

# Biography

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Antitrust desk officer in charge of e-commerce and data economy, Directorate-General for Competition, European Commission (2012 – Present)

- Experience

Case handler, M&As, DG COMP, COM (2006 – 2012)  
Official legal adviser, DG GROW, COM (2004 – 2006)

- Education

College of Europe, Bruges (2003 – 2004)  
Université Libre de Bruxelles (2002 – 2003)  
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# Impact assessment for a New Competition Tool

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(Disclaimer: Speaking in a personal capacity. The views expressed are not necessarily those of the European Commission.)

# Agenda

1. EVP Vestager's holistic three pillar approach
2. Context of the proposal
3. Rationale behind the New Competition Tool ("NCT")
4. Objective: tackling structural competition issues
5. Market investigation in other jurisdictions
6. The NCT's Inception Impact Assessment, policy options
7. Main steps & timeline
8. Evidence gathering
9. Interplay with possible ex-ante platform regulation

# 1. Executive Vice President Vestager's three pillar approach

To ensure the contestability and fair functioning of digital and other markets, EVP Vestager announced a three-pillar structure of complementary and therefore mutually reinforcing measures:

1. **Continued vigorous competition law enforcement** (including notably the use of interim measures and more prescriptive/restorative remedies, where appropriate);
2. As announced in the Communication “Shaping Europe’s Digital Future”, the Commission will explore, in the context of the Digital Services Act package, **ex ante rules** to ensure that markets characterised by large platforms with significant network effects acting as gatekeepers, remain fair and contestable for innovators, businesses and new market entrants; and
3. **Consider a new competition tool** allowing to deal with structural competition problems that cannot be tackled or addressed in the most effective manner on the basis of Articles 101 and 102 TFEU.

Parallel  
work streams

## 2. The context of the proposal

- Over the past years, there has been a worldwide reflection process about the need for changes to the current competition law framework to allow for enforcement action preserving the competitiveness of markets.
- Factors triggering this debate include digitalisation and market concentration

Special  
Advisers'  
Report

Reports  
by NCAs

Calls for  
action by  
EP

Member  
States

Consu-  
mer org.  
(BEUC)

Other  
stake-  
holders

Mission letter  
to EVP

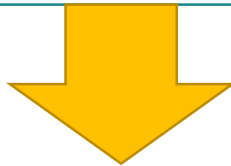
- Making sure that *“competition policy and rules are fit for the modern economy”*
- *“Strengthening competition enforcement in all sectors”*



# 3. Rationale behind the New Competition Tool

EU competition law can address:

- Anti-competitive agreements and concerted practices between companies pursuant to Article 101 TFEU; and
- The abuse by a company of a dominant position pursuant to Article 102 TFEU



For **conduct falling outside the scope** of these two articles, **we cannot act** (e.g. monopolisation strategies of non-dominant companies with market power)



For **conduct falling within the scope** of these two articles, **we can act but not always in the most effective manner** (e.g. parallel leveraging strategies in multiple adjacent markets)

## 4. Objective: tackling structural competition issues

- **Central element:** tackling structural competition problems across markets  
→ cannot be addressed under 101/102 TFEU or tackled in most effective manner  
→ case-by-case analysis required to determine adverse effects on competition
- **Structural risks for competition:** scenarios where market characteristics (e.g. network and scale effects, lack of multi-homing and lock-in effects) and the conduct of the companies operating in those markets create a risk for competition (i.e. need for early intervention to ensure effective competition)
- **Structural lack of competition:** scenarios where a market is not working well and not delivering competitive outcomes due to its structure (i.e. structural market failures such), including systemic failures going beyond the conduct of a particular company due to certain structural features (e.g. high concentration and entry barriers, consumer lock-in, lack of access to data or data accumulation)

## 4.1 Structural risks for competition

- Markets where specific features enable, foster or strengthen creation of powerful market players with an entrenched market and/or gatekeeper position, resulting in winner-takes-most/all scenarios and weak competition (notably in tipping markets)
- Possible scenarios:
  - Anti-competitive monopolisation strategies by non-dominant companies with market power
    - e.g. prevention of multi-homing to achieve consumer lock-in
    - e.g. dual role/vertical integration scenarios where a company exploits advantages gained from upstream service provision in markets where it competes
  - Unilateral conduct by not-necessarily dominant gatekeepers that further weakens competition and/or results in exploitation
    - e.g. aftermarket situations in mobile ecosystems (e.g. content or payment services)
  - Repeated leveraging strategies from dominated core market into different adjacent markets (in particular if latter are prone to tipping)
    - would allow for holistic and timely investigation of core market + adjacent markets and principle-based remedies, incl. core market to address further strengthening of dominance



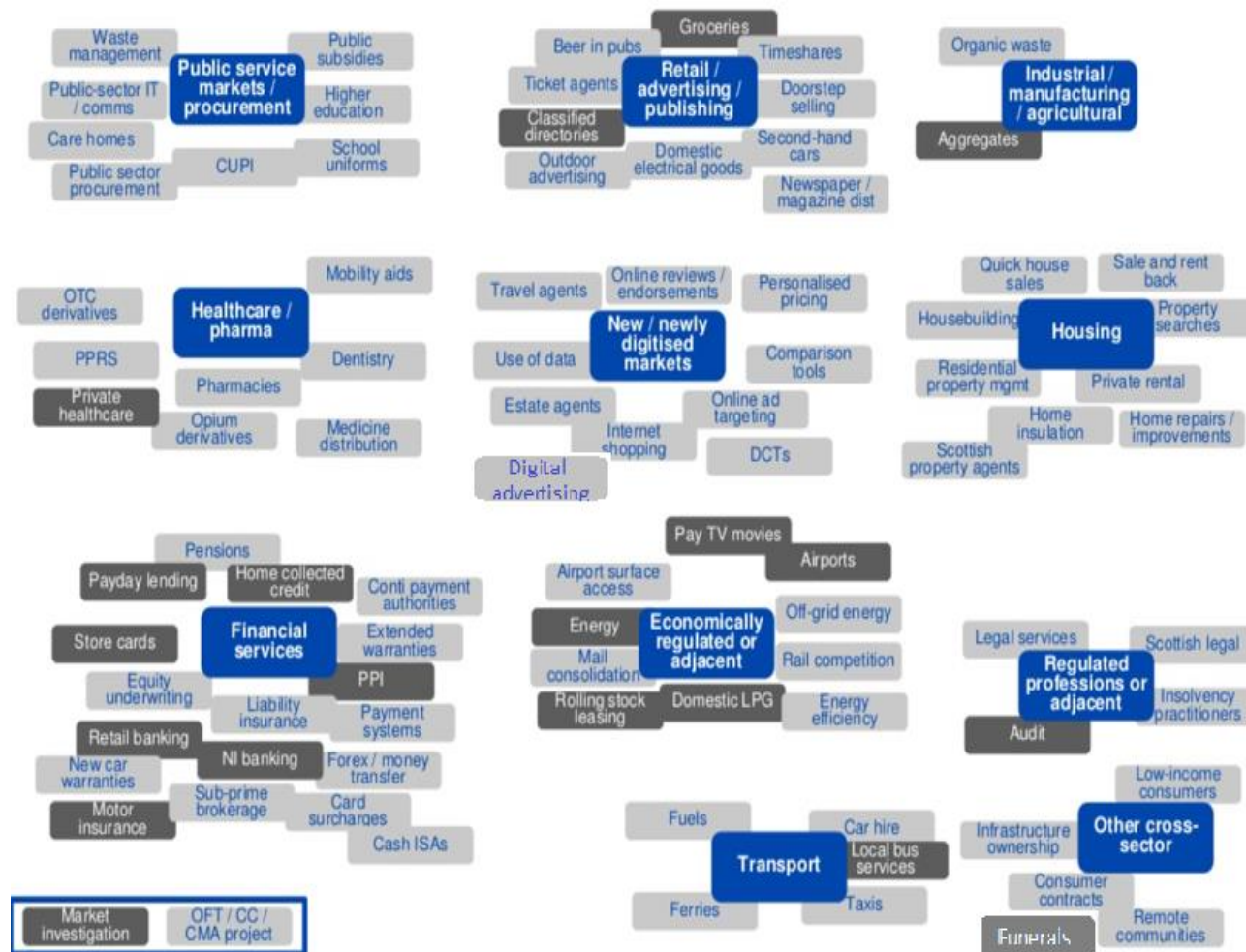
## 4.2 Structural lack of competition

- Possible scenarios:
  - Oligopolistic market structures resulting in incentives to compete less vigorously without any direct coordination
    - e.g. raw material markets (e.g. steel, cement, gasoline/fuel markets)
    - also in less concentrated markets where algorithm-based technological solutions can create increased transparency
  - Strategies by non-dominant incumbents in concentrated markets to prevent entry or growth of innovative alternative solutions without any direct coordination
    - e.g. pharmaceutical markets; financial/payment markets
  - Lack of competition in tipped markets resulting from specific market features
    - e.g. UK CMA's investigation into digital advertising markets
  - Common shareholdings resulting in reduced incentives to compete among portfolio firms
    - can facilitate coordination or favour unilateral anti-competitive conduct

## 5. Market investigation tools in other jurisdictions

- Inspired by UK CMA's market investigation references: whether a market feature (or combination thereof) prevents, restricts or distorts competition (so-called adverse-effect-on-competition test)
  - ✓ Market feature = market structure (or aspects thereof); conduct of firms and/or customers
  - ✓ Used e.g. in retail banking, energy, airports, cement and payment protection insurance
- Similar tools exist in several European countries and other jurisdictions
  - ✓ Europe: Greece, Iceland, Romania
  - ✓ Worldwide: e.g. South Africa, Mexico
- Commonality: recognition that not all competition problems can be cured through application of Articles 101 and 102 TFEU  
→ **need for comprehensive market structure based approach**

## 5.1 Sectors examined by the UK's CC/CMA



Since 2002:

- **20 market investigations**
- more than 80 market studies

Cases that result in a market investigation reference are those where the perceived competition problems are most significant.

Examples of scenarios tackled:

- Oligopolistic markets with weak competition between suppliers (e.g. concerns of coordination in *Aggregates*, exercise of unilateral market power over customer base in *Energy*)
- Impediments to switching by consumers (e.g. *Energy* and *Retail Banking*)

## 5.2 Examples of CMA market investigations& remedies

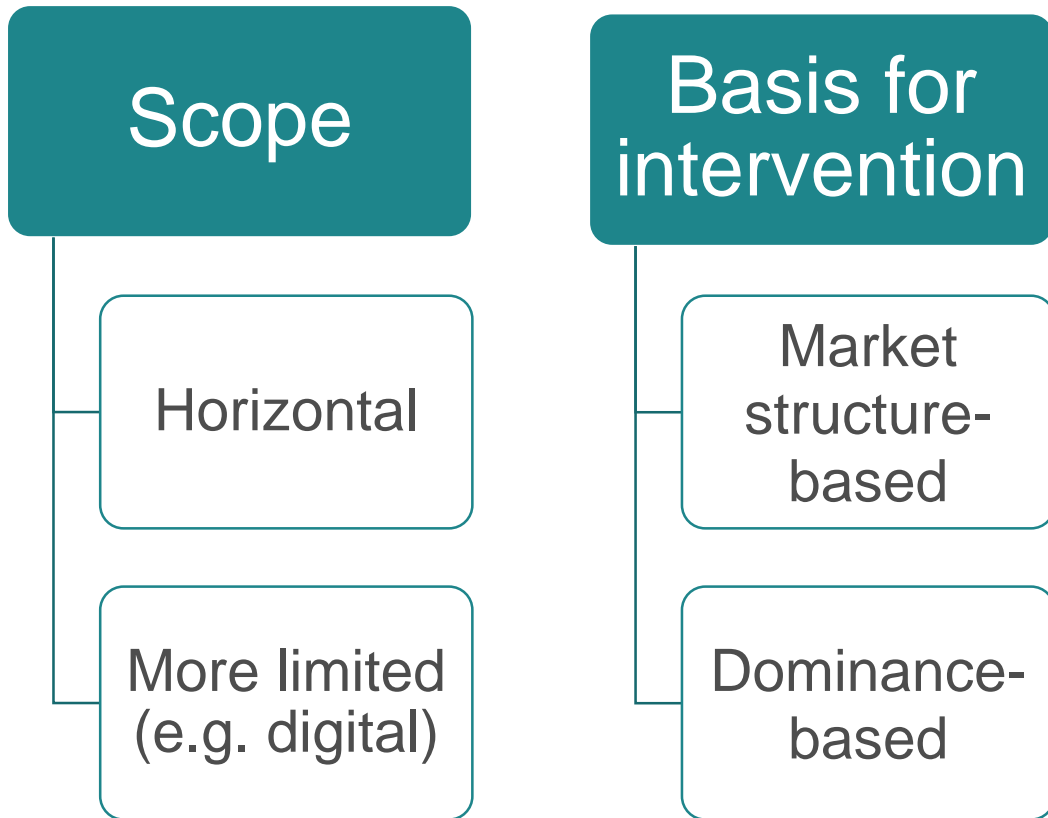
Regulatory remedies	Demand-side remedies	Supply-side remedies	Structural remedies
<b>Changes to regulatory framework</b> (BAA Airports, Groceries, Local Buses, Audit)	<b>Information on prices</b> (LPG, Care homes)  <b>Comparison tools</b> (Energy, Home credit)	<b>Access to key inputs</b> (Local buses, LPG)  <b>Anti-transparency</b> (Aggregates)	<b>Divestment</b> (BAA Airports, Aggregates, [ <i>almost</i> in Private Healthcare])
<b>Improved info for regulators</b> (BAA Airports)	<b>Measures to improve information available</b> (Rolling Stock, Personal accounts, Private Healthcare)	<b>Unbundling</b> (PPI, Store Cards)	<b>Market share/local expansion limits</b> (Class. Dir., Groceries)
<b>Price regulation</b> (Classified Directories, Energy [pre-payment meters])	<b>Measures to make switching easier</b> (LPG, Personal accounts)	<b>Limits on restrictions in agreements</b> (Groceries, Audit)	
		<b>Limits on referral incentives</b> (Private Healthcare)	

- CMA examples have to be seen against context of national or local issues investigated, whereas NCT aimed at structural competition issues with EU-dimension
- **No predefined list** of remedies
- Allows to **tailor comprehensive remedies packages**
- Remedies have to be **appropriate and proportionate** (subject to judicial review)
- Divestments are very rare
- Remedies can be changed or lifted over time

# 6. The Inception Impact Assessment: policy options

- **Central element:** tackling structural competition problems

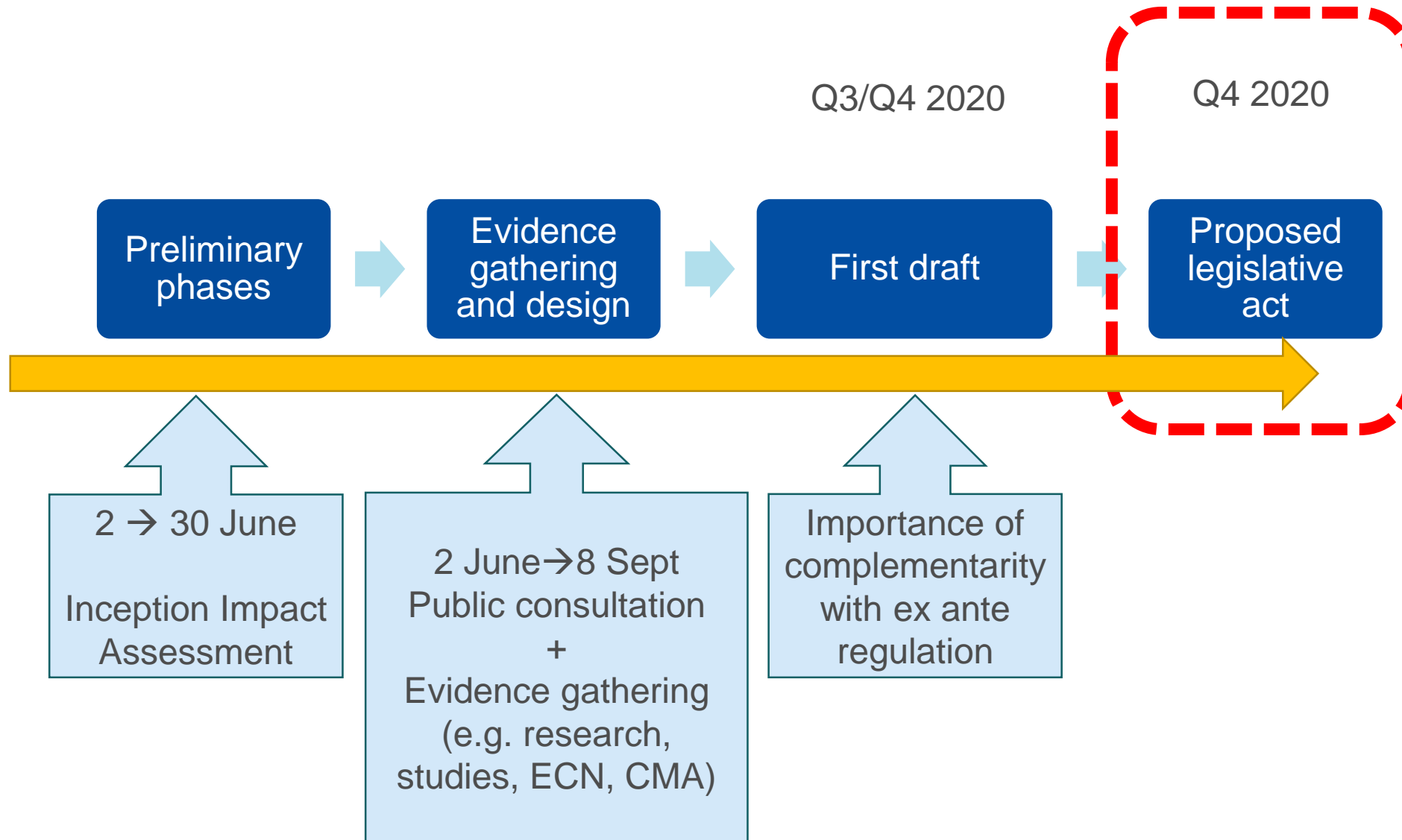
## Four policy options



## Commonalities

- Effective and timely market investigation
- Allowing for **imposition of suitable and proportionate remedies**
- Ability to inform/suggest legislative action
- **Fair process** (e.g. right to be heard) and judicial review to be ensured
- **No finding of an infringement**
  - No fines, nor damages
  - Increased incentives to cooperate

# 7. Main steps and timeline



# 8. Evidence gathering

## 1. Consulting broadly across stakeholder group

- Public consultation through EUSurvey questionnaire to gather information on structural competition problems, feedback on policy option and set-up of NCT (deadline: 8 September 2020)
- Interaction with businesses and consumer organisations
- Interaction with legal and economic stakeholder fora

## 2. Research on structural competition problems & set-up of a new competition tool

- Desk research
- DG COMP's Economic Advisory Group on Competition Policy (focus on non-digital markets)
- Study on the efficiency of the tool (cost-benefit analysis)
- Expert advice by academics on (i) intervention trigger for the NCT; (ii) interplay between the NCT and sector-specific regulation; (iii) procedural aspects of the NCT; (iv) comparative study with the UK's CMA Tool

## 3. Cooperation with European Competition Network (e.g. ECN questionnaire, targeted workshop)

## 4. Cooperation with UK CMA to benefit from enforcement experience with market investigation tool



## 9. Interplay with possible ex ante regulation

- Based on Commission's enforcement experience, potential benefit of regulation being targeted and clear-cut to give clarity and avoid stifling of innovation incentives (possible trade-off between scope and content):
  - ✓ Possible benefit of scope of regulation at EU level being asymmetric, i.e. applicable to a **narrow and well-defined circle of gatekeepers** above a clear and legally defined threshold
  - ✓ Possible content of regulation: **clear-cut set of prohibitions and obligations** covering proven harmful practices (e.g. related to data access and dual role) and unfair trading practices ("**dos and don'ts**")
- The advantages: predictable legal framework with immediate effect
- **Complementary to EU competition rules and NCT**, in line with EVP's three-pillar approach



# Thank you for your attention

