



European Commission Consultation on a New Competition Tool

Baker McKenzie Response

Baker McKenzie ("BM") welcomes the opportunity to comment on the European Commission's Consultation on a New Competition Tool ("NCT"). Our comments are based on the experience of lawyers in our EU Competition and Trade Law practice group of advising on EU and national (in particular UK) competition law. In particular, we have been involved in a number of market investigations in the UK over recent years (for example, the Energy Market Investigation and Investment Consultancy Market Investigation) for one of the main parties. We also have had a lead role in the Commission's Pharmaceutical sector inquiry. Our comments are based on our experience in these matters as opposed to the views of any individual client.

Executive summary

- BM welcomes the Commission's commitment to thinking creatively about ensuring its regulatory powers and enforcement priorities are adapted to evolving economies and industries characterised by a fast pace of change.
- However, we are concerned that the present NCT proposals may end up in regulatory over-reach, duplication of existing enforcement powers, and major procedural concerns for undertakings in affected sectors. From the Commission's perspective, if the powers are not limited to a specific situation/issue, the tendency will be to expand their use. To do so for an area such as an EU wide energy market investigation (similar to the UK recent investigation) would be a gargantuan task. It is important for market investigations to be concluded in a relatively short time (two years maximum in the UK) and the demands on Commission resourcing should not be underestimated.
- If, on the other hand, the Commission consider that there are specific issues to address on a more limited basis, then legislation would be more appropriate. An example of this is call termination rates – a specific issue addressed on an appropriate basis with targeted legislation.

Regulatory over-reach

We are concerned that the Commission envisages using an NCT to address perceived structural shortcomings or future impacts ('structural risks') in markets studied, based on Commission premises about what a well-functioning market should look like - for instance, that there should be no tipping or foreclosure - and its own predictions about where markets are headed. The Commission already has tools allowing it to address anticompetitive conduct leading to such effects, generally without needing such effects already to have materialised. If markets are tipping markets and a regulatory mechanism is needed to address (such as in telephony) this is best achieved through legislation. If, however, there is simply a desire to reign in the allegedly or potentially dominant firm prior to it reaching the tipping point by making it smaller, then the introduction of an NCT will be little more than a tool that allows intervention based on the Commission's own assumptions about which market outcomes are possible and desirable. The Commission would thereby assume a "market design" type role that it is not necessarily equipped to fulfil. Indeed, the history of similar interventions by other competition

authorities in markets is, at best, mixed with certain sectors repeatedly being reviewed as authorities seek to (re)design their solutions. BIAC's submission to the OECD's review of market studies in 2008 remains of relevance in this regard:

“One common feature of market studies, though, is that they are complex and difficult exercises to structure and manage. Typically they take as long as two years to complete and consume significant regulatory resources. Regulators therefore need to be selective and conscious of "value for money" considerations. Equally they can involve significant expenditure on the part of individual companies and substantial distraction of management time in order to respond properly. These costs arise with external advisers, internal advisers and lost opportunity costs through tying up the time of key managers who have businesses to run. **As the outcome of market studies generally has to be described as "patchy" with limited visible results in many cases there are recurring questions about market selection and value for money.** In some jurisdictions this has resulted in a certain polarisation of views between regulators (who welcome the "freedom to roam" as well as the opportunity to deepen their knowledge of markets which such studies provide) and the business community (who resent the time and costs involved particularly where no anticompetitive behaviour is alleged or found). **The question arises whether such broad brush investigations are a justifiable use of the extensive resources which regulators have to deploy on such exercises given that their main focus should be on dealing with actual anti-competitive behaviour.”** (emphasis added)¹.

For such a tool to be needed, the inadequacy of the existing tools (or more proportionate legislation) should be considered. The Commission's existing competition powers are subject to defined limits, carefully articulated through decades of case-law. Anticompetitive object or effect must be shown. The current proposals could be read as suggesting the Commission has ambitions to sidestep these important constraints.

We note, moreover, that under variants (3) or (4) of the NCT (as described in the Inception Impact Assessment), the Commission's powers would extend beyond examining the role of dominant undertakings, to potentially any undertaking in a market deemed problematic. This risks making smaller players and innovators collateral damage to behavioural or structural remedies where they would not meet the thresholds for current sweeping enforcement powers.

Duplication of existing enforcement powers

The Commission's existing powers provide a broad suite of tools that the Commission can use to address both anticompetitive conduct and also markets where there is evidence of competition being distorted (Sector Inquiries can be launched "where the trends of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market").

Past cases have shown a purposive and broad approach is more than possible under the current regime. Concerns about market trends going beyond individual anticompetitive conduct have been addressed through concepts such as 'collective dominance', 'leverage of dominance into neighbouring

¹ <http://www.oecd.org/daf/competition/sectors/41721965.pdf>, page 197, 2008.

markets', or 'tacit collusion'. There is often no need to prove effect or actual realised harm. With respect to abuse of dominance, the Courts have frequently endorsed the view that there is no exhaustive list of what constitutes an abuse. Similarly, the Commission's existing merger control powers allow it to consider conglomerate effects and sophisticated (and predictive) theories of harm including impacts on innovation. The Commission therefore already can and does enforce to protect competitive processes going beyond the conduct of individual firms.

If current powers are deemed too slow to prevent irreparable harm, then that is arguably a result of how the Commission has used them to date. Investigations could be handled more expediently, commitments or recommendations used more broadly in lieu of headline-grabbing fines, Sector Inquiries could be opened and progressed more nimbly. Notably, the Commission already has the power to impose interim measures. While little used in recent years, the Commission deployed them in *Broadcom*. If this had been subject to successful challenge, then there would be a clear case to seek to adjust the legislation in this regard – to make it easier and quicker to impose interim measures while the Commission investigates.

In any event, there seems little prospect that an NCT would be faster. Investigations are slow and not iterative. They examine a market at a point in time. The CMA recognised this when declining to launch a Market Investigation Reference following its Online Platforms and Digital Advertising Market Study in the UK: "Although some of the interventions we have proposed the [Digital Markets Unit] takes forward could be implemented using order making powers within a market investigation, effective design and implementation of these measures will require a holistic approach, taking into account the interaction between the code and procompetitive interventions, and the ability to monitor, test and amend interventions on an ongoing basis, to ensure that they are effective."²

There is also a question as to how an NCT would fit in with the Commission's proposed *ex ante* regulation, or other existing specific rules in regulated sectors. There is a serious risk of both duplication and inconsistent outcomes. This is the case even if the NCT is restricted to 'digital or digitally enabled sectors' as, in the near future, one might expect there to be few remaining sectors that are not 'digitally enabled' (as the Commission's Inception Impact Assessment itself recognises). With respect to the communications sector, much of the *ex ante* remedies are based on a finding of significant market power – which is defined as dominance.

Major procedural concerns

Ex ante regulation - if additional regulation is needed at all - would provide greater legal certainty, and would be adopted through democratic processes ensuring a degree of independent scrutiny.

While a 'one stop shop' market review mechanism is theoretically appealing given the choice between that or multiple national regulators individually carrying out such assessments, as discussed above, there is already centralised power at an EU level to both enforce and legislate; and no suggestion that the Commission gaining these powers would be accompanied by a divestment of such review powers from national competition authorities.

² (Final Report, para 112).



The prospect of onerous and lengthy investigations, with a wide range of potential intervention tools available, and perhaps unclear (or low) legal thresholds at which these can be applied, is a disaster for businesses.

Complying with investigations is already hugely onerous and resource-draining for businesses, even without the threat of direct remedies (e.g., as under Sector Inquiries or Market Studies in the UK). Data leaks are a risk and potential fishing expeditions a threat to the fundamental right against self-incrimination. The suggestion in the Inception Impact Assessment that additional administrative costs for companies concerned will likely 'be counterbalanced by the increasing efficiency gains and public interests related to each policy option, as well as economic opportunities for other companies (e.g. entrants, innovators, etc)' ignores the huge opportunity cost, particularly to innovator or start-up companies, of complying with this type of investigation.

A defined time limit would be essential, particularly if divestment remedies are a potential threat. Businesses need to be able to plan ahead, and their ability to raise funds or conclude agreements is compromised if divestment or restrictive behavioural remedies loom. But how would the Commission propose to carry out complex assessments across 27 national markets - with potentially different competitive and even regulatory landscapes - within a reasonable timeframe? How would remedies appropriate to all be devised, implemented and supervised?

Added to this is the concern that the Commission is not an impartial adjudicator. The Commission is a quasi-political body, with policy 'agendas' such as promoting European SMEs. There are also concerns that judicial review of its current enforcement is deferential, according a very wide margin of appreciation to the Commission.

The UK Market Investigation process has different panel/review layers inbuilt to ensure that confirmation bias is minimised. And the UK Market Investigation process is usually also preceded by a less intrusive Market Study stage, which can 'filter out' cases not suited to a full investigation reference. However, even then, the UK Competition Appeal Tribunal (CAT) has on numerous occasions intervened to overturn remedies or address procedural shortcomings, including with respect to concerns about impartiality.

The CAT has also recognised the principle of 'double proportionality' - where the more intrusive, far reaching or uncertain in outcome a remedy, the greater depth and sophistication of analysis was required by the authority imposing it. The Commission's Inception Impact Assessment for the NCT suggests that the proportionality of remedies imposed under it 'would be ensured by the fact that such remedies have to be limited to ensuring the proper functioning of the market under scrutiny', which is akin to saying the ends justify the means, completely over-stepping the point of proportionality, which is that they will not always do so.

The CAT has also been able to order further data disclosure to parties, thus correcting procedural irregularities and ensuring a fairer process. Were the EU to adopt a similar market investigation type power, it seems essential that the General Court ("GC") would be enabled to intervene in a similar, granular way.

In our view, therefore, any increase in Commission powers would need to be accompanied by concomitant scrutiny powers for the GC, both over the process and with full review on the merits over the outcome conclusions or remedies. But this would represent a significant additional burden for the GC.



Conclusion

It is therefore our view that the Commission should and must continue to assess relevance of the competition regulatory regime in the light of an evolving economic context, but the correct forum within which to do this is its policy work and its legislative advisory function. It certainly has a role to play in helping to design legislation, but within the institutional procedural framework. Market investigations with direct remedy powers could bypass these important checks and balances.

Further, the Commission can already gather evidence so as to help shape legislation or recommendations through its Sector Inquiry powers, which could be exercised more nimbly.

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