8 September 2020

European Commission
Directorate General for Competition
Unit A.1
1049 Bruxelles/Brussel
Belgique/België

Re: New CompetitionTool

Submitted via Electronic Submission

Dear Sir,

The IBA is the world's leading organisation of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to help to shape the future of the legal profession throughout the world. Bringing together antitrust practitioners and experts among the IBA's 80,000 individual lawyers from across the world, with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis on international competition policy issues. Further information on the IBA is available at http://www.ibanet.org.

This submission is made to the Directorate General for Competition of the European Commission on behalf of the IBA Antitrust Committee, working through its *ad hoc* Working Group on Digital Economy ("**Working Group**").

The IBA Antitrust Committee is grateful for this opportunity to comment on the proposed consultation and appreciates the willingness of DG Competition to consider its comments and suggestions. The IBA Antitrust Committee's comments and suggestions draw on the members' experience of competition law and practice in the European Union and Internationally.

The Officers of the IBA Antitrust Committee and the Co-Chairs of the Working Group would be delighted to discuss the following submission in more detail, should that be of interest.

Sincerely,

Thomas Janssens

Daniel G. Swanson

8 September 2020

INTERNATIONAL BAR ASSOCIATION

ANTITRUST COMMITTEE

SUBMISSION TO THE EUROPEAN COMMISSION REGARDING THE CONSULTATION ON A NEW COMPETITION TOOL

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1. Introduction

The International Bar Association is the world's leading organisation of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to shape the future of the legal profession throughout the world.

Bringing together antitrust practitioners and experts among the IBA's 80,000 international lawyers from across the world, with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in this area. Further information on the IBA is available at http://ibanet.org.

The Antitrust Committee of the IBA ("**IBA Antitrust Committee**") comprises international antitrust practitioners from jurisdictions throughout the world. It is cognisant of the fact that many jurisdictions are embarking on a reflection process on the role of competition law in regulating the digital economy. To facilitate its engagement on these issues, the IBA has formed an *ad hoc* Working Group drawing from different disciplines of competition law and focusing exclusively on the digital economy ("**Working Group**").

The IBA Antitrust Committee appreciates the opportunity to engage with the Commission regarding its Consultation on a New Competition Tool ("**Consultation**"), including its Inception Impact Assessment ("**IIA**") and accompanying questionnaire ("**Questionnaire**"), issued on 3 June 2020.[1] The IBA Antitrust Committee appreciates the Commission's efforts to ensure that competition policy and rules are "*fit for the modern economy*,"[2] a concern shared by many jurisdictions across the globe. In this spirit, this submission draws on the experience of the IBA Antitrust Committee's members, both within the EU and certain other jurisdictions that have also recently wrestled with the types of issues raised by the Consultation, and seeks to provide a view from the perspective of the legal profession with a focus on core legal principles (including legal certainty and rights of defence).

2. Executive Summary

The Commission contemplates that a New Competition Tool ("**NCT**") might be needed to address enforcement gaps that its existing "competition toolbox" cannot address effectively or at all. These enforcement gaps are described by the Commission as "*structural competition problems*" that have emerged in digital and non-digital markets (although the focus is clearly on digital and "digitally-enabled" markets). Structural competition problems could include a variety of different market characteristics, which can result in scenarios that present risks to competition – in particular, tilting the playing field in favour of only a few market players. Structural competition problems can, according to the Commission, also arise where the structure of a market itself presents risks to competition. The Commission perceives that in

[1] The IBA is separately responding to the parallel consultation being conducted jointly by the European Commission's Directorate General for Communications, Networks, Content and Technology (CONNECT) and the Directorate General for Internal Market, Industry, Entrepreneurship and SMEs (GROW).

[2] Inception Impact Assessment ("**IIA**"), p.1.

many cases structural problems might exist even absent any clear anticompetitive conduct on the part of market participants.

The Commission states that early intervention to correct structural competition problems can prevent eventual distortions to competition and outlines four forms that an NCT could take, none of which are based on the existing competition toolbox (such toolbox being in effect conduct-based enforcement). In effect, the NCT (if adopted) will be a new, preventative tool that aims to eliminate structural competition problems to ensure undistorted competition. The NCT policy options would empower the Commission to impose behavioural and/or structural (divestment) remedies on companies active in markets with structural competition problems – in the absence of proving conduct that would infringe existing competition rules.

In this Submission, the IBA Antitrust Committee has considered the NCT proposals in a three-part analysis, in which it draws heavily on the experience of its members.

- ***First***, this Submission asks whether the structural competition problems identified by the Commission indeed are a problem that the competition rules are intended and well-placed to resolve. In the IBA Antitrust Committee's view, the types of scenarios characterised by the Commission as "structural competition problems" may create risks in certain markets. However, an important first question is whether such structural problems can, or should, be addressed *ex ante* and before any manifestation of competitive distortion. Given the unpredictable trajectory of dynamic technology-based markets, the risk of a static regulation "getting things wrong" and chilling innovation, investment and perhaps itself distorting the competitive process is significant. Overall, the IBA Antitrust Committee also considers that these are not necessarily the types of risks that the competition laws were intended to address and submits that a cross-disciplinary approach is warranted. (Section 3)

- ***Second*****,** this Submission considers whether the existing competition toolbox – the "baseline" – can effectively address most structural competition problems that are shown to be manifest. Consistent with a number of other jurisdictions that have considered the applicability of traditional antitrust rules to digital markets, the IBA Antitrust Committee believes that the existing competition toolbox is generally fit for purpose. Existing competition tools, grounded in more than 60 years of precedent, have proven to be flexible and adaptable to changing market conditions, and there is no reason that they cannot be further refined to meet the challenges of digitalisation. As suggested by the Commission's own report on "Competition policy for the digital era", the IBA Antitrust Committee believes that it is also prudent to consider a cross-disciplinary approach. That is, the Commission should consider the extent to which non-competition rules may be better able to address certain problems cited by the Commission in this Consultation before embarking on a fundamental re-think of competition law enforcement. (Section 4)

- ***Third***, assuming that the Commission nevertheless considers that an NCT is essential in certain contexts, the IBA Antitrust Committee provides general observations, and also specifically considers each of the four policy options. The IBA Antitrust Committee

outlines its concerns, and how these might be addressed to ensure that any policy option adopted by the Commission respects core legal principles and ensures robust procedural safeguards, rights of defence and judicial review. (Section 5, with procedural safeguards discussed in detail in Section 6.)

Overall, the IBA Antitrust Committee believes that caution is warranted. The IBA Antitrust Committee believes that it is not entirely established the NCT is sufficiently necessary, and presents risks that could result in it being counterproductive to the objectives it intends to achieve. A hasty adoption of an NCT could potentially undermine 60+ years of established competition law and transform the Commission from an enforcer of competition law into an industry regulator, potentially of the entire economy. This would require extensive resources, which would be diverted from critical enforcement activity.

However, if the Commission believes that the NCT may be essential, it should be wary of pre-empting or cutting across certain industry-specific interventions that may also address issues targeted by the NCT. The potential impact of these moves should be carefully considered and understood lest the Commission's proposed intervention operate at cross purposes, or introduce inconsistencies. It may be more efficient for the Commission to adopt a purposeful advocacy function to help shape industry-specific moves rather than pursue its own interventions. Moreover, it would be prudent to use the understanding gained from the newly launched sector inquiry into the consumer Internet of Things before seeking to regulate these and potentially other industries.

Assuming that the Commission proceeds with an NCT, the IBA Antitrust Committee has also identified a number of issues that the Commission should first clarify as key protections. Notably, the Commission must ensure that the NCT respects core legal principles and that companies subject to the NCT have recourse to procedural safeguards, rights of defence and judicial review that are at least as strong as those applicable in Article 101 and 102 TFEU proceedings. The Commission should clarify these issues with urgency, as they are not addressed in either the IIA or the Questionnaire.

3. Problems Targeted by the Commission

The IBA Antitrust Committee welcomes the Commission's reflections on competition in dynamic markets, such as rapidly evolving digital markets. The debate raises complex questions about the ability of competition law to adapt to the challenges presented by digitalisation, and – more fundamentally – about the role and limits of competition law.

The Commission has identified "*structural competition problems*," as a gap in its enforcement toolbox, as they cannot be addressed "*in the most effective manner*", or at all, by Articles 101 and 102 TFEU.[3] In effect, the Commission's premise is that it has observed certain market scenarios and conduct, left unchecked, result in entrenched structural issues that could ultimately harm competition by tilting the playing field in favour of a few large market players. As set out below, the IBA Antitrust Committee does not believe that structural competition

[3] *See* IIA, p.2.

problems, as defined by the Commission, represent a gap in competition enforcement requiring an NCT.

In detail, the Commission has categorised structural competition problems into two categories, both requiring essentially preventative intervention: (i) structural risks for competition, and (ii) a structural lack of competition. In both categories, the Commission focuses on conditions that could lead to competition problems, even in the absence of demonstrated harm to competition through an infringement of Articles 101 and/or 102 TFEU – although many of the key terms on which it relies remain undefined. Broadly:

- The Commission posits that "**structural risks for competition**" can arise in markets characterised by certain features, including network and scale effects, a lack of multi-homing and lock-in effects and the conduct of companies acting in these markets. The Commission observes that such markets can give rise to powerful, entrenched market players (gatekeepers), resulting in harm to competition – although the term "gatekeeper", critically, is not defined. This category of risks also includes scenarios in which non-dominant companies may end up "monopolising" a market through "anticompetitive means.[4] Indeed, this characterisation implies that if tipping occurs there are inherent competition problems, but ignores the fact that if tipping happens, it is often because of upfront competitive merits driving behaviour in platform markets. The Commission concludes by positing that risks to competition arising from such scenarios could be "*prevented by early intervention*."[5]

- A "**structural lack of competition**" refers to circumstances where a market's structure itself is to blame for poor competitive outcomes. The Commission cites two examples of such failures, namely, (i) highly concentrated markets with entry barriers, consumer lock-in, lack of access to data or data accumulation; and (ii) oligopolistic markets, in particular those that have become more transparent due to algorithm-based technology solutions. Notably, a structural lack of competition is not necessarily attributable to the conduct of individual companies but rather to the overall structure of the market itself. In other words, the Commission takes the view that markets with a "structural lack of competition" are those that do not function well due to structural "market failure."[6]

The Commission's accompanying Questionnaire includes several questions that seek feedback as to whether and to what extent specific scenarios/conduct give rise to structural competition problems.[7] The IBA Antitrust Committee welcomes the Commission's effort to confirm the nature and extent of structural competition problems. However, the Questionnaire (and accompanying IIA) also appear to proceed from the premise that competition law should

[4] *See* IIA, p. 2. *See also* Questionnaire, at Question 7 (characterising a "tipping" or "winner takes all" market as a market "*where the number of customers is a key element for business success: If a firm reaches a critical threshold of customers, it gets a disproportionate advantage in capturing remaining customers. Therefore, due to certain characteristics of that market, only one or very few companies will remain on those markets in the long term*.").
[5] *See* IIA, p.2.
[6] *See* IIA, p. 2.
[7] *See e.g.* Questionnaire, at Questions 6-10, 12.3, 14, 16.7

proactively intervene to correct structural market problems. Certain questions also presume the existence of concerns, by framing responses as ranging from "*no knowledge*" to "*very important*" and assume that certain practices are problematic, such as data pooling and the use of algorithms – where the debate is far from settled.[8] Indeed the IBA Antitrust Committee notes that the specific scenarios/conduct set out do not always result in harm to competition and that the conduct could be pro-or anti-competitive depending on the whole factual situation of the market in question. The IBA Antitrust Committee suggests that the Commission consider the possibility for confirmation bias when reviewing the results of this Consultation.

With that said, the IBA Antitrust Committee agrees with the Commission that digitalisation has in some cases led to challenges that are difficult to resolve. This is apparent from the reflection process that is taking place in a number of jurisdictions that have identified concerns similar to those identified in the Consultation. While problems may exist, the IBA Antitrust Committee does not believe that competition law is the only or best available tool. Indeed, consistent with the Report of Special Advisers to the Commission on Competition Policy for the Digital Era (the "**Competition Report**"), the IBA Antitrust Committee suggests that the challenges arising from digitalisation are cross-disciplinary in nature. These challenges implicate a number of other areas of law, in addition to competition law, including data protection, consumer protection, unfair trading rules[9] – as well as regulations targeting the digital economy.[10] Other jurisdictions that have considered the challenges arising from digitalisation have generally arrived at the same conclusion.[11]

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[8] *See e.g.*, Questionnaire at Question 14.7 ("*In your experience, what are the main competition concerns that arise in markets where pricing algorithms are used*") and Question 16.7 ("*In your experience, what are the main competition concerns that arise in tipping markets?*")

[9] *See* Jacques Crémer Yves-Alexandre de Montjoye Heike Schweitzer, Report of Special Advisers to the Commission on Competition Policy for the Digital Era (the "**Competition Report**"), p. 126, *available at* https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf

[10] *See, e.g.*, Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services ("P2B Regulation"); Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market ("Geoblocking Regulation") and Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market ("Portability Regulation").

[11] For example: In June 2020, HDMC announced "Report on Mid-term Vision on Competition in Digital Market" for public comments, which expresses their views on how to develop digital markets into dynamically competitive ones with future risks taken into consideration. The report pointed out, as future risks, certain concerns such as winner-takes-all, more control of individuals' decisions, lack of data reliability, and data processing and its costs. Most current views of the Japanese government on digital issues are reflected in this report. https://search.e-gov.go.jp/servlet/PcmFileDownload?seqNo=0000204147.

Another example includes a joint study of the French and German Competition Authorities pointed out that "*where access to a large volume or variety of data is a factor of competitiveness in the market (which is specific to the market in question), their collection may constitute a barrier to entry if new entrants are not able to collect or purchase the same type of data, in terms of volume and/or variety, as the incumbents"*. Moreover, data collection "*may enhance network effects where the increase in the number of users of an undertaking allows it to collect more data than its competitors, which in turn allows it to increase the quality of its products or services and ultimately to increase its market shares.*" *See* French Competition Authority, Bundeskartellamt, *Competition Law and Data*, 10 May 2016, p. 32, *available at*

Thus, while the IBA Antitrust Committee acknowledges that structural competition problems may exist, it does not necessarily follow that an enforcement gap exists in competition law and that an NCT is needed. The role of EU competition law is not to preventatively alter market structures in an effort to create a more competitive marketplace, replacing market forces with the Commission's judgment. In the words of Rod Sims, the Chair of the Australia Competition and Consumer Commission ("**ACCC***"*) "*broadening the objectives of competition law is not the best way to promote them*."[12] Rather, the IBA Antitrust Committee believes that a cross-disciplinary approach is better tailored to the challenges of digitalisation, as explained in Section 4 below. Indeed, other jurisdictions that have considered the challenges of digitalisation have reached similar conclusions.

4. Suitability and Adaptability of Existing Tools

In the IBA Antitrust Committee's view, the Commission's existing competition toolbox is sufficiently flexible and adaptable to meet the challenges of digitalisation, including the ability to assess and prosecute conduct in digital markets that harms competition. Notably, a number of jurisdictions that have considered these issues have reached similar conclusions.

Even to the extent that, in limited instances, there may be an enforcement gap, *non*-competition rules, including consumer protection, data protection and privacy, and targeted industry regulations provide additional tools to address structural market issues and certain types of conduct on these markets. The Questionnaire, however, devotes few questions to the complementary role of non-competition tools[13] and the IIA merely notes the existence of a parallel consultation pursuant to the Digital Services Act package. The role of non-competition rules, however, is not trivial given the cross-disciplinary nature of issues raised by digitalisation. The issue is complex because unlike regulators that have a broader remit,[14] the Commission (DG Competition) is limited to competition law. The problems arising from digital markets do not exist in silos. The IBA Antitrust Committee respectfully suggests that the Commission (in connection with other Directorates General and NCAs) should consider the broader impact of non-competition rules on structural competition problems, to assess how competition law enforcement could operate alongside non-competition rules, before concluding that an NCT is required.

4.1. The Baseline Scenario

The Commission does not appear to consider the "*baseline scenario*" an option for dealing with structural competition problems. In its IIA, the Commission notes that under the baseline scenario:[15]

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/10_05_2016_Big%20Data%20Papier.html.

[12] *See* R. Sims, 'Dealing with Multi-sided Platforms and the Digital Economy' (2020) 28 AJCCL 6

[13] *See* Questionnaire, Questions 29, 40.

[14] For example, the ACCC has one of the widest remits of all competition authorities globally: it enforces competition laws, consumer laws and regulates infrastructure. This is much broader than the European Commission.

[15] Inception Impact Assessment, pp. 2-3.

> *Commission would continue to enforce Articles 101 and 102 TFEU on a case-by-case basis against anti-competitive conduct of individual companies. It would also continue to conduct sector inquiries, which, however, only empower the Commission to request information necessary for giving effect to Articles 101 and 102 and also do not allow the Commission to impose remedies outside the scope of individual enforcement proceedings*….. [T]he *described structural competition problems could not be tackled or addressed in the most efficient manner under this scenario*

The IBA Antitrust Committee considers that the Commission understates the current and potential reach of its existing competition rules. Rather, the IBA Antitrust Committee agrees with the Competition Report, that the existing competition rules are sufficiently flexible to adapt to complex and changing market conditions – including digitalisation – and the actual harm to competition that they cause:[16]

> *Over the last 60 years, EU competition rules have provided a solid basis for protecting competition in a broad variety of market settings. Competition law doctrine has evolved and reacted to the varying challenges on a case by case basis. This evolutionary method has allowed competition law enforcers to react to changing circumstances based on the solid empirical evidence of real-life cases. At the same time, the stable core of EU competition rules has prevented EU competition policy from following fashions. We are convinced that the basic framework of competition law, as embedded in Articles 101 and 102 of the TFEU, continues to provide a sound and sufficiently flexible basis for protecting competition in the digital era. However, the challenges stemming from the rise of the Internet, the 'new economy' and, today, the digital economy do require an adaptation of the way this basic framework is applied. The specificities of platforms, digital ecosystems and the data economy require adaptation and refinement of established concepts, doctrines and methodologies, and competition law enforcement itself.*

The IBA Antitrust Committee acknowledges that the existing competition toolbox does not give the Commission the power pro-actively to intervene with remedies to eliminate structural market problems in the absence of anticompetitive conduct. However, as set out above, such pre-emptive market shaping rules do not naturally fall within the orbit of competition law and would be better suited, if at all, for targeted industry regulation – which is also evolving rapidly.

As demonstrated below, several other jurisdictions that have considered the challenges presented by digitalisation have likewise concluded that the existing competition rules are suitable, but could be subject to refinement or adaptation. Competition authorities have also generally taken a multi-faceted approach to address the challenges of digitalisation, as they have also considered the role of other non-competition areas of law, such as consumer

[16] *See* Competition Report, p. 39, *available at* https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

protection, data protection, privacy and others. The IBA Antitrust Committee is aware of no jurisdiction (listed below or otherwise) that has considered such a dramatic change as the NCT would be.

- **United Kingdom:** As a starting point, the IBA Antitrust Committee acknowledges that the UK Competition and Markets Authority has certain powers that, to some degree, reflect the type of powers sought in the NCT – in particular, policy Option 3. In the UK, the legal basis for its market investigation powers derive from the 2002 Enterprise Act and the amendments in the Enterprise and Regulatory Reform Act 2013.

  The exercise of these powers begins with a market study, conducted by the CMA or in some cases by industry regulators. This is broadly similar to the concept of an EU Sector Inquiry (see Section 4.2(c)) below, although market studies can result in a broader array of outcomes. These range from declaring a clean bill of health, making recommendations (to industry or the government), launching enforcement actions, or launching a market investigation reference (or accepting undertakings in lieu of such a reference).[17] A reference for a market investigation may be made where the findings of a market study give rise to reasonable grounds for suspecting that market feature(s) prevent, restrict or distort competition. A market investigation is thus a detailed examination into whether there is an adverse effect on competition in the market(s) referred and, if so, what remedial action may be appropriate, including the imposition of behavioural and structural remedies. Notably, there are clear procedures and time limits, as well as strong rights of defence that apply throughout the market study and, if applicable, market investigation process. In practice, the CMA has shown restraint in applying these broad powers. Since 2001, 20 market investigations have been launched in the UK (15 of which were based on CMA market studies).[18]

  The CMA recently concluded a Market Study into Online Platforms and Digital Advertising, issuing its Final Report in July 2020.[19] The CMA noted that the statutory test for reference for a market investigation were met; *however,* the CMA also concluded that "*a market investigation is not the most appropriate way forward at this time.*" Rather than launching an investigation that could have enabled it to impose structural changes on these markets, the CMA – at least for now – has opted to make policy recommendations to the government, some of which are cross-disciplinary in nature.[20] Indeed, the CMA specifically and favourably noted the UK government's

[17] *See* UK Competition and Markets Authority ("**CMA**"), "Market Studies and Market Investigations: Supplemental guidance on the CMA's approach", revised July 2017, *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/624706/cma3-markets-supplemental-guidance-updated-june-2017.pdf

[18] *See* Oxera Agenda, July 2020: "What problems can the European Commission's New Competition Tool fix" (noting the number and outcomes of market studies in the UK since 2001), *available at* https://www.oxera.com/agenda/what-problems-can-the-european-commissions-new-competition-tool-fix/.

[19] *See* CMA, Final Report of Market Study on Online Platforms and Digital Advertising, , *available at* https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf

[20] See CMA, Final Report of Market Study on Online Platforms and Digital Advertising, p. 34, *available at*

announcement that it would accept the cross-disciplinary recommendations of the Furman Review, which relate to competition in digital markets, which include competition and non-competition policy recommendations.[21]

- In **Australia**, the approach taken by the ACCC resembles the Commission's baseline approach, with some refinements. Although the ACCC has recommended some changes to competition and non-competition rules, the ACCC does not consider an overhaul of the Australian competition laws appropriate. Specifically, in its Digital Platform Inquiry Final Report,[22] the ACCC recommended changes to both merger rules and non-competition rules. Its suggested changes to non-competition rules included the introduction of an unfair trade practices prohibition and industry-specific regulation. The ACCC also recommended changes to Australia's privacy laws, which would be enforced by a different regulator. The ACCC's multi-faceted approach also includes the use of mandatory industry codes,[23] market inquiries,[24] market studies, and the use of court-enforceable undertakings in its enforcement of competition and consumer laws. The ACCC has also established specialist units to assist with its pursuit, of issues specific to digital markets. Through proactive enforcement, the ACCC has investigated cases, under both its competition and consumer laws that have dealt with the types of structural competition problems cited by the Commission in this Consultation.[25]

- In **Austria,** overall, the existing Austrian regulations are considered sufficient to address potential competition problems in connection with the digital economy, partly due to the existence of the concept of "relative market dominance" pursuant to Section 4(3) of the Austria Cartels Act. This is a flexible concept, which can apply in a variety of situations – including a company's dependency to access certain data.

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https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf

[21] *See* "Unlocking digital competition, report of the Digital Competition Expert Panel" aka 'the Furman Review'.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf

[22] ACCC, Digital Platforms Inquiry: Final Report (June 2019) ("**DPI Final Report**"), *available at* https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf.

[23] The use of industry codes is well-established in Australia. At present, the ACCC is in the process of developing a sector-specific code of conduct to provide a framework for payment by digital platforms to news publishers for use of their content. It released an Exposure Draft on 31 July 2020. In the DPI Final Report, the ACCC also recommended that a code of conduct be implemented to address misinformation being perpetuated online.

[24] *E.g.*, The findings in the DPI Final Report, released in July 2019, had a knock-on effect and led the ACCC to recommend that it undertake further inquiries into digital platforms. To date, the ACCC has been directed by the government to conduct the following inquiries into digital markets: the DPI which had a broad remit including competition, consumer, privacy and public policy issues; the ongoing Ad Tech Inquiry, which spun off from the DPI; and the ongoing Digital Platform Services Inquiry, which will run until 2025.

[25] The ACCC has finalised consumer law proceedings against Apple in relation to false or misleading representations made to consumers about their consumer guarantee protections ([2018] FCA 953) and has two ongoing proceedings against Google in respect of its collection and use of consumers' data. The ACCC has also indicated in press conferences on 10 December 2018 and 26 July 2020 that it is currently progressing an additional 5-10 investigations, some relating to misuse of market power and some to consumer law protections.

- In **France,** the French Competition Authority ("**FCA**") considers that competition laws are generally suitable to address the challenges of digitalisation, noting that the case-by-case approach enables competition law to evolve, effectively and flexibly. In this respect, competition authorities have demonstrated the ability to use competition laws to address the behaviour of market players in digital industries, including through innovative reasoning the application of well-established solutions to "new objects." The FCA thus considers the existing competition laws to be suitable, and has suggested some refinements to adapt to digital industries. This includes the increased use of interim measures to enable the FCA to intervene more quickly[26], a new concept of a "structuring" position on a market, which is a new form of dominance, and changes to merger control thresholds. In its "Contribution to the debate on competition policy and digital issues[27]", the FCA proposed to broaden the concept of dominance to include certain players in a position of near dominance or on the verge of tipping the market.

- In **India**, the Chairman of the Competition Commission of India ("**CCI**") in his speeches at various fora acknowledged the rising competition concerns in digital markets and that digital markets exhibit characteristics like network effects, lock-in etc., which can result in the market tipping in favour of a dominant platform. The views of the CCI regarding the competition concerns in the digital markets are largely similar to the views of the Commission. However, in the view of the CCI, while antitrust cannot and should not try and upend the economics that drive these markets, timely detection and appropriate intervention to correct anti-competitive practices is of key importance in these markets. The CCI considers that antitrust enforcement in digital markets may need to be complemented with a code of conduct that identifies certain do's and don'ts, in particular for digital platforms. While a novel legal approach needs to be considered for digital markets, this does not mean that existing laws are to be revised. It merely means that the existing laws need to be enforced even more rigorously and be complemented by some innovative regulatory architecture. The CCI is considering whether the findings of the e-commerce market study can be converted to a code of conduct requiring compliance from the industry, and is considering changes to the merger control thresholds for mergers and acquisitions in the digital economy.

- In **Japan,** the current approach of the Japanese government is to try to maximize the reach and effectiveness of the existing tools including enforcing existing competition law (The Anti-Monopoly Law ("**AMA**"))[28] and establishing complementary, non-competition regimes to the extent necessary to support them in order to address new

[26] *See* Decision No. 19-MC-01 of January 31, 2019 relating to a request for protective measures by Amadeus

[27] French Competition Authority, "Contribution to the debate on competition policy and digital issues", 19 February 2020, p. 7, *available at* https://www.autoritedelaconcurrence.fr/sites/default/files/2020-02/2020.02.28_contribution_adlc_enjeux_num.pdf

[28] For example, the JFTC has actively detected infringements of digital platforms (e.g. Amazon, Rakuten), resulting in remedial commitments by them.
https://globalcompetitionreview.com/article/1190194/amazon-changes-rewards-in-response-to-jftc-probe https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191025.html

issues.[29] This includes, for example, the issuance of guidelines in December 2019 to clarify provisions in the AMA regarding "abuse of a superior bargaining position", which is one type of unfair trade practice that can apply to a digital platform's unjust acquisition of individual data from consumer. The Japan Fair Trade Commission ("**JFTC**") has announced revised merger control guidelines, which clarify its view on potential restraints of competition through network effects, analysis on the prevention of new entry and data accumulation. The JFTC also established criteria based on transactional value and local effects, and if these thresholds are met the JFTC recommends that the parties voluntarily notify non-reportable transactions. Finally, the JFTC established the Headquarters for Digital Market Competition ("**HDMC**") under the Cabinet to promote competition and innovation in rapidly changing digital markets, and to promptly and effectively implement competition policies[30]

- In **Korea**, the Korea Fair Trade Commission ("**KFTC**") announced the intention to propose a separate (and/or supplemental) competition law on "Online Platform Transactions", and as of June 2020 had held a number of hearings on the subject. At this time, the KFTC has indicated that no legislative timeline applies, and that no decisions had been made as to content and that it wold continue to solicit and review comments from relevant stakeholders.

- In **New Zealand,** Government officials have confirmed that there are currently no proposals to regulate competition aspects of the digital economy. Officials consider that *"the digital economy is the economy".* Therefore, the primary focus is continuing to maintain quality generic competition law settings. Among other things this includes a proposal to adopt an "effects test" for unilateral conduct like that in Australia. There are related consumer law proposals relating to "unfair contract terms". With that said, there is an apparent growing concern that competition regulation may not be adequate for digital markets[31]. A recent report of the New Zealand Productivity Commission (March 2020) recommended that ""*The Government should review and refresh regulatory settings to make sure they are adequate to deal with emerging technologies (e.g. competition policy; data access and consumer data rights) and are not inhibiting technology adoption (eg, restrictions on the use of genetic modification*

[29] In May 2020, the Bill on Improving Transparency and Fairness of Specified Digital Platforms passed the Diet, which aims to enhance transparency and fairness by obliging certain digital platforms to disclose trading conditions, etc. This bill aims to maintain or improve competitive market conditions and support JFTC to more promptly and effectively enforce AMA if the government has found problematic conducts. This will be enacted within this fiscal year. *See* https://www.kantei.go.jp/jp/singi/digitalmarket/index_e.html

[30] This is an inter-agency organization to address competition problems arising from digital markets in an integrated manner as the entire Japanese government. HDMC is not an enforcement agency such as JFTC but a policy-making organization that would reform the existing regimes or introduce a new one.
https://www.kantei.go.jp/jp/singi/digitalmarket/index_e.html

[31] *See* Growing the digital economy in Australia and New Zealand: Maximising opportunities for SMEs, Joint research report, January 2019), *available at* https://www.productivity.govt.nz/assets/Research/b32acca009/Growing-the-digital-economy-in-Australia-and-New-Zealand_Final-Report.pdf

technologies)."[32] Thus, while changes are not currently envisaged, it is clear that a reflection process is ongoing in New Zealand that is cross-disciplinary in nature. This may now be recognised with current consultations on *Options for establishing a consumer data right in New Zealand*, closing on 5 October 2020. In addition, the Commerce Commission gained powers to conduct market (competition) studies in 2018, which can lead to targeted regulatory responses and, more recently, the Privacy Act 2020 was introduced to replace the earlier Privacy Act (reflecting a cross-disciplinary approach).

- In **Singapore**, the current antitrust framework is sufficiently flexible to address concerns raised by digital markets and e-commerce, though emphasis on specific competition issues may change. The Competition and Consumer Commission of Singapore ("**CCCS**") has aggressively used and interpreted the rules at its disposal, in particular with regard to mergers,[33] and made use of its powers to conduct market studies. The findings of market studies often include guidelines or recommendations on changes to market practices, and increasingly also include legislative changes following market studies. The CCCS has also been working with other government agencies on new laws that may improve the competitive landscape, e.g. its work with the Personal Data Protection Commission. Following from such work, a draft bill to introduce a data portability requirement in Singapore was recently published for public consultation.

- In **South Africa** recent policy-based amendments have sought more effectively to foster growth by, and reduce barriers to entry facing, small, medium and black-owned firms (a so-called "designated class" of vulnerable or marginalised market participants). However, these amendments have remained rooted in traditional enforcement against dominant firms. The legislation contemplates that increased concentration in certain designated industries may lead to buyer power, which has been introduced as a species of abuse of dominance. Similar provisions have been introduced in regard to price discrimination by dominant firms. Attendant guidelines[34] have served to refine how dominance might be assessed, with a greater emphasis on circumstantial market power rather than mere concentration levels.

  This approach to market power, taking into account the dynamics of a particular sector or channel, might serve to catch more participants in the net from a jurisdictional point

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[32] *See Technological change and the future of work, available at* https://www.productivity.govt.nz/assets/Documents/0634858491/Final-report_Technological-change-and-the-future-of-work.pdf. In addition, the Minister of Commerce and Consumer Affairs directed the Ministry of Business Innovation & Employment ("**MBIE"**) – which oversees the Commerce Commission – to look at whether a *Consumer Data Right* should be introduced in New Zealand. https://www.mbie.govt.nz/business-and-employment/business/competition-regulation-and-policy/payment-systems-open-banking-and-consumer-data/

[33] Indeed, the CCCS has not hesitated to use its existing suite of powers to take action against mergers that it has concerns with, including directing the acquirer not to change pre-transaction pricing, pricing policy and product options, or enter into any exclusive agreements, indefinitely until competitors have reached certain market share levels or the CCCS agrees to release the acquirer from the directions as circumstances have changed such that the directions are no longer necessary.

[34] Available at http://www.compcom.co.za/buying-power/

of view – without jettisoning the need nevertheless ultimately to address conduct rather than structure. Although a negative effect on competition is still the overall standard, the lens has been recalibrated to focus on "effective participation" by the designated class, as well as "unfair treatment" towards the designated class. Accordingly, rather than opting for *ex ante* powers to shape markets, the emerging South African policy aims to train the existing and proven enforcement powers of the regulator to focus on the effect of conduct on more vulnerable and marginalised firms. In the case of digital markets, "e-commerce and online services" have been designated as a sector to which the new buyer power provisions will apply. This in principle will allow the regulator to ensure that digital players with market power do not impose unfair terms on smaller market participants. Notably, the guidelines, which allow market participants to assess their own conduct, have also provided for a list of terms that would be considered provisionally unfair if imposed by a provider of online intermediation services – although this approach has been criticised as being inappropriate in a rule of reason context.

Worth noting is that, the South African legislation does provide for formal inquiry in respect of the general state of competition, the levels of concentration in and structure of a market. These provisions include a "duty" by the South Africa Competition Commission ("**SACC**") to remedy, mitigate or prevent any identified adverse effects on competition. In the case of drastic remedies (such as divestiture"), however, the SACC is only empowered to recommend remedies that must be considered by the Competition Tribunal with full regard to a hearing on evidence.[35] Rights of defence apply, any person materially affected by any findings under a market inquiry is entitled to be informed of provisional findings and to react thereto. There is also a clear right of appeal to the Competition Tribunal and, ultimately, the Competition Appeal Court. Accordingly, while the Commission has wide-ranging powers of inquiry, which can be deployed as front-line investigator to identify market structures that appear deleterious to competition, its ability to remedy these structures are trammelled by a robust procedure and full rights of appeal before two specialist adjudicatory bodies. Finally, South African merger control provisions have also been amended to provide greater scope to addressing structural distortions resulting from mergers.[36]

Among these jurisdictions, it is clear that the existing competition rules are suitable but may be refined to meet the challenges of digitalisation (including, with regard to merger control) and to ensure that the regulators can move nimbly and quickly to address competition problems. Competition authorities have also recognised the cross-disciplinary nature of issues raised by digitalisation and have recommended or sought non-competition tools to address certain challenges – for example, relating to consumer protection or data protection.

[35] In addition, the Commission is empowered to make recommendations for new or amended policy, legislation or regulations; and to other regulatory authorities in respect of competition matters.

[36] In detail, the revised provisions expressly require the Commission to consider, when assessing a particular merger "any other mergers engaged in by a party to a merger for such period as may be stipulated…" Coupled with the Commission's power to call for notification of mergers that fall below the thresholds for compulsory merger notification, there is greater scope for a firm's acquisition strategy over time to be assessed with a view to addressing resultant structural distortions.

It appears clear that none of these jurisdictions has considered change at the level of the NCT.

The IBA Antitrust Committee submits that this provides reason to reflect on the suitability of the Commission's own baseline scenario, and the ways that this can be refined to address challenges of digitalisation. As set out in the next section, the IBA Antitrust Committee considers that the Commission's existing competition tools are robust and adaptable and fully capable of addressing the competition challenges of digital and digitally enabled markets.

4.2. The Commission's Existing Competition Tools are Suitable

Drawing on the experience of its members, the IBA Antitrust Committee has also identified how certain tools have been refined or expanded to address specific issues in digital or digitally-enabled industries in other jurisdictions. And indeed, the baseline scenario includes individual enforcement cases under Articles 101 and 102 TFEU, sector inquiries and additional tools such as the ability to impose interim measures and the ability to issue communications and guidelines that clarify key principles and interpretations and lay out enforcement guidelines. Taken together, this tends to suggest that the Commission's existing toolbox is comparatively robust and relatively flexible (although less so in the concept of abuse of dominance) and well-suited to address competition problems arising from digitalisation.

a) Traditional antitrust principles – Articles 101 and 102 TFEU

The existing competition toolbox provides the Commission with potent and flexible tools, including the enforcement of the core principles embedded in Articles 101 and 102 TFEU. Both provisions have proven to be flexible over time in addressing practices that harm competition, as well as the structure of competition. [37] The Commission has indeed used the traditional competition tools in a number of cases.

Aggressive enforcement and interpretation of the existing antitrust laws is a core element of the competition toolbox of the jurisdictions described in Section 4.1. Indeed, in many instances, regulators in these jurisdictions have used traditional antitrust tools to successfully address complex issues arising from digital industries, including for example in Australia, France, India, Japan and Singapore.[38]

[37] See, *e.g.* Report on Competition Policy for the Digital Era, *citing inter alia* Case T-286/09, Intel v Commission, EU:T:2014:547, at para. 105; Case C-209/10, *Post Danmark I*, EU:C:2012:172, at para. 20; Case C-280/08 P, Deutsche Telekom v Commission, EU:C:2010:603, at para. 182.

[38] In India for example, the CCI notes that the existing laws are robust and need to be enforced even more rigorously and in a timely manner. It believes that the timing of intervention is critical for ensuring that digital markets remain competitive. The CCI has stepped up its enforcement activities in the digital markets and has directed investigations in the e-commerce market, cab aggregator market, online travel agency platform market and the market for licensable smart mobile operating systems (Android). In the past, the CCI (using the existing competition legislation/tools) held Google in contravention of the competition laws for abusing its dominant position *inter alia* for giving prominent display and placement of commercial flight unit with link to Google's specialised search options/ services (Flight) as well as for imposing unfair terms in the negotiated search intermediation agreements upon the publishers

b) Interim measures

The Commission also has the power to seek interim measures where there is an urgent need for protective measures due to serious and irreparable harm to competition. The Commission recently imposed interim measures against Broadcom in connection with an investigation under Article 102 TFEU, ordering Broadcom to stop applying certain contract provisions that *prima facie* infringe EU competition law.[39] This decision has been appealed.

The ability to impose interim measures is a powerful tool, though it has been seldom used in practice. The French Competition Authority has called for the modification of the standard for imposing interim measures by the European Commission, for example, by using the criteria applicable under French law.[40] Indeed, the ECN+ Directive also favours developing the use of interim measures.[41]

The IBA Antitrust Committee suggests that the Commission could consider the extent to which the use of interim measures could be refined or adapted to address the enforcement gap perceived by the Commission.

c) Sector Inquiries

The Commission has the power to conduct sector inquiries pursuant to Regulation 1/2003, enabling it to better understand markets from the perspective of competition policy, and to understand if infringements of competition rules contribute to how a market operates. The Commission has a number of powers to gather evidence (including unannounced inspections), but it cannot impose remedies following a sector inquiry. In practice, however, sector inquiries have typically resulted in a number of individual infringement cases.

Sector inquiries have traditionally covered topics that presented complexity for antitrust enforcement and which present structural competition problems, including – most recently – the Consumer Internet of Things (ongoing), E-commerce, Pharmaceuticals, Financial Services, Energy, Local Loop, Leased Lines, Roaming and Media (3G). Sector inquiries have typically resulted in significant individual enforcement cases. The power to conduct sector inquiries remains an important tool available to the Commission. The IBA Antitrust Committee is, however, also aware that, in some cases, Sector inquiries have not led to the cessation of conduct that the Commission finds problematic, notwithstanding follow-on enforcement.[42]

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[39] Case A.40608 – *Broadcom*; see European Commission Press Release, "*Antitrust: Commission imposes interim measures on Broadcom in TV and modem chipset markets*" (16 October 2019), available here:
https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6109

[40] This is "*to prevent imminent damage in the event of serious and immediate harm to the interests of an economic sector, an enterprise or consumers or to the functioning of competition in the market*", pursuant to Article L. 464-1 §2 of the FCC.

[41] *See* Directive (EU) 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

[42] For example, in the Commission's 8th Report on the Monitoring of Patent Settlements (9 March 2018), which followed the Commission's Sector Inquiry into the Pharmaceuticals sector, the Commission noted that, "[a]*s with the former seven exercises, the results of the eighth monitoring exercise show that the Commission's announcement that it would continue scrutinizing B.II category settlements* [i.e. those

In explaining the need for an NCT, the Commission cited its inability to impose remedies following sector inquiries. Other regulators, notably including the UK Competition and Markets Authority and the South African Competition Commission, have this power in connection with market investigations, although most market studies result in agreed undertakings, voluntary changes or policy recommendations to the government. The procedures for UK CMA and South African market investigations also differ compared to the European Commission's sector inquiry processes, and include rights of defence that are not part of a Commission sector inquiry. With that said, the IBA Antitrust Committee is not aware of the Commission seeking to expand its powers in relation to sector inquiries, as this is not specifically contemplated in any NCT. It is submitted that market investigations can play a valuable role in articulating concerns that can be addressed through self-regulation or sector-specific rules.

On the other hand, other jurisdictions, notably Australia, have *declined* to seek the power to impose structural remedies when reviewing digital markets. The position of the ACCC is that market structure in these rapidly changing industries is best left to competitive forces. Ordered divestitures may have unintended consequences, including – among other things – reducing incentives for investment, reducing efficiencies of scale and scope and negatively impacting consumer outcomes.

In any case, the power to conduct sector inquiries is an important tool at the Commission's disposal, as evidenced by the fact that it is currently conducting an inquiry into the Internet of Things. Jurisdictions cited in Section 4.1 have also used the power to conduct sector inquiries (even without the power to impose remedies) to address issues relating to digitalisation.[43]

d) Communications, Guidelines and Enforcement Priorities

In addition to these tools, the Commission has, over time, issued communications and guidelines, laying out its interpretations of key issues and its enforcement priorities – for example, the Commission's Enforcement Priorities under Article 82 EC. While not enforceable, its communications and guidelines are influential, particularly when backed by the prospect of individual enforcement action grounded in Articles 101 and 102 TFEU.

The Commission could consider the extent to which updated interpretations on key issues such as dominance, collective dominance, certain categories of abuse, or the use of algorithms may help reduce a perceived enforcement gap arising from competition enforcement in digital industries. Other jurisdictions, such as Japan, have made notable use of guidelines, covering issues such as "abuse of a superior bargaining position", as well as revised merger guidelines.[44]

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which involve a value transfer from the originator to the generic company] *in the future has not hindered companies from settling their patent disputes*."

[43] *See e.g.*, DPI Final Report, *available at* https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf; Market Study on E-Commerce in India, https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf;

[44] *See e.g.* JFTC guidelines to clarify that the provision of "abuse of superior bargaining position", one type of unfair trade practices, can apply to digital platform's unjust acquisition of individual data from

e) Merger Control

Pursuant to the EU Merger Regulation, the Commission has the power to approve *ex ante* concentrations that fulfil financial thresholds and thus have a Community Dimension, and can prohibit transactions that significantly impede effective competition. The Commission has reviewed a number of transactions in digital and digitally-enabled industries, enabling it to expand its understanding of these industries and their structures and prevent transactions that threaten to harm competition.[45]

The Commission does not identify the EU Merger Regulation among its "baseline" in its IIA or accompanying Questionnaire. The IBA Antitrust Committee, however, submits that the EU Merger Regulation forms an important part of the Commission's competition toolbox as it enables the Commission to anticipate and prevent harm to competition that results from notifiable concentrations.

In the context of digital markets, some concern has been raised about multiple acquisitions by large players of small, start-up firms, or niche players that might not on the face of it offend concentration rules. Taken together and over time, such a strategy may create a market structure that is less competitive or innovative, or susceptible to tipping. The fact that such a situation might be obtained through acquisition rather than organic innovation could be seen as offensive to competition on the merits. Some commentators have observed that while the reality of digital platform markets (and the drive for efficiency) might mean less competition "in the market" at certain times, competition "for the market" (for instance if a new and innovative product is poised to disrupt) can still be protected with more pointed merger control. This could include blocking more ostensibly innocuous acquisitions that stunt potential competition.[46]

Vigorous enforcement and interpretation of merger control rules is a core element of the competition toolbox of the jurisdictions of several jurisdictions described in Section 4.1. In fact, this is an area where rules have been adapted, namely, seeking to change merger control thresholds to enable the review of below-threshold transactions in digital industries. The Commission has considered such amendments in the past, but has not advanced them.[47]

f) European Competition Network

The European Competition Network ("**ECN**") provides another tool for the Commission to coordinate and address novel competition issues, working collaboratively with National Competition Authorities ("**NCAs**") in cases where Articles 101 and 102 TFEU apply. The stated objective of the ECN is to build an effective legal framework to enforce EU competition law. To achieve this objective, among other things, ECN members inform each other of new cases

consumers.(December 2019). https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217_DP.htmlA Also in 2019, the JFTC announced revised merger control guidelines, intending to encouraging the reportability of below-threshold deals in digital markets, if they meet certain criteria. https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217.html

[45] To cite a few examples, *see* M.6281 – *Google/DoubleClick* (2008); *Microsoft/Skype* (2011); M.7217 – *Facebook/WhatsApp*; M.8124 – *Microsoft/LinkedIn* (2016); M.8788 – *Apple/Shazam* (2018).

[46] A word of caution: a regulator embarking on this strategy should also assess the extent to which the prospect of acquisition and further investment might in fact stimulate initial innovation.

[47] Cite Prior consultation.

and envisaged enforcement, coordinate investigations and assist with investigations, exchange evidence and discuss issues of common interest. [48]

The IBA Antitrust Committee is aware that the ECN has developed sector-specific expertise to discuss competition problems and promote a common approach and thus pool experience and identify best practices. The ECN has also worked collaboratively to address novel and complex issues in digital industries, notably with respect to the Hotel Booking cases which were brought by national competition authorities (NCAs) in a number of Member States. An ECN Working Group comprising 10 NCAs and the Commission was formed in 2015 to mitigate divergence in the resolution of these cases. The Working Group conducted a year-long study, monitoring and comparing the introduction of narrow most favoured nation clauses (MFNs) in a number of Member States, with the prohibition of MFNs in Germany, and published a report in 2017.[49] While this did not fully resolve the divergence in approach among the NCAs, it brought much-needed clarity and represented a significant contribution among European competition authorities to understand and clarify a complex matter in a digital industry.

Also in 2017, the ECN Directive was proposed, which would help empower NCAs and improve cooperation.[50] This has significant potential for addressing certain structural competition problems identified by the Commission in connection with this Consultation, particularly where certain NCAs may have tools that are not available to the Commission. This includes the ability to bring infringement cases based on the concept of economic dependence, or in cases involving significant market power that is less than dominance – which is possible in certain Member States (*e.g.* Germany and Austria). As the Dutch Competition Authority has recently noted with respect to the *ex ante* tool for platforms and markets, "*enforcement at the national level may be in line with subsidiarity principles. Some companies might after all be dominant only in one member state*."[51]

The IBA Antitrust Committee submits that the Commission could consider expanded cooperation with the NCAs to address problems that result from structural competition concerns, both at the EEA and national level. Given the wider variety of tools available and the heterogeneous nature of digital companies acting across the EEA, this may provide the Commission with yet another tool in its existing toolbox to address the problems identified in this Consultation.

g) Other tools that are not presently part of the Commission's toolbox

As stated, the IBA Antitrust Committee considers that the Commission's existing competition

[48] *See* Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, *available at* https://ec.europa.eu/competition/ecn/joint_statement_en.pdf.
[49] Report on the Monitoring Exercise Carried Out in the Online Hotel booking Sector by EU Competition Authorities in 2016 (6 April 2017), *available at* https://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf.
[50] *See* Directive (EU) 2019/1 to empower the competition authorities of Member States to be more effective enforcers and to ensure the proper functioning on the internal market was published in the Official Journal of the European Union on 14 January 2019.
[51] *See* ACM: Extension of enforcement toolkit to increase effectiveness in dealing with competition problems in the digital economy, p. 2. https://www.acm.nl/sites/default/files/documents/2019-08/ex-ante-tool.pdf

toolbox can effectively deal with the challenges raised by digitalisation and that there is not an enforcement gap warranting an NCT. To the contrary, the IBA Antitrust Committee believes that – as with many other jurisdictions – the existing competition laws are well suited for their objective, although certain refinements and adaptations could help them work better.

Beyond this, we note also that certain other jurisdictions have used competition tools that go beyond the Commission's competition toolbox, an example of which is the concept of codes of conduct. If the Commission is still concerned about the sufficiency of its existing competition toolbox, it may be that a code of conduct targeting digital platforms is an effective additional tool. This is especially in light of comments by Senior European Commission economist Pierre Régibeau (in a personal, not official, capacity) that he viewed the likelihood of an across-industry New Antitrust Tool as very small. In his view, the additional powers would be likelier to apply to the digital platforms.[52] If that is the case, then a code of conduct that addresses the transparency and conduct concerns raised by the European Commission may be more appropriate. To be clear, the IBA Antitrust Committee is not recommending that the Commission add codes of conduct to its toolbox. Rather, to the extent that the Commission considers its toolkit to be insufficient, an additional tool like a code of conduct could be a possible alternative to the NCT.

4.3. Conclusions

In sum, the IBA Antitrust Committee is of the view that the existing competition toolbox is sufficient to address the problems cited by the Commission. The existing competition rules are flexible and adaptable, and based on more than 60 years of precedent that is of considerable benefit when applying these rules to evolving market circumstances. Indeed, taking into account innovations in other key jurisdictions, the IBA Antitrust Committee considers that the existing competition toolbox can be refined and adapted. Such adaptations and refinements could, however, ensure that the Commission's robust competition law toolbox can be used more deftly, with greater speed and effect.

5. Evaluation of Policy Options

As explained above, while the IBA Antitrust Committee recognises the seriousness of the issues identified by the Commission, it queries whether this represents a significant gap in competition law enforcement. The Commission should also consider unintended consequences, such as the chilling of competition, reduction of incentives for companies to invest in new technologies and the making of type 1 errors and over-enforcement. This can negatively affect consumer outcomes, particularly in industries where innovation (rather than price) is a key parameter of competition. While the risks associated with concentrations of market power are clear, so too is the risk of a concentration of regulatory power to corporate and natural citizens alike. It is submitted that the current enforcement tools and the attendant, well established due process draws an appropriate balance between meaningful regulation and the rights of firms to strive for ascendancy through dynamic rivalry.

[52] Lewis Crofts and Michael Acton, 'Proposed EU competition powers could be limited to digital, Régibeau says', *Mlex Global Antitrust: Insight* (7 July 2020) https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1205782&siteid=190&rdir=1.

Nevertheless, the IBA Antitrust Committee recognises that the Commission is of the view that a new antitrust tool may be necessary, and the IBA Antitrust Committee is prepared to contribute to the debate as to what tools the Commission may need and safeguards associated with them. In this respect, the IBA Antitrust Committee believes that any solution should not limit or undermine traditional antitrust tools, or overlap with other applicable regulations

In this spirit, the IBA Antitrust Committee has first provided general observations about the set-up of the NCT (applicable to all four options), followed by a brief assessment of each option.

5.1. Initial Observations

a) The NCT must maintain a clear distinction between competition and regulatory law

The NCT options set out by the Commission each empower the Commission to address structural competition problems that have not (yet) resulted in an infringement of the competition laws. This implies a prescriptive, *ex ante* role for the Commission, enabling it to intervene against dominant companies that have not committed an abuse (Options 1 and 2) or against any company to remedy structural competition problems and suggest remedial action (Options 3 and 4). The NCT would apply to all sectors of the economy (Options 1 and 3) or to a more limited set of sectors that would include digital and digitally-enabled industries (Options 2 and 4).

The NCT concept would thus provide the Commission with new powers to intervene in markets across all, or at least a significant portion, of the economy and potentially impose remedies that shape these markets. This presents the risk that the Commission may transform from an enforcement body into an industry regulator.[53] This raises clear risks of regulatory overlap, confusion and uncertainty, and it also threatens to fundamentally transform the role and objectives EU competition law. At an extreme, such a transformation could empower the Commission to decide how a market should be structured in lieu of market forces, choosing winners and losers. At a minimum, this role will require a significant amount of Commission resources, to the detriment of actual enforcement cases.

In addition to the NCT being unnecessary (as discussed in Section 4 and 5), the IBA Antitrust Committee believes that the NCT presents serious risks that innovation will be chilled, and may place in jeopardy core legal principles such as legal certainty and proportionality.

b) An NCT must have a clear legal basis

Furthermore, the IBA Antitrust Committee notes the importance of a firm legal basis for any policy proposal selected by the Commission, including the NCT. The Commission has cited

[53] See Question 40, which asks about the need for new competition rules *in addition to* the current competition rules and taking into account the Digital Services Act package.

Articles 103 and 114 TFEU as the legal basis for the NCT, but precisely how these Articles support the four policy options cited by the Commission is not entirely clear.

- Article 114 TFEU empowers legislation that harmonises national law, regarding the establishment and functioning of the internal market, and utilises the ordinary legislative procedure. The IBA Antitrust Committee is aware that Article 114 can serve as a legal basis to prevent the obstacles that would lead to divergence in national law, if the emergence of such obstacles is likely and the measure is designed to prevent them.[54] Here, however, the Commission notes that many market players have pan-European business models and that digital/digitally-enabled products are cross-border in nature, and stating that action at the EU level is necessary to avoid divergence in national law. [55] The IBA Antitrust Committee is uncertain that divergence in national law is inevitable, and why existing tools – such as cooperation through the ECN – do not reduce the risks of divergence, and justify an entirely new regulatory regime necessary.

- Article 103 TFEU enables the adoption of legislation to give effect to the principles set out in Articles 101 and 102 TFEU, ensure compliance with their prohibitions or define the scope of the provisions. Articles 101 and 102 TFEU prohibit conduct that is harmful to competition and prevents, restricts or distorts competition in the Common Market. The NCT shares the baseline principle that it seeks to prevent, restrict or distort competition in the Common Market. However, the NCT seeks to do so by empowering the Commission to pre-emptively intervene in market structures, even in the absence of infringing conduct. Outside of the context of mergers, [56] the IBA Antitrust Committee is not aware that Articles 101 or 102 TFEU have been validated as prescriptive tools to – for example – impact market structure or the practices of dominant firms that have not engaged in abuse. Indeed, empowering the Commission to impose binding remedies on firms in the absence of an infringement, is a significant expansion of the antitrust laws.

In sum, the NCT, by its nature, envisages new powers of intervention for the Commission that are not anticipated by Articles 101 and 102 TFEU. In this respect, there is some conceptual similarity to the EU Merger Regulation, as the original EU Merger Regulation, Regulation (EEC) 4064/89, also provided the Commission with new powers of intervention. The original EU Merger Regulation was based on Article 235 (now Article 352 TFEU) and Article 87 (now

[54] Case C-547/14 – *Philip Morris*, para. 62 (4 May 2016) (*citing British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 61; *Arnold André*, C-434/02, EU:C:2004:800, paragraph 31; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 30; *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 38; and *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraph 33)).

[55] *See* IIA, p. 2 ("However, even if in some cases relevant markets are defined as national under EU competition law, intervention at national level would not effectively address the cross-border dimension of competition related issues. This would likely lead to diverging rules, thus creating legal uncertainty for companies operating in the internal market, whether at national or on a pan-European basis.")

[56] Indeed, when the EU Merger Regulation was first promulgated, it cited then-Article 87 (now Article 103 TFEU) as a legal basis, as the Courts had by then recognised applicability of Articles 101 and 102 TFEU to mergers**.** *See* Case 6/72 *Europemballage Corp. and Continental Can v Commission* [1973] ECR 215; Joined Cases 142 and 156/84 BAT and Reynolds v Commission *[1987] ECR 4487.*

Article 103 TFEU), which required unanimity in the legislative process.[57] The most recent EU Merger Regulation, Regulation (EC) No 139/2004 on the control of concentrations between undertakings has the same legal basis (citing Article 83 (now Article 107 TFEU) and Article 308 (now Article 352 TFEU).[58] As Article 352 TFEU empowers the Commission to propose additional powers to obtain objectives defined in the Treaty, it is not clear why this would not be a more natural legal basis for the NCT. For completeness, the IBA Antitrust Committee notes that the recent "ECN Plus" Directive was based on Articles 103 and Article 114, but here the fit is clearer as that directive was expressly intended to resolve disparities in national law that compromise enforcement under Articles 101 and 102 TFEU.[59]

To help ensure legal certainty, the IBA Antitrust Committee suggests that the Commission provide greater clarity as to how Articles 114 and 103 TFEU serve as a legal basis for the policy options set out in the IIA.

c) The distinction between the "horizontal" and "limited" application may be difficult to apply in practice

The policy options identified by the Commission include two "dominance-based" options (Options 1-2), namely a "horizontal" option which would apply to all sectors of the economy and a "limited" option which would apply to "digital and digitally enabled" markets. Similarly, the Commission has identified two "market structure-based" competition options, including a "horizontal" option that would apply to all sectors of the economy and a "limited" option that applies to digital and digitally enabled markets.

The horizontal versions of policy options would at least theoretically provide the Commission with the power to intervene in any sector in which it identifies structural competition problems to prevent harm to competition. However, the "limited" options raise significant questions as to precisely which "digital and digitally-enabled" industries will fall within their scope. The Competition Report does not use the term "digitally-enabled" to describe industries, but it does identify a number of industries impacted by digitalisation, including healthcare, finance, mobility, telecommunications and education among others. The Commission itself has also mentioned media, pharma, farming and manufacturing as impacted by digitalisation.

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[57] *See Regulation (EE*C) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ("*Whereas this Regulation should therefore be based not only on Article 87 but, principally, on Article 235 of the Treaty, under which the Community may give itself additional powers of action necessary for the attainment of its objectives, and also with regard to concentrations on the markets for agricultural products listed in Annex II to the Treaty*.")

[58] See Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, para. 7 ("Articles 81 and 82, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty. This Regulation should therefore be based not only on Article 83 but, principally, on Article 308 of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, and also powers of action with regard to concentrations on the markets for agricultural products listed in Annex I to the Treaty.")

[59] *See* Directive (EU) 2019/1 of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, Para. 5 ("*National law prevents many NCAs from having the necessary guarantees of independence, resources, and enforcement and fining powers to be able to enforce Union competition rules effectively. This undermines their ability to effectively apply Articles 101 and 102 TFEU and to apply national competition law in parallel to Articles 101 and 102 TFEU*.")

Digitalisation has impacted a wide range of diverse industries, and the speed of disruption is unlikely to slow.

These dynamics highlight two difficulties associated with the "limited" options: (i) defining the scope; and (ii) whether, as a matter of principle, competition rules should encompass industry-specific regulation.

- **Scope:** With regard to defining its scope, the concept of "digitally-enabled" is very broad (alongside digital industries themselves) and subject to constant change given the inherently innovative, disruptive and dynamic nature of digitalization. The Commission notes the need for careful definition, and the IBA Antitrust Committee shares this concern.[60] Defining the limited reach could lead to either a rigid category that does not keep pace with innovation and disruption to increasingly diverse industries, *or* to subjective criteria that result in uncertainty whether an industry is, or is not, subject to the new tool. Moreover, over time, given the speed of innovation and digitalization, the difference between a horizontal and limited tool is likely to shrink. Any legislation formalizing Option 2 or 4 would need to be sufficiently flexible to cover the dynamism of digital and digitally-enabled industries, while maintaining sufficient clarity to avoid legal uncertainty.

- **Industry regulation:** Assuming that the scope could be defined, the "limited" tool set out in Option 2 and 4 also raises a fundamental question as to whether the competition rules should be recast as a tool to prevent harm in specific industries – a role they have never served. In principle, the IBA Antitrust Committee believes that traditional antitrust tools should not be used as industry regulation and that the line between antitrust tools and industry regulation should not be blurred as the purpose and objectives differ. Indeed, sectors that the Commission appears to consider digitally enabled, such as finance and healthcare, are already highly regulated. If the Commission were to pursue Option 2 and 4, it is critical important to ensure that the legislation does not overlap, create ambiguity or conflict with existing industry regulation.

d) All four NCT policy options empower the Commission to impose remedies that are characteristic of infringement cases (Article 101 and 102 TFEU) – and could therefore create a risk that the Commission could circumvent traditional competition rules through preventive market regulation

Options 1-4 would all empower the Commission to impose behavioural or structural remedies to resolve structural competition problems. In practice, this means that the Commission would be able to impose legally-binding orders on companies to change their commercial conduct, or even to divest part(s) of their respective businesses. Options 1-2 would limit this power to dominant companies, while Options 3-4 contain no such limitation.

The Commission makes clear that it does not envision the creation of a new infringement of competition law, and that no fines would ensue. In effect, the NCT is a "no-fault" system that enables the Commission to "remedy" dominance without abuse, or impose remedies on any

[60] *See* IIA, p. 4.

company acting in a market which the Commission considers have structural competition problems.

However, many enforcement cases brought under Articles 101 and 102 TFEU ultimately include behavioural and/or structural remedies (even without fines). This makes the distinction in outcomes between Article 101 and 102 TFEU enforcement cases and anticipated outcomes of the NCT less clear. The distinction is even less clear when considering the prevalence of so-called "Article 9" decisions to resolve cases under Articles 101 and/or 102 TFEU, where parties offer binding commitments and no infringement decision issues. Moreover, it can be argued whether the ability to impose remedies that fundamentally change a company's structure and its ability to operate would be an equal or greater deterrent than the imposition of a high fine in an infringement case. The IBA Antitrust Committee suggests that the Commission clarify how the NCT would, in practice, differ from enforcement cases under Articles 101 and 102 TFEU.

Since both the NCT and enforcement under Articles 101 and 102 TFEU have similar outcomes, this further demonstrates why the NCT must include procedural safeguards, rights of defence and rights of judicial review that are (at least) equal to those available under Articles 101 and 102 TFEU. If such rights do not apply, and the Commission can use the NCT to obtain rights similar to Articles 101 and 102 TFEU, then there is a risk that the Commission would simply use the NCT in lieu of traditional antitrust enforcement – and companies may be less able to defend themselves. It is critically important that the NCT therefore have strong procedural safeguards and ensure rights of defence and judicial review if the NCT is to complement traditional antitrust enforcement and not replace it.

e) None of the NCT policy options focus on timely resolution of competition problems

According to the IIA, the Commission's existing competition tools cannot effectively address structural competition problems in dynamic, digital and digitally-enabled industries. It is surprising that the IIA does not refer to the need for timely resolutions of structural competition problems, and only one question in the Questionnaire asks about whether the NCT should have binding legal deadlines.[61] Other jurisdictions have stressed the need for prompt resolution of competition problems, while respecting procedural safeguards. For instance, the French Competition Authority has suggested amending the criteria for the Commission to impose interim measures, and that companies may be able to offer provisional measures during the course of a proceeding. In India, the CCI likewise stressed the need for timely resolution of cases involving digital markets.

The IBA Antitrust Committee submits that none of four options for an NCT are likely to result in swift outcomes. First, the Commission appears unsure if binding deadlines should apply to an NCT. Second, in dismissing the baseline approach, the Commission does not appear to consider the expanded use of tools like interim measures to form part of an NCT solution. Given that options 1-2 would still require the Commission to establish that a company is dominant to justify a preventive intervention, and that options 3-4 would presumably need to establish a basis for intervention based on market structure, these procedures may be lengthy.

[61] *See* Questionnaire, Question 34-34.1.

A lengthy process seems inconsistent with the notion that the Commission requires a tool to let it pre-emptively intervene to eliminate structural competition problems before they lead to actual harm to competition.

f) Behavioural and structural remedies (divestment), in particular, may not be appropriate or effective as a tool to prevent harm to competition

Options 1-4 are, to some extent, preventative tools in that they allow intervention before actual harm to competition occurs. The IBA Antitrust Committee is also concerned that the imposition of legally binding, preventative remedies could have significant and unintended adverse consequences, raising questions of proportionality and risking a chilling effect on the competitive behaviour of innovative companies. The IBA Antitrust Committee recognises that competition problems in digital industries have proven difficult to address, but the power to impose behavioural and structural remedies could risk replacing market structure shaped by dynamic market forces with the Commission's judgement as to what market structure should be, and may be neither advisable nor effective if attempted.

To highlight these risks, the IBA Antitrust Committee notes the experience of the ACCC, which recently concluded that the power to impose remedies is not appropriate in similar circumstances. Specifically, the ACCC considered that *"there are significant risks accompanying divestiture…at this point in time, it is not appropriate to recommend".*[62] The ACCC's current stance on divestiture includes the following views:

- Market structure is best left to competitive forces. Divestitures may have unintended consequences: reducing incentives for investment; reducing efficiencies of scale/scope; and negatively impacting consumer outcomes.[63]
- It is difficult to predict the future competitive effects of acquisitions, especially in digital contexts where there are only nascent competitors or competitors in related markets.[64]
- Regulatory solutions are not as dynamic as market forces.[65]
- Digital markets tend to be characterised by significant network effects, brand effects and economies of scale, all of which act as barriers to entry and expansion. Divestiture does not address these barriers. It may not be a long-term solution.[66]
- There is no way to quarantine assets or businesses in digital markets.[67]

Even if the Commission were to have the power to impose structural remedies on a preventative basis and in the absence of actual harm to competition or anticompetitive conduct, it is not clear that such a power would *prevent* harm to competition. The power to

[62] *See* ACCC, DPI Final Report, p 116.
[63] *See* ACCC, DPI Final Report, pp 116-17.
[64] See also section 3 of Rod Sims' Address to the International Competition Network Merger Workshop 2020 (27 February 2020, Melbourne) https://www.accc.gov.au/speech/address-to-the-international-competition-network-merger-workshop-2020.
[65] ACCC, DPI Final Report, pp 116-17.
[66] Ibid.

impose remedies outside of individual enforcement cases exists in some jurisdictions, for example in the UK. The CMA is empowered to impose remedies following market investigations; however, while faster than traditional antitrust enforcement, they are still procedures that are roughly 18 months in duration and require the CMA to devote resources to monitoring. This example suggests that the proposed preventative imposition of structural; remedies may not prove to be a nimble or flexible tool that can be used to quickly address potential harm to competition in digital markets.

5.2. Assessment of Individual NCT Policy Options

In addition to the general observations that apply to all four NCT policy options, the IBA Antitrust Committee offers the following additional specific comments on each of the four options:

a) Option 1 & 2 – the "dominance-based" competition tools

As noted above Options 1 and 2 are "dominance-based" competition tools, with either a "horizontal" or "limited" scope. Both options are essentially preventative in nature, enabling the Commission to intervene against unilateral conduct of dominant companies, even if that conduct is not abusive. Conceptually, these tools would enable the Commission to take action before an abuse – and the resulting harm – actually arises. While the Commission would not be able to find an infringement or impose a fine, the Commission would be able to impose behavioural or structural remedies on the dominant firm.

The IBA Antitrust Committee appreciates that Article 102 TFEU procedures, in practice, are long and burdensome as it required a finding of dominance – which is itself a difficult process – followed by a finding of abuse. However, the IBA Antitrust Committee believes that care should be taken before empowering intervention against companies that are merely dominant but have not engaged in abusive conduct. Indeed, even jurisdictions that enable intervention against unilateral conduct by non-dominant companies – such as Australia, Austria, France, Germany and Japan – still typically require evidence of actual anticompetitive conduct. (In addition, in France, the FCA is considering expanding the concept of dominance.) However, with one exception, there must be a finding that a company engaged in abusive conduct. Being dominant, or having a degree of market power, alone is not enough. The one exception can be found in Japan, where it is technically possible that intervention can take place on the basis of dominance alone under a theory of "monopolistic circumstances" – even if no abuse has taken place.[68] However, this provision is difficult to apply and has never been used i

This speaks to the difficulty of taking action against dominance on a preventative basis, before an abuse takes place. In addition and as already set out above, the IBA Antitrust Committee is concerned that Options 1 and 2 threaten to undermine Article 102 TFEU and be used to circumvent Article 102 TFEU, particularly if fewer procedural safeguards apply.[69] This raises

[68] *See* AMA, Section 8-4.

[69] Also, given that the Commission is considering imposing procedural penalties as part of the investigative process, it is apparent that infringements *may* be found, albeit for failing to cooperate with the investigation rather than the outcome itself. (*See* Questionnaire, Question 33.2).

serious questions about legal certainty, predictability, procedural fairness and rights of defence.

If the Commission nevertheless believes that it requires an NCT with the features of Options 1 or 2 the IBA Antitrust Committee respectfully suggests that it align with existing competition law and take into account the issues identified in Section 5.1, above. It must also ensure procedural safeguards and rights of defence that are at least as strong as those which apply in Article 102 TFEU infringement cases.

b) Options 3 & 4

The Options for a market-structure-based competition tool are broader than the dominance-options discussed above, and would have either a horizontal reach (Option 3) or a limited scope, applying to digital or digitally-enabled markets (Option 4). Of all of the options, the Commission appears to prefer Option 3, as it notes that "*Option 3 is expected to safeguard long-term consumer interest and welfare*" and that while the other options are "*geared toward the same objective*, *their likely social impact is expected to be of a lesser degree*."[70]

At their core, Options 3 and 4 would enable the Commission to intervene and impose behavioural or structural remedies on theoretically any individual company "*when a structural risk for competition or a structural lack of competition prevents the internal market from functioning properly*". In other words, it would not require a finding of dominance, abuse or a restrictive agreement/concerted conduct among undertakings. It would instead appear to rely on the Commission's *ex-ante* judgement that observed conduct (or not even conduct, but mere circumstance) is preventing the internal market from functioning properly. In effect, the Commission would become an industry regulator for digital (or digitally enabled) markets, or potentially for all sectors of the economy. The IBA Antitrust Committee respectfully submits that the Commission should not transform into an industry regulator with the power to shape markets. The IBA Antitrust Committee is concerned that this presents significant risks to chill innovation, and could lead to serious questions of proportionality, legal uncertainty and the risk of Type-1 errors or over-enforcement – among other risks. In addition, an NCT following Options 3 or 4 would require significant resources from the Commission for the purpose of investigating and monitoring the remedies it imposed. This would detract from the resources that the Commission would otherwise devote to enforcement.

In addition, as explained above, Options 3 and 4 also risk potentially undermining enforcement under Articles 101 and 102 TFEU, as these Options could provide the Commission with a no-fault alternative to complex infringement cases, yet obtain similar results.

If the Commission nevertheless believes that it requires an NCT with the features of Options 3 or 4, the IBA Antitrust Committee respectfully suggests that it must take into account the issues identified in Section 5.1, above. It must also ensure procedural safeguards and rights

[70] *See* IIA, p. 4.

of defence that are at least as strong as those which apply in Article 101 and 102 TFEU infringement cases, as discussed below.

6. Procedural Safeguards and Fairness are Critical

Each of the four NCT proposals under consideration would greatly expand the Commission's power to regulate markets, whether applied to the entire economy or only to digital and digitally-enabled markets. Yet, the Commission has not outlined whether procedural safeguards would apply under any of the four NCT concepts under consideration, and has not indicated how rights of defence would apply or whether companies would have recourse to judicial review.

Indeed, certain questions in Section E of accompanying Questionnaire inquire about whether procedural safeguards are even needed, asking whether the NCT "*should be subject to adequate procedural safeguards, including judicial review*".[71] A follow-up question asks "*which further procedural safeguards you would consider necessary*."[72] In addition to questioning whether procedural safeguards should play a role in the NCT, the Commission asks multiple questions about the types of investigative powers it should have, including the power to impose penalties.[73] There is little detail about procedure; however, the Commission inquires whether binding deadlines should apply and whether the NCT should include the possibility of interim measures.[74] The Commission also asks whether the NCT should allow voluntary commitments "*by the companies operating in the markets concerned to address identified and demonstrated structural competition problems*."[75] Finally, the Commission asks whether market testing should form part of NCT procedure, both in the identification of a "*structural competition problem before the final decision*" and "*appropriateness and proportionality of the envisaged remedies*."

The IBA Antitrust Committee appreciates that consideration of an NCT is at an early, conceptual stage. However, the IBA Antitrust Committee strongly believes that the issue of whether procedural safeguards should apply is not up for debate. The policy options identified by the Commission, if pursued, may not technically result in an infringement, but they would empower the Commission to impose behavioural and/or structural remedies – including divestment – on individual companies, on a preventative [even speculative] basis. In some respects, the outcome of an NCT procedure would not differ significantly from an infringement procedure under Article 101 or 102 TFEU, particularly in cases resolved via commitments under Article 9 of Regulation 1/2003.

The IBA Antitrust Committee urges the Commission to clarify key questions of procedural fairness (including the criteria/trigger for commencing an investigation), proportionality, regulatory certainty, rights of defence and the availability of judicial review. The IBA Antitrust Committee believes that companies that may be subject to the NCT (which at least theoretically could include all companies under Option 3) must be treated fairly and be able to defend themselves, and to challenge the Commission's conclusions before the Courts. In sum,

[71] *See* Questionnaire, at Question 39.
[72] *See* Questionnaire, at Question 39.2.
[73] *See* Questionnaire, Question 33-33.3.
[74] *See* Questionnaire, Questions 34-35.1.
[75] *See* Questionnaire, Question 36.

they must have at least the same rights that are available to companies subject to Articles 101 and 102 TFEU. Absent strong procedural safeguards, there is a real risk that the NCT could be used to circumvent traditional antitrust tools (Article 101 and 102 TFEU) as it would simply be easier for the Commission to impose remedies that fundamentally change the ways in which companies act.

Moreover, the IBA Antitrust Committee understands that the NCT proposals are intended to empower the Commission to intervene in scenarios presenting structural competition problems, and to impose behavioural and/or structural remedies to prevent harm to competition from arising – although no infringement would be found. This appears to imply that the NCT would enable the Commission to act quickly to resolve structural competition problems. It is critical that procedural rights and the rights of defence not be sacrificed for the purpose of a fast procedure. This is essential to ensure regulatory certainty following the expansion of the Commission's powers, and to ensure that the procedures are predictable. To the extent that this limits the ability of the NCT to act *ex ante* to prevent competition harm, it may be a reason to reconsider the need for the NCT, given the other policy options available (See Sections 4 and 5, above).

Meaningful procedural safeguards in competition law enforcement proceedings are essential to ensuring consistent, predictable, and fair-decision making in competition law investigations. Thus, if the Commission proceeds with an NCT option, the IBA Antitrust Committee encourages the Commission to consider the following types of safeguards:

- **Predictability and regulatory certainty:** In terms of predictability and regulatory certainty, the new antitrust tools should include clear definitions as to the scope and the reach of the tool. As mentioned, this is in particular important since the options for consideration would appear to fundamentally redefine the notion of Article 102 TFEU and will involve new concepts. The introduction of new concepts also means there might be a risk of lengthy legal procedures that the introduction of new concepts will involve.

- **Investigation criteria:** The criteria for commencing an investigation must be clarified. In other words, how will the Commission identify structural competition problems? The IBA Antitrust Committee encourages the Commission to establish clear and objective criteria. To the extent possible, the NCT could stay close to the established terminology and procedure. It must also align with case-law. In addition, as the NCT would be entirely new, it would be helpful for the Commission to consider ways it could be clarified in the Commission's guidance and notices – *e.g.*, the Commission's (updated) guidelines on market definition, clarifying how e.g. the role of data, consumer behavior and network effects should be taken into account as desirable. This will also help develop a uniform approach with the NCAs.[76]

- **Rights of defence:** The Commission has suggested that market testing should be part of its procedure.[77] However, it is critical that companies investigated under an NCT

[76] The risk of lengthy procedures, the fact that updated guidelines might be desirable are included in the position of the Dutch Consumer and Markets Authority on the potential new antitrust tool, see https://www.acm.nl/sites/default/files/documents/2019-08/ex-ante-tool.pdf

[77] *See* Questionnaire, Questions 37-38.

should have the ability to defend themselves – at least to the extent available to companies investigated under Articles 101 and 102 TFEU. Indeed, for the reasons stated above, rights of defence must be a core element of the NCT, at least to the same extent as available to companies investigated under Articles 101 and 102 TFEU. Rights of defence should at least include the ability of companies to understand and respond to the Commission's concerns, rebut presumptions on the legality of imposing certain remedies, examine evidence in the Commission's file, and the right to judicial review on the merits of the case. This includes the ability to challenge interim measures.

- **Institutional make-up:** In terms of institutional make-up, the IBA Antitrust Committee encourages the Commission to consider how an NCT would be enforced. The powers envisioned by the Commission are significant, as the Commission will have the power to shape wide swaths of the economy – if not all market sectors. As behavioural and structural remedies are considered, this also implies that the Commission will need to devote significant resources to monitoring. In the IBA Antitrust Committee's view, it is important to ensure that resources required for preventative regulation of structural competition problems not drain resources from investigating and enforcing actual infringements of EU competition law. The Commission should also consider the role, if any, of National Competition Authorities to enforce or coordinate in the enforcement of the NCT through the ECN.

- **Potential regulatory overlap:** Finally, the IBA Antitrust Committee encourages the Commission to ensure that there are no regulatory overlaps resulting from the creation of an NCT. New legislation has been enacted that applies to elements of competition in the digital economy, and the Commission is currently consulting on the possibility of a new regulatory *ex ante* tool applicable to online platforms as part of the Digital Services Act package. As explained above, the IBA Antitrust Committee encourages the Commission first to consider the impact of newly-implemented legislation, as well as the results on the need for new targeted industry regulation before proceeding with the NCT. However, if the Commission proceeds at this time with an NCT policy option, it should ensure that it will not result in confusion or overlap with industry regulation.[78]

As set forth above, the NCT options considered by the Commission raise a number of difficult questions of procedural fairness, rights of defence, proportionality, legal and regulatory certainty and other key issues. The IBA Antitrust Committee respectfully suggests that the Commission consider the ways in which the NCT – if needed – could ensure procedural fairness and rights of defence. While not central to the current debate, the IBA Antitrust Committee suggests that the Commission could use this reflection process to consider ways in which rights of defence could be strengthened across its procedures under competition law.

7. Conclusions

The IBA Antitrust Committee acknowledges that the digitalisation of the economy has led to characteristics in certain markets that could create risks for competition. The IBA Antitrust

[78] *See e.g.* Questionnaire, Question 40 (on the need for an NCT at this time); Question 29 (ensuring a "smooth transition with existing sector specific legislation").

Committee, however, agrees with the Commission's Competition Report that these problems are cross-disciplinary, and therefore are not necessarily best addressed by competition law. Rather, a multi-disciplinary approach is required, as the experience of several other jurisdictions shows.

To the extent that problems resulting from digitalisation actually harm competition, the IBA Antitrust Committee believes that the Commission's existing competition toolbox is robust, flexible and can be adapted or refined if needed. In sum, the Commission believes that the baseline scenario is an appropriate solution. This conclusion is reinforced by the parallel evolution of non-competition laws that have the possibility of impacting the concerns identified by the Commission in digital industries. This includes, for example, non-competition rules, which form part of the Digital Services Act package (and those currently under consultation). In other words, the IBA Antitrust Committee believes that an NCT is not necessary, and that consideration of NCT policy options is premature given the current robust competition rules and evolution of non-competition rules that impact digital industries.

If the Commission nevertheless considers that an NCT is needed, the IBA Antitrust Committee believes that there are several points that must be considered to ensure that core legal principles are respected and that an NCT does not risk undermining or *de facto* replacing Articles 101 and/or 102 TFEU. The IBA Antitrust Committee has serious concerns that an NCT could transform the Commission from a competition enforcement agency into an industry regulator. Moreover, the IBA Antitrust Committee has serious concerns that procedural safeguards, rights of defence and rights to judicial review must be as strong as in infringement cases under Articles 101 and 102 TFEU.