

## Factual summary of the contributions received in the context of the open public consultation on the New Competition Tool

### Executive Summary

The open public consultation on the New Competition Tool (“NCT”) was launched on 2 June 2020 and open for feedback until 8 September 2020. During this period, a total of 188 contributions were received. Businesses (68) and their associations (54) represented more than 2/3 of respondents. Other respondents included NGOs, consumer organisations and academic/research institutions. Nineteen contributions were received outside the open public consultation, which largely echoed the issues raised in the contributions to the public consultation. The statistics computed in this summary are based only on contributions to the public consultation submitted through the online questionnaire.

Respondents generally agreed that there are structural competition problems that Articles 101/102 of the Treaty on the Functioning of the European Union (“TFEU”) cannot tackle or address in the most effective manner. Respondents also generally agreed that an NCT could help address the limits of the existing competition rules.

More specifically, respondents confirmed that certain market features may lead to structural competition problems. Respondents also confirmed that the examples of structural competition problems set out in the questionnaire, in particular leveraging and monopolisation strategies, as well gatekeepers scenarios and tipping markets, may raise competition concerns that Articles 101/102 TFEU are not suitable or sufficiently effective to address, and that the Commission should be able to intervene in such scenarios. Respondents considered that such structural competition concerns commonly occur in digital markets, while pointing out that there are indications that they are not limited to digital markets.

As regards the intervention trigger for the NCT, the majority of respondents that expressed a view in this regard considered that such a tool should focus on structural competition problems, thus being applicable to all companies in a market, rather than only to dominant companies or gatekeepers or digital platforms. As regards the scope of application, the majority of respondents considered that such a tool should be applicable to all markets. A majority of respondents that expressed a view also indicated that the tool should not be limited to only markets/sectors affected by digitisation. However, a large number of those respondents who indicated that the tool should apply in all sectors and markets nevertheless provided explanations that mainly highlighted how the tool would be especially beneficial if applied to the problems found in digital markets.

As regards the interplay with other instruments and policy options, such as those included in the Digital Services Act (“DSA”) package, there is general support for ex ante rules consisting of obligations and prohibitions for digital gatekeepers in order to address issues in digital markets raised by gatekeeper platforms. Most respondents emphasised that in order to effectively address contestability issues in digital markets there is a need for a combined approach, consisting of more than one policy solution. In those respondents’ view, this should include ex ante rules and an enforcement tool applicable to digital markets.

## I. Introduction

From 2 June to 8 September 2020, the European Commission (“the Commission”) ran an open public consultation (“public consultation”) on the need for a possible New Competition Tool (“NCT”), which would allow addressing structural competition problems in a timely and effective manner. The notion of structural competition problems refers to scenarios that cannot be tackled or addressed in the most effective manner by the existing EU competition rules (Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”)).

As part of its impact assessment, the Commission asked citizens and stakeholders to express their views, through an online questionnaire, on the existence of structural competition problems, the suitability and effectiveness of Articles 101/102 TFEU to tackle such problems, and the possible design of a New Competition Tool, including its scope, set-up and rules of procedure.

The online questionnaire was published in all 24 official EU languages. Participants could reply in any of those languages.

The public consultation was also promoted through Twitter and the DG Competition website.

The Commission received 188 contributions to the public consultation submitted through the online questionnaire. The Commission also received nineteen submissions in the context of the public consultation, mainly by businesses and business associations, which largely echoed the issues raised in the contributions to the public consultation.

The statistics computed in this summary are based only on contributions to the public consultation submitted through the online questionnaire. The input has been analysed using a data analysis tool,<sup>1</sup> complemented by manual analysis.

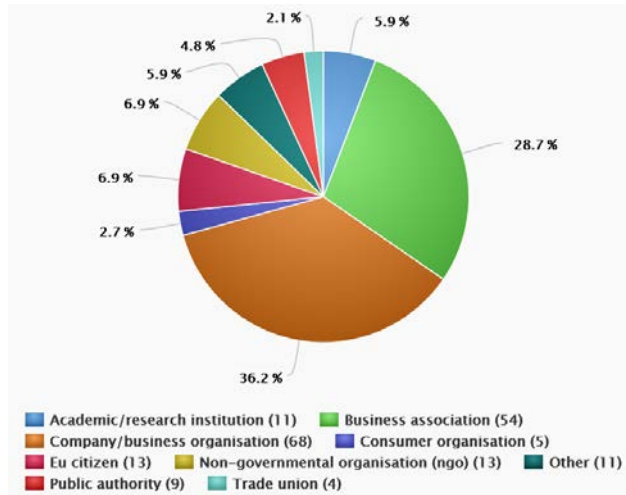
This document should be regarded solely as a factual summary of the contributions made by citizens and stakeholders during the public consultation. The summary cannot be regarded in any circumstances as the official position of the Commission and its services and thus does not bind the Commission. The summary of the contributions is preliminary and does not prejudice the findings of the Staff Working Document to be published at the end of the impact assessment phase.

## II. Profile of respondents to the online questionnaire

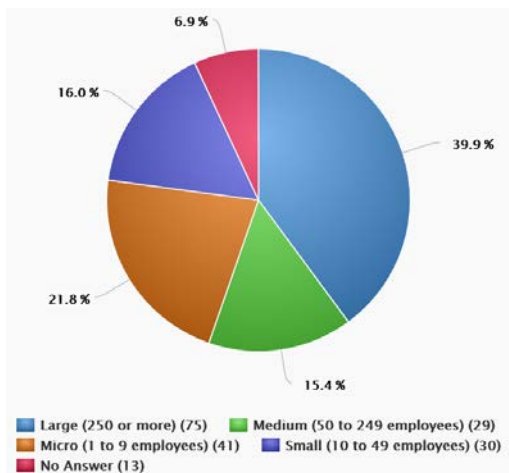
In terms of categories of respondents to the public consultation, the large majority of the respondents are businesses or business associations (i.e. 122 respondents, of which 68 are businesses and 54 business associations, corresponding to 64.9% of all respondents). Other respondents include academic or research institutions (11 respondents, or 5.9%), consumer organisations (5 respondents, or 2.7%), EU citizens (13 respondents, or 6.9%), Non-Governmental Organisations (“NGOs”, 13 respondents, or 6.9%), public authorities (9 respondents, or 4.8%) and trade unions (4 respondents, or 2.1%).

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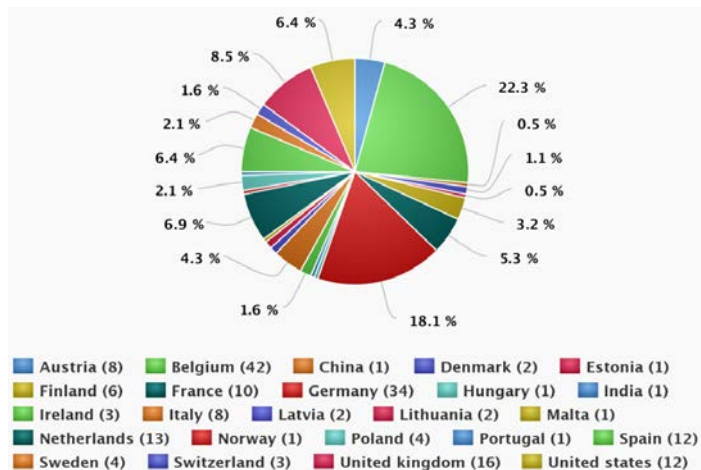
<sup>1</sup> The tool used is Doris Public Consultation Dashboard, an internal Commission tool for analysing and visualising replies to public consultations. It relies on open-source libraries using machine-learning techniques and allows for the automatic creation of charts for closed questions, the extraction of keywords and named entities from free-text answers as well as the filtering of replies, sentiment analysis and clustering.



In terms of size of respondents, almost 40% (corresponding to 75 respondents) indicated that they are a large organisation (i.e., more than 250 employees); 15.4% (corresponding to 29 respondents) stated that they are medium size (i.e., between 50 and 249 employees); 16% (corresponding to 30 respondents) indicated that they are a small business (i.e, from 10 to 49 employees).



As to the geographical distribution of responses, the large majority of respondents are from an EU Member State (154 respondents). Sixteen respondents are from the UK and twelve are from the US. The majority of the contributions were submitted in English, German, Spanish and French.

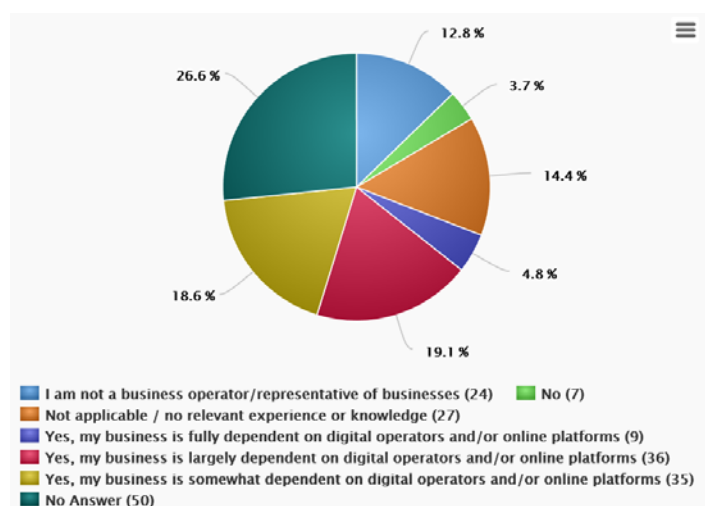


More specifically as regards the different categories of respondents, among the 68 respondents that classified themselves as a business, 51 indicated that they are a large business, 9 said medium, 5 small, and 3 said they are a micro business.

Among the 54 respondents that specified that they are a business association, 6 indicated that they are of large size, 8 of medium size, and 16 of small size.

Among the respondents that classified themselves as a business or business association, 93 indicated that they provide a digital good or service, consisting of one of the following: a social network (5 respondents), an operating system (3 respondents), an e-commerce marketplace (17 respondents), development and production of apps (25 respondents), app store (6 respondents), search engine (7 respondents), digital identity services (10 respondents), network and/or data infrastructure (20 respondents). 15 businesses or business associations replied that they do not offer digital services.

Most business users with relevant knowledge that provided an answer indicated that they rely on digital services, digital operators or on an online platform<sup>2</sup>. 9 respondents stated that they are fully dependent, 36 said they are largely dependent, and 35 said they are somewhat dependent on such services. Only 7 said they do not rely on digital services, digital operators or on online platforms.



### III. Contributions to the online questionnaire

The aim of the public consultation was to collect views and evidence from citizens and stakeholders on the following topics: (i) the types of market characteristics that may result in structural competition problems (see section 1 below); (ii) what scenarios might constitute structural competition problems (see section 2 below); (iii) specific types of structural competition problems (see section 3 below); (iv) the policy options proposed to address these structural competition problems (see section 4 below); (v) the possible design of an NCT (see section 5 below); and (vi) the interaction between the NCT and the parallel impact assessment on a possible ex ante regulatory

<sup>2</sup> “Online platform” refers to a firm operating in two (or multi)-sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups.

instrument for very large online platforms acting as gatekeepers as part of the DSA package (see section 6 below).<sup>3</sup>

This summary illustrates the general views expressed by stakeholders on the aforementioned issues. The purpose of this summary is to outline the main points raised by stakeholders without regard to the number of contributions addressing a particular point or whether a particular point of view is shared by all respondents. Therefore, in the following, reference is made generically to “respondents”. However, for issues on which respondents expressed diverging views, both sides of the argument are presented.

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

When asked which among several listed market features/elements can be a source or part of the reasons for a structural competition problem in a given market, respondents mostly submitted that the following market features/elements can be an **important or very important source or part of the reasons for a structural competition problem**:

- Lack of access to a given input/asset which is necessary to compete on the market (e.g. access to data): 114 respondents out of all providing a view
- Strong direct network effects: 109 respondents out of all providing a view
- One or few large players on the market (i.e. concentrated market): 108 respondents out of all providing a view
- High degree of vertical integration: 107 respondents out of all providing a view
- Customers typically use one platform (i.e. they predominantly single-home) and cannot easily switch: 106 respondents out of all providing a view
- Data dependency: 105 respondents out of all providing a view
- The platform owner is competing with the business users on the platform: 104 out of all providing a view
- Strong indirect network effects: 100 respondents out of all providing a view
- High customer switching costs: 99 respondents out of all providing a view
- Extreme economies of scale and scope: 95 respondents out of all providing a view
- Information asymmetry on the customer side: 92 respondents out of all providing a view
- High start-up costs: 72 respondents out of all providing a view

Respondents submitted that the following market features/elements can be a **somewhat important source or part of the reasons for structural competition problems**:

- Regulatory barriers: 70 respondents out of all providing a view

Respondents expressed more **mixed views** on the following market features/elements:

- Significant financial strength: among those replying, 84 respondents indicated it as an important or very important source or part of the reasons for a structural competition problem. In contrast, 21 respondents said it is not important.

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<sup>3</sup> For more information, see <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12417-Digital-Services-Act-deepening-the-Internal-Market-and-clarifying-responsibilities-for-digital-services>.

- Zero-price markets: among those replying, 76 respondents indicated them as an important or very important source or part of the reasons for a structural competition problem. In contrast, 23 respondents said they are not important.
- Use of pricing algorithms: among those replying, 55 respondents indicated it as an important or very important source or part of the reasons for a structural competition problem. In contrast, 30 respondents said it is not important.
- High fixed operating costs: among those replying, 64 respondents indicated them as a somewhat important source or part of the reasons for structural competition problems. In contrast, 26 respondents said they are not important.
- Importance of patents or copyrights that may prevent entry: among those replying, 51 respondents indicated it as a somewhat important source or part of the reasons for structural competition problems. In contrast, 25 respondents said it is not important.

In addition, respondents pointed to the following **other market features/elements** as a source or part of the reasons for a structural competition problem:

- Exclusive intermediation power
- Acquisitions by enterprises with market power
- State aid and state-owned enterprises
- Corporate tax planning and tax evasion
- Labour-related aspects (low wages, low labour protection standards)
- Lack of interoperability, standardisation
- Emergence of ecosystems
- Multi-sided nature of the market
- Lack of transparency (in relationship with smaller participants on platform, in the way algorithms work)
- Data accumulation
- Consumer behavioural biases
- Cross-shareholdings/common ownership
- Tying/bundling of different services by same platform, coercion of smaller businesses
- Privacy-related issues
- Asymmetry in applicable regulatory provisions (e.g. platforms vs. traditional media outlets)

## 2. Scenarios resulting in structural competition problems

When asked to express their views and rate potential scenarios involving structural competition problems, respondents argued that the following market scenarios qualify as **important or very important** structural competition problems:

- Gatekeeper scenarios: 131 respondents
- Anti-competitive monopolisation, where one market player may rapidly acquire market shares due to its capacity to put competitors at a disadvantage in the market unfairly: 125 respondents
- A (not necessarily dominant) company with market power in a core market extends that market power to related markets: 115 respondents
- Tipping (or 'winner takes most') markets: 106 respondents

- Highly concentrated markets where only one or few players are present, which allows to align their market behaviour: 90 respondents

44 respondents considered that the widespread use of algorithmic pricing that allows to easily align prices qualifies as a **somewhat important** structural competition problem. Conversely, 29 respondents considered this scenario as **not important/not relevant**.

Respondents' views on each of these market scenarios and the suitability of the existing EU competition law framework to address them in an effective manner are described in more in detail in Section 3 below.

In addition, respondents pointed to the **following additional market scenarios that may qualify as structural competition problems**:

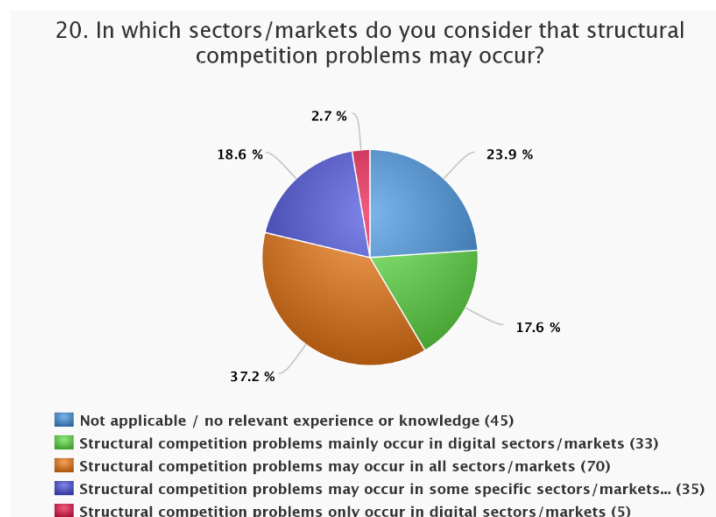
- Geographic isolation (island economies)
- State-owned enterprises
- Highly concentrated retail markets, private labels
- Cross-shareholdings among competitors/common shareholding
- Data accumulation
- Bundling/tying of different services offered by the same platform
- Vertical entry of platforms into adjacent markets (e.g. Google Vacation Rentals)
- Tracking activities of users online
- Lack of interoperability
- Asymmetric bargaining power (platforms can unilaterally impose conditions, standards, etc.)
- Lack of transparency and control (e.g. for advertisers in online advertising markets)
- Lack of compliance with data protection rules by large platforms
- Mergers and the emergence of walled gardens (e.g. Facebook-WhatsApp-Instagram)
- Software licensing issues in P2B relations
- Labour-related issues
- Unequal access to capital markets, in particular venture capital
- Aftermarket issues in car repair markets
- Killer acquisitions

In relation to these additional market scenarios that may qualify as structural competition problems, the majority of respondents that pointed to them stated that there is a need for the Commission to be able to intervene. 56 out of 65 respondents who took a view on these additional scenarios expressed such an opinion. Among those 65 respondents, 35 also indicated that, in their view, Articles 101 and 102 TFEU are not suitable and sufficiently effective to address the additional market scenarios identified as resulting in structural competition problems. 18 respondents stated that Articles 101 and 102 TFEU would be suitable, whereas 11 stated they did not have relevant knowledge or experience. Among these additional structural competition problems identified, two respondents flagged the buying of innovators by large companies. Other respondents pointed to the dual role of some gatekeepers, data accumulation (coupled with data protection matters), lack of access to customer data, unclear price-setting rules/lack of transparency and the existence of cross-shareholdings as market scenarios resulting in structural competition problems. The remaining respondents who expressed a view in this regard identified sectorial issues such as problems in

cybernetic ecosystems, anticompetitive conducts in data, business intelligence and analytics, a lack of regulatory caps on advertising revenues by digital players, and lock-ins in the area of cloud services.

As to the sectors concerned by structural competition problems, respondents who expressed a position in this regard had mixed views.

70 respondents indicated that structural competition problems may occur **in all sectors**, while 35 indicated that structural problems may occur **in some sectors, including but not limited to digital sectors/markets**. In contrast, 33 said that these problems manifest themselves **mainly in digital sectors/markets**, and 5 replied that structural competition problems occur **only in digital sectors/markets**.



In their explanations, those respondents having indicated that structural competition problems occur in all sectors and markets highlighted that **no sector is immune to structural competition problems**. Specific references to sectors where structural competition problems may occur included the following: agri-food, biotech, digital, energy, financial services, healthcare/pharmaceuticals, hospitality, industrial products, journalism, liner shipping, manufacturing, media, real estate, telecommunications or other utilities, and transport. Some respondents argued that adopting an NCT with a horizontal scope would not necessarily mean applying it in all sectors, but rather making it future-proof and effective. Respondents also highlighted that the boundaries between digital and non-digital sectors/markets are increasingly blurred and that, with digitisation on the rise and changing sectors, it is difficult to foresee how to draw any boundaries between the two. Other respondents also argued that one of the general principles of EU law – and more specifically of competition law – is its general applicability, stressing that structural competition problems can occur in all markets.

At the same time, a high number of respondents who indicated that structural competition problems can occur in all sectors and markets flagged to varying degrees the **prominence of structural competition problems in digital markets**. More specifically, some respondents within this category indicated that the prevalence of structural competition problems related to certain large platforms or cyber-giants is accelerating.



Respondents indicating that **structural competition problems mainly or solely occur in digital sectors/markets** raised similar arguments. Those respondents argued that the characteristics of digital markets (e.g. economies of scale and scope, data accumulation and dependency, network effects, lock-in, zero-pricing) make digital markets particularly prone to the emergence of quasi-monopolistic market structures. Within the digital sphere, respondents flagged the following fields as being particularly prone to structural competition problems: online advertising, app stores, communication apps, content distribution including streaming, e-commerce, online marketplaces, operating systems for smartphones, search engines, social networks, software distribution and services provided by online travel agencies.

Finally, respondents indicating that **structural competition problems occur in some specific sectors (including but not limited to digital)** pointed to electronic communications and other network sectors as those most prone to structural competition problems similar to those appearing in the digital sector. Other respondents flagged highly concentrated sectors or sectors where there is an essential facility or a gatekeeper as also being susceptible to the occurrence of structural competition problems. One respondent raised concerns with regard to the prominence of oligopolistic market structures in the agricultural and food sectors. Some respondents indicated that other non-digital non-network sectors may also be increasingly affected by such problems in the future, with one respondent flagging the mobility sector as a possible candidate.

When asked whether Article 101 TFEU is a suitable and sufficiently effective instrument to address structural competition problems, 60 respondents replied in the affirmative, whereas 63 answered in the negative (65 respondents said they do not have knowledge/relevant experience).

As regards Article 102 TFEU, among the respondents who expressed a view in this regard, 78 submitted that Article 102 TFEU is not suitable and sufficiently effective to tackle structural competition problems, whereas 55 indicated that it is (55 respondents indicated they do not have knowledge/relevant experience).

Regarding the **lack of suitability and effectiveness of Articles 101 and 102 TFEU** in addressing structural competition problems, respondents very often flagged common arguments for both. Respondents pointed in particular to the inability of both provisions to cater for preventive action, the difficulties in proving consumer harm and defining relevant markets to meet legal standards, and the fact that data related issues or effects on the labour market cannot be taken into account in an appropriate way.

Respondents considering that **Article 101 TFEU cannot (effectively) tackle structural competition problems** mainly focussed their replies on problems related to platforms and the digital environment, including tacit collusion, algorithmic pricing and placement, the parallel imposition by online platforms of similar unfair commercial terms and conditions (such as parity clauses), computerised data exchanges or price recommendations.

Respondents considering that **structural competition problems cannot be tackled (effectively) on the basis of Article 102 TFEU** flagged the following issues as escaping competition law enforcement: monopolisation strategies, vertical integration and multi-level players, strategies to leverage dominance into adjacent markets, the exercise of market power by non-dominant players, cross-subsidisation between businesses to allow for almost predatory pricing, control of essential facilities

and indispensability of certain trading partners. Respondents emphasised the risks deriving from conduct occurring in digital markets, especially if those were tipping markets or markets characterised by the presence of digital gatekeepers.

Respondents argued that the main challenges with regard to the enforcement of Article 102 TFEU relate to situations where dominance does not exist, as well as to the high burden of proof (e.g. the need to show anti-competitive effects of the conduct concerned) and the difficulties with remedying a conduct found to be anti-competitive in an appropriate and effective manner, notably once the damage had already occurred. They considered that these challenges also have a negative effect on the duration of antitrust investigations and the ability of the existing competition law framework to ensure the contestability of the markets concerned. Respondents also highlighted the need for a legislative solution regarding conduct recurrently showing negative effects on competition, as well as the need to pursue more exploitative cases and to take non-economic objectives into account in the competitive assessment.

In contrast, respondents arguing that **Articles 101 and 102 TFEU are suitable and sufficiently effective** in addressing structural competition problems were primarily satisfied with the level of enforcement of the existing competition rules. Respondents pointed towards interim measures, sector inquiries, merger control and deadlines as potential ways to tackle any shortcomings that competition law may have. Some respondents also pointed to the ongoing reviews of competition legislation such as the Market Definition Notice, as well as the rules applicable to vertical and horizontal agreements as other ways to improve the existing competition law framework. Some respondents also considered that targeted ex ante regulation – including DG CNECT’s proposal on ex-ante rules for large platforms – could already cover any gaps. Some respondents also argued for a broader use of sector inquiries and a review of the EU merger regulation (“EUMR”).<sup>4</sup>

### **3. Specific types of structural competition problems**

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

Structural competition problems may arise in markets where a (not necessarily dominant) company with market power in a core market applies repeated strategies to extend its market position to those related markets.

On this scenario, 107 respondents indicated that they have knowledge or that they have come across such situations. In terms of sectors or markets where these situations manifest themselves, respondents mentioned digital sectors/markets (including app stores, operating systems, online advertising, search services, social networks, messaging apps, e-commerce and online marketplaces), transport, automotive, and telecoms. As examples and manifestations of the leveraging of market power, respondents pointed to various types of behaviour, including tying and bundling, discrimination, “self-preferencing”,<sup>5</sup> “enveloping” strategies,<sup>6</sup> refusal to share or provide access to

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<sup>4</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L24, 29.1.2004, p. 1–22.

<sup>5</sup> “Self-preferencing” refers to conducts where an undertaking favours its own products or services against those of its competitors.

information, and cross-subsidisation. Several respondents mentioned that a key factor of expanding market power in digital sectors/markets is that the player with market power has access to vast amounts of data from core market activities that it can use to its advantage in adjacent markets. Respondents considered that such behaviour was either common or very common, or at least common to some extent in digital markets/sectors (98 respondents out of 98 respondents who indicated that they had relevant knowledge or experience).

According to 91 respondents out of 100 respondents, who indicated having relevant knowledge or experience, situations where a (not necessarily dominant) company with market power in a core market applies repeated strategies to extend its market position to a related market raise competition concerns. As to the type of concerns caused by such scenarios, those respondents mainly pointed to a loss of competition, reduced innovation and less choice for consumers, caused by the fact that the company with market power uses this power in an adjacent market to harm competition by not competing on the merits. At the same time, some respondents argued that in certain cases the entry by a company with market power could also enhance competition in the adjacent market and bring efficiencies or benefits to consumers. The assessment of whether or not such scenarios result in a negative effect on competition therefore has to take account of the specificities of each case.

Respondents who expressed a view generally considered 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 (121 respondents out of 146 replied in the affirmative). Respondents that expressed a view also submitted that Articles 101 and 102 TFEU are not suitable and sufficiently effective to address these market situations (81 respondents out of 134 replied in such sense), arguing notably that Article 102 TFEU is not always effective or does not capture all problematic scenarios. In contrast, some respondents argued that Article 102 TFEU provides sufficient flexibility to tackle relevant situations and should therefore be used to address related competition concerns. Some respondents in this latter group emphasised that in any event intervention to tackle such scenarios should be based on a careful case-by-case assessment.

#### **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 in an unfair manner, for instance, by imposing unfair business practices or by limiting access to key inputs, such as data.

103 respondents indicated that they have relevant knowledge or experience. In terms of sectors or markets concerned, they mentioned notably digital sectors/markets (including app stores, online advertising, search services, social networks and online marketplaces), transport, automotive, pharmaceuticals and telecoms. Most respondents that expressed a view considered that this scenario is common or at least somewhat common in digital markets, including because of the

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<sup>6</sup> “Enveloping” refers to a provider moving into a rival’s market by combining its own offering with the types of products/services of the competitor.

particular features of such markets (87 respondents out of 89: 23 said it is common, 26 said it is common to some extent, 38 said very common, and 2 said no).

When asked whether anti-competitive monopolisation raises competition concerns, most respondents that expressed a view answered in the affirmative (94 respondents out of 95), pointing to the exclusion of competitors, higher prices, lower innovation and lower quality.

Respondents considered that the Commission should be able to intervene where structural competition problems may arise due to anti-competitive monopolisation (121 respondents out of 138 respondents who expressed a view in this regard). Respondents also considered that Articles 101 and 102 TFEU are not suitable and sufficiently effective to address such scenarios (74 respondents out of 124 who expressed a view in this regard).

### **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 where a few sizeable oligopoly firms operate. The oligopoly firms operating in such markets 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 any explicit coordination. Such so-called coordinated behaviour can have a similar impact on competition as a cartel (e.g. aligned price increases).

88 respondents signalled having experience with oligopolistic markets with a high/substantial risk of tacit collusion. They mentioned examples in sectors/markets such as digital (e.g. app stores, social media, e-commerce, online advertising), agriculture, energy, telecoms, entertainment, shipping, medical products and airlines. As to whether oligopolistic market structures are common in digital markets, those respondents that expressed a view answered mostly in the affirmative (25 respondents out of 30: 7 said common, 8 very common, 10 to some extent, and 5 said no).

Respondents considered that important/very important features of an oligopolistic market with a high/substantial risk of tacit collusion are the following: (1) high concentration levels (62 respondents out of 79 who expressed a view in this regard); (2) competitors can monitor each other's behaviour (61 respondents out of 78 who expressed a view in this regard); (3) high barriers to enter (e.g., access to intellectual property rights, high marketing costs, global distribution footprint, strong incumbency advantages, network effects) (61 respondents out of 77 who expressed a view in this regard); and (4) homogeneity of products (50 respondents out of 76 who expressed a view in this regard).

Less flagged as important/very important, but still mentioned by several respondents are the following features: (1) vertical integration into key assets of the vertical supply chain (48 respondents out of 77 who expressed a view in this regard), (2) strong incumbency advantages due to switching costs for customers and/or customer inertia (46 respondents out of 73 who expressed a view in this regard); (3) a lack of transparency for customers with regard to the best offers available in the markets (46 respondents out of 77 who expressed a view in this regard); (4) existence of a clear price leader, resulting in leader-follower behaviour (42 respondents out of 75 who expressed a view in this regard) and (5) oligopolists competing against each other in several markets (30 respondents out of

69). Respondents also referred to the existence of common shareholdings and deterrence mechanisms as characteristics of oligopolistic markets prone to tacit collusion.

Respondents indicated that the main competition concerns in oligopolistic markets are the possibility of increased prices, lower choice and innovation.

Respondents generally agreed that the Commission should be able to intervene in oligopolistic markets prone to tacit collusion in order to preserve/improve competition (75 respondents out of 110 who expressed a view). The majority of respondents however considered that the existing competition law framework is suitable and sufficiently effective to do so, as tacit collusion can, in their view, be tackled by Articles 101 and 102 TFEU. This position was taken by 55 respondents out of 95 who expressed a view. 40 other respondents submitted that tacit collusion falls outside of Article 101 TFEU and thus cannot be tackled under that provision.

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

Companies may easily align their behaviour, in particular retail prices, without any explicit coordination by relying on digital tools. 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.

48 respondents signalled having experience with pricing algorithms. Respondents indicated that pricing algorithms are widely used in online advertising, e-commerce, and the distribution of plane tickets. As to the question whether pricing algorithms are common in digital sectors/markets, most respondents that expressed a view answered in the affirmative (13 indicated they are common, 11 said to some extent, 12 very common, and 1 respondent answered in the negative).

Respondents were split as to whether pricing algorithms are used mostly in markets that are highly transparent as a result of their structure, i.e. without companies using pricing algorithms that can create a certain level of transparency (20 respondents out of 45 who expressed a view) or in markets that are not transparent (18 respondents of 42 who expressed a view). Respondents considered that the use of pricing algorithms is common in markets where prices are aligned, without market players having explicitly agreed their prices (30 respondents out of 44 taking a view). The majority of respondents considered that pricing algorithms are more common in the case of goods and services offered in digital markets (15 respondents out of 40 expressing a view) than in non-digital markets (9 respondents out of 39 expressing a view).

Respondents considered that using pricing algorithms can lead to competition concerns in the form of an alignment of prices and less competition between market players (30 respondents out of 72 replying). Some respondents submitted that the use of pricing algorithms can lead to less choice for customers (22 respondents out of 72 replying) or to price increases (22 respondents out of 72 replying).

Respondents agreed 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 (53 respondents out of 79 replying). However, the majority of respondents considered that the existing competition law framework is suitable and sufficiently effective to do so (41 respondents out of 69 replying) and that nothing in Article 101 TFEU or the case law prevented the Commission from intervening in

algorithmic collusion cases. Respondents pointed out that enforcement could be improved by investing in technological means to better analyse algorithmic behaviour.

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

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 certain characteristics of that market, only one or very few companies will remain on those markets in the long term.

110 respondents signalled having relevant knowledge or experience with tipping markets, such as social networks, search services, e-commerce platforms, online advertising, online messaging, app stores, operating systems, online food delivery, accommodation bookings and regulated markets like telecoms, energy and rail.

Respondents generally considered that important or very important market features of a tipping market are the following: (1) direct network effects (99 respondents out of 106 replies provided); (2) indirect network effects (93 respondents out of 103 replies provided); (3) users predominantly single-home (i.e. they use typically one platform only) (84 respondents out of 103 replies provided) and (4) economies of scale (83 respondents out of 101 replies provided). Respondents generally considered that tipping is common or to some extent common in digital markets (93 respondents out of 97 that expressed a view).

When asked what are the main competition concerns that arise in tipping markets, respondents generally rated as important or very important competition concerns that arise in tipping markets the following: (1) there will not be sufficient competition on the market in the long run (90 respondents out of 104 replying); (2) customers will not have enough choice (85 respondents out of 103 replying); (3) customers will face insufficient innovation (80 respondents out of 102 replying); (4) efficient or innovative market players will disappear (79 respondents out of 102 replying) and (5) customers may face higher prices (68 respondents out of 99 replying).

Respondents generally agreed that the Commission should be able to intervene early in tipping markets to preserve/improve competition (101 respondents out of 131 that expressed a view). A large number of respondents also agreed that Articles 101/102 TFEU are not suitable and sufficiently effective instruments to intervene early in such markets (72 respondents out of 119 that provided a reply), as they only allow for an ex-post intervention if the dominant undertaking abuses its position. The 47 respondents (out of 119 that expressed a view) who considered Articles 101/102 TFEU to be suitable and sufficiently effective to intervene argued that rules are sufficiently flexible to allow for such intervention. Several respondents argued that interim measures could be used if there is a risk that a market tips. Two respondents also argued that tipping is not always necessarily negative and that it is sometimes preferable to allow for such a tipping to occur.

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

Gatekeepers control access to a number of customers and/or to a given input/service such as data, which – at least in the medium term – cannot be reached otherwise. Typically, customers of gatekeepers cannot switch easily and therefore only use the gatekeeper's offering ('single-homing').

It should be noted that a gatekeeper may not necessarily be dominant within the meaning of Article 102 TFEU.

122 respondents indicated that they have relevant knowledge or experience with regard to markets characterised by gatekeepers, for instance, in e-commerce, search services, social networks, online advertising, app stores, operating systems, online messaging, accommodation bookings, entertainment services (e.g. video distribution and broadcasting), as well as financial, energy, telecommunication or transport markets.

Respondents generally considered that gatekeeper scenarios are common or at least somewhat common in digital sectors/markets (101 respondents out of 108 expressing a view), pointing to the fact that the features of digital markets can lead to a gatekeeper position. A large number of respondents considered that gatekeeper scenarios also occur in non-digital markets (48 respondents out of 65 that replied), most often when it comes to essential facilities and natural monopolies, be it in energy, telecoms, airport and port operator services, rail services or financial services.

Respondents generally considered that important or very important features that qualify a company as a gatekeeper are the following: (1) customers cannot easily switch (lack of multi-homing) (103 respondents out of 119 that expressed a view); (2) business operators need to accept the conditions of competition imposed by a platform, including its business environment, to reach the customers that use the platform (102 respondents out of 118 that expressed a view) and (3) they have a high number of customers or users (84 respondents out of 118 that expressed a view). In addition to those features, respondents submitted that gatekeepers typically also have access to key assets (e.g. essential data and content), such that there are no alternatives in the market. In addition, gatekeeper scenarios are characterised by vertical integration or integration in ecosystems. Further relevant features of these markets are the existence of barriers to entry, consumer behavioural biases and lock-in effects, lack of countervailing buyer power, the capacity of gatekeepers to expand their power to other markets, as well as strong network effects and economies of scale.

When asked what are the main competition concerns that arise in markets featuring a gatekeeper, respondents rated as important or very important the following: (1) the gatekeeper determines the dynamics of competition on the aftermarket/platform (103 respondents out of 117 replying); (2) as customers/users cannot easily switch, they have to accept the competitive environment on the aftermarket/platform (102 respondents out of 117 replying) and (3) business operators can only reach the customers that use the platform/aftermarket by adapting their business model and accepting the gatekeeper's terms and conditions (101 respondents out of 117 replying).

There is strong agreement among respondents that the Commission should be able to intervene in gatekeeper scenarios to prevent/address structural competition problems (121 respondents out of 141 expressing a view). Respondents also generally agreed that Articles 101/102 TFEU are not suitable and sufficiently effective instruments to preserve/improve competition on those markets (79 respondents out of 128 that expressed a view). Those respondents considering that both Articles are sufficient (49 out of 128 that expressed a view) claimed that the alleged enforcement gap was not demonstrated. Several of these respondents indicated that gatekeepers should be regarded as having market power and thus a dominant position.

#### **g. Other structural competition problems**

In addition to the problems outlined immediately above, respondents also mentioned additional issues which, they considered to be structural competition problems. These include the dual role of certain platforms (beyond gatekeeper functions), discriminatory access to data and other inputs, the raising of entry barriers including tech barriers, vertical integration and the acquisitions of competitors by dominant players, increased market concentration and matters related to information asymmetries and lock-in effects.

### **4. Policy options proposed in the IIA of 2 June 2020**

#### **a. Views on whether a New Competition Tool is needed**

Among the respondents who expressed a view on the question whether there is a need for a New Competition Tool to deal with structural competition problems, 102 respondents replied in the affirmative, whereas 56 respondents did not see such a need. More specifically, 38 businesses out of 59 that expressed a view on the question answered that there is a need for the NCT. Among the business associations, 23 replied there is a need for the NCT, whereas 22 said no. All 5 consumer organisations and 11 NGOs out of 12 expressing a view answered in the affirmative.

Respondents arguing in favour of introducing such a tool submitted that Articles 101 and 102 TFEU are insufficient to tackle structural competition issues, in particular those arising from digitalisation. In their view, such a tool could provide an efficient way to analyse and understand the markets where such issues may arise and ensure that they are addressed through effective remedies.

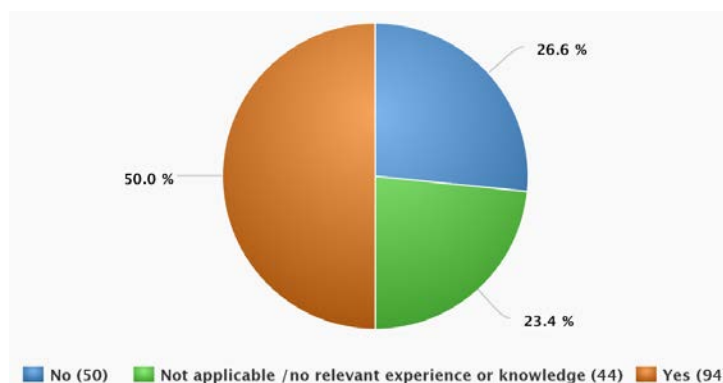
In contrast, respondents arguing against the need for an NCT did not see a gap in the existing EU competition rules. They argued that structural competition problems should be addressed through the application of Articles 101 and 102 TFEU, rather than through a new, potentially intrusive instrument. Some respondents specified further that before introducing an NCT, the Commission should conduct a review of the effectiveness of the existing tools and consider all possible options to make the best use of its existing toolbox. As regards possible procedural improvements, some respondents argued that the dynamics of digital markets call for a better use of interim measures and a pre-defined timeline for antitrust investigations in order to ensure a stricter, faster and more flexible approach instead of creating more rules. Other respondents acknowledged the structural competition problems identified in digital market,s but submitted that targeted sectorial regulation would constitute a better solution to address such problems.

More specifically with regard to the possible introduction of an NCT, these respondents argued further that this would lead to a risk of greater uncertainty and increased politicisation of the competition rules. Some respondents also raised the question whether there is a sufficiently clear legal basis to justify the adoption of an NCT addressing structural competition problems outside the reach of Articles 101 and 102 TFEU. A few respondents claimed that as a result of the introduction of a NCT, there could be an overall reduction in innovation and consumer welfare in the digital sector. They considered that an NCT would provide overreaching discretion and power to the Commission, which could lead to legal uncertainty and hamper the willingness of businesses to innovate and strengthen competition. Respondents also underlined the importance of safeguards if an NCT were to be introduced, namely any intervention under an NCT should be in line with the principles of



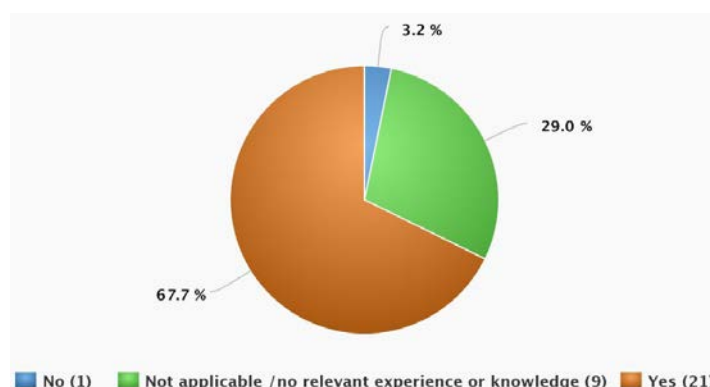
appropriateness and proportionality, balancing the benefits of intervention against the costs and impact on investment and innovation. A few respondents also claimed that an NCT should only be applied to situations and enforcement gaps that cannot be adequately tackled on the basis of Articles 101 and 102 TFEU.

When asked whether an NCT should be able to prevent structural competition problems from arising and thus allow for early intervention, 94 respondents of those who expressed a view answered in the affirmative, whereas 50 respondents replied in the negative.



**Businesses and their associations who indicated having relevant experience**, which represented the most numerous category of respondents, were generally supportive of an NCT allowing for early intervention (94 respondents answered in the affirmative and 50 in the negative).

The support for an early intervention tool is also strong among **public interest organisations** (consumer organisations, trade unions, public authorities and NGOs), with 21 of them agreeing with an NCT permitting early intervention and only one disagreeing with such a proposal. Consumer organisations expressed unanimous support for an NCT allowing for early intervention in the markets concerned.



Of the 44 respondents that identified themselves as providing digital goods or services, 22 agreed that an NCT should allow to prevent structural competition problems from arising and thus provide a basis for early intervention in the markets concerned, whereas 13 disagreed with that position.

As regards the **main reasons outlined in support of an early intervention tool**, respondents linked their replies to the need for efficiency and timeliness. They argued that the existing competition rules only come into play once the harm has already reached the market, whereas it is important to intervene at an earlier stage against structural risks for competition in order to prevent harm from

arising in the first place. Respondents also argued that any such intervention should be accompanied by appropriate remedies.

The **main reasons expressed by respondents against an intervention tool** that would prevent a structural competition problem from arising are the following. First, according to those respondents, intervention is only justified where anticompetitive effects have been detected. In their view, a tool that would intervene in case of a mere risk to competition on a predictive basis would be intrusive and create uncertainty. Second, the Commission's current competition toolbox is well equipped and has the necessary legal tools to address any potential competition concerns. As regards the shortcomings of Articles 101 and 102 TFEU explained at the end of Section 2 above, respondents pointed towards a better use of existing instruments and the ongoing reviews of the rules as potential ways to tackle any shortcomings that competition law may have. Respondents also expressed concerns that over-regulation could end up stifling innovation and turning the Commission from an external rule-maker and referee into a player on the field, randomly knocking out front-runners. These respondents also argued that it is irrelevant that the New Competition Tool would not entail the finding of an infringement, given the far-reaching remedy powers that would accompany the tool.

#### **b. Intervention trigger and scope of the NCT**

On the question of the intervention trigger for the NCT and specifically whether the NCT should be based on a dominance threshold or a market structure-based **approach**, among the respondents who indicated that they have relevant knowledge or experience (141 respondents), the majority considered that **an NCT should focus on structural competition problems, being applicable to all undertakings in a market, including dominant but also non-dominant companies** (85 respondents). Some respondents, in contrast, considered that the tool should be dominance-based (22 respondents). Other respondents presented alternatives, such as a tool being applicable only to gatekeepers or digital platforms (34 respondents).

Among **businesses and business associations** that provided a view on the question (91 respondents), the majority (47 respondents) considered that the tool should focus on structural competition problems, whereas a minority (16 respondents) considered that the tool should be dominance-based. 28 suggested alternatives, either because they disagreed with the idea of introducing an NCT or because they considered that such a tool should only be applicable to very large digital players. Among **consumer organisations**, 4 expressed support for a market structure-based instrument, whereas 1 took the view that the NCT should be dominance-based. As regards **NGOs**, those that expressed a view were mostly in favour of a market structure-based instrument (8 for market structure, 1 for dominance base).

As regards the question of the scope of application of the NCT, among the respondents who indicated that they have relevant knowledge or experience (128 respondents), the majority considered that **an NCT should be applicable to all markets** (61 respondents). In contrast, some respondents considered that an NCT should be limited in scope to sectors/markets where structural competition problems are the most prevalent (50 respondents). In their replies, respondents flagged the digital economy as the sector where such structural competition problems were most prevalent.

Taking into consideration only the replies from **businesses or business associations** to this question (89 respondents), the views were split, with 31 respondents considering that the NCT should be applicable to all markets and 39 considering that an NCT should be limited in scope to sectors/markets where structural competition problems are the most prevalent. As regards **consumer organisations**, 4 of the 5 replying expressed a preference for an NCT applicable to all markets and sectors. Among **NGOs**, 9 of those expressing a view suggested that the NCT should be applicable to all markets, whereas 1 suggested that it should only apply to sectors/markets where structural competition problems are the most prevalent.

When asked whether the NCT should apply only to markets or sectors affected by digitisation, a majority of respondents indicated that **it should not be limited to markets/sectors affected by digitisation** (87 respondents out of 124 expressing a view). Respondents expressing these views mainly argued that structural competition problems can appear in most sectors, that there is no clear boundary between what may be or not be a digital or digitised market, and that most markets are affected or will be affected by digitisation. A few respondents nevertheless considered that an NCT should apply only to markets/sectors affected by digitisation (37 respondents).

Among the **businesses or business associations** who expressed a view on whether to limit the NCT to markets/sectors affected by digitisation (78 respondents), the majority of respondents (48 respondents) considered that an NCT should not be limited to markets/sectors affected by digitisation, whereas other respondents (30 respondents) considered that the tool should only apply to markets/sectors affected by digitisation. As regards **consumer organisations**, 4 out of 5 considered that the tool should not be limited to markets/sectors affected by digitisation. Among **NGOs**, 9 submitted that the NCT should not be limited to markets/sectors affected by digitisation, with 1 supporting such a limited scope.

However, a large number of those respondents who indicated that the new tool should apply in all sectors and markets nevertheless provided explanations that mainly highlighted how the new tool would be especially beneficial if applied to the problems found in digital markets.

### **c. Relation of the NCT with sector-specific legislation**

Respondents were also invited to express a view on how a smooth interaction of an NCT with existing sector-specific legislation (e.g. for telecoms and financial services) could be ensured.

Almost all **the 30 respondents who identified themselves as businesses/economic operators providing digital goods and services expressed a concern about possible overlaps between the NCT and existing or future sector-specific regulation**, in particular with regard to the DSA package and the Platform-to-Business (“P2B”) regulation, as well as telecoms regulation, and about the ensuing lack of legal certainty. While there was no consensus about whether sector-specific rules or competition rules should prevail when tensions arise, a majority of respondents argued that sector-specific regulation should prevail in such a situation. Where such overlap is unavoidable, the Commission should give clear guidance about which rules should apply in which case. Moreover, respondents pointed to the need to know how the enforcement of the rules will be allocated between the Commission, the Member States, national regulatory and competition authorities, as well as the Body of European Regulators for Electronic Communications (BEREC).

The **remaining 38 businesses/economic operators** (of which 25 declared that their business depends to a certain degree or even fully on digital operators and/or online platforms) and the **54 business associations** who responded to the public consultation **shared the concern about possible overlaps between the NCT and sector-specific regulation**. A number of respondents did not feel competent to state a view on this issue, or did not consider there to be a need for an NCT and hence did not reply to questions on a possible institutional design. Of those respondents who expressed an opinion, a majority was in favour of sector-specific regulation having primacy over competition rules. Some respondents suggested creating ad-hoc advisory committees of national regulatory authorities (similar to the ones existing already for the national competition authorities) to allow for coordination between the Commission and the national regulatory authorities whenever there is a risk of overlap.

Also the **31 respondents identifying themselves as public authorities, trade unions, NGOs, or consumer organisation** shared the general concern about possible overlaps between an NCT and **sector-specific regulation**, and stressed the need for consultation and coordination between the relevant authorities. Respondents in this category also pointed to the interplay between an NCT, social policies, employment laws, data protection regulation, and regulation of public services. Among the 11 academic institutions and 13 EU citizens who responded to the public consultation, only few respondents felt competent to answer this question, but those who did expressed similar concerns about possible overlaps and a need for coordination.

**d. Actions following an investigation under the NCT**

When queried regarding the types of actions that the Commission should be able to take at the end of an investigation based on the NCT, respondents expressed **support for all the options outlined** in the public consultation questionnaire.

Do you consider that under the new competition tool the Commission should be able to:	Number of respondents having answered		
	“Yes”	“No”	“Not applicable/ no relevant experience or knowledge”
Make non-binding recommendations to companies (e.g. proposing codes of conducts and best practices)	98	44	46
Inform and make recommendations/proposals to sector regulators	116	22	50
Inform and make legislative recommendations	119	21	48
Impose remedies on companies to deal with identified and demonstrated structural competition problems	110	31	47

Respondents emphasised that the above-mentioned options **should be coordinated and it should be clear what are the conditions** for recourse to a specific option over others, so as to ensure flexibility, effectiveness and consistency in the choice of the most appropriate follow-up action. Some respondents commented that **binding remedies and powers would be more effective** than soft law instruments.

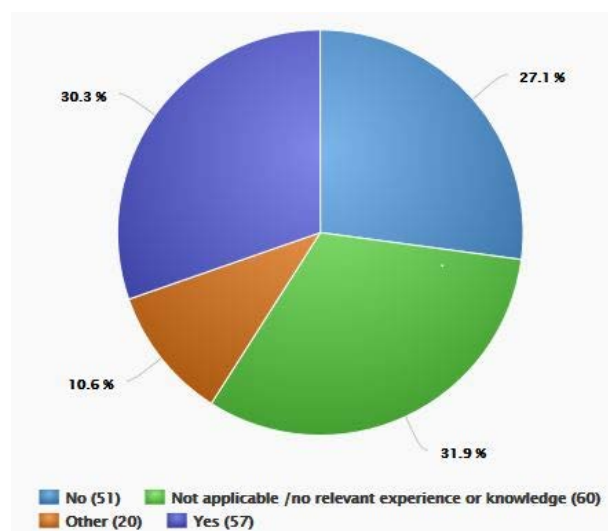
### e. Remedies under the NCT

Regarding the types of remedies that the Commission should be able to impose with an NCT, respondents agreed that a **broad array of remedies should be available to the Commission**.

Do you consider that in order to address the aforementioned structural competition problems, the Commission should be able to impose appropriate and proportionate remedies on companies?	Number of respondents having answered		
	"Yes"	"No"	"Not applicable/ no relevant experience or knowledge"
Non-structural remedies (such as obligation to abstain from certain commercial behaviour)	112	29	47
Structural remedies (for instance, divestitures or granting access to key infrastructure or inputs)	95	39	54
Hybrid remedies (containing different types of obligations and bans)	102	37	49

When commenting on the typologies of remedies, respondents raised the following points: First, **all types of remedies may be necessary**, as they may all be suitable to address structural competition concerns, depending on the circumstances and concerns at stake. Second, the **type of remedy chosen should be the most appropriate and proportionate**, with structural remedies being the last resort for more serious situations. This means that flexibility should be ensured, so that the most appropriate remedy is chosen, with higher standards required for stricter remedies. Third, the **remedies chosen should be market-tested**.

Finally, when asked specifically whether certain structural competition problems can only be dealt with by structural remedies, such as the divestment of a business, the views among respondents were mixed. 57 respondents stated that structural remedies are necessary to deal with certain structural competition problems, whereas 51 disagreed.



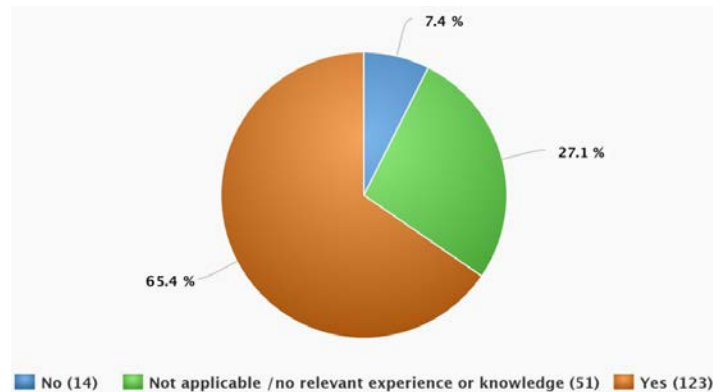
In explaining their views on structural remedies, some respondents emphasised that structural remedies **may, in certain instances, be necessary as a last resort** to address a structural competition problem. In particular, this would be the case if other types of remedies are insufficient or not properly implemented or monitored. However, some respondents indicated that **other types of remedies, such as access remedies or behavioural remedies, may also be appropriate** to address

structural competition problems, and that divestitures could be intrusive and disproportionate in such cases. Respondents emphasised that the use of a structural remedy such as a divestiture should be subject to a **careful case-by-case assessment**.

## 5. The design of the New Competition Tool

### a. Investigative powers

Respondents to the public consultation agreed that **an NCT would require investigative powers in order to be effective**.



Respondents explained that **the Commission should have a broad set of investigative powers**. In their view, without proper information gathering, the Commission would not be able to properly assess and address structural competition problems. Some respondents added that these investigative powers should be **counterbalanced by due process and procedural safeguards** for businesses concerned, such as proper checks-and-balances, stakeholder involvement and transparency.

As regards the specific types of possible investigative tools, respondents agreed with the different options set out in the public consultation questionnaire, with the option “very important” always being the one chosen the most for every single option. Detailed answers are shown in the table immediately below.

Please indicate what type of investigative powers would be adequate and appropriate to ensure the effectiveness of the new competition tool.	Number of respondents having answered				
	No knowledge / No experience	No importance / No relevance	Somewhat important	Important	Very important
Addressing requests for information to companies, including an obligation to reply	5	0	9	33	76
Imposing penalties for not replying to requests for information	6	5	12	37	63
Imposing penalties for providing incomplete or misleading information in reply to requests for information	6	3	13	34	67
The power to interview company management and personnel	9	9	15	34	56
Imposing penalties for not submitting to interviews	10	13	15	41	44
The power to obtain expert opinions	8	6	14	30	65
The power to carry out inspections at companies	12	14	10	27	60
Imposing penalties for not submitting to inspections at companies	13	18	16	27	49

When commenting on the types of investigative powers that the Commission should have, respondents generally submitted that these should be broad and include a range of possible investigative means. However, some respondents pointed out that certain powers would be particularly intrusive and burdensome for businesses, raising issues of proportionality. At the same time, other respondents recognised that in order to be effective, investigative measures should be coupled with sanctions in case of non-compliance. In addition, some respondents argued that the Commission's powers should be counterbalanced through appropriate procedural safeguards ensuring transparency, proportionality and stakeholder involvement. As examples, respondents mentioned that the businesses concerned should be given adequate notice and the possibility to comment on the Commission's provisional findings or documents setting out the structural competition issues identified. In this context, some respondents made reference to the investigative powers used by the UK's CMA in the context of its market investigations.

#### **b. Binding legal deadlines**

106 respondents argued that the **NCT should be subject to binding legal deadlines**, whereas only 12 respondents disagreed with such a requirement. Respondents arguing in favour of binding deadlines explained that the inclusion of binding legal deadlines in the process would ensure expediency and legal certainty, notably for the businesses under investigation.

Respondents suggested the **introduction of deadlines for both the Commission for the major steps of the investigation** (such as issuing the findings, testing remedies and for the overall duration of the investigation) **and the businesses concerned**. As regards the former, respondents pointed to the fact

that if the NCT is used, businesses would need to know the timing of the investigation and the deadlines in order to have clarity and legal certainty. Respondents also added that deadlines would ensure a swifter outcome, which is necessary, in particular in digital markets, both for a swift resolution of the case and for providing sufficient legal certainty to the market. As regards binding deadlines for the businesses concerned, respondents argued that this would avoid risks of certain businesses slowing down the process through dilatory conducts, and that these deadlines should be coupled with the possibility of imposing fines for non-compliance to ensure speed and effectiveness.

#### **c. Interim measures and voluntary commitments**

Respondents generally agreed that **an NCT should include the possibility to impose interim measures in order to pre-empt irreparable harm** (87 respondents replied in the affirmative and 37 in the negative). Respondents explained that interim measures would be necessary to ensure the speed and effectiveness of an intervention under the NCT, in particular in fast-moving markets. However, some respondents pointed out that the decision on whether to adopt interim measures should be subject to a case-by-case assessment, and that the adoption of interim measures should be limited to cases where they are necessary, limited in time to what is strictly required, and possibly subject to judicial review. Some respondents noted that imposing interim measures on businesses in the absence of an infringement of competition law would be quite intrusive and lead to a lack of legal certainty. Other respondents noted that if the NCT were to be subject to a fast procedure, this might limit the need for interim measures.

In a similar vein, respondents recognised that **the NCT should include the possibility to accept voluntary commitments from businesses in order to address identified and demonstrated structural competition problems** (103 respondents replied in the affirmative and 25 in the negative). Respondents noted that this is already a possibility in investigations under Articles 101 and 102 TFEU, and should be maintained for the NCT, in particular if it could lead to faster and effective outcomes. Some respondents stressed that voluntary commitments should be properly and effectively monitored, and non-compliance should be sanctioned. Other respondents added that these voluntary commitments would have to properly address the structural competition problems identified, and should therefore be market-tested to verify their effectiveness. Some respondents also noted that the Commission should nevertheless have the power to impose remedies itself in case the voluntary commitments prove inadequate.

#### **d. Stakeholder involvement and procedural safeguards**

Respondents almost unanimously agreed that the **parties to an investigation** (i.e. businesses operating in the markets concerned, or suppliers and customers of those businesses) **should have the possibility to comment on the findings** concerning the existence of a structural competition problem before the final decision is issued (123 respondents of those expressing a view on this question agreed and 4 disagreed). Respondents explained that this possibility would be a further means to ensure procedural safeguards, transparency and the right to be heard. Some respondents added that the parties involved in the investigation should also have the right to comment on intermediate procedural steps of the investigation. Finally, some respondents pointed out that such a mechanism should however not lead to undue delays in the investigation.



Respondents also agreed with the **possibility of the parties to an investigation to comment on the appropriateness and proportionality of the envisaged remedies** (112 respondents replied in the affirmative and 13 in the negative). Some respondents explained that the parties concerned should also be able to comment on the effectiveness and suitability of the envisaged remedy to address the identified structural competition problems, given that market players have relevant industry knowledge. Some respondents added that external experts should be involved, and that there should be a specific procedure for commenting on the remedies to ensure timeliness and effectiveness. Several respondents suggested that the Commission should adopt remedy guidelines to explain the framework for the evaluation and choice of remedies.

Generally, respondents expressing a **view** on the procedural set-up of the NCT argued for a **well-designed and legally sound tool with a clear procedure**. A variety of respondents – both in favour of and against the NCT – expressed the need to dispel uncertainties concerning the functioning of such a tool and to ensure legal certainty. Respondents mentioned notably the following requirements: a clear procedure and procedural safeguards; legal certainty; a clear legal standard; effectiveness and speed; intervention under the NCT should be strictly necessary, proportionate and properly designed, notably to avoid stifling innovation or discouraging entry. In addition, there should be a clear delineation of roles between the NCT and Articles 101 and 102 TFEU.

Finally, respondents highlighted the importance of having **a tool that is subject to adequate procedural safeguards, including judicial review**. This support was almost unanimous insofar as only 2 of the 130 respondents having expressed a view in this regard disagreed with the need for procedural safeguards. When commenting, respondents explained that the NCT should include all the existing procedural safeguards of investigations under Articles 101 and 102 TFEU, given the potentially broad reach of the NCT. Respondents emphasised that this would require setting up clear rules on procedure and timing. Other respondents suggested the procedure should have check-and-balances in place, including e.g. external panels. Several respondents referred to the set-up of the UK CMA's market investigation regime as an example.

As regards specifically judicial review, respondents explained that it would be an essential procedural guarantee to have. Some respondents emphasised that for judicial review to be effective, the legal test for a finding of a structural competition problem should be clearly defined, so that courts can review based on that standard. Other respondent added that the procedure for judicial review should be clearly outlined, and could include a right to claim damages in case of annulment of a Commission decision, as well as the possibility to seek interim relief against Commission remedies and the possibility to challenge Commission binding requests for information.

## **6. Interplay between the New Competition Tool and the parallel DSA initiative**

The Commission asked stakeholder to express their views on the interplay between the NCT and the policy options proposed in the parallel DSA initiative concerning possible ex ante rules for large gatekeeper platforms. More specifically, respondents were asked to rate the need for and suitability of various policy options to address the issues raised by online platforms. The respondents' views are set out per policy option in the table below, showing the results for both all respondents and separately for businesses and business associations as the most numerous category of respondents.

In relation to the existing competition rules, the view of respondents were mixed, but they generally suggested that the existing competition rules alone are not sufficient to address the problems identified. Among those respondents that expressed a view, most submitted that the existing competition rules are not effective or only somewhat effective. Similarly, taking into consideration only the replies of businesses or business associations, most respondents indicated that the existing competition rules are not effective or only somewhat effective. As regards obligations and prohibitions for gatekeeper platforms, a majority of respondents expressing a view in this regard suggested that ex ante rules can be suitable and a very effective or the most effective option. This view was also shared by businesses and business associations that provided a reply to this question. The introduction of a regulatory framework imposing tailored remedies on digital gatekeeper platforms on a case-by-case basis was supported by a majority of respondents that expressed a view, as well as by those respondents that identified themselves as a business or business association. Most viewed this option as very effective or the most effective. The introduction of an NCT to address structural risks and a lack of competition in digital markets was also supported by a majority of respondents that expressed a view. This view was also shared by businesses and business associations.

As regards the possibility to adopt a combination of policy options to address concerns in digital markets, most respondents who expressed a view in this regard submitted that a **combination of two or more of these four policy options would be effective**. Most businesses or business associations also supported an approach that combines more than one policy option.

When explaining their views on the available policy options, respondents generally expressed the following points:

- There is general support for ex ante rules, consisting of obligations and prohibitions, focused on digital gatekeepers, to complement competition enforcement and address issues in digital markets raised by gatekeeper platforms.
- Most respondents emphasised that there is a need for a combined approach, consisting of more than one policy option. The combination most referred to is that of an ex ante set of rules, in addition to a flexible intervention tool.
- Some respondents argued that the existing competition rules are sufficient and that there is no need for additional intervention tools.
- There is support for an additional case-by-case instrument. There is consensus on an instrument covering digital markets, whereas some respondents also explained that they support an NCT applicable to all markets.

<b>A. Existing competition rules and digital markets</b>		
<b>Evaluation</b>	<b>All respondents</b>	<b>Businesses or business associations</b>
Not effective	60	31
Somewhat effective	55	39
Sufficiently effective	14	11
Very effective	5	3
Most effective	17	14
<b>B. Additional regulatory framework imposing obligations and prohibitions that are generally applicable to all online platforms with gatekeeper power</b>		
<b>Evaluation</b>	<b>All respondents</b>	<b>Businesses or business associations</b>
Not effective	19	15
Somewhat effective	24	19
Sufficiently effective	12	9
Very effective	26	13
Most effective	60	36
<b>. Additional regulatory framework allowing for the possibility to impose tailored remedies on individual large online platforms with gatekeeper power on a case-by-case basis</b>		
<b>Evaluation</b>	<b>All respondents</b>	<b>Businesses or business associations</b>
Not effective	23	18
Somewhat effective	18	11
Sufficiently effective	8	7
Very effective	34	19
Most effective	56	35
<b>. New Competition Tool allowing to address structural risks and lack of competition in (digital) markets on a case-by-case basis</b>		
<b>Evaluation</b>	<b>All respondents</b>	<b>Businesses or business associations</b>
Not effective	43	33
Somewhat effective	8	7
Sufficiently effective	7	7
Very effective	31	15
Most effective	52	30
<b>E. Combination of two or more of the policy options</b>		
<b>Evaluation</b>	<b>All respondents</b>	<b>Businesses or business associations</b>
Not effective	29	23
Somewhat effective	8	8
Sufficiently effective	6	4
Very effective	24	15
Most effective	71	41