

## **Summary of the contributions of the National Competition Authorities to the impact assessment of the new competition tool**

On 2 June 2020, the European Commission (“the Commission”) published a public consultation on the need for a possible new competition tool. The new competition tool would allow addressing structural competition problems in a timely and effective way, which the existing competition rules (Articles 101 and 102 of the Treaty on the functioning of the European Union, “TFEU”) cannot tackle or cannot address in the most effective manner.

Article 101 TFEU prohibits agreements between companies which prevent, restrict or distort competition in the EU and which may affect trade between Member States (“anti-competitive agreements”). These include, for example, price fixing or market-sharing cartels. Article 102 TFEU prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it. The Commission and the national competition authorities of the EU Member States have the parallel competence to apply Articles 101 and 102 TFEU. They cooperate through the European Competition Network (the “ECN”) to ensure the consistent application of EU competition law across the Union.

As part of its impact assessment, the Commission asked national competition authorities to share their experience with applying Articles 101 and 102 TFEU and provide their views on the need for a possible new competition tool and its design.

The Commission received responses from 26 EU national competition authorities and one response from the Icelandic competition authority (together referred to as “NCAs”) to the survey. In addition, several NCAs decided to submit stand-alone position papers.

This summary provides the NCAs’ general views on the need for a possible new competition tool and its design. The purpose of this summary is to outline the main points raised by the NCAs without regard to the number of contributions addressing a particular point or whether a particular point of view is shared by all the NCAs. The summary also takes into account the views outlined in stand-alone position papers. Therefore, in the following, reference is made generically to “NCAs”. However, for issues on which NCAs expressed diverging views, the summary presents both sides of the arguments.

### **I. Problem-definition**

#### **1. Market features leading to structural competition problems**

NCAs with relevant experience submit that the following market features/elements can be an **important or very important source or part of the reasons for a structural competition problem**:

1) one or few large players on the market (i.e. concentrated market);
2) high customer switching costs (“Switching costs” are one-time expenses a consumer or business incurs or the inconvenience it experiences in order to switch over from one product to another or from one service provider to another.);
3) lack of access to a given input/asset which is necessary to compete on the market (e.g. access to data);

4) extreme economies of scale and scope ('Extreme economies of scale' occur when the cost of producing a product or service decreases as the volume of output (i.e. the scale of production) increases. For instance serving an additional consumer on a platform comes at practically zero cost. 'Economies of scope' occur when the production of one good or the provision of a service reduces the cost of producing another related good or service);
5) strong direct network effects (Where network effects are present, the value of a service increases according to the number of others using it. For instance in case of a social network, a greater number of users increases the value of the network for each user. The more persons are on a given social network, the more persons will join it. The same applies e.g. to phone networks);
6) strong indirect network effects (Indirect network effects, also known as cross-side effects, typically occur in case of platforms which link at least two user groups and where the value of a good or service for a user of one group increases according to the number of users of the other group. For instance, the more sellers offer goods on an electronic marketplace, the more customers will the marketplace attract and vice versa);
7) customers typically use one platform (i.e. they predominantly single-home) and cannot easily switch;
8) the platform owner is competing with the business users on the platform (so-called dual role situations, for instance the owner of the e-commerce platform that itself sells on the platform);
9) data dependency ('Data dependency' refers to scenarios where the operation of companies are largely based on big datasets); and
10) the use of pricing algorithms ('pricing algorithms' are automated tools that allow very frequent changes to prices and other terms, taking into account all or most competing offers on the market.)

NCA's with relevant experience submit that the following market features/elements can be an **important or somewhat important source or part of the reasons for structural competition problems**:

1) high start-up costs (i.e. non-recurring costs associated with setting up a business),
2) high fixed operating costs (i.e. costs that do not change with an increase or decrease in the amount of goods or services produced or sold);
3) regulatory barriers ('Regulatory barriers' refer to regulatory rules that make market entry or expansion more cumbersome or extensively expensive); 3) importance of patents or copyrights that may prevent entry, and
4) information asymmetry on the customer side ('Information asymmetry' occurs when customers (consumers or businesses) in an economic transaction possess substantially less knowledge than the other party so that they cannot make informed decisions)
5) significant financial strength; data dependency ('data dependency' refers to scenarios where the operation of companies are largely based on big datasets);
6) high degree of vertical integration ('vertical integration' relates to scenarios where the same company owns activities at upstream and downstream levels of the supply chain); and 6) zero-pricing markets ('Zero-price markets' refer to markets in which companies offer their goods/services such as content, software, search functions, social media platforms, mobile applications, travel booking, navigation and mapping systems to consumers at a zero price and monetise via other means, typically via advertising (i.e. consumers pay with their time and attention).

In addition to the market features/elements listed above, one respondent suggests adding common ownership situations that can potentially lead to structural competition problems.

As some of the NCAs point out, it is often a combination of several features that may create a structural competition problem. Moreover, the relative importance of the above-mentioned market features can vary depending on the specific economic context.

## **2. Sectors concerned by structural competition problems**

NCAs with relevant experience are split as to the question in which sectors structural competition problems can occur. According to half of the respondents, structural competition problems may occur in all sectors/markets, whereas others argue that structural competition problems may occur in some specific sectors/markets, including but not limited to digital sectors/markets. There appears to be an emerging view that even though some markets are particularly prone to structural competition problems, they are not limited to digital markets. However, NCAs suggest that digital markets are more prominently affected by structural competition problems than other markets. In contrast, those arguing that a potential new competition tool should not be limited to specific sectors suggest focusing at the features that can cause structural competition problems, such as direct and indirect network effects in combination with enormous economies of scale (which increase the risk of tipping), economies of scope and learning effects (for example a large customer base or significant data accumulation could make it much easier for a company to leverage its market power from one market to another), and endogenous sunk costs (for example as a result of large marketing expenditure or R&D costs).

## **3. Scenarios resulting in structural competition problem**

NCAs with relevant experience consider that the following market scenarios qualify as **important or very important structural competition problems**: 1) a (not necessarily dominant) company with market power in a core market extends that market power to related markets; 2) anti-competitive monopolisation; 3) highly concentrated markets where only one or few players are present, which allows to align their market behaviour; 4) gatekeeper scenarios; and 5) tipping (or 'winner takes most') markets; and 6) the widespread use of algorithmic pricing that allows easily to align prices. As NCAs stress, any analysis related to market scenarios that may qualify as structural competition problems must necessarily be conducted on a market-by-market basis. The market scenarios listed above can only be labelled a structural competition problem after a careful assessment of the underlying market features.

The detailed views of the NCAs on each of these market scenarios and the suitability of current EU competition law framework to address them are set out below.

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

There is a consensus among NCAs with relevant experience that structural competition problems may arise in markets where a (not necessarily dominant) company with market power in a core market may apply repeated strategies to extend its market position to related markets, for instance, by relying on large amounts of data and that according to their experience such situations raise structural competition problems. These NCAs consider that such behaviour is common or at least common to some extent in digital markets/sectors.

When asked about examples, NCAs mention a number of markets or services from the digital sector where this scenario could arise, such as search, social media, mobile app stores, audio-books, digital advertising and digital payment services, instant messaging services, e-mail services, e-commerce platforms, marketplaces, translation services, web analytics tools, cloud storage and processing services, payment services, crowdfunding services, videogames, productivity software, map search and visualization services, news aggregators, digital advertising, support services, monitoring algorithms and pricing algorithms. Many NCAs stress that large ecosystems are particularly prone to such behaviour. Some NCAs explain that when such companies gain market power in related markets, this does not only raise traditional vertical concerns (incentives to abuse their market power through foreclosure in related markets), but also concerns about their ability to cross-subsidise products/services or to raise profit margins by enabling more strategic pricing decisions allowing them to further expand their market power.

NCAs with relevant experience generally consider that there is a need for the Commission to be able to intervene in situations where structural competition problems may arise due to such leveraging strategies and that Articles 101 and 102 TFEU are not suitable and sufficiently effective to address. Many NCAs stress the importance to intervene in such market situations as early as possible to avoid structural competition problems from arising. This applies notably to the digital sector where markets show a strong risk of rapid concentration, in particular due to network effects, data advantages and self-reinforcing effects. At the same time, some of the NCAs underline the need to better understand the precise legal framework that would be applied under the new competition tool to address such structural competition problems to be able to judge its effectiveness. Some NCAs however specify that, in many cases, Article 102 TFEU would be sufficient to address leveraging concerns.

#### **b. Anti-competitive monopolisation**

Anti-competitive monopolisation refers to scenarios where one market player may rapidly acquire market shares due to its capacity to put competitors at a disadvantage in the market unfairly, for instance, by imposing unfair business practices or by limiting access to key inputs, such as data.

All NCAs with relevant experience consider that anti-competitive monopolisation raises structural competition problems, and that this scenario is common or at least somewhat common in digital markets. NCAs with relevant experience mostly consider that Articles 101 and 102 TFEU are not suitable and sufficiently effective to address anti-competitive monopolisation scenarios. NCAs with relevant experience generally agree that the Commission should be able to intervene where structural competition problems may arise due to anti-competitive monopolisation. Some NCAs specified that early intervention (before monopolisation arises) requires careful reflection as to the legal test on the basis of which to intervene.

#### **c. Oligopolistic markets with a high/substantial risk of tacit collusion**

An oligopolistic market with a high/substantial risk of tacit collusion is a highly concentrated market structure, where a few sizeable oligopoly firms operate. Oligopolists may be able to behave in a parallel manner and derive benefits from their collective market power without necessarily entering into an agreement or concerted practice of the kind prohibited by competition law. In those situations, rivals often 'move together' to e.g. raise prices or limit production at the same time and to the same extent, without having an explicit agreement. Such so-called coordinated behaviour can have the same outcome as a cartel for customers, e.g. price increases are aligned.

Most NCAs have dealt with such markets in the past. They mention examples, such as car distribution, energy, including retail electricity, supermarkets, telecoms, the provision of textbooks for pupils, petrol markets, tobacco and banking. There is a strong view among NCAs with relevant experience that oligopolistic market structures are also to some extent common in digital markets. They specify however that many digital markets more often than not tend to be monopolistic.

NCAs with relevant experience consider that important/very important features of an oligopolistic market with a high/substantial risk of tacit collusion are the following: 1) high concentration levels; 2) competitors can monitor each other's behaviour; 3) homogeneity of products; and 4) high barriers to enter (e.g., access to intellectual property rights, high marketing costs, global distribution footprint, strong incumbency advantages, network effects).

NCAs with relevant experience consider that important/somewhat important features of an oligopolistic market with a high/substantial risk of tacit collusion are the following: 1) oligopolists competing against each other in several markets; 2) strong incumbency advantages due to customers' switching costs and/or inertia; 3) lack of transparency for customers on best offers available in the markets; 4) vertical integration into key assets of the vertical supply chain; and 5) the existence of a clear price leader, resulting in leader-follower behaviour.

As one respondent explains, a further characteristic of oligopolistic markets prone to tacit collusion is historical stability of shares (low degree of market volatility). In such situations, the possibility of new entry is essential for constraining the behaviour of incumbent players. In view of this, particular attention should be paid to innovation as a potential key to sufficient scale for entry and efforts should be made to prevent the suppression of innovation and killer acquisitions.

NCAs tend to agree that the main structural competition concern in oligopolistic markets derives from the fact that tacit collusion can indeed have the same effects as market sharing or customer allocation without the need for direct contacts between competitors. Thus, from an economic perspective, the results of tacit collusion are not significantly different from the results of explicit collusion (cartels), which have strong negative effects on competition and overall welfare. The main concerns are the possibility of restricting output and increased prices.

NCAs with relevant experience generally consider that the Commission should be able to intervene in oligopolistic markets prone to tacit collusion in order to preserve/improve competition and that the existing competition law framework is not sufficiently effective to do so. Many NCAs explain that the existing competition rules do not allow addressing tacit collusion, which leads to substantial under-enforcement.

#### **d. Pricing algorithms**

Relying on digital tools, companies may easily align their behaviour, in particular their retail prices. Pricing algorithms are automated tools that allow very frequent changes to prices and other terms taking into account all or most competing offers on the market.

NCAs do not have extensive experience with such market situations. Some of them therefore conducted studies in order to explore different theories of harm when using pricing algorithms. NCAs with relevant experience consider that pricing algorithms are common at least to some extent in digital sectors/markets. They explain that pricing algorithms are widely used for the distribution of mass-market products (such as electronic goods, or household appliances) and services (such as

plane tickets and accommodation). They are used especially to set flexible prices for products or services in several industries including tourism, transport, hospitality and entertainment.

NCA generally consider that using pricing algorithms can lead to the alignment of prices/less competition between market players. Some NCA specify that their use can lead to less choice for customers. As one of the respondents explains, algorithms allow observing easily competitors' change of behaviour and result in companies not undercutting the market price if it calculates that the best option is to maintain prices at a supra-competitive level. In the long term, such algorithms could therefore make prices converge at the most profitable level. NCA with relevant experience consider that there is a need for the Commission to be able to intervene in markets where pricing algorithms are prevalent in order to preserve/improve competition. Moreover, NCA with relevant experience generally consider that Articles 101 and 102 TFEU are not suitable and sufficiently effective instruments to address all scenarios where algorithmic pricing can raise competition issues, with some of them however specifying that certain scenarios, in particular where the use of algorithms is a manifestation of explicit collusion, can be tackled under the existing legal framework.

#### **e. Tipping (or 'winner takes most') markets**

So-called tipping (or 'winner takes most') markets are markets where the number of users 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 the specific characteristics of such markets, only one or very few companies will remain on those markets in the long term.

Around half of the NCA signal that they have experience with tipping markets, for instance in the area of social networks or online food delivery. NCA with relevant experience consider that important or very important market features of a tipping market are the following: 1) direct network effects; 2) indirect network effects; 3) economies of scale; and 4) users predominantly single-home (i.e. they use typically one platform only). NCA with relevant experience consider that the main structural competition concerns that arise in tipping markets are that 1) efficient or innovative market players will disappear; 2) there will not be sufficient competition on the market in the long run; 3) customers will not have enough choice; and 4) customers may face higher price. All NCA with relevant experience consider that tipping is common in digital sectors/markets. NCA with relevant experience generally consider that the Commission should be able to intervene early in tipping markets to preserve/improve competition. NCA with relevant experience overwhelmingly agree that Articles 101/102 TFEU are not suitable and sufficiently effective instruments to intervene early in tipping markets. NCA underline that intervention should however be carefully considered in such scenarios to avoid a stifling of innovation incentives. Some NCA also indicate that competition policy and other (regulatory) instruments that the Commission has at its disposal should be used in a complementary way when it comes to tipping markets.

#### **f. Gatekeeper scenarios**

Gatekeeper scenarios refer to situations where a company controls the access to a number of customers (and/or to a given input/service such as data) who – at least in the medium term – cannot be reached otherwise. Typically, customers of gatekeepers cannot switch easily ('single-homing'). A gatekeeper may not necessarily be dominant within the meaning of Article 102 TFEU.

NCA's have dealt in the past with gatekeeper scenarios, for instance in online retail, online travel intermediation services, travel services, energy, telecoms, classified aids, online ad services, operating systems, taxi markets, and retail food and payment services. NCA's with relevant experience generally consider that gatekeeper scenarios are common/somewhat common in digital sectors/markets. They generally point out however that gatekeeper scenarios also occur in non-digital markets, most often when it comes to essential facilities, be it in energy, telecoms or rail services.

NCA's with relevant experience consider that important or very important features that qualify a company as a gatekeeper are the following: 1) high number of customers/users; 2) customers cannot easily switch (lack of multi-homing); and 3) business operators need to accept the conditions of competition of the platform – including its business environment – to reach the customers that use the specific platform. In addition to those features, NCA's submit that gatekeepers typically also have access to key assets, such as essential data. In addition, gatekeeper scenarios are characterised by a lack of multi-homing, which can lead to significant market power, even in the absence of dominance. Further features of these markets are the existence of barriers to entry, the capacity of gatekeepers to rapidly develop new features/services/products internally or through acquisitions and strong network effects.

NCA's with relevant experience submit that the main structural competition concerns that arise in markets featuring a gatekeeper are the following: 1) gatekeepers determine the dynamics of competition on the aftermarket/platform; 2) business operators can only reach the customers that use the specific platform/aftermarket by adapting their business model to the gatekeeper's terms and conditions; and 3) as customers/users cannot easily switch, they have to accept the environment on the aftermarket/platform.

There is a strong view among NCA's with relevant experience that the Commission should be able to intervene in gatekeeper scenarios to prevent and/or address structural competition problems and that Articles 101/102 TFEU are not suitable and sufficiently effective instruments to preserve and/or improve competition on those markets. They explain in this regard that gatekeepers may escape the dominance test under Article 102 TFEU. Furthermore, Article 102 TFEU is not a tool that is designed to preserve or enhance competition, but rather to restore competition once there is a distortion. When gatekeeper scenarios occur in highly dynamic and innovation driven markets, there is a risk that the (ex-post) application of Articles 101 and 102 TFEU can be too slow and ineffective. At the same time, some NCA's specify that Article 102 TFEU is appropriate to deal with certain anticompetitive conducts in gatekeeper markets.

#### **4. Overall views**

**NCA's generally agree with respect to the features that may lead to structural competition problems set out above and the most prominent examples of scenarios that may qualify as a structural competition problem.** Certain NCA's make reservations: one of them has several ongoing projects to map competition dynamics in digital markets; two others ask to discuss and elaborate further on the structural competition problem scenarios. NCA's with relevant experience generally consider that Articles 101/102 TFEU are not suitable and sufficiently effective instruments to address such structural competition problems.

## II. Policy options

**There is a consensus among NCAs with relevant experience that there is a need for a new competition tool** to deal with structural competition problems that Articles 101 and 102 TFEU cannot tackle conceptually or cannot address in the most effective manner. As NCAs with relevant experience point out, such a new competition tool should enable the Commission to conduct investigations in markets with structural problems since a case-by-case enforcement against abuses of dominance is not sufficient in the increasingly fast-paced and interconnected economy. The tool should make it possible to analyse structural risks for competition and structural market failures in the context of an appropriate legal framework. With regard to the former, the tool shall allow for a prospective analysis of the structure of the market with a better consideration of all the implications of network effects on multi-sided markets, massive data accumulation, financial strength, vertical and conglomerate integration, consumer bias and ecosystems effects. A new competition tool should be tailored to address inter alia phenomena of tipping markets, gatekeeper situations, leveraging strategies to enter adjacent markets or algorithm-based collusion.

**Some NCAs make a caveat stressing that their support for the new competition tool is subject to its design.** First, one NCA stresses that existing ex-ante regulation should be taken into account before deciding to apply the new competition tool. Second, there is a need to create clear boundaries and ensure compatibility between traditional competition enforcement tools and the proposed legislative initiatives (i.e. both the new competition tool and the ex-ante regulation for platforms acting as gatekeepers). Third, there is a need to ensure the necessary checks and balances including due process and judicial review (see Section III below). Fourth, there is a need to provide clear indications/legal test as to which type of structural problem(s) will allow launching an investigation/imposing remedies. In addition, as some NCAs mention, whereas the new competition tool should tackle, inter alia, digital platforms, it should be complemented by an ex-ante regulation concerning digital gatekeeper platforms.

There is a strong general view among NCAs with relevant experience that **a new competition tool**, which would not result in the finding of an infringement of the law by a company and would not result in fines, **should also be able to prevent structural competition problems from arising and thus allow for early intervention in the markets concerned.** NCAs explain that early intervention should be a key feature of a new competition tool and a condition for its success. This aspect is particularly important when it comes to tipping markets or monopolisation scenarios. In such cases, the tool should allow to prevent structural problems from arising before the market starts to malfunction or before an undertaking reaches an entrenched position of dominance that is difficult to challenge. For NCAs therefore also tackling scenarios in which structural risks for competition arise should be covered by the tool. A couple of NCAs are however of the view that such an assessment would be difficult to carry out in practice. In particular, as one NCA pointed out, the analysis of structural risk scenarios envisaged under the new competition tool is a prospective one that requires careful consideration. There is clear a difference between addressing actual structural competition problems, which have been identified as causing harm (structural lack of competition scenarios), and addressing potential structural competition problems, which might arise in the future, but where no actual harm has occurred yet (structural risk of competition scenarios). Identifying a sound legal test for the latter is challenging.

According to one NCA, the new tool should rather be dominance-based, in accordance with the existing competition rules. **The general view among NCAs with relevant experience is, however,**



**that such a tool should depart from the traditional dominance concept** and thus be applicable to all undertakings in a market, including dominant but also non-dominant companies. This is because a dominance-based tool would fail to cover many important structural competition problems that are not caused by dominant companies. At the same time, as some NCAs point out, using the dominance threshold would have the advantage of relying on well-tested legal concepts.

**NCAs with relevant experience generally consider that such a new competition tool should be applicable to all markets and not be limited to markets/sectors affected by digitisation.** Some NCAs consider that the new competition tool shall be limited in scope to sectors/markets where structural competition problems are the most prevalent and/or most likely to arise but not to digital sectors/markets only, whereas a few NCAs with relevant experience consider that the new competition tool should apply only to markets/sectors affected by digitisation.

In this regard, one NCA pointed out that if a new competition tool were to be needed to address some problems not covered by the existing tools, it does not seem to be logical to restrict its application to specific sectors. Despite the current interest in the digital economy, competition problems may also exist in other sectors of today's economy or could arise in new sectors in the future. Apart from substantive issues, there are also procedural aspects. Defining what is digital and what is not (or what is a gatekeeper and what is not) is far from straightforward and can make the procedure rather lengthy. Others pointed out that, in any event, all sectors are subject to digitisation.

### **III. The design of the new competition tool**

There is a consensus among NCAs with relevant experience that, under the new competition tool, the Commission should be able to: 1) make non-binding recommendations to companies (e.g. proposing codes of conducts and best practices); 2) inform and make recommendations/proposals to sectorial regulators; 3) inform and make legislative recommendations; and 4) impose remedies on companies to deal with identified and demonstrated structural competition problems. **The general view is that the new tool should include all possible soft and hard powers to deal with structural competition problems,** as a wide discretion to identify the appropriate measures would allow the Commission to identify the right solutions to address the competition problems identified. At the same time, many NCAs point out that the real novelty would be the possibility to impose remedies in case of structural competition problems. In addition, one NCA stressed that the goal of achieving greater effectiveness than through the existing competition rules should not result in the application of a lower legal standards.

NCAs with relevant experience generally consider that the Commission **should be able to impose structural remedies, as well as hybrid remedies (containing different types of obligations and bans).** Those NCAs that favour the use of behavioural remedies only pointed to the fact that they are less intrusive. Even NCAs that support the possibility to impose structural remedies, if necessary and appropriate, stress that it is important to evaluate the existence of less intrusive forms of separation than divestment, such as operational separation or remedies addressing conflict of interests, which can emerge in case of highly vertically integrated platforms. As some NCAs pointed out, the Commission should be able to revise the remedies adopted after a fixed period. This would allow adapting the design of such remedies in light of sudden changes of highly dynamic markets. NCAs with relevant experience all agree that the new competition tool **should include the possibility to accept voluntary commitments** offered by the companies operating in the markets concerned to address identified and demonstrated structural competition problems. As NCAs explain, the

possibility to offer commitments provides incentives for the companies to accelerate the proceedings and can reduce litigation risks.

There is a strong view among NCAs with relevant experience that the new competition tool would require **adequate and appropriate investigative powers in order to be effective**. They explain that adequate and appropriate investigative powers are crucial and indispensable to ensure the tool's effectiveness. Complex structural competition problems require the collection of relevant data and documents to properly assess the market situation and take appropriate measures. NCAs consider that the following investigative powers would be important or very important to ensure the effectiveness of the new competition tool: 1) addressing requests for information to companies, including an obligation to reply; 2) imposing penalties for not replying to requests for information; 3) imposing penalties for providing incomplete or misleading information in reply to requests for information; 4) the power to interview company management and personnel; 5) imposing penalties for not submitting to interviews; 6) the power to obtain expert opinions; 7) the power to carry out inspections at companies; and 8) imposing penalties for not submitting to inspections at companies. One NCA submits that certain of these powers, notably imposing penalties for not submitting to interviews, would go beyond the investigative powers granted to the Commission under the existing competition rules.

NCAs with relevant experience tend to consider that **the new competition tool should be subject to binding legal deadlines**. They stress that if the goal is to act in a timely manner, there should be a time limit after which an authority should decide whether intervention is warranted. In contrast, some others NCAs believe that rushing complex market analyses could be counterproductive. There is notably a significant evidentiary and procedural burden that must be met in order to justify imposing remedies. Others stress that it is important to ensure a balance between appropriate time for investigations and their quality. Both very strict and very loose deadlines can have a negative impact on the effectiveness of the tool. Again others point out that binding legal deadlines would be their preferred option, provided that sufficient resources/funding is ensured beforehand to enable the Commission to comply with such deadlines. Others suggest that establishing indicative administrative timetables can be useful for ensuring the effectiveness of the procedure and reducing the uncertainty on a particular market subject to investigation. Some NCAs added that, should the investigation be subject to binding legal deadlines, a possibility of 'stopping the clock' or having some flexibility for extending the deadlines should be considered.

NCAs with relevant experience tend to consider that the new competition tool **should include the possibility to impose interim measures in order to pre-empt irreparable harm**. Those supporting this possibility however caution that such measures should be strictly limited to situations where there is a threat of irreparable damage. One NCA stressed that interim measures, similarly to the existing EU competition rules, should be subject to a standalone reasoned decision justifying the need for those measures. They should also be subject to judicial review and the same procedural safeguards as interim measures taken in investigations under Articles 101 and 102 TFEU.

NCAs with relevant experience all agree that during the proceedings, the companies operating in the markets concerned, or suppliers and customers of those companies should have **the possibility to comment on the findings of the existence of a structural competition problem before the final decision and on the appropriateness and proportionality of the envisaged remedies**. While some NCAs consider that launching such a consultation should be at the discretion of the Commission to avoid placing an unnecessary procedural burden on the Commission, others consider that it is

essential that the Commission gathers feedback on the appropriateness and proportionality of the envisaged remedies.

There is **consensus among NCAs with relevant experience that the new competition tool should be subject to adequate procedural safeguards**, including the right to be heard and judicial review. Some NCAs stress the importance of transparency throughout the proceedings. As some NCAs pointed out, the protection of business secrets and confidentiality should be ensured in a way that guarantees the timeliness of the intervention.

Finally, one NCA pointed out that there may be overlaps between the new competition tool and sector-specific regulation under which authorities can already impose remedies (such as telecommunications, energy and transport). Thus, when designing the new competition tool, appropriate coordination mechanisms should be established.

#### **IV. Interaction and cooperation between the Commission and the national competition authorities**

Eight NCAs signalled that the competition rules applicable in their respective Member States have been amended in order to deal with competition problems similar to those outlined in Section I or that there are plans for doing so, namely Belgium, Bulgaria, Austria, Romania, Lithuania, Iceland, Germany and Greece. One NCA therefore stressed the importance to clarify the interaction between pre-existing investigatory regimes and the new competition tool.

NCAs suggest various solutions to design a coordination mechanism between the Commission and the NCAs. NCAs generally suggest relying on similar principles as those governing the existing coordination mechanism between the Commission and the NCAs with regard to the application of Articles 101/102 TFEU, including notably early exchanges of experience and knowledge on the markets under investigation.

One NCAs suggested an enhanced cooperation mechanism for the national markets concerned by investigations under the new tool. It proposed that the NCA of each Member State concerned should be informed of every major step of the investigation, including through full access to the file and the right to be heard. The NCA considers that limiting the role of the NCAs concerned by such an investigation to providing its views in an Advisory Committee meeting is insufficient since the measures that can be adopted under the new tool are more far-reaching and have a greater impact on the structure of a market than antitrust decisions. In addition, the NCAs concerned could participate in the monitoring of the implementation of the measures adopted following an investigation under the new tool, since NCAs are closer to the economy of the Member States affected by these measures. Another NCA suggested that, similarly to investigations under Articles 101/102 TFEU, the NCAs concerned should be entitled to participate in investigative measures within their territory.

A couple of NCAs stressed that the new tool should only be applicable in cases where no infringement of Articles 101/102 TFEU can be found so that using the new competition tool does not risk jeopardising the enforcement of Articles 101/102 TFEU nor limiting their scope, notably to avoid “forum shopping” as regards the choice of the competition instrument used in particular case. Moreover, remedies under the new tool must take into account existing remedies imposed under

Articles 101/102 TFEU for the same market and should not exclude any future remedies imposed under these provisions.

In addition, one NCA submits that Article 3(2) of Regulation 1/2003 allows for stricter national rules on unilateral conduct and that the new tool should not jeopardise this provision. These stricter national rules are frequently designed as legal prohibitions, which are both enforceable in civil courts and punishable with fines, which cannot be undermined by the new competition tool. These national rules should therefore be taken into account as "market characteristics", but should not exclude the possibility of imposing remedies under the new tool. Finally, stricter national rules on unilateral behaviour should remain applicable during and after the proceedings under a new competition tool.

A number of NCAs pointed out that some Member States already have tools similar to the new competition tool. It can be expected that further Member States will adopt such national tools. In order to avoid a variety of tools with different requirements and consequences, it could be useful to expand the competence to apply the new competition tool to NCAs.

One NCA, however, pointed out that having powers to impose structural remedies without finding a breach of competition rules could make NCAs subject to considerable political pressure. This could put at risk the NCAs' independence.

## **V. Interaction between the Digital Single Act initiative on gatekeeper platforms and the new competition tool**

Taking into consideration the parallel impact assessment in the context of the Digital Services Act package on a proposal for ex ante rules for gatekeeper platforms, NCAs with relevant experience are split as to whether there is a need for an additional regulatory framework imposing obligations and prohibitions that are generally applicable to all online platforms with gatekeeper power. NCAs with relevant experience generally consider that not adapting existing competition law tools would be at most somewhat effective, meaning that an ex-ante regulation would in itself not be sufficient to address structural competition problems. NCAs with relevant experience consider a new competition tool allowing to address structural risks and a lack of competition in (digital) markets on a case-by-case basis as generally effective and desirable.

As some NCAs explained, in all likelihood competition law alone will not be able to solve the issues of gatekeeper platforms given the specific features of these markets. These issues can probably only be tackled in a meaningful way by combining other areas of law, be it sector-specific regulation or consumer protection laws. Therefore, **the complementary nature of regulation and competition law seems of paramount importance** in order to make the most of the digital transformation and to ensure that these markets provide the best possible outcome for consumers and the economy as a whole. These different legal frameworks have to be adapted in parallel and in a harmonised way. As a general point, however, NCAs warn against over-regulation or regulation that would distort investment and innovation incentives or create entry barriers for smaller operators.

NCAs point out that a **combination of traditional competition enforcement, ex ante rules and the new competition tool can prove effective in addressing contestability issues, provided that there are no overlaps between these tools**. The NCAs with relevant experience are split as to whether there is a need for an additional regulatory framework allowing the possibility to impose tailored remedies on individual large online platforms with gatekeeper power on a case-by-case basis. As

NCA's pointed out, **when it comes to the suggested case-by-case tool for gatekeeper platforms, particular care will have to be taken in order to avoid overlaps and conflicts with existing competition tools, in particular Article 102 TFEU and merger control, as well as with the new competition tool.** There is a risk that companies would face multiple regulatory regimes that have the same aim of securing a well-functioning internal market, thus limiting their incentives to invest and innovate. Therefore, the Commission should make it clear in the impact assessment(s) for the ex-ante regulatory framework and the new competition tool whether and, if yes, to what extent there are overlaps between both tools. The Commission should also put forward suggestions for how to solve those overlaps and show a willingness to drop one or more of these initiatives. Some NCA's point out that the duplication of case-by-case competition assessment should definitely be avoided.

One NCA points out that an ex-ante regulatory framework should set clear-cut criteria to determine its addressees in order to allow companies to understand whether it applies to them. Tailored remedies should only be imposed by competition authorities and on an informed basis. This also applies to qualitative criteria determining whether a company would fall under the regulatory framework. Given that the question of whether or not a company has gatekeeper power comes close to or encompasses a competition-based assessment, such an analysis should only be carried out by competition authorities.