

**COMMENTS OF THE AMERICAN BAR ASSOCIATION'S ANTITRUST LAW SECTION
ON THE EUROPEAN COMMISSION
PROPOSAL FOR A NEW COMPETITION TOOL**

September 8, 2020

The views stated in this submission are presented on behalf of the Antitrust Law Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

The Antitrust Law Section of the American Bar Association (the Section) respectfully submits these comments in response to the European Commission's (Commission's) public consultation regarding the proposed New Competition Tool (NCT), which, according to the Commission, aims to address gaps in the current EU competition rules and solicits views on the question "whether there is a need for a new competition tool to ensure fair and competitive markets" and on "the characteristics that such a new competition tool should have in order to address structural competition problems in a timely and effective manner."¹

The Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 7,600, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors and law students. The Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous Section members have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise.²

These comments reflect the Section's collective experience and expertise with respect to the application of antitrust law and economics in the United States, the European Union, and other jurisdictions, as well as with international best practices. The Section offers these comments to share our experience and provide suggestions to evaluate the effectiveness of the proposed ex ante rules.

As further explained below, the Section does not perceive a need for an NCT aimed at dealing with "structural competition problems that Articles 101 and 102 TFEU cannot tackle conceptually or cannot address in the most effective manner." The NCT would allow the Commission to pro-actively intervene in platform-based and online markets but may potentially also be applied to more traditional sectors, such as agri-food markets. Critically, intervention on the basis of the NCT would not require a prior finding of a violation of EU competition law. The Section respectfully submits that, if structural competition problems arise, they are likely to be caught by the current EU competition rules. Moreover, the Section is concerned that the EC's NCT relies on the Commission to engineer markets. However, competition rules are not and should not be a market engineering tool; rather, they should focus on intervening against anti-competitive conduct.

¹ Eur. Comm'n, *Single Market—new complementary tool to strengthen competition enforcement*, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool/public-consultation>.

² Past comments are available on the Section's website at https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/.

Against the backdrop of the current debate on the sufficiency of existing enforcement tools and given the absence of clear consensus that “tipping” and other phenomena that sometimes occur in digital, platform-based markets present genuine antitrust problems, a cautious approach is warranted. If the Commission nevertheless elects to pursue this initiative, the Section suggests that the new instrument should be dominance-based, and thus not be potentially applicable to all undertakings in a market, and should also be applicable to all markets (and, as a consequence, not be limited to markets or sectors affected by digitization).

In addition, the Section recommends that the Commission provide clear and unambiguous guidance on the scope of the NCT and its relationship with Articles 101 and 102 TFEU and the Digital Services Act package. It would also be beneficial if the Commission clearly articulated the applicable test for intervention, offered robust procedural guarantees and provided guidelines for the imposition of remedies.

The Section has not analyzed and does not take a view on the question whether the current TFEU provides a sufficient legal basis for the NCT.

I. Executive Summary

The Section respectfully submits that:

- There is no demonstrated need for an NCT that would permit the Commission to pro-actively intervene in markets (digital and other) to address potential concerns, without requiring a prior finding of a violation of EU competition law. The Section believes that existing European competition and consumer protection laws adequately address the issues raised in the consultation, including as applied to digital markets. In addition, the possible adoption of new, quasi-ex ante rules may give rise to negative effects.
- If the Commission were to proceed with the NCT initiative, it is preferable that the NCT would only apply to dominant companies and would have general application, that is, not be confined to digital or platform-based industries.
- Whether the specific market features listed in the consultation “can be a source or part of the reason” for structural competition problems requires in all circumstances a fact-intensive inquiry to determine the magnitude and direction of their effect, based on the specific market and conduct at issue. The Section’s Comment discusses a number of these market features.
- The market scenarios listed in the consultation may arise in particular circumstances, but require a fact-intensive inquiry to determine whether these scenarios are in fact present. The Comment discusses a number of the market scenarios listed.
- Any proposal for an NCT should include robust rights of defense and the right to judicial review. The Comment discusses the nature of these rights and other aspects in relation to the institutional set up of the NCT.

II. Methodological Note

The Section respectfully cautions the Commission against overreliance on online surveys such as the Consultation questionnaire. The U.S. Federal Judiciary’s *Reference Manual on Scientific Evidence* explains “participants are very likely to self-select on the basis of the nature of the topic” and so self-

selected surveys “do not meet standard criteria for legitimate surveys admissible in [U.S.] courts.”³ Surveys such as the Consultation must be organized carefully and given appropriate weight that recognizes their strengths and weaknesses. The Section recognizes that these surveys are a helpful tool for making the Consultation more accessible and hopes the Consultation will be supplemented by further opportunities to comment as the Commission continues to evaluate possible policy proposals.

Furthermore, according to the U.S. Federal Judiciary’s *Reference Manual on Scientific Evidence*, survey questions should be framed in a manner that is clear, precise, and unbiased.⁴ The Section respectfully notes its concerns that some of the questions in this survey may unintentionally be biased in that they assume certain facts such as the existence of competition concerns in tipping markets (Q 16.7) and markets featuring a “gatekeeper” (Q 18.9).

III. No Demonstrated Need For a New Competition Tool

The Commission’s proposal for the NCT is premised on the notion that the existing competition rules may not be sufficient to effectively address today’s challenges.⁵ While the scope of the NCT has not been decided upon, the new enforcement instrument would, if adopted, allow the Commission to proactively intervene in markets (digital and other) to address potential concerns, without requiring a prior finding of a violation of EU competition law.

The Section is first concerned that the operation of the NCT may give rise to quasi-ex ante regulation, either in respect of specific businesses, or even market-wide. Indeed, Questions 30 and 31 of the Questionnaire contemplate a range of potential remedies, ranging from non-binding codes of conduct to obligations to abstain from certain commercial behavior and other obligations and prohibitions.

To the extent that the NCT would indeed permit the adoption of new ex ante rules, the Section urges caution and a thorough assessment as to whether ex ante regulation would be preferable to ex post intervention. The basis for economic regulation rests on the need to correct a market failure in a particular industry.⁶ Existing market imperfections should be compared to market outcomes in the presence of the proposed new tool or regulation (taking into account error costs and administrability), rather than to the theoretical ideal of perfect or perhaps “better” competition. Moreover, even if a market failure is identified through careful study, careful attention needs to be given as to whether a proposed regulatory solution sufficiently corrects it and has an overall positive effect as determined by a rigorous economic analysis, including consideration of potential unintended consequences.⁷ Once a potential market failure has been identified, the proposed regulatory solution must itself survive a rigorous economic analysis, one that factors in the potential for imperfect regulation and unintended consequences as well as the effect of alternative solutions based on private ordering.⁸

³ FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 407-08 (3d ed. 2011), <https://www.fjc.gov/sites/default/files/2015/SciMan3D01.pdf>.

⁴ *Id.* at 387-89.

⁵ In this respect, the EC consultation specifically mentions monopolization strategies by non-dominant companies with market power and company strategies to extend their market position into multiple related markets.

⁶ See Joshua D. Wright, Regulation in High-Tech Markets: Public Choice, Regulatory Capture, and the FTC, Remarks at the Big Ideas about Information Lecture 9 (Apr. 2, 2015), available at https://www.ftc.gov/system/files/documents/public_statements/634631/150402clemson.pdf. Successful identification of a market failure is a necessary but not a sufficient condition to justify introducing the NCT or regulation on economic grounds.

⁷ *Id.* See also Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. L. & ECON. 1 (1969).

⁸ See Koren Wong-Ervin, Anne Layne-Farrar & James Moore, *The Risks of Radicalism: Exacerbating Harms from Type I Errors*, COMPETITION POL’Y INT’L, Apr. 9, 2020, <https://www.competitionpolicyinternational.com/the-risks-of-radicalism-exacerbating-harms-from-type-i-errors/>.

One important cost associated with ex ante rules is that they may harm competition and consumers by chilling procompetitive conduct. In general, ex ante rules carry a greater likelihood of error costs and, for this reason, are generally associated with lower levels of innovation than an ex post enforcement policy. Creating ex ante rules in an attempt to prevent certain conduct risks sacrificing the efficiencies and other benefits of that conduct by imposing rigid rules that lack the flexibility of existing methods for competition assessments. In addition, the Section notes the risk that increased regulation will advantage large incumbents at the expense of smaller competitors and potential new entrants. For example, increased costs and complexity in managing online platforms will tend to increase entry barriers and entrench incumbents. Large incumbents can often absorb regulatory compliance costs more effectively than new entrants. Regulation that protects incumbents will tend to decrease competition.

Regulation is often believed inappropriate unless and until competitive harm has been identified that exceeds the benefits of the conduct being regulated. This trade-off is particularly complex as the possibility of ex ante regulation leads to an uncertain regulatory environment and risks being over-inclusive, while at least some of the likely targeted conduct – for example the extension of the activities of undertakings to adjacent markets – may also generate efficiencies.

Second, the Section is skeptical about the claimed failures that the European competition rules—according to the EC—ought to be able to address, but do not. Again, in light of the current debate on the sufficiency of existing enforcement tools and given the absence of clear consensus that “tipping” and other phenomena that characterize digital, platform-based markets present genuine competition problems, a cautious approach and regulatory restraint is warranted. All in all, the Section believes that there is not yet a sufficiently solid basis for an entirely new enforcement tool that may be applied without a prior finding of a violation.

The Section respectfully suggests that existing European competition and consumer protection laws adequately address the issues raised in the Consultation, including as applied to digital markets. The activities of digital markets are often not substantively different from other avenues to market—such as traditional media, retailers, or wholesalers—merely because they involve software and internet content. As such, digital markets remain equally subject to the well-established competition laws. Indeed, if anything, the online nature of the service increases transparency into some aspects of platform operators’ practices which, in turn, increases the ability of market participants and competition authorities to detect anticompetitive behavior in a timely manner. Existing laws promote effective and accurate enforcement by identifying problematic conduct on a case-by-case basis through a flexible inquiry.

As reflected in current law, dominance or the possession of monopoly power is not an abuse in itself. The Section respectfully urges the Commission to continue focusing enforcement efforts on case-by-case analysis of particular forms of conduct that substantially restrict competition, even by firms that are rendered dominant by virtue of network externalities, switching costs, or other attributes of specific products, services, and/or technologies.

Finally, the Section sees no fundamental concern with competition enforcement agencies conducting market inquiries—as long as it does not entail excessive costs for businesses—and, based on those inquiries, deciding to investigate and prosecute specific conduct as the Commission has done in the past in the pharmaceutical and other sectors. However, the proposed NCT appears to go far beyond merely investing in understanding the functioning and evolution of markets. It is worth considering whether enhanced use of existing, less intrusive enforcement instruments would be fully adequate alternatives to the proposed new instrument.

If the Commission nevertheless elected to pursue an NCT, the Section suggests that the new instrument should be dominance-based and thus not potentially applicable to all undertakings in a market,

and that it should be applicable to all markets (and, as a consequence, not be limited to markets or sectors affected by digitization). In that event, the Section also respectfully recommends that the Commission provide guidance on the scope of the NCT, its relationship with Articles 101 and 102 TFEU and the Digital Services Act package; that it clearly articulates the applicable test for intervention; and that it offer robust procedural guarantees and provides clear guidelines for the imposition of remedies.

IV. Market Features and Their Contribution to Structural Competition Problems (Section C)

Section C of the Questionnaire solicits views on the extent to which specific market features “can be a source or part of the reason” for structural competition problems. The Section considers that the market features listed in Section C Question 6 may, in some cases, be relevant to the evaluation of structural competition problems but require in all circumstances a fact-intensive inquiry to determine the magnitude and direction of their effect, based on the specific market and conduct at issue. Below we address some of these features and consider the variety of economic effects they may have.

Market concentration alone is not a reliable cause of structural competition problems. Rather, market concentration is a crude signal of competitive conditions and may invite errors when used without more to identify substantial market power, dominance, or monopoly power.⁹ Economic studies and surveys show little correlation between market structure and market power or investment in innovation.¹⁰ By contrast, there is credible evidence that market incentives matter.¹¹ Reliance on market concentration is particularly problematic as applied to digital markets with multi-sided platforms, where shares can be calculated on any side of the platform, and it is unclear how to reconcile or weigh these market shares.¹² Moreover, in cases in which multi-sided platforms provide one of their products for free or at a subsidized price, market shares based on revenue may not be appropriate, since revenues from one customer group do not account for the subsidy from other platform users.¹³

Multi-homing¹⁴ can have a significant effect on the existence and durability of substantial market or monopoly power and will decrease the risk of structural competition problems.¹⁵ The Section therefore cautions against antitrust enforcement directed at platforms due to their relative user base without

⁹ See Koren W. Wong-Ervin, *Assessing Monopoly Power or Dominance in Platform Markets* 2-4 (Jan. 26, 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3525727.

¹⁰ See, e.g., Philippe Aghion et al., *Competition and Innovation: An Inverted U-Relationship*, 120 Q.J. ECON. 701, 701 (2005) (finding an “inverted-U” relationship between product market competition (PMC) and innovation and suggesting competition “discourages laggard firms from innovating but encourages neck-and-neck firms to innovate”); see also Richard J. Gilbert, *Looking for Mr. Schumpeter: Where Are We in the Competition-Innovation Debate?*, in 6 INNOVATION POLICY AND THE ECONOMY 159, 187-206 (Adam B. Jaffe et al. eds., 2006) (surveying the economic literature on the relationship between market structure and investment in research and development).

¹¹ See generally Eric Budish et al., *Do Firms Underinvest in Long-term Research? Evidence from Cancer Clinical Trials*, 105 AM. ECON. REV. 2044 (2015) (concluding that patient groups with longer commercialization lags tend to attract lower levels of R&D investment); Daron Acemoglu & Joshua Linn, *Market Size in Innovation: Theory and Evidence from the Pharmaceutical Industry*, 119 Q.J. ECON. 1049 (2004) (linking innovation rates to current and future market size).

¹² David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multi-Sided Platform Businesses* 20 (Chicago Inst. for L. & Econ., Working Paper No. 623, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185373 (surveying the economic literature) (“[I]t is not always clear how to compute ‘share’ for multi-sided firms. Consider a software platform. One of the main ‘products’ that software developers get from the platform is access to users; one of the main ‘products’ that users get is the access to software developers. One could compare shares of each sides across platforms and then make a judgment about market power based on looking at the shares for both sides, but there is no reason to expect those shares to be equal.”).

¹³ *Id.*

¹⁴ Multi-homing refers to a user’s option to participate in more than one platform.

¹⁵ See Catherine E. Tucker, *What Have We Learned in the Last Decade? Network Effects and Market Power*, ANTITRUST, Spring 2018, at 80, available at https://www.americanbar.org/content/dam/aba/publishing/antitrust_magazine/anti-spring18-3-23.pdf (“in general, platform markets may still be competitive even if larger firms in these industries exhibit both sizable user bases and competitive dynamics, which are driven by network effects. This implies a tempering of antitrust enforcement actions surrounding market dominance of digital platforms predicated simply on their relative size of user base.”).

considering whether users multi-home or single-home.¹⁶ Multi-homing increases competitive pressures on platforms who compete for user time and reduces switching costs because users are already established on rival platforms. For example, the ride hailing industry is characterized by multi-homing by each customer group (riders and drivers). This industry exhibits fierce price and quality competition as rivals compete to build and maintain their networks.¹⁷

Multi-homing can appear in a few ways. For example, in some cases, only one customer group multi-homes, but this will still intensify price competition on the single-homing side of the platforms. In other cases, there may be low multi-homing but the most popular suppliers multi-home, which also enhances competition for the market.¹⁸

Switching costs can affect the durability of market power and may contribute to structural competition problems.¹⁹ When evaluating switching costs, it is important to consider, among other factors, whether collective switching is possible and whether firms are competing away future profits to acquire users. Indeed, the fact that some consumers choose not to switch should not “necessarily be viewed as a significant competitive issue if it is easy [to switch] and if the options are there through interoperability.”²⁰ Switching costs may exist on multi-sided platforms if consumers on one side are reluctant to switch unless they expect that some consumers on the other side will also switch.²¹ But consumer coordination can resolve or mitigate this switching problem if consumers are most interested in collective switching with a smaller number of individuals (as opposed to the entire group).²² An example of this “spontaneous order” is a social group deciding to adopt a new social media platform. This collective switching remedies the barrier to entry as “the barrier to entry is not the cross-platform network effect itself, but rather the inability of users to coordinate their response to that effect.”²³

In addition, markets with high switching costs may still be competitive if platforms are required to compete away future profits in order to acquire customers. For instance, gaming consoles have historically been sold at or below cost in order to acquire new customers or convince previous customers to stay on the

¹⁶ *Id.*

¹⁷ By contrast, in *United States v. Microsoft Corp.*, customers and developers generally single-homed on the Windows operating system. In that case single-homing was used to explain the relative power of Microsoft’s network effects. *United States v. Microsoft Corp.*, 253 F.3d 34, 52-53.

¹⁸ Sami Hyrynsalmi, Arho Suominen & Matti Mäntymäki, *The Influence of Developer Multi-homing on Competition Between Software Ecosystems*, 111 J. SYS. & SOFTWARE 119, 124 (2016) (“Our results indicate that multi-homing rates among the most popular applications, that is, superstars (i.e., 39.2%) and their nucleus developers (i.e., 42.7%), are almost ten times that of their competitors when compared to all other applications and developers in the market.”).

¹⁹ Switching costs are those costs that are incurred when switching from one supplier of a particular good or service to another supplier, including money costs and the value of users’ time.

²⁰ Transcript at 125, Fed. Trade Comm’n, Competition and Consumer Protection in the 21st Century, Hearing #3: Multi-Sided Platforms, Labor Markets and Potential Competition (Oct. 15, 2018), *available at* https://www.ftc.gov/system/files/documents/public_events/1413712/ftc_hearings_session_3_transcript_day_1_10-15-18_0.pdf.

²¹ David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REG. 325, 364 (2003).

²² Daniel F. Spulber, *Unlocking Technology: Antitrust and Innovation*, 4 J. COMPETITION L. & ECON. 915, 918 (2008) (“Because network effects are the main driver of lock-in in theoretical arguments, it is necessary to determine whether network effects lead to technology lock-in in practice. Even if network effects do exist, consumer coordination is likely to take advantage of any potential benefits. When there are small numbers of consumers, they can engage in Coasian bargaining, what I call ‘coordination in the small.’ Consumers can coordinate their innovation adoption decisions in light of any mutual benefits from consumption. When there are large numbers of consumers, firms can apply various instruments to coordinate the choices of large numbers of consumers corresponding to Hayek’s ‘spontaneous order,’ what I call ‘coordination in the large.’ Coordination by consumers and firms internalizes the benefits of network effects, eliminating network externalities and avoiding technology lock-in.”).

²³ OECD, RETHINKING ANTITRUST TOOLS FOR MULTI-SIDED PLATFORMS 30 (2018), *available at* <https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf>.

platform.²⁴ Another example is wireless carriers inducing customers to switch by offering discounts and other favorable terms on new phones and plans.

In some circumstances, **network effects** may increase the durability of substantial market or monopoly power and may contribute to structural competition problems. However, network effects alone do not indicate substantial market power or monopoly power. When evaluating network effects, it is important to consider, next to switching costs and multi-homing and other factors, the possibility of negative network effects and the characteristics of the network effects at issue.²⁵

Network effects can “cut both ways,” accelerating both the emergence and decline of dominant firms.²⁶ Indeed, while networks can experience exponential growth, “the same principle can lead to exponential decline. [In that case,] [e]ach lost customer induces other customers to leave, which induces more to leave.”²⁷ Negative network effects can be triggered by platform congestion.²⁸

The Section submits that any assessment of network effects should also consider whether the network is localized versus decentralized, market-level versus firm-level, and “hit-driven” versus scale driven.

First, on some platforms, such as social networks, the network effects occur at a “local” level because users tend to use the platform for a small number of often personal connections.²⁹ Localized networks thus reduce the importance of a platform’s total user base. Localized networks also facilitate the competition from niche entrants, such as a ride-sharing platform focused on a specific geography,³⁰ and are more susceptible to collective switching, discussed above. Second, networks may also develop at either the firm or market level. In this respect, the Section observes that market-level network effects, often driven by standardization, are unlikely to create substantial barriers to entry and lead to structural competition problems.³¹ Third, the strength of network effects depends on whether the platform is “hit-driven” or scale driven. For instance, gaming systems like XBOX have weaker indirect network effects since hit game titles drive gaming system purchases rather than the long tail of game titles. With these weaker indirect network effects, higher quality platforms can enter more easily, as was the case for XBOX.

²⁴ Robin S. Lee, *Vertical Integration and Exclusivity in Platform and Two-Sided Markets*, 103(7) AM. ECON. REV. 2960 (2013), <https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.103.7.2960>.

²⁵ Network effects may be direct or indirect, and positive or negative. Network effects are direct if the value to one side of the platform depends on the size of the user group on that side and indirect if the value to one side of the platform depends on the size of the other group on the platform. Network effects are positive when the benefit increases as the user group grows and negative when the user group shrinks. See Evans, *supra* note 21, at 332.

²⁶ Wong-Ervin, *supra* note 9, at 6; see also Tucker, *supra* note 15.

²⁷ David S. Evans & Richard Schmalensee, *Debunking the Network Effects Bogeyman*, REGULATION, Winter 2017-2018, at 36, 38, available at <https://ssrn.com/abstract=3148121>. Examples of this negative network effect include AOL, MSN Messenger, MySpace, and others.

²⁸ Tucker, *supra* note 15, at 80 (“[a]n individual user may prefer to avoid a platform that offers too much choice, and instead choose a platform that fulfills a curation function. . . . Indeed, research has emphasized the importance of a well-designed curation system for encouraging users to engage with a platform due to lower search costs. This means that there is no reason to think that ‘buyers’ will always be likely to engage with a two-sided platform that has a larger number of ‘sellers’ on the platform.”) (internal citations omitted).

²⁹ *Id.* at 79 (citing Catherine E. Tucker, *Identifying Formal and Informal Influence in Technology Adoption with Network Externalities*, 54 MGMT. SCI. 2024 (2008)). Other examples include restaurant review platforms, where a user is most interested in reviews for local restaurants, and ride sharing platforms, where users are interested in drivers in their nearby geographic vicinity.

³⁰ Feng Zhu & Marco Iansiti, *Why Some Platforms Thrive and Others Don’t*, HARV. BUS. REV., Jan.-Feb. 2019, at 118, available at <https://hbr.org/2019/01/why-some-platforms-thrive-and-others-dont>.

³¹ For example, email exhibits network effects in that the value of getting an email address is high because there are many email users. However, users can choose amongst many email providers since standard protocols allow users to send an email to any email address. Because the network effects of email are on the market-level these network effects are not a substantial barrier to entry for email providers. This contrasts with other communications applications like instant messaging applications, which typically cannot send messages to other messaging applications.

In some circumstances **data inputs and data dependencies** may increase the durability of substantial market or monopoly power and may contribute to structural competition problems. The importance of access to data or “big data” will depend on (i) whether the data is rivalrous, (ii) whether the data exhibits economies of scale, and (iii) whether the data’s value is inherent or highly dependent on how it is analyzed or processed. Importantly, the use of data as an input is procompetitive which explains why virtually all online providers and many offline businesses collect data from users and customers.³²

The first consideration when evaluating whether the use of data may lead to competitive advantages is to determine if its use is rivalrous.³³ Second, data is often one of the determinants of the quality of the service offered to users. While in some instances, there may be economies of scale with data, they are mitigated where historical data is not a significant advantage or where the marginal value of data decreases above a certain threshold.³⁴ Similarly, the economies of scale of data may exhibit diminishing returns. If a platform’s use of user data has diminishing returns to scale, the value of incremental users is greater for smaller rivals than it is for a larger platform, which means that smaller rivals may have greater incentive to compete in attracting users at the margin, such as by investing in quality or distribution. Indeed, data is only one input in the production of a firm’s output.³⁵

Third, new technologies employ constantly evolving types of data, or novel combinations and treatments of existing data. If these factors are present, it may be very difficult for any incumbent competitor to obtain a significant and non-transient competitive advantage from a large data set or from particular methods of analyzing such data.³⁶

Finally, in limited circumstances vertical conduct, including **vertical integration**, can affect the durability of substantial market or monopoly power and may contribute to structural competition problems. Vertical integration generally produces procompetitive effects.³⁷ This view is supported by a significant body of empirical evidence.³⁸ Nonetheless, in the merger context it is important to consider the potential

³² Howard A. Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161 U. PA. L. REV. 1663, 1680 (2013) (“[c]ustomer information is an input of production when platforms use it to improve their services and make user interactions more efficient. More complete customer information allows a platform to better satisfy customer preferences. It allows platforms to serve customers more efficiently by targeting products to customers based on their individual profiles.”).

³³ Data is often non-rivalrous and available from a variety of sources; for example, the fact that one competitor has extensive customer information does not impede the acquisition by a competitor of similar data from the same customer set. Other data are exclusive to a certain platform, which may gain a competitive advantage.

³⁴ See, e.g., Leslie Chiou & Catherine Tucker, *Search Engines and Data Retention: Implications for Privacy and Antitrust* 19 (Nat’l Bureau of Econ. Research, Working Paper No. 23815 23815, 2017), <https://www.nber.org/papers/w23815.pdf> (“We find little empirical evidence that reducing the length of storage of past search engine searches affected the accuracy of search. Our results suggest that the possession of historical data confers less of an advantage to firms who own the data than is sometimes supposed.”).

³⁵ See Wong-Ervin, *supra* note 9, at 8.

³⁶ Nils-Peter Schepp & Achim Wambach, *On Big Data and Its Relevance for Market Power Assessment*, 7 J. EUR. COMPETITION L. & PRAC. 120, 122 (2016).

³⁷ U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, VERTICAL MERGER GUIDELINES 2 (June 30, 2020), available at https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf (recognizing that “vertical mergers often benefit consumers”) [hereinafter U.S. VERTICAL MERGER GUIDELINES]; Koren Wong-Ervin, *Antitrust Analysis of Vertical Mergers: Recent Developments and Economic Teachings*, ANTITRUST SOURCE, Feb. 2019, at 1, available at https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2018-2019/at-source-february2019/feb19_wong_ervin_2_18f.pdf (“The generally accepted belief underlying modern antitrust analysis of vertical mergers . . . has been that they are generally procompetitive or neutral.”).

³⁸ Francine Lafontaine & Margaret Salde, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629, 663 (2007); James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT’L J. INDUS. ORG. 639, 642, 658 (2005) (surveying the empirical literature, concluding that although “some studies find evidence consistent with both pro- and anticompetitive effects . . . virtually no studies can claim to have identified instances where vertical practices were likely to have harmed competition” and “in most of the empirical studies reviewed, vertical practices are found to have significant pro-competitive effects”); Global Antitrust Inst., The Federal Trade Commission’s Hearings on Competition and Consumer Protection in the 21st

risk of foreclosure in vertical mergers and its effects on competition, which will depend on efficiencies arising from vertical integration, the strength of the incentives to foreclose, and the competitive conditions in the upstream and downstream markets, including whether the downstream market is characterized by significant innovation.

V. Market Scenarios and Their Likelihood of Structural Competition Problems (Section C, cont'd.)

The market scenarios listed in Question 7 may arise in particular markets, but fact-intensive inquiry is required to determine whether these scenarios are in fact present. These comments therefore consider the economic conditions that may lead to these scenarios and whether these scenarios present structural competition problems.

A. *A (not necessarily dominant) company with market power in a core market extends that market power to related markets*

Under U.S. law, a monopolist is permitted to operate in related markets, under certain conditions. In a leveraging scenario involving a monopolist, U.S. law finds no violation unless monopoly is threatened in the second market as well. Single firm conduct of a company with monopoly power should only be considered unlawful when there is both monopoly—established through appropriate evidence and analysis—and anticompetitive conduct evidencing a specific intent to leverage the dominant platform to monopolize another properly defined antitrust market.

Platforms that face vertical threats may have procompetitive responses like creating a superior vertical service or creating a superior platform to prevent disintermediation from the vertical market. Leveraging practices such as technological ties and bundling arrangements can also create procompetitive benefits. In the U.S., the 2020 *Vertical Merger Guidelines* state how vertical mergers can lead to cognizable efficiencies, like reducing the cost of seeking, arranging for and enforcing market transactions, as well as the elimination of double marginalization.³⁹ Thus, enforcement should first and foremost target exclusionary conduct that creates dominance or a dangerous probability thereof in the “leveraged” market, and any alleged anticompetitive harms should be balanced carefully against any claimed efficiencies or consumer benefits.

B. *Anti-competitive monopolization, where one market player may rapidly acquire market shares due to its capacity to put competitors at a disadvantage in the market unfairly*

U.S. antitrust laws prohibit any single firm from unreasonably restraining competition by creating or maintaining monopoly power. A company is however, permitted to gain substantial market power through having a better product, a lower price, or other form of superior performance. Where competitive conduct that contributes to the acquisition or maintenance of monopoly power may seem ambiguous in its competitive effects, the legal assessment depends on the anticompetitive effects of the conduct and its procompetitive justifications.

In order to assess the effects of monopolization, the concept of “consumer welfare” should be distinguished from “fairness.” There is no commonly accepted methodology to assess fairness, and attempts

Century, Vertical Mergers, Comment of the Global Antitrust Institute, Antonin Scalia Law School, George Mason University 6–8 (Sept. 6, 2018), available at <https://gai.gmu.edu/wp-content/uploads/sites/27/2018/09/GAI-Comment-on-Vertical-Mergers.pdf>; Daniel P. O’Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, in THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 72–76 (2008), available at <https://sls.gmu.edu/gai/wp-content/uploads/sites/27/2017/04/The-Antitrust-Treatment-of-Vertical-Restraints-Beyond-the-Possibility-Theorems.pdf>.

³⁹ U.S. VERTICAL MERGER GUIDELINES, *supra* note 37, at 11.

to assess both consumer welfare and fairness and arrive at an appropriate balance are inherently subjective, leading to ambiguous standards for conduct and great legal uncertainty as well as preventing effective appellate review.⁴⁰ In the U.S., a firm may engage in conduct that harms competitors but does not harm competition, even if that same conduct may seem “unfair” under certain definitions.⁴¹

C. Highly concentrated markets where only one or few players are present, which allows them to align their market behavior

The proposed test for whether a market is concentrated or not might rely on market shares. The Section respectfully points out that reliance on market shares alone is likely to invite errors when attempting to identify substantial market power that may allow alignment of market behavior. In the U.S., there has been a movement away from focusing primarily upon market shares to analyze actual competitive effects.⁴² Reliance on market shares may be especially problematic in markets characterized by dynamic competition in which market shares and other indicia may be subject to rapid change.

D. The widespread use of algorithmic pricing that allows easily to align prices

Algorithmic pricing has become more prevalent in digital markets along with technological innovations, but it does not necessarily increase the likelihood of collusion by firms as the effects of algorithmic pricing are co-dependent upon market features and may also have pro-competitive effects.⁴³ For instance, market transparency can lead to procompetitive effects through increasing availability of data as an input. Pricing algorithms can also enhance competition by facilitating rapid response to competitive conditions and customer demand.⁴⁴ Finally, although algorithmic pricing may pose a strong influence on pricing, firms may still retain strategic incentives to undercut each other on pricing.⁴⁵

E. Gatekeeper scenarios: situations where customers typically predominantly use one service provider/platform (single-home) and therefore the market dynamics are only determined by the gatekeeper

Please see the previous discussion of vertical and gatekeeper conduct in section III.

F. Tipping (or “winner takes most”) markets

Tipping markets do not necessarily harm consumer welfare. A tipping market’s most efficient market outcome may be for customers to consolidate on a small number of platforms. Standardization in a

⁴⁰ Christine S. Wilson, Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get, Address Before the George Mason Law Review 22nd Annual Antitrust Symposium (Feb. 15, 2019), *available at* https://www.ftc.gov/es/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf.

⁴¹ *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (explaining it is “not enough to inquire ‘whether the defendant has engaged in ‘unfair’ or ‘predatory’ tactics’” and that the plaintiff must prove “a dangerous probability that [the defendant] would monopolize a particular market.” (citing *Spectrum Sports*, 506 U.S. 447, 459 (1993)).

⁴² U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES 7 (Aug. 19, 2010), *available at* <https://www.justice.gov/atr/file/810276/download> (“The measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger’s likely competitive effects.”).

⁴³ U.K. COMPETITION & MKTS. AUTH., PRICING ALGORITHMS: ECONOMIC WORKING PAPER ON USE OF ALGORITHMS TO FACILITATE COLLUSION AND PERSONALISED PRICING (Oct. 8, 2018), *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746353/Algorithms_econ_report.pdf; OECD, ALGORITHMS & COLLUSION COMPETITION POLICY IN THE DIGITAL AGE (2017), *available at* <http://www.oecd.org/daf/competition/Algorithms-and-collusion-competition-policy-in-the-digital-age.pdf>.

⁴⁴ *Id.*

⁴⁵ Jeanine Miklos-Thal & Catherine E. Tucker, Collusion By Algorithm: Does Better Prediction Facilitate Coordination Between Sellers? (Oct. 5, 2018), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3261273.

tipping market can encourage competition and may allow multiple networks to exist.⁴⁶ Additionally, tipping markets do not necessarily stifle competition. Tipping may not occur at the market level but rather in smaller networks. For instance, tipping for ride-sharing services may occur at the level of a city.⁴⁷ This implies that companies would still have to compete in separate smaller markets. The Section also observes that markets that tend to tip due to network effects may still re-tip, as opposed to other natural monopolies.⁴⁸ Therefore, tipping markets due to network effects may retain the incentive for firms to innovate given the potential rewards of winning that market in competition for-the-market.⁴⁹

VI. Assessment of Policy Options (Section D)

Section D of the Questionnaire identifies a number of policy options. In particular, it solicits views on whether the NCT should only apply to dominant companies and whether it should apply only to digital markets.

The Section is skeptical that a new enforcement tool is merited and respectfully suggests that the current EU competition rules are sufficiently flexible to effectively address competitive concerns, including in platform-based or digital markets.

If the Commission were to proceed and propose an NCT, the Section suggests that it should have a general application and not be limited to platform-based or digital markets. Indeed, the Section respectfully suggests that those markets display no special features that distinguish them from other markets and justify a specific, new enforcement mechanism that would allow the imposition of remedial measures without a specific finding of a violation of EU competition rules.

In addition, the Section respectfully urges that, if the NCT were to be adopted, it should be limited to dominant companies. Indeed, in many, if not most, cases, competitive concerns are only likely to occur in the presence of significant market power. Limiting the scope of the NCT to dominance would therefore be a suitable requirement that would discipline the use of the NCT, thereby guarding against over-enforcement. In addition, the Section believes that, if competitive problems were identified in the absence of a dominant company, Article 101 TFEU would apply to that conduct. Therefore, it seems that an additional enforcement tool that would allow remedial action—without a prior finding of a 101 TFEU violation—in those circumstances would be unnecessary.

VII. Institutional Set-Up of a New Competition Tool (Section E)

The Section welcomes the EC's acknowledgement that any NCT will include robust rights of defense and the right to judicial review. Procedures that are—and are rightly perceived to be—accurate, efficient and impartial will enhance respect for competition law and its enforcement institutions and processes among counterpart agencies, within the business community, among consumers and by the general public.⁵⁰

⁴⁶ However, the introduction of standards early in the development of the network may harm competition if an inferior standard is adopted. See Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP. 93 (1994), <https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.8.2.93>.

⁴⁷ Zhu & Iansiti, *supra* note 30.

⁴⁸ OECD, Global Forum on Competition, *Competition For-The-Market—Background Note by the Secretariat* (Oct. 22, 2019), available at [https://one.oecd.org/document/DAF/COMP/GF\(2019\)7/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2019)7/en/pdf).

⁴⁹ In the case of a tipped market with indirect network effects, exclusivity can facilitate entry, as was the case for XBOX entering the gaming console market. See Lee, *supra* note 24.

⁵⁰ ABA SECTION OF ANTITRUST LAW, BEST PRACTICES FOR ANTITRUST PROCEDURE 3 (May 22, 2015), available at www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_bestprac_20150522.pdf [hereinafter ABA BEST PRACTICES].

The Section views the rights of defense and the right to judicial review as paramount, especially bearing in mind that companies stand to have remedies imposed on them that can go so far as to require forced divestitures without a finding of infringement of law. The Section also emphasizes the importance of principles of international comity.

Although the Section believes existing European competition and consumer protection laws adequately address the issues raised in the Consultation, if the Commission decides to pursue a NCT, the Section would support exploring a comparable institutional set-up as in the UK. In the UK detailed guidelines apply to the conduct of market investigations, including precise timetables for site visits, the publication of working papers and annotated issues statements, a series of hearings with concerned parties, and consultation on any recommended remedies. The Section would encourage the Commission to implement a comparable level of engagement and transparency which should ensure that each and every proposed remedy would be necessary and proportionate. Furthermore, there should be strong judicial review which might even require a standard of review that goes further than the current standard that is applied when EU courts review the EC's actions because the impact can be much larger, while undertakings might not have received any finding of infringement of any laws. U.S. practice, in particular the powers of the Federal Trade Commission to conduct market studies, may also be instructive.⁵¹

A. *Investigative Powers (Q33)*

While it is clear that effective application of the NCT requires adequate and appropriate investigative powers, the Commission should keep in mind the costs and benefits that these investigative powers impose on companies and society, particularly in light of the risk of structural divestments or stringent behavioral remedies being imposed. Information requests and the interviewing of company management and staff, amongst others, are resource intensive and impose a significant burden on businesses, both in terms of the extensive information requested and the requisite management time involved.

Even if the Commission deems it likely that these costs will be counterbalanced by the increased efficiency gains and public interests related to each policy option, as well as the economic opportunities for other companies (for example, entrants, innovators, etc.), it is important to note that these costs are unlikely to be counterbalanced in full.⁵²

The Section respectfully suggests following the framework laid down in Article 18 of Regulation 1/2003 that distinguishes the respondent's duty to reply to a simple request from the Commission versus a formal decision. Only in case of a request by decision should there be an obligation to reply. Staying close to well-established terminology and case law of EU competition law reduces the risk of lengthy legal procedures that the introduction of new concepts will involve. Additionally, it increases legal certainty and predictability.

The investigative powers could include the power to interview company management and personnel or to conduct site visits. The Section does not oppose the idea of either a power to obtain expert opinions or to impose penalties for providing false or misleading information provided that the burden of

⁵¹ While the Federal Trade Commission (FTC) does not have a tool equivalent to the proposed NCT, the FTC does have the power to require corporations to file informational reports regarding the company's "organization, business, conduct, practices, management and relation to other corporations." Thus, the FTC has the authority to collect confidential business information and to conduct industry studies. These industry studies might be followed by rulemaking. *See* FTC Act § 6(b), 15 U.S.C. § 46(b).

⁵² ABA BEST PRACTICES, *supra* note 50, at 5 ("Officials should adopt management practices designed to help ensure that the expected costs and other burdens of investigation—including those imposed upon targets and others who provide information or otherwise cooperate with the investigation—are proportionate to the expected value of the evidence sought. The expected significance of the potential competitive harm also should be considered in making this assessment.").

proof rests with the EC. Dawn raids do not seem to be proportionate under the NCT given that there does not have to be a suspicion of a violation of any law.

The Section furthermore suggests publishing clear standards and guidelines as to the circumstances under which the NCT and the investigative powers of the Commission may be used. The perception that the NCT is used as a shortcut around competition enforcement or the legislative process should be avoided. This justifies a two-step approach: only if there are reasonable and substantiated grounds for suspecting that features of the market lead to structural problems might binding investigative powers be considered.

B. Binding Legal Deadlines (Q 34)

Non-binding deadlines offer more flexibility, while binding deadlines provide for greater transparency and more legal certainty. Binding legal deadlines prevent investigations from continuing for an unnecessary amount of time in which targets and third parties are (unnecessarily) burdened.⁵³

The Section respectfully recommends the use of binding deadlines with optional extensions, such as in the UK. Given the fast pace of change in complex markets, the Section believes that any NCT should include rules that ensure a timely investigation without preventing a thorough investigation. As the Section already proposed in 2012, one of the best practices for conducting investigations is setting limits on the duration of investigations, including completing civil non-merger investigations within one year of the issuance of the first CID.⁵⁴ Specific time frames should also be set for information requests, including the possibility to override the set time frame with the consent or approval of an appropriate official.

C. Interim Measures and Voluntary Commitments (Q35&Q36)

If the NCT can be applied without a finding that an infringement has occurred, then it should not include provisions for interim measures. Interim measures are among the most powerful and intrusive enforcement tools and their use should thus be limited to situations in which an infringement is obvious. This would also avoid irreparable harm to the company in question.

If the Commission considers including interim measures as part of the NCT framework, the Section respectfully recommends that the Commission set a high evidentiary and procedural standard. There should be at least *prima facie* evidence of structural problems that cannot await the resolution of the investigation.⁵⁵ The NCT's evidentiary and procedural safeguards for interim measures also should not result in a burdensome procedural process.⁵⁶

⁵³ There is no prevailing practice among jurisdictions with tools similar to the NCT. For example, Romania has no set time for its investigation or decision, while in the UK a timetable is set for the different stages of the investigations with an 18-month deadline for the whole process. If justified by exceptional circumstances, the deadline can be extended by 6 months under Section 137 of the Enterprise Act 2002.

⁵⁴ ABA SECTION OF ANTITRUST LAW, CONTROLLING COSTS OF ANTITRUST ENFORCEMENT AND LITIGATION 48 (Dec 20, 2012), available at https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/2013_agenda_cost_efficiency_kolasky.pdf.

⁵⁵ Joined Cases 228 and 229/82, *Ford of Eur. Inc. & Ford-Werke Aktiengesellschaft v. Comm'n*, 1984 E.C.R. 1129 (Eur. Ct. Justice), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61982CJ0228&from=GA>. See also Council Regulation (EC) No 1/2003, 2003 O.J. (L 1) 1, art. 8.

⁵⁶ See Alec. J. Burnside & Adam Kidane, *Interim Measures: An Overview of EU and National Case Law*, CONCURRENCES N° 86718, June 7, 2018, available at <https://www.concurrences.com/en/bulletin/special-issues/interim-measures-en/dominance/interim-measures-an-overview-of-eu-and-national-case-law>; Philip Lowe & Frank Maier-Rigaud, *Quo Vadis Antitrust Remedies*, in INTERNATIONAL ANTITRUST LAW & POLICY: FORDHAM COMPETITION LAW 2008.

The Section does not oppose the inclusion of voluntary commitment mechanisms as those can help accelerate the resolution of investigations in their early stages.⁵⁷

D. Opportunities for Comment prior to a Final Decision and on the Appropriateness and Proportionality of Proposed Remedies (Q37&Q38)

Remedies should ensure the proper functioning of the market under scrutiny while minimizing compliance and error costs and should be carefully crafted to avoid hampering innovation or disincentivizing investments.⁵⁸

It has been suggested that rebuttable presumptions on the proportionality of certain remedies would be appropriate for effective and efficient enforcement, particularly in light of the non-punitive character of the NCT.⁵⁹ However, the Section submits that justifying presumptions on the basis that NCT remedies would not have a non-punitive character is misplaced without a showing that such “non-punitive” remedies would have a lesser economic impact than “punitive” remedies. Moreover, the NCT will permit the imposition of remedies while no violation has been established. Therefore, the Section believes that the use of rebuttable presumptions is not merited.

The Section respectfully urges the inclusion of channels for market players to comment before the final decision on the findings of the existence of a structural competition problem and on the appropriateness and proportionality of proposed remedies. These opportunities to comment, through hearings or written submissions, should be available to the undertakings addressed in the decision as well as other stakeholders. The enforcement and regulation of business conduct will be more effective at promoting competition when more voices and evidence from the marketplace are considered. UK practice offers instructive examples of the engagement of interested parties.⁶⁰

E. Procedural Safeguards (Q39)

The Section respectfully urges incorporating adequate procedural safeguards, including judicial review, into the NCT’s design.⁶¹ Review by an independent third-party will help ensure standards for

⁵⁷ Voluntary commitments are of a non-punitive nature and thus facilitate a constructive dialogue with the undertaking as envisioned in the joint memorandum of the Benelux competition authorities. *See also* Joint Memorandum of the Benelux Competition Authorities On Challenges Faced By Competition Authorities in a Digital World (Oct. 2019), *available at* https://www.belgiancompetition.be/sites/default/files/content/download/files/bma_acm_cdlcl.joint_memorandum_191002.pdf [hereinafter Benelux Digital Memorandum].

⁵⁸ For example, the U.S. Supreme Court has remarked that requiring firms to supply rivals, for example with data, can reduce competition by “lessen[ing] the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.” *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

⁵⁹ *See* Benelux Digital Memorandum, *supra* note 57.

⁶⁰ In the UK, interested parties are invited to respond to the provisional findings report and remedies notice, allowing no less than 21 days to respond. The CMA will take the input by parties at these hearings and on its initial statement of possible remedies into account in its provisional decision on remedies for consultation. With the publication of the formal remedies proposals comes the last opportunity for interested parties to comment before the CMA takes its final decision. *See* Ashurst, *Quick Guides: The use of market studies and market investigations in UK competition law* (Oct. 2019), *available at* <https://ashurstcde.azureedge.net/-/media/ashurst/documents/news-and-insights/legal-updates/2019/oct/quickguide---the-use-of-market-studies-and-market-investigations-in-uk-competition-law.pdf>.

⁶¹ ABA BEST PRACTICES, *supra* note 50, at 11-12 (“First-instance decisions should be subject to review by an independent tribunal. 1. ‘Independent’ in this context means (1) having no prior role in the investigation, accusation, or first-instance proceeding (except as a neutral decision maker regarding interim or preliminary matters required for management of first instance proceedings, as provided by law); (2) having no specific personal interest in the matter or material relationship to any party; and (3) having sufficient expertise in the law and economics of competition and/or other relevant disciplines to review the first-instance decision

launching investigations and seeking remedies are applied as evenly as possible across investigations and defendants. These safeguards are necessary to ensure due process and provide a necessary counterweight to the extensive powers of the EC. These safeguards are necessary to ensure due process and provide a necessary counterweight to the extensive powers of the EC and limit the overstepping of the boundaries of its functions. The Section recommends as a minimum that the Commission ensure a judicial review that is equally robust to the judicial review that is currently available for competition law infringements in the EU, which grants the General Court the power to review competition decisions, or in the UK, which grants the power of review to the Competition Appeal Tribunal.

F. Comity

The design of the NCT and its powers should follow principles of comity to protect against multiple punishments for the same conduct.⁶² Most importantly, any new competition power should restrict the use of extra-jurisdictional remedies.⁶³

in a disinterested, efficient and accurate Manner. 2. ‘Tribunal’ in this context means one or more named officials specifically designated to conduct the review and render decision and personally identified to counsel for the parties.”).

⁶² Comity “reflects the broad concept of respect among co-equal sovereign nations and plays a role in determining ‘the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.’” U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION § 4.1 (Jan. 13, 2017), available at <https://www.justice.gov/atr/internationalguidelines/download>.

⁶³ See Koren Wong-Ervin et al., *Extra-Jurisdictional Remedies Involving Patent Licensing*, COMPETITION POL’Y INT’L, DEC. 14, 2016, available at <https://www.competitionpolicyinternational.com/extra-jurisdictional-remedies-involving-patent-licensing-2/> (discussing the costs of extra-jurisdictional remedies in the context of competition and intellectual property rights).