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The New Competition Tool & its Implications

Introduction

In recent months, the Commission has been assessing ways to enhance the deterrent effect of competition law such that digital platforms, and dominant firms in general avoid anti-competitive behaviour. Antitrust investigations take a long time, and the downstream market may already be monopolised to an irreversible extent - due to network effects. The conclusion of an investigation for abuse of dominance could not always restore competition in an already compromised market. Furthermore, digitalisation of the society and of the economy has brought significant changes in market dynamics, such as radical decrease of competition (tipping) and “winner takes most” scenarios.



A New Initiative: The New Competition Tool

In this context, on 2 June, the Commission launched the Inception Impact Assessment and an open consultation on the New Competition Tool “NCT”. The initiative is part of a holistic approach to ensure contestability and fair functioning of markets, based on the following three pillars, namely:

- the **continued vigorous enforcement of the existing competition rules**;
- **the possible ex-ante regulation of digital platforms**, including additional requirements for those that play a gatekeeper role (also published today; and
- a **possible New Competition Tool** to deal with structural competition problems in relevant markets.

The objective of the NCT is to restore the competitive structure of a market so that it can function properly. This would allow many companies to be active in or enter the market - providing more choice and innovative products or services to consumers. This new tool would allow the Commission to carry out market enquiries (not sector inquiries) and to intervene in markets that raise preliminary antitrust concerns. The Commission could then propose structural changes. The burden of proof is not as extensive as is required in antitrust investigations, allowing the Commission to act more swiftly compared to antitrust investigations.

The Commission envisages a range of options as a basis for the legislative initiative:

- whether to focus the intervention on a specific company that has a dominant position or, rather, on a given market; and



- whether to limit the adoption of the NCT to digital or digitally enabled markets or to extend it to all markets.

The NCT would allow the Commission to preserve the competitive structure of the market without the need to assess an illicit behaviour (anticompetitive agreement or abuse of dominant position) or a merger.

The idea for this law instrument stemmed from **the UK's Consumers and Markets' Authority (CMA)** Digital Market Strategy and the creation of the Task Force unit, equipped with new enforcement tools that enable it to timely intervene in digital markets and strike the right balance between promoting innovation and avoiding any anticompetitive conduct. The CMA's initiatives follow the recommendations of the Furman Review published last year on unlocking competition in digital markets.

The initiative has been framed as part of a broader push by European Commission Executive Vice President Vestager to give competition enforcers the tools needed to tackle competition problems at an early stage to make sure that decisions can restore effective competitive structure in markets. Given the digitalisation of many sectors, it should be expected that other industries, such as transport, agriculture or heavy industry, will also be subject to this new legal instrument.

The Commission plans to table **a legislative proposal by end of this year**. It is already clear that discussion will be very polarised:

- Critics of the initiative argue that it has **protectionist ambitions** aimed at promoting an EU model and limiting the expansion of big digital platforms that are almost exclusively US based. The possibility for the Commission to intervene at an early stage to restore the competitive structure of a relevant



market is perceived as an **invasive intervention on the freedom of enterprise to establish a proper and successful commercial strategy**. Furthermore, the ability to impose remedies - such as divestment of activities - without a fully-fledged investigation can lead to solutions that may not fully take into account market structures, and the market impact of the behaviour under assessment.

- On the other side, **new market players – especially SMEs - claim that the NCT is key for entrance and expansion** into digital markets, and an ability to challenge incumbents. An antitrust decision might come too late to correct an already compromised market structure. Supporters of this initiative refer to long antitrust investigations that give time for incumbents to consolidate their market power and exclude smaller competitors. Remedies, they claim, are not always capable of re-establishing a competitive environment.

The NCT is the result of a new push by the current Commission to promote an EU vision on market development, and how authorities should act to support these developments. It is a markedly interventionist approach with the aim to keep markets more contestable and to impose additional responsibilities on dominant companies (named by the Commission as gate keepers, essential patent holders et cetera). This new vision is consistent with a Commission calling itself a “geopolitical Commission” looking to play an international role and boosting its own economy at global level.

In the same context, we must consider the forthcoming initiative of the Commission on third country subsidies, with which the Commission hopes to accomplish two things – firstly, assessing the effect of subsidies from third countries to their own



undertakings and secondly, the impact of such subsidies on competition in the internal market.

For longstanding competition practitioners, this newly interventionist approach would have been virtually unimaginable at the time of the first antitrust investigations on Microsoft or Intel. Today new, fascinating scenarios are emerging, and it will be interesting to see if they will really lead to more fair and competitive markets, as envisaged.

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