they may have, including on possible impacts of the different options.

<b>TITLE OF THE INITIATIVE</b>	<b>New Competition Tool ('NCT')</b>
<b>LEAD DG (RESPONSIBLE UNIT)</b>	COMP A1
<b>LIKELY TYPE OF INITIATIVE</b>	Legislative instrument
<b>INDICATIVE PLANNING</b>	Q4 2020
<b>ADDITIONAL INFORMATION</b>	

The Inception Impact Assessment is provided for information purposes only. It does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content. All elements of the initiative described by the Inception impact assessment, including its timing, are subject to change.

### A. Context, Problem definition and Subsidiarity Check

#### Context

Commission President von der Leyen tasked Executive Vice-President Vestager in [her mission letter](#) with making sure that “*competition policy and rules are fit for the modern economy*” as well as to “*strengthening competition enforcement in all sectors*”. The proposal for a New Competition Tool is one of the measures aimed at fulfilling this task by addressing gaps in the current EU competition rules and allowing for timely and effective intervention against structural competition problems across markets. It is based on the Commission's experience with enforcing the EU competition rules across a wide range of markets, as well as on the worldwide reflection process about the need for changes to the current competition law framework to allow for enforcement action preserving the competitiveness of markets.

The Commission's enforcement experience in both antitrust and merger cases in various industries points to the existence of structural competition problems that cannot be tackled under the EU competition rules while resulting in inefficient market outcomes. There is also a growing body of economic evidence in the EU suggesting increasing market concentration and increasing firm profitability levels, as e.g. pointed out in the Commission Staff Working Document to the [Single Market Performance Report 2019](#) (SWD(2019)444 final), in digital but also in other markets. Even short of individual market power, increasingly concentrated markets can allow companies to monitor the behaviour of their competitors and create incentives to compete less vigorously without any direct coordination (so-called [tacit collusion](#)). Moreover, the growing availability of algorithm-based technological solutions, which facilitate the monitoring of competitors' conduct and create increased market transparency, may result in the same risk even in less concentrated markets.

The increasing digitalisation of society and economy has attracted increasing attention under competition policy. Whilst digitalisation has brought many benefits and holds the promise of still significant larger benefits in the future, a few large platforms have become gatekeepers for many digital and non-digital products and services. Underlying this development are market characteristics such as extreme economies of scale and scope, strong network effects, zero pricing and data<sup>1</sup> dependency, as well as market dynamics favouring sudden and radical decreases in competition ('tipping') and 'winner-takes-most' scenarios. As the Commission also established in some of its competition decisions, these characteristics can make a position of market power or dominance, once acquired, difficult to contest (see e.g. Case M.8124 *Microsoft/LinkedIn* and AT.37.990 *Intel*). While these characteristics are typical for digital markets, they can also be found in non-digital markets. Moreover, with the increasing digitalisation of the economy, more and more markets will exhibit these characteristics, and the differences between digital and non-digital markets will become increasingly blurred.

Against this backdrop and in addition to vigorously enforcing the EU competition rules, the Commission has

<sup>1</sup> For the purpose of this Inception Impact Assessment, the concept of 'data' should be understood in a wide sense, covering personal and non-personal data in all forms and uses (without prejudice to the fact that personal data is subject to the General Data Protection Regulation).

carried out a reflection process about the role of competition policy in a fast-changing world, which included commissioning a [report by the independent Special Advisers](#) to Commissioner Vestager published in April 2019. This reflection process is part of a broader policy debate about the need for changes to the current competition law framework in order to allow interventions that preserve competitive markets. During the last couple of years, many stakeholders from the public and private sector, including competition authorities and government bodies, academia, as well as legal and economic practitioners have engaged in this debate and generated numerous reports and studies making proposals on how to adapt or extend the competition law toolbox. More recently, several EU Member States have called for changes and complements to the existing competition rules and some of them have prepared legislative proposals for amendments to their national competition laws.

#### **Problem the initiative aims to tackle**

EU competition law can address (i) anti-competitive agreements and concerted practices between companies pursuant to Article 101 of the Treaty on the Functioning of the European Union ('TFEU') and (ii) the abuse by a company of its dominant position pursuant to Article 102 TFEU. The enforcement experience of the Commission and national competition authorities, and the reflection process on the fitness of the existing competition rules have helped identify certain structural competition problems that these rules cannot tackle (e.g. monopolisation strategies by non-dominant companies with market power) or cannot address in the most effective manner (e.g. parallel leveraging strategies by dominant companies into multiple adjacent markets).

Structural competition problems concern structural market characteristics that have adverse consequences on competition and may ultimately result in inefficient market outcomes in terms of higher prices, lower quality, less choice and innovation. While **structural competition problems** can arise in a broad range of different scenarios, they can be generally grouped into two categories depending on whether harm is about to affect or has already affected the market:

- **Structural risks for competition** refer to scenarios where certain market characteristics (e.g. network and scale effects, lack of multi-homing and lock-in effects) and the conduct of the companies operating in the markets concerned create a threat for competition. This applies notably to tipping markets. The ensuing 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. Other scenarios falling under this category include unilateral strategies by non-dominant companies to monopolise a market through anti-competitive means.
- **Structural lack of competition** refers to a scenario where a market is not working well and not delivering competitive outcomes due to its structure (i.e. a structural market failure). These include (i) markets displaying systemic failures going beyond the conduct of a particular company with market power due to certain structural features, such as high concentration and entry barriers, consumer lock-in, lack of access to data or data accumulation, and (ii) oligopolistic market structures with an increased risk for tacit collusion, including markets featuring increased transparency due to algorithm-based technological solutions (which are becoming increasingly prevalent across sectors).

This initiative is without prejudice to existing sector-specific regulation. It is also complementary to the Commission's [new initiative on platform-specific ex ante regulation](#), which seeks to provide a fair trading environment for the platform ecosystems in the EU's internal market and which is part of the Digital Single Market package announced in the "Shaping Europe's digital future" Communication (Lead: DG CNECT). To ensure consistency and avoid possible overlaps, notably in the identification of policy options to be pursued, the open public consultation and the impact assessment of the present initiative and the DG CNECT-led initiative will be conducted in parallel.

#### **Basis for EU intervention (legal basis and subsidiarity check)**

In line with the general objective of ensuring fair and undistorted competition in the internal market, the legal basis for such a New Competition Tool would be Article 103 TFEU in combination with Article 114 TFEU.

The need for intervention at EU level stems from the pan-European business models of many market players, as well as the cross-border nature of digital or digitally-enabled products and services and the increased consolidation of the internal market. However, even if in some cases relevant markets are defined as national under EU competition law, intervention at national level would not effectively address the cross-border dimension of competition related issues. This would likely lead to diverging rules, thus creating legal uncertainty for companies operating in the internal market, whether at national or on a pan-European basis.

### **B. Objectives and Policy options**

The **general objective** of this initiative is to ensure fair and undistorted competition in the internal market. In order to achieve this general objective, the initiative intends to address as **specific objectives** the structural competition problems that prevent markets from functioning properly and tilt the level playing field in favour of only a few market players. Restoring undistorted competition on these markets will deliver competitive outcomes in terms of lower prices and higher quality, as well as more choice and innovation to European consumers. It will also help small and medium-sized enterprises to compete more effectively against powerful incumbents and reap the fruits of their investments. This will be all the more important following the devastating effects of the Covid-19 outbreak

on many markets where a level playing field will help fuelling renewed growth.

In the **baseline scenario** (against which the proposed policy options will be assessed), the current EU competition law framework would remain unchanged. The Commission would continue to enforce Articles 101 and 102 TFEU on a case-by-case basis against anti-competitive conduct of individual companies. It would also continue to conduct sector inquiries, which, however, only empower the Commission to request information necessary for giving effect to Articles 101 and 102 TFEU and also do not allow the Commission to impose remedies outside the scope of individual infringement proceedings. Therefore, the described structural competition problems could not be tackled or addressed in the most effective manner under this scenario.

Against this baseline scenario, the following policy options are considered:

**Option 1. A dominance-based competition tool with a horizontal scope**

Option 1 would address competition concerns arising from unilateral conduct by dominant companies without any prior finding of an infringement pursuant to Article 102 TFEU. Similar to the existing EU competition rules, it would be generally applicable across all sectors of the economy. The goal of this tool would be to allow the Commission, in close cooperation with the national competition authorities, to identify competition problems and intervene before a dominant company successfully forecloses competitors or raises their costs. The tool would enable the Commission to impose behavioural and, where appropriate, structural remedies. However, the Commission would not make any finding of an infringement of the EU competition rules, nor impose fines and thus not generate rights to launch damage claims.

**Option 2. A dominance-based competition tool with a limited scope**

Similar to the tool presented under Option 1, this option would address competition concerns arising from unilateral conduct by dominant companies without any prior finding of an infringement pursuant to Article 102 TFEU. Under Option 2, however, the use of the tool would be limited in scope to sectors in which the characteristics mentioned in the context and problem definition sections above are most prevalent. These could include certain digital or digitally-enabled markets, as identified in the report by the Special Advisers and other recent reports on the role of competition policy, and/or other sectors identified as being especially prone to such concerns due to entrenched dominance, high entry barriers, etc.

**Option 3. A market structure-based competition tool with a horizontal scope**

This option would allow the Commission to identify and remedy structural competition problems that cannot be addressed (at all or as effectively) under the EU competition rules. Thus, unlike Options 1 and 2, it would not be limited only to companies that are already dominant. Similar to already existing competition tools of this kind, this tool would be based on a test allowing the Commission to intervene when a structural risk for competition or a structural lack of competition prevents the internal market from functioning properly. The tool would enable the Commission to impose behavioural and, where appropriate, structural remedies. The Commission could also recommend legislative action to improve the functioning of the market concerned. As under the previous options, there would be no finding of an infringement, no fines and no damage claims.

Similar to the existing EU competition rules, the tool would be generally applicable across all sectors of the economy.

**Option 4. A market structure-based competition tool with a limited scope**

Similar to the tool presented under Option 3, this option would address structural competition problems. Under Option 4, however, the use of the tool would be limited in scope to sectors in which the characteristics mentioned in the context and problem definition sections above are most prevalent. These could include certain digital or digitally-enabled markets, as identified in the report by the Special Advisers and other recent reports on the role of competition policy, and/or other sectors identified as being especially prone to such concerns due to entrenched dominance, high entry barriers, etc.

For the different policy options outlined above, particular attention will be paid as to whether the different tools can be expected to generate **real value added** compared to the current EU competition law toolbox. The Commission will ensure a joint analysis of the results of the related [impact assessment led by DG CNECT](#) and referred to above under the section concerning the “*Problem the initiative aims to tackle*” with a view to exploring synergies and ensuring consistency on the policy options pursued, in particular as regards possible remedies and enforcement.

## C. Preliminary Assessment of Expected Impacts

The Impact Assessment will assess, for each policy option, the following types of likely impacts:

### Likely economic impacts

Compared to the baseline scenario, all policy options would have an economic impact, while differing in their ability to address the challenges identified in the context and problem definition sections above.

All policy options would **address competition distortions and the negative consequences arising from it** (i.e. higher prices, lower choice and quality and innovation), albeit to a different extent:

- Options 1 and 2 would address unilateral conduct by dominant companies only. The intervention would focus on market players bearing a special responsibility for the competitive process in view of their size and the resulting effects of their conduct on competition in the market, while improving the market conditions for smaller market players, allowing them to grow and compete on the merits with the market incumbent. These options would, however, necessarily require a finding of dominance, which can be challenging in terms of investigatory steps, legal test and overall timeliness of the intervention.
- Options 3 and 4 would cover all identified structural competition problems. In addition to tackling scenarios involving dominant companies, these two options would also address structural competition problems that are not necessarily related to dominance (e.g. tipping markets and oligopolistic market structures).

The **remedies that can be imposed** under all policy options would be broadly similar in scope, as none of them would entail the finding of an infringement or the imposition of fines. All policy options would empower the Commission to impose certain obligations on companies by which they would have to abide. As such, 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. Consumer benefits deriving from the timely intervention under all policy options should outweigh those costs.

As to the **scope of the different policy options (limited scope vs horizontal scope)**:

- The limited scope of Options 2 and 4 would allow addressing the issues identified in markets being most prone to such problems. While the most pressing competition problems are widely perceived to occur in digital or digitally-enabled markets, other sectors should also be considered under these options. In any event, the boundaries of the markets covered would need to be carefully designed in order to properly take into account that (i) the entire economy is increasingly digitised and all sectors (from energy to media, pharma, farming, manufacturing and mobility) will become to a large extent digital in the years to come; and (ii) any solution should be future-proof, thus allowing the Commission to address novel issues in constantly evolving markets without introducing uncertainty in terms of its scope of application.
- Options 1 and 3 would be applicable across all markets, similar to how Articles 101 and 102 TFEU are applied.

#### **Likely social impacts**

By addressing situations where there exists a structural risk for competition or a structural lack of competition that prevents markets from functioning properly and thus from delivering lower prices and higher quality, as well as more choice and innovation, Option 3 is expected to safeguard long-term consumer interest and welfare.

While the other policy options are geared towards the same objective, their likely social impact is expected to be of a lesser degree, either by nature of their limited scope or their dominance-based enforceability.

#### **Likely environmental impacts**

The possible impact of the policy options on the environment will be assessed in the Impact Assessment. Given the variety of sectors/markets that could be covered, any such environmental implications are expected to be diverse.

#### **Likely impacts on fundamental rights**

All policy options will have an impact on the way in which companies can act on the market. Depending on their design, including the underlying procedural framework, all policy options would therefore have to take into account the rights of defence and the right to judicial review of the companies subject to intervention under the respective tool. The Impact Assessment will analyse the impact on fundamental rights for each policy option.

#### **Likely impacts on simplification and/or administrative burden**

Whereas all policy options are expected to lead to some additional enforcement costs for the companies concerned, it is likely that these costs will be counterbalanced by the increasing efficiency gains and public interests related to each policy option, as well as economic opportunities for other companies (e.g. entrants, innovators, etc).

Under all policy options, the New Competition Tool would complement the competition toolbox and therefore hinge on the Commission's existing enforcement capabilities. This should help to limit the administrative burden through additional enforcement.

### **D. Evidence Base, Data collection and Better Regulation Instruments**

#### **Impact assessment**

The Impact Assessment is expected to be finalised and submitted to the Regulatory Scrutiny Board of the European Commission in the fourth quarter of 2020.

#### **Evidence base and data collection**

The Impact Assessment will be informed and supported by the Commission's enforcement experience across all markets, as well as by the findings and proposals from the worldwide reflection process on the need to amend the

competition law framework to allow for preserving the competitiveness of markets in a context of increased concentration and digitalisation. An important part of the work will therefore involve the review of existing evidence underpinning the problem definition and policy options. This includes the numerous contributions to the worldwide reflection process, such as studies, the report of the Special Advisers to Commissioner Vestager and the reports prepared by different national competition authorities, be it in an independent manner or in cooperation (e.g. the joint study on algorithms and competition of the French Autorité de la Concurrence and the German Bundeskartellamt).

Furthermore, the Commission will also undertake targeted evidence-gathering with respect to the prevalence of structural competition problems in non-digital markets that cannot be tackled or addressed in the most effective manner on the basis of Articles 101 and 102 TFEU. This will include contributions received in the context of the public consultation, as well as expert advice from DG COMP's Economic Advisory Group on Competition Policy and other scholars. Contributions by the national competition authorities, international organisations (e.g. the OECD), economic and legal scholars, as well as consumer associations will also be considered.

In addition, the Commission will gather information from competition authorities around the globe that are using similar competition tools as the one proposed by this initiative. Finally, the Commission intends to procure targeted research papers on policy options and key features of a possible New Competition Tool.

#### **Consultation of citizens and stakeholders**

The Impact Assessment will include an **open public stakeholder consultation** to be launched in Q2/2020, which will collect views from relevant stakeholders on the policy options and their perceived impact on the Commission's ability to intervene against structural competition problems in an effective and timely manner.

The Commission will also carry out **targeted stakeholder workshops** to gather the views of particular stakeholder groups such as the national competition authorities and consumer organisations in the course of 2020. In this context, the Commission will rely, where possible, on existing consultation structures (e.g. the European Competition Network) and advisory bodies (e.g. DG COMP's Economic Advisory Group on Competition Policy).

#### **Will an implementation plan be established?**

There is no need for an implementation plan since all policy options consider the Commission as the enforcer of the New Competition Tool.