An Economic Evaluation of the EC's Proposed "New Competition Tool"

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I. Executive Summary

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."[3] 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."[4]

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.[5] 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).

Finally, in Section V we provide a critical evaluation of the functioning of the UK's markets regime in light of this evidence, and offer seven recommendations regarding the merits and design of a New Competition Tool:

- For markets where harm has "already affected the market", we see a strong case for the introduction of a New Competition Tool (Rec1) with a broad scope both within and across sectors (Rec2) to address factors like those covered by the UK's markets regime that prevent effective competition in markets. Such an NCT should strongly consider including a consumer protection mandate (Rec3).

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[3] See https://ec.europa.eu/commission/presscorner/detail/en/ip_20_977 for the press release announcing the initiative and https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool for further details.

[4] Crafts, L. and N. Hirst (2020), "Comment: New EU antitrust power to tackle `structural' problems eyes algorithms, tacit collusion," MLex, 2 June 2020; CMA (2017), "Market Studies and Market Investigations: Supplemental guidance on the CMA's approach," CMA Guidance document CMA3, 10 January 2014 (revised 5 July 2017), (hereafter "CMA3").

[5] Readers interested in this topic may also wish to see an excellent review covering similar territory by Fletcher (2020), "Market Investigations for Digital Platforms: Panacea or Complements," available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668289, as well as the CMA's own filing in this matter, CMA (2020), "The CMA's response to the European Commission's consultations in relation to the Digital Services Act package and New Competition Tool, "The CMA's response to the European Commission's consultations in relation to the Digital Services Act package and New Competition Tool," available at https://www.gov.uk/government/publications/ec-public-consultations-on-the-digital-services-act-package-and-the-new-competition-tool-cma-response.

- For markets where harm is "about to affect the market":
    - We agree that there are economic characteristics of markets that foster concentration in the long run. It is therefore important to identify markets with such characteristics, maintain a high level of awareness about their evolution (Rec4), and have a lower threshold for investigating whether they are functioning well and whether they are likely to function well in the near future (Rec5).
    - If such markets have not yet achieved high levels of concentration and an investigation has found features that are impeding competitive outcomes, fostering competition "in the market" requires remedying limitations on multihoming and on customer and/or supplier switching behavior as well as remedying "offensive" leveraging of firms with market power in an adjacent market into the market exhibiting factors that encourage long-run concentration (Rec6a).
    - If such markets have already achieved high levels of concentration and an investigation has found features that are impeding competitive outcomes, fostering competition "for the market" requires remedying limitations by dominant incumbent(s) on multi-homing and on customer / supplier switching as well as remedying "defensive" leveraging of firms with market power in the concentrated market into any adjacent market (often) providing complementary goods or services; new entrants and challengers may instead be exempted from these remedies (Rec6b).

- The implementation of a New Competition Tool requires a careful design of its governance structure to safeguard appropriate checks and balances (Rec7)

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), and 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.[6]

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 OFT and CC, respectively, and within the combined CMA there are different decision-makers and governance structures for market studies and any subsequent market 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

[6] We have relied primarily on three UK markets regime guidance documents: CMA3, *Op cit.*, OFT (2010), "Market studies: Guidance on the OFT approach" OFT guidance document OFT519, June 1, 2010 (hereafter "OFT519"); and OFT (2014), "Market investigation references: Guidance about the making of references under Part 4 of the Enterprise Act," OFT guidance document OFT511, March 12, 2014 (hereafter "OFT511").

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."[7]

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 (12 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 ultimately decide on results of the investigation (with individuals different from those that made the decision to refer it for 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), "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.[8] Market features are broadly defined and include (1) the economic structure of the market, (2) the conduct of sellers in a market, and/or (importantly) (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."[9]

As for market studies, the process of a market investigation is transparent with significant stakeholder engagement, clear milestones, a statutory time limit (18 months, extendible to 24), 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 effectiveness considerations. The CMA may also impose interim measures, but only after the publication of the final market investigation report.

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[7] For further discussion of the role of the UK's market studies relative to these other tools, see OFT519, para 2.13-2.19.

[8] 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).

[9] For further discussion of the role of the UK's market investigations relative to these other tools, seFT511, para 2.2-2.8 and its (pre-Brexit) role relative to EC competition law, see OFT511, para. 2.9-2.18.

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).[10] 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.[11] 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.[12] 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, or MFN clauses).

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' inability 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).

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

[10] CMA3, para 3.63-3.64.

[11] See https://www.regulation.org.uk/competition-regime.html and Fletcher (2020), *op. cit.*, p12.

[12] 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.

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.[13]

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 strategies 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 achieving 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" such as default bias and contextual factors that limit consumer engagement, plausibly increasing switching costs. Search and switching costs, in turn, limit the substitutability of demand 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 provided them with significant savings. The investigation found that current (checking) accounts for both personal and business customers had complicated and opaque fee

[13] 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.

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 (FCA) 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.[14] 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, it suggests the possibility that potential new entrants 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.[15] 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

[14] FCA and CMA (2018), "Helping people get a better deal: Learning lessons about consumer facing remedies," FCA and CMA, October 2018. See also Fletcher (2016), "The role of demand-side remedies in driving effective competition: A review for Which?", 7 November 2016, available for download at https://www.staticwhich.co.uk/documents/pdf/the-role-of-demand-side-remedies-in-driving-effective-competition-456067.pdf.

[15] FCA (2015), "Making current account switching easier: The effectiveness of the Current Account Switching Service (CASS) and evidence on account number portability."

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. There are now over 150 new providers of banking services active in the market (largely account information and payment services) and a similar number seeking to enter. These services are already being used by 2 million consumers and small/medium businesses, with the number doubling every six months.[16]

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 airport owners greater incentives to respond to customers' needs.

In 2015/2016, the CMA carried out an ex post evaluation of the remedies imposed.[17] 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.

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 was 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). The last investigation involved four large price comparison websites which had each wide MFN clauses in their contracts, terms which were banned as a consequence of the investigation. This is interesting not only

[16] https://www.openbanking.org.uk/

[17] CMA (2016), "BAA Airports: Evaluation of the Competition Commission's 2009 market investigation remedies."

because it involved a restriction that is popular among online platforms, but also because it illustrated the use of the UK's markets regime where the cumulative effects of strategies undertaken by non-dominant firms can be important.

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.[18] 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.[19]

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 also included concerns about vertical issues and the 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.[20] 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.

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[18] See, e.g., M. D. Whinston (1990), "Tying, Foreclosure, and Exclusion," *American Economic Review* 80:837—860; Carlton, D. W., and M. Waldman (2002), "The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries," *Rand Journal of Economics* 33:194-220; and Choi, J. P., and C. Stefanadis (2001), "Tying, Investment, and the Dynamic Leverage Theory," *Rand Journal of Economics* 32(1):52-71.

[19] See, e.g., Hart, O., and J. Tirole (1990), "Vertical Integration and Market Foreclosure," *Brookings Papers on Economic Activity (Microeconomics)* 205-285; Ordover, J., G. Saloner and S. C. Salop (1990), "Equilibrium Market Foreclosure," *American Economic Review* 80:127-142; and Allain, M-L., C. Chambolle, and P. Rey (2016), "Vertical Integration as a Source of Holdup," *The Review of Economic Studies* 83(1):1–25.

[20] 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.

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.

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 ("FRAND") 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."[21] 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' 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).[22] 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.[23]

[21] Digital advertising market study, para 21.

[22] 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."

[23] See paragraphs 7.74-7.89 for further details.

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.

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. 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 anti-competitive 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 an 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 an 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.[24] 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

[24] Calvano, G., G. Calzolari, V. Denicolo, and S. Pastorello (2020), "Artificial Intelligence, Algorithmic Pricing, and Collusion," forthcoming, *American Economic Review;* Assad, S., R. Clark, D. Ershov, and L. Xu (2020), "Algorithmic Pricing and Competition: Empirical Evidence from the German Retail Gasoline Market," CESifo Working Paper 8521.

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. Recommendations for markets where harm is "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).[25] 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 the winner, particularly if the economics of the existing market suggest that there will necessarily be a "winner-take-most" outcome in the long run.[26]

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 (and switching costs more generally), multi-sidedness, and binding non-negativity price constraints (i.e., "no prices below zero"). It is therefore important to identify markets with such characteristics and maintain a high level of awareness about their

[25] See, e.g., Viscusi, Vernon, and Harrington (2018), *Economics of Regulation and Antitrust*, MIT Press, 5th edition, Chapter 14.

[26] 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/kd0419345enn.pdf.

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, a lower threshold should be used for investigating whether the market is functioning well for consumers and suppliers and whether it is likely to continue to function well in the near future. These investigations should consider both *consumer conduct* and *firm conduct* in such markets, as well as in 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.[27]

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, fostering competition "in the market" requires remedying limitations on multi-homing -- on all sides of the market -- and 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.[28] It also requires remedying "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). 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.). It may also make it harder to enter either market. 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, 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.[29]

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, fostering competition "for the market" requires again remedying

[27] 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.

[28] 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.

[29] 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.

limitations *by the dominant incumbent(s)* on multi-homing and on customer / supplier switching; new entrants and challengers may instead be exempted from these remedies.[30] Fostering this competition "for the market" also requires remedying "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. Furthermore, if a firm dominant in Market A is able to extend its dominance into complementary products, this can encourage a "domino effect" of its using dominance in both products to achieve dominance in further products. This is particularly a concern where a firm dominant in Market A offers an "ecosystem" consisting of a potentially large number of complementary products. As such, an NCT should particularly seek to prevent the leveraging of the market power of a firm or firms in Market A into these adjacent layers.

As is well-known, there is often a tension between encouraging competition "for the market," which calls for encouraging entry and may lead to grant a more favorable treatment to new entrants and challengers, and competition "in the market," which calls instead for a level-playing field. For this reason, the asymmetry should fade if/when the market becomes less concentrated.

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 see a strong case for empowering the NCT with the ability to impose Interim Measures based on relatively low procedural hurdles.[31] 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

[30] A similar asymmetric treatment can be found in regulatory regimes. For example, telecom regulators have allowed higher termination charges for new entrants. Lee (2013) shows that banning exclusivity and/or vertical integration in video game platforms would have increased both consumer surplus and sales, but primarily for the incumbent; exclusivity permitted entrant platforms to better compete with incumbents. Lee, R. (2013), "Vertical integration and Exclusivity in Platform and Two-sided Markets," *American Economic Review,* v103n7, 2960-3000.

[31] 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 (2020). *Op cit*).

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, the mandate for the NCT could 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. Any or all of the competition concerns surveyed in Sections III and IV above could be included.
- 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 the UK, cases may begin at the suggestion of the UK's sector regulators or the CMA itself; similar initiation and referral powers should perhaps be given to EU and national competition and regulatory authorities.
- Procedures should also be specified allowing for learning across countries and time. For example, where markets are geographically distinct but share similar underlying characteristics, similar competition problems may be likely to arise across countries, albeit not as quickly in some as in others. Thus, evidence in one country (e.g. via reports of a national competition authority and/or national sector regulator) of competition problems that are likely to be shared elsewhere should serve as a normal referral channel for the initiation of a multi-country investigation. Similarly, if the market characteristics under consideration are those which encourage long-run concentration and this has already happened in one or more countries, investigations into those markets in countries where concentration has not yet arisen should naturally rely on potential evidence of harm from those where it has taken hold.
- Learning across countries and time may also arise in the application of remedies. For example, to the extent market characteristics that were found to cause harm to consumers or the competitive process in one or more countries at a given time are or become present in other countries at other times, then the procedures should (1) allow for demonstration that the market characteristics of concern are materially similar in these new countries and, if so, (2) allow for the adoption of remedies from the original investigation to the extent they can address the relevant concerns (as seems likely, but which would need to be motivated).
    - We further encourage such procedures to allow for differences in the application of such remedies according to the market structures in the new countries. For example, if an investigation found that a market has already achieved high levels of concentration and imposed certain remedies upon *incumbents* in that market (as in Recommendation (6b)

above), but that the same characteristics in another country has not yet yielded high levels of concentration, then such remedies might instead be applied to *all firms* in the market of the new country (as in Recommendation (6a) above), with similar analogies drawn according to the structure of the market(s) under consideration in the original investigation(s) relative to those for the same product or service in other countries. We also note that remedies should be country- and firm-specific; thus a firm dominant in one (e.g. its home) market and subject to remedies there need not be subject to the same remedies in other (e.g. geographically adjacent) markets where it has not achieved a significant market position.

- In comments submitted in response to the proposed NCT, the CMA has also offered valuable suggestions about how to improve the design of its market studies and investigations regime, with implications for the design of an NCT.[32] In addition to the introduction of interim measures, already recommended above, these include ensuring strong information-gathering and enforcement powers supported by meaningful fines and penalties for non-compliance, allowing for "undertakings" (remedies) to address a subset of issues while referring remaining issues for an investigation, and having the ability to review, adjust, or change remedies where they have been found not to be effective and competition issues remain. These elements should also be included in the establishment of the NCT.
- 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 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.

[32] See CMA (2020), *op cit*, pages 22-23.