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European Commission

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Ministry of Economic Affairs and Employment of Finland's (MEAE) preliminary comments on the European Commission's Inception Impact Assessment (IIA) regarding the New Competition Tool (NCT) initiative

Introduction

The Commission's initiative is one of the measures aimed at making sure that competition policy and rules are fit for the modern economy. The initiative is meant to address gaps in the current EU rules identified on the basis of the Commission's experience with enforcing the EU competition rules in digital and other markets as well as the worldwide reflection process about the need for changes to the current competition rules to allow for enforcement action preserving the competitiveness of markets. The NCT would be without prejudice to existing sector-specific regulation and it would also be complementary to the Commission's new initiative on platform-specific *ex ante* regulation.

According to the IIA, the enforcement experience of the Commission and national competition authorities as well as the reflection process on the fitness of the existing competition rules have helped identifying certain structural competition problems that the existing competition rules cannot address either at all or not in the most effective manner. Structural competition problems include e.g. monopolisation strategies by non-dominant companies with market power and parallel leveraging strategies by dominant companies into multiple adjacent markets.

MEAE welcomes the Commission's initiative to explore the need for a new competition tool and would like to highlight the following points.

Characteristics of platform markets

On a general level MEAE acknowledges that certain market characteristics typical to digital and platform markets could lead to competition problems that cannot be solved with current rules. For example issues related to the possibility of multi-homing, data ownership and market entry as well as pricing algorithms could require new type of regulation.

The IIA mentions certain characteristics that are typical for certain markets. These include inter alia:

- network effects;
- economies of scale and scope;
- lack of multi-homing;
- lock-in and market tipping

The aforementioned characteristics are especially typical for platform markets. These characteristics can increase the possibility for gatekeeper platforms to emerge, which could compromise the proper functioning of competition on the markets in question. According to the IIA, such problems could be avoided by competition authorities' early intervention.

Adopting new regulation might not be an effective way to address issues rising from market characteristics that are especially typical for platform markets. For example, it is possible that economies of scale and network effects increase the level of concentration on markets regardless of regulation. It should also be noted that on several platform markets the benefits relating to economies of scale are a consequence from the behavior on the demand side of the markets rather than the supply side. This can make it difficult to reach the desired results of new regulation. It is further worth noticing that several market characteristics cannot be generally classified as harmful. For example, it is possible that strong network effects increase consumer benefit and therefore are not seen as harmful from the competition perspective.

It is nevertheless true that concentrated market structure is usually harmful to competition. The harmful effects to competition caused by concentrated market structure might be mitigated by increasing the availability of multi-homing. In the case of platform markets granting new competitors access to vital data is also a possible way to advance the proper functioning of competition. This would lower the barriers of market entry and make it easier to challenge a gatekeeper platform with new innovations.

Policy options presented in the IIA

The IIA presents four policy options. All of the presented options would give the Commission the power to impose both behavioral and structural remedies without requiring a prior finding of any actual infringement. Especially structural remedies can have very far-reaching and serious consequences for the undertaking they are imposed on. It should be carefully assessed whether there is an actual need for such far-reaching powers or if the issues could be tackled with less invasive measures. It would be useful to have a more detailed proportionality assessment of the extent and nature of the problems that cannot be solved with the existing rules and the legislative means to solve the problem.

The IIA does not clarify what would be the burden of proof for the Commission, i.e. what kind of evidence the Commission would have to have about a structural competition problem in order to impose remedies. During the further preparation of the initiative sufficient emphasis should be placed to ensure legal certainty and foreseeability of the NCT. The concept of a structural competition problem is somewhat open for interpretation at this time and should be clarified during the further preparation of the initiative.

It should also be noted that there already are several types of competition regulation (Articles 101 and 102 TFEU, sectoral regulations and national competition legislations). In the further preparation of the initiative it would therefore be important to clarify the relationship between the proposed NCT and existing competition regulation in order to avoid fragmenting the regulatory framework. The relationship between the NCT initiative and possible new *ex ante* regulation of platforms should also be further clarified to avoid overlapping regulations. Adopting new regulation might also lead to increased administrative burden, especially if the NCT's scope is not clearly defined in advance but would be decided on case-by-case basis.

MEAE is highly interested to have further discussions about the NCT initiative with the Commission and other Member States. MEAE will also deliver more detailed comments to the Commission in the context of the public consultation.