

The Consumer Voice in Europe

## DIGITAL SERVICES ACT (EX-ANTE RULES) AND NEW COMPETITION TOOL

BEUC contribution to the Roadmaps



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## Why it matters to consumers

**Whilst the increasing sophistication of services offered by big tech companies has brought many benefits for consumers, it is also clear that many digital markets are not working as they should. Without healthy, competitive markets, consumers will not be offered the best choices, prices or the most innovative products and services. Competition law enforcement in digital markets, though important, has not been effective in dealing with all problems in these markets and consequently to remedy or better, prevent harms to consumers in a timely manner. It is therefore in consumers' interests to consider additional tools to deal with these weaknesses.**

## Summary

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This paper provides BEUC's views on the Commission's Roadmaps on the (1) Digital Services Act package: Ex ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union's internal market ("Ex Ante Regulation") and (2) the New Competition Tool ("NCT").

BEUC welcomes the Commission's consultations on the two proposals. BEUC's preliminary input is based on the assumption that there should be no overlap or friction between the ex-ante rules and the NCT but that they should complement each other in ensuring that markets are open, competitive and fair so consumers can benefit from innovation, choice and quality products.

The challenges posed in particular by the large players in digital markets merit new instruments in addition to traditional competition law enforcement in order to protect consumers' interests in an effective and timely manner.

BEUC would highlight in particular the following in relation to the proposed Roadmaps:

### **Ex-Ante Regulation**

- BEUC supports the introduction of ex-ante regulation for large online platforms with significant network effects acting as gatekeepers.
- Regarding the options provided by the Commission in the Roadmap, the chosen option must ensure strong, effective, timely and consistent rules and enforcement in the EU digital single market. BEUC would favour option 3a provided a list of comprehensive, enforceable, and regularly reviewable obligations and prohibited practices by large online platforms acting as gatekeepers could be drawn up or, alternatively, a combination of 3a and 3b to include a case-by-case analysis by a regulator. This would seem likely to lead to the most direct and timely remediation of harms to consumers in digital markets. Furthermore, it is necessary to consider how this initiative will interplay with the NCT and enforcement of Article 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). This is important because positive obligations could be established in the context of this

competition instrument and therefore the Ex-Ante Regulation could be limited to establishing a list of practices.

### **New Competition Tool (NCT)**

- BEUC supports the introduction of an NCT to deal with structural lack of competition and structural risks for competition in markets, subject to appropriate safeguards. BEUC favours option 3: A market structure-based competition tool with a horizontal scope.
- The NCT should be sufficiently broad and future proof to catch all issues of competition that could harm consumers.
- It will be essential to establish not only investigative powers where problems are suspected but also to ensure that, if these powers are used and concerns are substantiated, this leads to effective and enforced remedies, again subject to appropriate safeguards.

## General Remarks

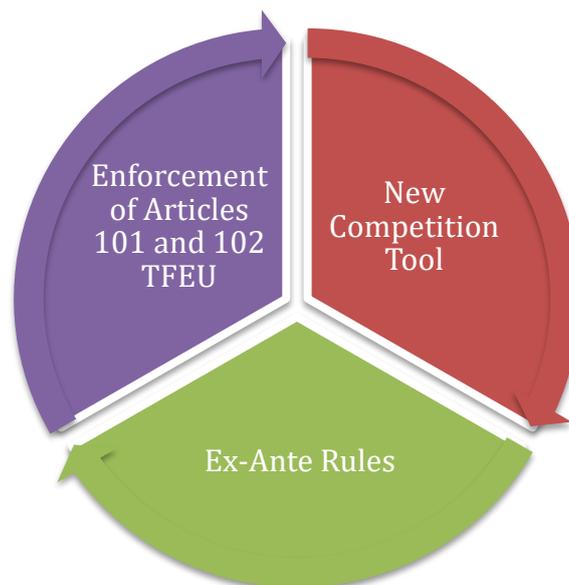
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There is little doubt that the digital economy has brought significant benefits to consumers' lives. There is however also little doubt that some digital players have today become so powerful that this situation has allowed them to deploy anti-competitive practices which have led to consumer harm.

Competition law enforcement has identified certain types of conduct that have been engaged in repeatedly by some online platforms to the detriment of consumers. Self-preferencing when done in vertically related markets such as general search and comparison shopping, local search, travel, etc. can, for example, have negative effects not only directly on consumer choice but also on innovation and competition, and strengthen the cross-market power of large online platforms into ever increasing areas of consumers lives. Practices leading to the "lock-in" of consumers into an ecosystem, particularly in light of high switching costs and information asymmetries for consumers would be another example. The characteristics and structure of some digital markets today are such that it is hard for innovative newcomers and competition to flourish to the benefit of consumers.

While individual competition law enforcement cases have sanctioned and remedied competition law infringements, this has taken many years during which time the harm to competition and consumers has persisted. As competition cases and multiple international studies have identified clear risks to competition in digital and related markets and the inability of these markets to self-correct, BEUC supports measures that can help to prevent, rather than belatedly attempt to cure the resulting harms to consumers.

Thus, by complementing ex-post competition enforcement with rules tackling specific market structural problems and adding new powers to the toolbox of the Commission, it would be possible to establish a legal and enforcement framework capable of addressing the blind-spots of competition law enforcement and creating the conditions for consumer welfare to thrive in the digital economy.



## Ex-Ante Regulation (Digital Services Act)

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BEUC believes that there is today substantial evidence showing that large online platforms have such market power that its unfettered application is likely to hamper the development of well-functioning digital markets to the detriment of consumers. In light of this and the particular characteristics of the digital economy, BEUC supports the proposal for ex-ante regulation of large online platforms with significant network effects acting as gatekeepers (i.e. in the form of asymmetric regulation, not horizontal regulation of all online intermediation services) to establish clear obligations and prohibited practices for such platforms. Such regulation should both prevent harmful practices by large online platforms and open markets to new entrants, including SMEs and start-ups, thereby promoting consumer choice, and driving innovation. It could also go some way towards redressing the significant imbalances in bargaining power between large online platforms and their users.

The Roadmap suggests several options for ex-ante regulation. In deciding which of these is the most appropriate, BEUC would make the following observations:

The objectives must be, first the prevention and where necessary the timely termination of harmful practices by large online platforms; and second, mechanisms or rules to ensure that digital markets function competitively, fairly and in the interests of consumers.

Key objectives to achieve include:

- **Avoiding fragmentation of the single market through inconsistent rules** (e.g. diverging national provisions on obligations and prohibitions for platforms) **or in the enforcement of such rules**. This is necessary to ensure the effective functioning of the Digital Single Market in the interests of consumers and innovative companies. This does not necessarily mean that enforcement must be done by an EU body. Other mechanisms may also achieve this aim provided that the substantive rules to be enforced are clear enough to avoid diverging interpretations and there is effective co-ordination of national enforcement bodies through EU networks.
- Whatever system is adopted it should **not involve lengthy delays** in establishing clear obligations and prohibited practices for large online platforms. Given the characteristics of digital markets, the problems identified are unlikely to self-correct but rather become further entrenched with the further lapse of time. Over-engineering the system and the ensuing delay risks exacerbating the current situation. Furthermore, there must be effective means to **enforce the rules in a timely manner**.
- A clearly defined and predetermined **list of obligations and prohibited practices**, “do’s and don’ts” would be one way to reduce delays in realising the goals of the proposed Ex-Ante Regulation and promoting timely enforcement. This would likely send the quickest signals to the market and have the most visible deterrent effect.

Experience with antitrust enforcement, including in digital markets, suggests that whilst a case-by-case approach can provide maximum flexibility, it can also take an unacceptably long time to have any meaningful impact on the market. It is difficult to see that imposing individual remedies on a case-by-case basis on the same digital players under ex-ante regulation can be done in a short timeframe. Unless the

framework for a case-by-case approach can be sufficiently narrowed, both in terms of the scope of the obligations and prohibitions and the foreseeable menu of remedies, the starting point for a case-by-case approach in digital markets is likely more akin to the complexity of antitrust investigations than enforcement in relation to regulated industries such as telecoms.

However, the effectiveness of a pre-determined list approach will depend on several factors:

- First, defining at EU level, the criteria to identify which large online platforms should be subject to asymmetric regulation.
- Second, establishing an unambiguous list of practices which are broad enough in scope to catch all relevant conduct but sufficiently precisely defined to have the desired signalling effect and to enable simple monitoring and enforcement. It seems unlikely that the list will be the same for the different large platforms and different services offered.
- Third, prohibited practices may be more suited to inclusion in a pre-determined list than positive obligations in so far positive obligations could be established by the NCT or as a result of restorative remedies in the field of competition law enforcement or regulatory measures by sectoral regulators e.g. telecoms.
- Fourth, a legislative or regulatory mechanism would be required to keep both lists up to date in fast-moving digital markets.
- Finally, it will be important when considering any list of prohibited practices to ensure that these do not preclude consideration of efficiencies and incentives to innovate.

Inspiration on some of the above points could be drawn from other EU legislation such as:

- The Multi-Interchange Fees (MIF) Regulation<sup>1</sup> on establishing a list of entities subject to different levels of regulation, depending on market power.
- The Unfair Trading Practices Directive<sup>2</sup> in agriculture which provides for a list of unfair practices (Article 3) accompanied by specific provisions to make enforcement more consistent across Member States (Article 8), including a prominent role for the Commission.
- Sector specific regulation including access to data or to Application Programming Interfaces (APIs) provisions such as the Payment Services

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<sup>1</sup> Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions.

<sup>2</sup> Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.

Directive 2<sup>3</sup>, the Type Approval Regulation<sup>4</sup> and the new Electricity Directive<sup>5</sup>.

- Given the speed with which digital markets evolve, **ex ante regulation needs to be nimble**. To ensure that a predetermined list of platforms to be regulated and list of obligations and prohibited practices remains up to date in fast moving digital markets, **regular review and revision should be built into the legislation**. This could draw on the findings of competition enforcement actions and the NCT (see below). Such review should also foresee mandatory consultation with stakeholders, including consumer organisations. Should such regular review and revision not be feasible, one could envisage setting up case-by-case review by a competent regulatory body as a second step to extend the flexibility of the system, though this may also bring with it some legal uncertainty.
- Whether a predetermined list or case by case approach, or a combination of the two is chosen, the data protection rights, obligations and principles of the **General Data Protection Regulation (GDPR)** must remain fully applicable and **Data Protection Authorities and the European Data Protection Supervisor at EU level must be involved** in the design of measures and remedies involving the sharing of consumers personal data<sup>6</sup>.
- For legal certainty and to avoid potential forum shopping it will be important to ensure **clear demarcation and consistency** with the concurrently proposed New Competition Tool both in scope of application and enforcement. The Roadmaps indicate that both of these instruments are built on similar market structural concerns beyond the abuse of a dominant position and behavioural concerns (for example leveraging market power into adjacent markets).
- The Roadmap notes that one source of the economic power of large online platforms is their ability to take over competitors. The Commission should also consider this aspect and review options in particular with regard to the impact on innovation of **large online platforms' acquisitions of start-up acquisitions**<sup>7</sup>.

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<sup>3</sup> Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market.

<sup>4</sup> Commission Regulation (EU) 2017/1151 of 1 June 2017 supplementing Regulation (EC) No 715/2007 of the European Parliament and of the Council on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information.

<sup>5</sup> Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity.

<sup>6</sup> See BEUC position paper "Access to consumers' data in the digital economy", available at <[https://www.beuc.eu/publications/beuc-x-2019-068\\_european\\_data\\_policy.pdf](https://www.beuc.eu/publications/beuc-x-2019-068_european_data_policy.pdf)>.

<sup>7</sup> See BEUC contribution to the OECD best-practice roundtables on competition policy, "Start-ups, killer acquisitions and merger control", available at <[https://one.oecd.org/document/DAF/COMP/WD\(2020\)30/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)30/en/pdf)>.

- Given the considerable work that has already been completed by the Commission<sup>8</sup>, at Member State level and globally<sup>9</sup> on the competition and market structure concerns in relation to large online platforms, at this stage **a tool that solely collected information** from large online platforms acting as gatekeepers without any additional powers to use this information to propose remedies would not seem the most useful approach.

### Conclusions

Taking into account the above considerations, BEUC favours option 3: Adopt a new and flexible ex-ante regulatory framework for large online platforms acting as gatekeepers. Within this option, a combination of obligations and prohibitions could be a way forward. However, we consider that establishing a 'blacklist', foreseeing a procedure to update it following new market developments, would be the most appropriate approach in terms not only of legal certainty but also, and most fundamentally, to ensure an immediate effect in the market in benefit of consumers. It is important however to highlight that such a list should be accompanied not only by a more vigorous ex-post antitrust enforcement against dominant platforms but also by market investigations and remedies to be carried out under the NCT.

## New Competition Tool (NCT)

While the digital economy has brought important benefits to consumers, in more recent times, some markets have become excessively concentrated with a few large platforms becoming gatekeepers for many digital products and services. This is due in particular to the market characteristics in the digital sector, enabling large platforms to act in ways that can significantly harm competition, innovation and ultimately consumers. BEUC is also of the view that digital/non-digital markets are blurring. The Internet of Things, Connected Cars, Digital Assistants and Wearables are examples of this. The scope of potential market structure problems is therefore expanding.

Whilst existing competition rules must be actively used to deal with illegal behaviour by market players, BEUC shares the Commission's view that, given the specific new structural competition challenges in digital and related markets, these rules are not suited to effectively address all problems. Examples include monopolisation strategies by non-dominant companies with market power or parallel leveraging strategies by dominant companies into multiple adjacent markets. This can lead to consumers harms in the form of higher prices, lower quality, less choice and innovation. A NCT is therefore necessary at EU level.<sup>10</sup>

The Roadmap suggests four options for the NCT. BEUC would make the following observations.

<sup>8</sup> EU Commission special advisors report by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer on "Competition Policy for the Digital Era", available at <http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

<sup>9</sup> George J. Stigler Center for the Study of the Economy and the State Committee report for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee, available at <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure---report-as-of-24-june-2019.pdf?la=en&hash=872E4CA6B09BAC699EEF7D259BD69AEA717DDCF9>.

<sup>10</sup> BEUC, "The Role of Competition Policy in Protecting Consumers' Wellbeing in the Digital Era", available at [http://www.beuc.eu/publications/beuc-x-2019-054\\_competition\\_policy\\_in\\_digital\\_markets.pdf](http://www.beuc.eu/publications/beuc-x-2019-054_competition_policy_in_digital_markets.pdf).

- With regard to whether the tool **should be horizontal** or have a limited scope. Whilst recognising that the most pressing problems today are in digital markets, if such a new tool is going to be adopted in legislation, limiting its scope would not seem the best approach:
  - First, as recognised in the Roadmap, the lines between digital/non-digital markets are blurring.
  - Secondly, it is not possible to predict which sectors will raise structural concerns in the future. Adopting a new tool with horizontal scope does not mean you have to use it in other sectors but would future proof the ability to do so if necessary.
- As regards whether the tool should be market structure-based or only dominance-based, BEUC considers that **a market structure-based model is more appropriate**. This is because digital markets are not necessarily only characterised by single company dominance but, particularly with the development of ecosystem models, by the presence of powerful actors acting in several markets making oligopolistic and tacit collusion scenarios more relevant.

Where it is the structure of the market itself, and not the conduct of powerful individual players, that harms competition (as the Roadmap points out), similar tools have been used (for example Market Studies/Investigations in the UK) which have led to industry-wide remedies.

Furthermore, if the NCT is only to be dominance-based this would suggest a potentially significant overlap with Article 102 enforcement. If so, what will determine which tool is used? The advantages of a NCT based solely on dominance, leaving aside the absence of an infringement finding, would not appear to be radically broader in terms of potential market outcomes than existing options in terms of commitments and settlement decisions under Article 102, other than potentially the speed of the outcome. A broader tool would lend itself better to preventing markets from tipping and also be more useful in keeping any ex ante regulation relevant in the future.

- BEUC believes that such a tool would be appropriate at **EU level in coordination with National Competition Authorities** who may have or may be introducing complementary tools in their markets. This is because digital markets (as well as many non-digital markets) are pan-European, if not global. Any remedies would therefore be most appropriate at EU or international level. The confusion and legal uncertainty that have arisen because of differing analysis between Member States on issues arising in digital markets are not helpful, neither for consumers nor for internationally operating businesses. Examples include the booking.com antitrust cases involving the use of parity clauses preventing hotels from offering cheaper prices outside booking.com<sup>11</sup> or *Coty*<sup>12</sup> on vertical restrictions to sell “luxury” products on third-party platforms such as Amazon.
- BEUC also considers that it will be essential to have clarity on important issues which will likely be determinative of the validity and success of the NCT, such as:

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<sup>11</sup> For an overview of the national cases against Booking.com see: Ariel Ezrachi, “The Competitive Effect of Parity Clauses on Online Commerce”, *Oxford Legal Studies Research Paper No. 55/2015*, available at <<https://ssrn.com/abstract=2672541>>.

<sup>12</sup> Judgment of the Court of 6 December 2017, C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH*, ECLI:EU:C:2017:941.

- Monitoring and criteria to determine **when to use the NCT** and when to rely on ex-post antitrust enforcement of Articles 101 and 102 TFEU.
- **Involvement of consumer organisations** in the identification of market structures and practices that are harmful to consumers.
- The **standard and burden of proof** required to (1) open investigations and (2) to impose remedies.
- Ensuring **appropriate and effective remedies** which are consistent with Ex-Ante regulation (see above).
- **Enforcement** of remedies; **monitoring** of their implementation and **post-evaluation** of their effectiveness.
- Ensuring DG Competition will have the **financial and human resources** to effectively implement the NCT.

### Conclusions

BEUC considers that the European Commission (DG Competition) should have additional powers in its toolbox to carry-out market investigations, even in the absence of dominance by a single player. BEUC therefore favours option 3: A market structure-based competition tool with a horizontal scope, which would allow the Commission to impose behavioural and, where appropriate, structural remedies to improve the functioning of markets independently of the finding of an infringement of Article 101 or 102 TFEU.



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