

The Consumer Voice in Europe

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

Response to public consultations



**Contact: Agustin Reyna and Vanessa Turner - [competition@beuc.eu](mailto:competition@beuc.eu)**

**BUREAU EUROPÉEN DES UNIONS DE CONSOMMATEURS AISBL | DER EUROPÄISCHE VERBRAUCHERVERBAND**

Rue d'Arlon 80, B-1040 Brussels • Tel. +32 (0)2 743 15 90 • [www.twitter.com/beuc](https://www.twitter.com/beuc) • [www.beuc.eu](http://www.beuc.eu)

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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 enough in dealing with all problems in these markets and consequently not able to remedy, let alone prevent, harm to consumers in a timely manner. It is therefore in consumers' interests to put in place additional tools to deal with these weaknesses. At the same time, it would be beneficial to consumers for the European Commission to expand its toolbox to deal with harmful structural competition problems in other markets beyond digital.

## Summary

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*This paper summarises BEUC's main views on the European Commission's consultations on (1) the Digital Services Act package: an ex ante regulatory instrument for large online platforms with significant network effects acting as gatekeepers in the European Union's Internal Market ("Ex Ante Regulation") and (2) a New Competition Tool ("NCT").*

*BEUC welcomes the opportunity to respond to these two Commission consultations. The challenges posed in particular by large players in digital markets require new instruments in addition to traditional competition law enforcement in order to protect consumers' interests in an effective and timely manner.*

*BEUC would highlight the following in relation to the two consultations:*

### Digital Services Act (DSA)

- *BEUC supports the introduction of asymmetric Ex Ante Regulation for large online platforms with significant network effects acting as gatekeepers.*
- *BEUC favours the creation of a "blacklist" of prohibitions and, where appropriate, of targeted obligations ("a DSA prohibitions and obligations list"), comprising a defined list of comprehensive, self-enforcing and regularly reviewable prohibitions and obligations for large online platforms acting as gatekeepers. This could be complemented by case-by-case enforcement of further obligations where appropriate under the NCT or through enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).*
- *BEUC supports the creation of an interdisciplinary body within the Commission to be responsible for monitoring and enforcement of such Ex Ante Regulation where necessary.*

*New Competition Tool (NCT)*

- *BEUC supports the introduction of a market structure-based competition tool with horizontal scope.*
- *For the NCT to be effective, the Commission must be vested with powers not only to investigate situations where problems are suspected but also to impose and enforce effective remedies if these concerns are substantiated.*
- *The legal and evidentiary thresholds, distinguishing the NCT from enforcement of Articles 101 and 102 TFEU, must be clearly set out.*

***Overall, BEUC favours a combination of Ex Ante Regulation based on a DSA prohibitions and obligations list to be included in the DSA and any case-by-case assessment to be addressed in the context of the NCT. With this approach, we would be able to build on existing experience and expertise while at the same time targeting specific practices that we do not want to see taking place in digital or other markets.***

## General Remarks

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BEUC welcomes the opportunity to expand on its response to the consultation on the Roadmaps on the (1) Digital Services Act (DSA) package: Ex ante regulatory instrument for large online platforms with significant network effects acting as gatekeepers in the European Union's Internal Market ("Ex Ante Regulation") and (2) the New Competition Tool ("NCT").<sup>1</sup>

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<sup>2</sup> for many digital products and services accessed by consumers. The structure and characteristics of some digital markets also enable participants to act in ways that can significantly harm competition and innovation, for example raising barriers to alternative business models that do not seek to exploit consumer data. This harms consumers, in the form of higher prices, lower quality and less choice.

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 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 can strengthen the cross-market power of large online platforms into ever broader areas of consumers' lives. Practices leading to the "lock-in" of consumers into an ecosystem, particularly in the light of high switching costs and information asymmetries for consumers, are another example of such harmful conduct. The characteristics and structure of some digital markets today are such that it is hardly possible for innovative newcomers to enter and for competition to flourish to the benefit of consumers.

While individual competition law enforcement cases have sanctioned and required remedies, this has taken many years during which the harm to competition and consumers has persisted. There is also some doubt about the effectiveness of remedies in digital market cases. Competition cases and multiple international studies<sup>3</sup> have identified wide ranging and self-reinforcing harms to competition in digital and related markets, and the inability of these markets to self-correct. Therefore, BEUC strongly supports the introduction of new measures that can help to prevent, rather than belatedly attempt to cure, the resulting harms to consumers.

Given the specific new challenges in digital and related markets previously identified<sup>4</sup>, whilst existing competition rules must be actively used to deal with illegal behaviour by market players, these rules are not suited to effectively address all problems posed in particular by the large players in digital markets such as parallel leveraging strategies into multiple adjacent market or market tipping. These challenges call for new instruments at EU level to protect consumers' interests in an effective and timely manner.

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<sup>1</sup> BEUC contribution to the roadmaps on the DSA and the New Competition Tool, available at [http://www.beuc.eu/publications/beuc-x-2020-059\\_beuc\\_response\\_to\\_roadmaps\\_dsa\\_ex-ante\\_and\\_nct.pdf](http://www.beuc.eu/publications/beuc-x-2020-059_beuc_response_to_roadmaps_dsa_ex-ante_and_nct.pdf)

<sup>2</sup> Suggestions for criteria to identify gatekeeper platforms are set out below on page 6.

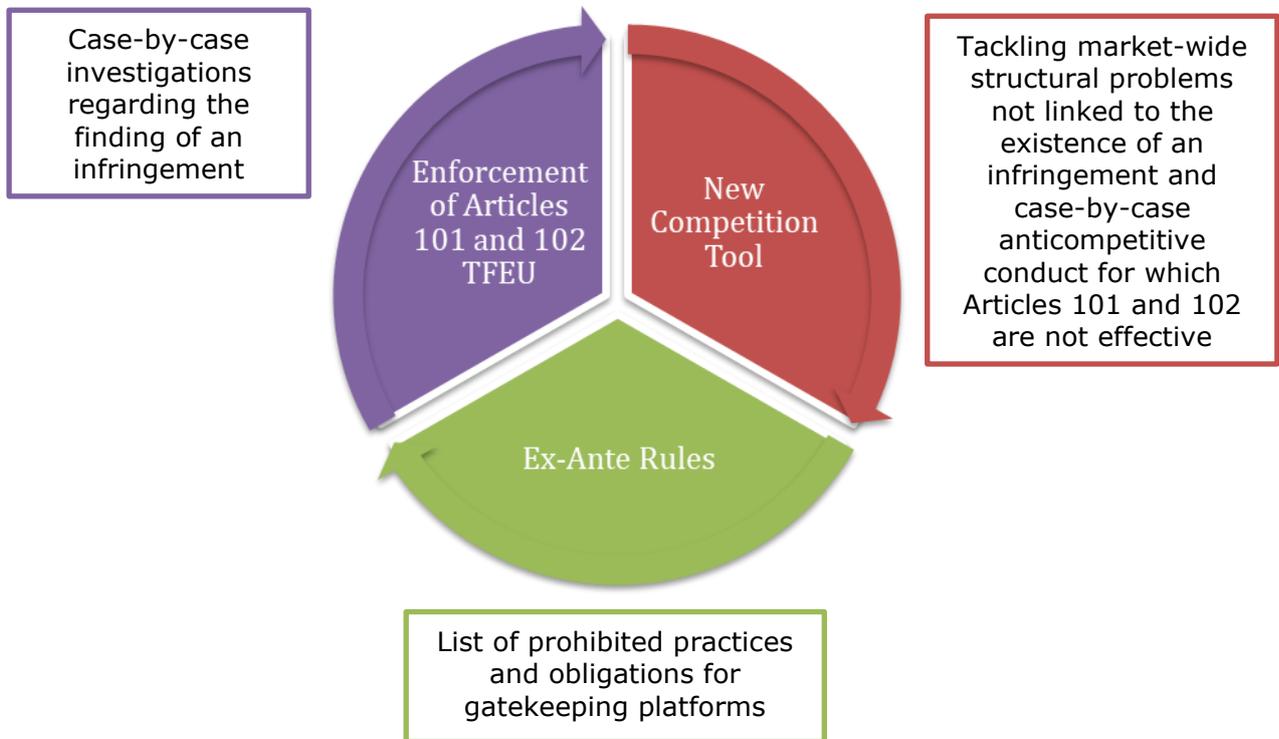
<sup>3</sup> Including most recently, the in-depth analysis of digital advertising markets by the UK CMA - Online Platforms and Digital Advertising Market Study, 1 July 2020, <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study#final-report>.

<sup>4</sup> BEUC response to the public consultation on the "Shaping of Competition Policy in the Era of Digitalisation", available at [https://www.beuc.eu/publications/beuc-x-2018-084\\_beuc\\_response\\_shaping\\_of\\_competition\\_policy.pdf](https://www.beuc.eu/publications/beuc-x-2018-084_beuc_response_shaping_of_competition_policy.pdf) ; BEUC report "The Role of Competition Policy in Protecting Consumers' Wellbeing in the Digital Era", available at [https://www.beuc.eu/publications/beuc-x-2019-054\\_competition\\_policy\\_in\\_digital\\_markets.pdf](https://www.beuc.eu/publications/beuc-x-2019-054_competition_policy_in_digital_markets.pdf)

At the same time, experience at Member State level has shown that such instruments can be beneficial to tackle market-wide problems in other sectors like financial services, energy, healthcare/pharma and transport - leading to the imposition of remedies to make such markets work better for consumers in ways that cannot be done under existing competition law.

**Complementing competition enforcement with rules tackling specific market structural problems, and adding new powers to the toolbox of the Commission, would create 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 and other markets.**

BEUC's input is based on the understanding that there should be **no overlap, confusion or friction between the DSA ex ante rules and the NCT** but that they will complement each other's role in ensuring that markets are open, competitive and fair.



Furthermore, the Commission will need to ensure consistency between these new instruments and other EU policies, in particular the Commission's European Strategy for Data, AI policy and the Platform-to-Business Regulation.

Further comments are set out below for each proposed instrument respectively.

## Digital Services Act (Ex Ante Regulation)

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There is today substantial evidence showing that large online platforms are currently protected by strong and self-reinforcing incumbency advantages,<sup>5</sup> which they actively seek to maintain. They can apply their very considerable market power in an unfettered manner that hampers 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 so as to establish clear prohibited practices and obligations for such platforms.

Such ex ante 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, driving innovation and offering alternative, more consumer-friendly business models. It could also benefit consumers by going some way towards redressing the significant imbalances in bargaining power between large online platforms and their users.

Any ex ante regulation must therefore first prevent, and where necessary terminate in a timely way, any harmful practices by large online platforms; and second, set up mechanisms or rules to ensure that digital markets function competitively and fairly. Both of these are essential to protect the interests of consumers.

Key underlying principles for ex ante regulation should include:

- Ensuring the functioning of the internal market and avoiding gatekeeper practices that harm **consumers' interests**.
- **Avoiding fragmentation of the Single Market** arising from inconsistent rules (e.g. diverging national rules on prohibitions and obligations for platforms) or divergent enforcement of such rules. However, **existing enforcement standards** at national level should not be weakened.
- **Avoiding lengthy delays** before ex ante regulation establishes clear, enforceable prohibited practices and obligations for large online platforms. Given the characteristics of digital markets, the problems identified are unlikely to self-correct but rather to become increasingly entrenched with the further passage of time. Over-engineering the system and the ensuing delay risks exacerbating the current situation.
- A requirement for Data Protection Authorities and the European Data Protection Board to be involved in the design of measures and remedies involving the processing of consumers' personal data.<sup>6</sup> Current gatekeeper platforms have a

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<sup>5</sup> These include network effects, economies of scale, unequal access to user data but also the power of defaults, the lack of transparency and vertical integration. For more details, see UK CMA - Online Platforms and Digital Advertising Market Study, fn. 2; European Commission, Competition Policy for the digital era final report, 2019: <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>; see also Furman 2019, Unlocking Digital Competition, p. 5, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf); Stigler Committee on Digital Platforms, Final Report, September 2019, page 36 ("Stigler Report (2019)"). available at: <https://research.chicagobooth.edu/stigler/media/news/committee-on-digital-platforms-final-report>; European Commission Report on Competition Policy for the digital era - Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer, ("Report on Competition Policy for the digital era"), see p. 113-116 available at: <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

<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)

record of not respecting the EU's personal data protection rules. Data protection rights, obligations and principles of the **General Data Protection Regulation (GDPR) must be more strongly taken into account in the context of competition. The GDPR must be enforced and be fully applicable.**

- For legal certainty and to avoid potential forum shopping between different legal instruments and enforcers 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 ex ante regulation 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-ups**.<sup>7</sup>

Based on these principles, BEUC suggests that ex ante regulation include the following:

### Asymmetric regulation

BEUC recommends the introduction of **asymmetric ex ante regulation of large online platforms with significant network effects acting as gatekeepers** ("gatekeepers"). Blanket ex ante regulation of platforms without such a gatekeeper function risks harming other platforms' ability to compete with the gatekeepers and therefore reduce incentives to innovate and offer better products to consumers. Additional obligations that reflect other EU law principles and objectives such as consumer protection should however be imposed separately on all platforms, for example, in the field of liability of platforms for products sold in the marketplaces and a general duty to deal fairly with consumers (principle of "fairness by design"). Furthermore, should there be specific reasons requiring remediation of anticompetitive conduct of non-gatekeepers, this could be done by other means, notably through the NCT or antitrust enforcement.

### Identification of gatekeepers

The clear identification of gatekeepers as well as the conduct to be regulated are essential to the effectiveness of the ex ante regulation. This should be done on the basis of **clear and simple criteria to enable self-enforcing<sup>8</sup> prohibitions and obligations** as far as possible, thereby bringing immediate changes to the market to the benefit of consumers. Complexity or ambiguity in the criteria, leaving them open to differing interpretations, would risk lengthy debates and the ability of gatekeepers to delay the effect of regulation which would be contrary to consumers' interests.

BEUC suggests that the ex ante regulation should therefore first identify which markets/product areas are susceptible to gatekeepers based on the characteristics (identifying criteria) of the markets, e.g. substantial network effects, economies of scale and scope, lock-in effects on users/consumers (and inability of consumers to multi-home), high switching-costs for consumers and data dependency. Such markets could include for example, online intermediation services (consumer-facing online platforms such as e-commerce marketplaces, social media, mobile app stores, etc), search engines, operating systems for smart devices and online advertising intermediation services, many of which have been already identified and defined in EU law (i.e. Platform to Business Regulation).

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<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)

<sup>8</sup> Self-enforcing criteria are understood as criteria that are sufficiently clear that platforms would be in a position to self-assess their qualification as gatekeepers and their requirement to comply with the relevant prohibitions and obligations.

The initial set of markets/product areas concerned based on the identifying criteria could be set out in an annex to the regulation.

As a second step, within these markets/product areas, platforms which fulfilled specified easily verifiable criteria set out in the regulation would then be classified as gatekeepers and subject to the specific list of prohibitions and obligations. Ideally, these non-cumulative criteria should include easily measurable parameters in order to make the regulation as straightforward as possible. These criteria could therefore include, at thresholds to be determined, the number of users in the EU and the EU turnover of the company.<sup>9</sup>

This approach should enable platforms to unequivocally determine whether they are gatekeepers and thus the need to comply with clear prohibitions and obligations. The ex ante regulation should also provide for both the market/product area and platform criteria to be regularly reviewable in the review clause of the legislative instrument, for example every two years following a report from the Commission (see below).

### Scope of regulation

We favour “a **DSA list of prohibited practices and limited obligations** (where appropriate), i.e. the Option 3a”, in the Ex Ante Inception Impact Assessment, provided it is possible to draw up a list of practices considered to be always harmful in such a way that they can be easily enforced and not circumvented by platforms. Establishing such a list would be a more immediate way to correct harmful practices, and to signal to market players what is acceptable and what is not. Case by case analysis, though providing more flexibility, requires significantly more time to produce results. It seems unlikely that a case by case approach, without precisely pre-determined parameters<sup>10</sup>, could be materially quicker than a competition case under existing law where it requires the thorough investigation and balancing of multiple factors.

Practices included in a DSA prohibitions and obligations list would need to be unambiguous, exclude any efficiency defence<sup>11</sup> or disincentives to innovate, be broad enough in scope to catch all relevant conduct, but sufficiently precisely defined to have a clear signalling and self-enforcing effect for gatekeepers and to be simply monitored. Therefore, it seems unlikely that the list would be the same for the different large platforms and different services offered.

The DSA prohibitions and obligations list could also be supplemented by additional guidance notices (as in the field of competition enforcement) to bring legal certainty to market players and stimulate compliance through self-assessment.

As for the gatekeeper criteria, it would be essential to review and update this prohibitions and obligations list regularly, for example every two years, to ensure that it reflected current market and business practices in fast moving digital markets.

The following practices could be considered for inclusion in the initial list, though not all would be relevant for every type of gatekeeper<sup>12</sup>:

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<sup>9</sup> The definition of gatekeepers would thus be different to the concepts of dominance under competition law and significant market power under telecoms regulation.

<sup>10</sup> Similar to the pre-determined scope of detailed regulation in other regulated sectors.

<sup>11</sup> In other words, where the harm would be so obvious that it would preclude the possibility to argue that the conduct is necessary or justified.

<sup>12</sup> BEUC would recommend that the Commission considers the type of conduct identified as problematic in the UK CMA Online Platforms and Digital Market Study and proposed to be included in the UK's binding code of conduct for Google/Facebook.

- Prohibition on self-preferencing in specified circumstances (e.g. in ad tech and specialised search) by whatever means, including AI; this could be based on non-discrimination principles developed for telecoms regulation and adapted for digital markets.
- Restrictions on the use of pre-installation and defaults (in particular, for browsers and search engines).
- Restrictions on the use of unfair practices known as “dark patterns”. Such practices can consist in misleading choice architecture and phishing and sludging<sup>13</sup> techniques<sup>14</sup>. In this regard, gatekeepers could be subject to specific obligations, which can be inspired by the requirements of the Unfair Commercial Practices Directive, to ensure that they make it as easy as possible for consumers to make genuine choices.<sup>15</sup>
- Restrictions on changing how core services work without due notice to the user and affected business partner (e.g. algorithms).
- Restrictions on gathering and/or use of data by gatekeepers from their business users to gain competitive advantage (to the extent necessary beyond the Platform to Business Regulation, which is solely based on disclosure).
- Restrictions on the use of consumer data obtained by one service/entity by another service/entity within the gatekeeper’s ecosystem.
- Prohibitions on tying practices by gatekeepers in the form of forcing consumers who wish to access a service to agree to use/install a different service.
- Where platforms offer interoperability, prohibiting discrimination and termination of interoperability (whether contractually or technically/by design) where this would harm platform users.
- Obligations to report specified relevant information to the Commission (annually) on particular activities.

Prohibited practices may generally be more suited to inclusion in a pre-determined list than most positive obligations. Insofar as additional case-by-case positive obligations are necessary, these could be established either in sectoral legislation as already done in the European Electronic Communication Code regarding interoperability or through the NCT.

### **Monitoring and enforcement/Institutional architecture**

The issues at stake here are by their very nature cross-border. To ensure that enforcement of a DSA prohibitions and obligations list was effective and consistent, in the interests of both consumers and businesses alike, it would ideally be done at EU level within the Commission.

Monitoring and enforcement could be done by the European Commission, potentially through an interdisciplinary body comprising participants from the relevant Commission services, and working in close cooperation with designated national enforcement bodies, the European Data Protection Supervisor and Board. This composition would take account of competition, non-competition, unfair trading practices, consumer protection and data privacy aspects of the DSA prohibitions and obligations list.

The co-operation between the European Commission and the national enforcement bodies could take inspiration from the ECN principles of case allocation (Commission Notice on

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<sup>13</sup> Phishing is defined as the deliberate exploitation of information deficits and behavioural biases, and sludging the deliberate addition of frictions and hassles to make it harder to make good choices.

<sup>14</sup> See: Behavioural Insights Team, “The behavioural science of online harm and manipulation, and what to do about it”, available at [https://www.bi.team/wp-content/uploads/2019/04/BIT\\_The-behavioural-science-of-online-harm-and-manipulation-and-what-to-do-about-it\\_Single.pdf](https://www.bi.team/wp-content/uploads/2019/04/BIT_The-behavioural-science-of-online-harm-and-manipulation-and-what-to-do-about-it_Single.pdf)

<sup>15</sup> Rather than as presently, exploiting recognised consumer behavioural biases to lock-in consumers.

cooperation within the Network of Competition Authorities<sup>16</sup>). The European Commission would in principle take any necessary enforcement decisions with respect to infringements of obligations or prohibitions in the DSA list, given the inherent cross-border nature of platform conduct, unless another authority was better placed to do so in a particular case.

The European Commission would need to be given appropriate and deterrent powers to remedy and sanction any failure by gatekeepers to comply with the DSA prohibitions and obligations list. These powers could be modelled on competition law powers.<sup>17</sup>

This approach would have the following merits:

- No major and lengthy (and thus harmful) institutional set up would be required.
- The Commission could call on existing experienced staff and so could be operational immediately.
- The risk of inconsistencies at Member State level and consequential legal uncertainty would be avoided through the co-ordinating role of the Commission.
- Forum shopping by platforms would be excluded and maximum regulatory independence ensured.
- The Commission could also identify situations which should be addressed under the NCT<sup>18</sup> due to the structural nature of the market problems, thereby avoiding inconsistencies of application and enforcement between the two instruments. This approach would also maximise the synergies, using NCT findings to update ex ante regulation to make sure it reflects current market and business realities both in terms of the identity of the gatekeepers subject to regulation and the DSA prohibitions and obligations list.
- Potential **case by case obligations to be dealt in the context of the NCT** and existing competition law could include:
  - Mandating access to data where this is a barrier to market entry, in full compliance with the GDPR.
  - Access to other inputs/services<sup>19</sup> or requirements to deal.
  - Mandating interoperability and access to Application Programming Interfaces when this is needed to tackle structural markets problems. Where interoperability is needed to attain non-competition objectives (e.g. media pluralism regarding social media), it could be dealt with by means of sectoral legislation.
  - Giving consumers control (choice) over data use, sharing and mobility, including additional obligations to facilitate the portability of personal and non-personal data between service providers<sup>20</sup>.
  - Data separation within ecosystems (for example where data has been collected through the leveraging of market power).

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<sup>16</sup> Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(02)&from=EN)

<sup>17</sup> I.e. as under Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Regulation 1/2003), including remedies to end the unlawful behaviour and its effects, interim measures, fines and periodic penalty payments.

<sup>18</sup> Where necessary with input/participation of other sectoral specialists outside of digital markets.

<sup>19</sup> Inspiration could be drawn from existing legislation such as the Payment Services Directive, the Type Approval Regulation and the new Electricity Directive, i.e. Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market; 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; and 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>20</sup> BEUC submission on a European Strategy for Data, available at [http://www.beuc.eu/publications/beuc-x-2020-046\\_a\\_european\\_strategy\\_for\\_data\\_-\\_beucs\\_response\\_to\\_public\\_consultation.pdf](http://www.beuc.eu/publications/beuc-x-2020-046_a_european_strategy_for_data_-_beucs_response_to_public_consultation.pdf)

- Mandating consumer choice, e.g. via carefully designed choice architecture.
- Unbundling of services.
- Transparency requirements in relation to how platforms make decisions in, for example, rankings, auction processes or other competitive parameters (using AI or otherwise,) which affect users (businesses and consumers).
- Structural remedies, including divestiture.
- Obligation to deal fairly with trading partners in specified areas in order to preclude discrimination, forced data sharing, withholding of data from business users, unfair terms and conditions in relation to, for example, payment terms, liability, rights assignments, etc<sup>21</sup>.
- DG Competition is highly experienced in the types of procedures and processes which will be required, including interim measures, evidentiary standards and respect for due process.
- The Commission would most easily be able to facilitate EU wide cooperation with extra-EU jurisdictions.

It would be essential for the Commission to ensure that it has sufficient financial, human and technical resources and competence to carry out this new task.

Where gatekeepers fail to comply with ex ante regulation, these could be enforced in national courts in private actions by legitimate parties in addition to enforcement by the Commission where appropriate. At the same time, mechanisms should be foreseen to enable **effective redress/compensation for those harmed** by such non-compliance, be they consumers (including their representative organisations), competitors or other market participants. Inspiration could be drawn from Article 14 of the P2B Regulation.

## Conclusion

**BEUC favours an asymmetric ex ante regulatory framework for large online platforms acting as gatekeepers. We consider that establishing a DSA prohibitions and obligations list, with a procedure to update it to keep abreast of 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 to the benefit of consumers. It is important, however, to highlight that such a list should be accompanied not only by more vigorous antitrust enforcement against dominant platforms under existing law but also by market investigations and, where necessary, case by case remedies under a NCT.**

## New Competition Tool (NCT)

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Market structure characteristics in the digital sector enable large platforms to act in ways that can significantly harm competition, innovation and ultimately consumers. Distinctions between digital and 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, given the specific new structural competition challenges in digital and related markets and wide-ranging self-reinforcing concerns (for example, concentration levels, vertical integration and dual roles, network effects, extreme economies of scale and scope, switching costs, “zero” pricing and the importance of data and algorithms, including pricing algorithms), which significantly hamper new market entry and the development of incumbents’ smaller rivals, these rules are not suited to effectively address all problems. Examples of problematic conduct which cannot be effectively tackled under Articles 101 and 102 TFEU include monopolisation strategies by non-dominant companies with market power or parallel leveraging strategies by dominant companies into multiple adjacent markets, thereby tipping markets in their favour. This conduct can lead to consumer harms in the form of higher prices, lower quality, less choice and innovation. Furthermore, Articles 101 and 102 TFEU (and merger control) are primarily focused on preventing competition from declining. The market structure characteristics or features of some markets however can mean that there is a need to proactively promote increased competition.<sup>22</sup> A NCT is therefore necessary at EU level<sup>23</sup> to deal with both problematic conduct and problematic structures or features as such and open up the potential for disruptive and innovative competition from new technologies and business models.

As regards the scope of an NCT, BEUC would favour a **market structure-based competition tool with a horizontal scope** (Option 3 in the NCT Inception Impact Assessment).

Whilst the most obvious structural competition problems are currently seen in digital markets, if such a new tool were to be established by legislation, it would be unwise to limit its scope to selected sectors only (Options 2/4) given the blurring of lines between digital and non-digital markets. Furthermore, as it is not possible to predict which sectors will raise structural competition concerns in the future, it would be advisable to have the flexibility to use it in other sectors, subject to appropriate safeguards. Other sectors such as financial services (including payments), energy, healthcare/pharma and transport have demonstrated structural problems in the past. The UK’s CMA, for example, has carried out 19 market investigations and over 50 market studies in the last 18 years, the majority of which did not relate to digital markets.<sup>24</sup>

As regards whether the tool should be market structure-based or only dominance-based (Option 1), BEUC considers that a market structure-based model is more appropriate. By this we understand market structure in the broadest sense, including not only supply-side but also demand-side issues.

Many markets, including digital markets, are not necessarily only characterised by single company dominance but also by particular features or combinations of features such as high concentration levels, vertical integration and the development of ecosystem models, or the presence of powerful actors acting in several markets making oligopolistic and tacit collusion scenarios more relevant. Markets may be characterised by other factors that hinder competition such as structural barriers or consumer behavioural factors. Companies can hinder competition by exploiting behavioural biases or distorting consumer decision-making through, for example, not providing clear and comparable information, refusing to deal with price comparison website services, engaging in the use of dark patterns as

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<sup>22</sup> The NCT could, as is the case for the UK Market Investigation Tool “address markets which can have become ‘stuck’ in bad equilibria, which are good for neither firms nor society, but where some form of intervention is required to make the shift to a better equilibrium”, Amelia Fletcher, Market Investigations for Digital Platforms: Panacea or Complement? p.3, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3668289](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668289)

<sup>23</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)

<sup>24</sup> See the UK Enterprise Act Market Investigation Tool in the UK, available at <https://www.gov.uk/topc/competition/markets>.

described by our Norwegian member Forbrukerrådet in its report “Deceived by design”<sup>25</sup> or imposing on consumers contractual terms that make switching costly or cumbersome. This can have significant implications for competition, even in relatively non-concentrated markets.<sup>26</sup>

Tools exist in other jurisdictions to deal with situations where it is the structure or features of the market itself, and not only the conduct of powerful individual players, that harm competition, for example Market Studies/Investigations in the UK. These have led to effective forward-looking industry-wide remedies, such as facilitating easy switching by consumers, creating the conditions for choice of new services to enter the market as was the case with open banking, in addition to remedies related only to the conduct of individual companies.

Furthermore, if the NCT were only to be dominance-based this would suggest a potentially significant overlap with Article 102 enforcement. If so, what would be the basis to determine which tool were used? The advantages of an 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. A broader tool by contrast would lend itself better to preventing markets from tipping and to considering more recent developments such as tacit collusion through the use of algorithms and potential anticompetitive effects of common ownership across sectors (institutional investors owning non-controlling stakes in direct competitors). It would also be more useful in keeping any ex ante regulation relevant in the future.

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 the current trend is that many markets are becoming 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>27</sup> or Coty<sup>28</sup> on vertical restrictions to sell “luxury” products on third-party platforms such as Amazon.

Where Member States and the European Commission are considering opening investigations into the same market, a **coordination mechanism** as under the Commission Notice on cooperation within the Network of Competition Authorities in relation to Article 101 and 102 TFEU, would be advisable to prevent duplicate investigations which would waste both public and private resources and potentially lead to inconsistent outcomes.

For the NCT to function effectively and lead to the right outcomes, it would be essential to ensure that **appropriate and transparent procedures as well as robust governance** provisions are set up in this instrument. The NCT could take inspiration from the CMA’s market investigation tool. The following points should be considered:

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<sup>25</sup> Forbrukerrådet, “Deceived by design: How tech companies use dark patterns to discourage us from exercising our rights to privacy”, available at <https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf>

<sup>26</sup> Amelia Fletcher, Market Investigations for Digital Platforms: Panacea or Complement? p.4, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3668289](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668289)

<sup>27</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>28</sup> Judgment of the Court of 6 December 2017, C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH*, ECLI:EU:C:2017:941

- Establishment of **transparent and predictable criteria and procedures** for monitoring markets and determining when (i.e. the legal threshold) to use the NCT and when to rely on antitrust enforcement under Articles 101 and 102 TFEU (and the exclusion of both being used for the same issue).
- **Systematic involvement of consumer organisations** in the identification of problematic market structures, demand-side failures<sup>29</sup> and practices that are harmful to consumers.
- **DG Competition should have the same (or equivalent) set of investigative and procedural tools** as under Regulation 1/2003 (including interim measures, commitment decisions, structural/behavioural/hybrid remedies) except for:
  - the finding of an infringement
  - the ability to impose fines (except for procedural infringements and periodic penalty payments for failure to comply with investigative measures or decisions and remedies).

With the **additional ability** to:

- inform and make legislative recommendations, in particular in relation to ex ante regulation (identity of gatekeepers and the contents of the DSA prohibitions and obligations list).

And the **obligation** to:

- conclude investigations and the imposition of any remedies or other measures where appropriate within **legally binding deadlines**
- **consult all relevant market participants, including consumer organisations**, on the proposed remedies/other measures.
- Companies and other parties, including consumers, should have **equivalent rights of defence and due process to those under Regulation 1/2003 and additional opportunities to comment at key stages**. Here in particular the participative approach of the CMA's market investigation tool could serve as a model. Parties should also have **corresponding rights of appeal to the Court of Justice of the European Union**.
- The Commission should make the **standard of proof** for the identification of a competition problem and the imposition of remedial actions clear. This should be a lower standard than for an infringement decision under Article 101/2, for example, an adverse effect on competition, given that the absence of a fine and no finding of liability would mean no quasi-criminal liability for companies.
- The **burden of proof should remain with the Commission**, i.e. be equivalent to Article 2 Regulation 1/2003. This should apply both to the identification of a competition problem and the likelihood of intervention remediating this problem.
- **Dissuasive, effective and proportionate remedies** should be identified early in the investigative process and, if considered necessary at the end of the investigation, thoroughly market tested (regardless of whether these are imposed by decision or the result of commitments, are market-wide or imposed on specific market players). Remedies could be on the supply-side, for example to open up monopolies, otherwise enhance competition or prevent tipping and/or on the demand side. As regards the latter, they could, where appropriate, target the types of consumer behavioural biases and decision-making issues mentioned above. Such remedies could include disclosure and presentational requirements to improve decision-making, including appropriate choice architecture and "fairness by design"

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<sup>29</sup> As under the UK Enterprise Act Market Studies and Investigations regime. See <https://www.gov.uk/topic/competition/markets>

and limit the effects of behavioural biases, facilitating consumer search and switching and protecting consumers against unfair commercial practices. Consumer-facing remedies should be tested with consumers to identify whether their design has successfully taken into account actual consumer behaviour. This can be done through qualitative research, surveys, experiments in laboratory, field trial settings and pilot testing and would require sufficient timelines and the necessary expertise. DG Competition could for example benefit from the expertise on behavioural testing of the Joint Research Centre or even include a behavioural unit in the team of the Chief Economist.

- **Remedies imposed could take inspiration from and should be consistent with ex ante regulation** (see above). It is essential that remedies resulting from any NCT (or case by case ex ante regulation) are well designed to undo the harm identified without risking negative impacts on innovation that benefits consumers.
- **Remedies should also foresee the ability to adjust them.** This will be particularly important in dynamic markets.
- Finally, **remedies need to be enforced and regularly monitored.** Monitoring would allow remedies to be refined if they were not working, or terminated if they were no longer necessary. This will require resources and expertise. Sectoral regulators may be well placed to assist in this. Remedies should also be subject to systematic post-evaluation of their effectiveness to learn lessons for future remedies.
- Given the potentially far-reaching effects of this tool, mechanisms should be considered to ensure **robust governance and strong checks and balances** for the NCT, including the directorate/unit carrying out the investigation being different from the one deciding on, designing and enforcing the remedies.
- DG Competition should have the **financial, human and technical resources** to effectively implement the NCT.

Due process, but without unnecessary delays, would be essential to reach the right outcomes for consumers. Where final decisions have been made, should companies fail to comply, mechanisms should be foreseen to enable **effective redress/compensation for those harmed by non-compliance**, be they consumers, competitors or other market participants.

## Conclusion

**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, to deal with structural, including demand-side competition issues. BEUC therefore favours 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 to the benefit of consumers, independently of the finding of an infringement of Article 101 or 102 TFEU.**



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