

The “New Competition Tool” - A tool for the modern economy, not just the digital economy

The European Commission is currently consulting on a proposal for a new power (the NCT) that would allow them to impose behavioural and structural remedies in markets where they have identified certain competition issues.

- The Commission's view is that the NCT is required to ensure competition policy and rules that are fit for the modern economy, with a particular focus on digital markets.
- According to the Commission, digital markets display typical characteristics that can result in outcomes that are not competitive but that are beyond the reach of the current competition rules.
- Four options are proposed for the form the NCT might take, differing in threshold for application and scope of application.
- Businesses operating on (traditionally) non-digital markets may be surprised to learn that the reach of whatever NCT is adopted will have (at least) the potential to disrupt their industry.
- The Commission is looking towards the future and is acutely aware that more traditional sectors of the economy are inevitably going to adopt more digitally enabled outlets to connect with customers.

ICYMI (In case you missed it)

The European Commission (the **Commission**) launched its initiative for a “[New Competition Tool](#)” (NCT) on 2 June 2020. The overarching goal of the NCT is to give the Commission a new power that would allow them to impose behavioural and structural remedies in markets where they have identified certain competition issues. A core aim of the NCT is to strengthen competition enforcement in all sectors and making sure that competition policy and rules are fit for the modern economy. A [public consultation](#) has been launched to gather stakeholder views on the introduction of the NCT. The Commission has detailed four possible options regarding the form the new power could take, each differing in threshold for application and scope. Regardless of whether your business traditionally operates online or not, the NCT has the potential to reshape your industry and its development should be closely monitored.

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The Commission launched the NCT initiative on 2 June 2020 as one of two initiatives (the other being the Commission's [initiative](#) on platform-specific ex ante regulation, which seeks to provide a fair trading environment for the platform ecosystems in the EU's internal market). Core to the Commission's reasoning for the proposed introduction of the new power, is that its enforcement experience in both antitrust and merger cases in various industries points to the existence of structural competition problems that cannot be tackled under the current EU competition rules. The Commission makes plain that the magnitude of the shift in the status quo caused by the rise of digital markets and the characteristics typical of these markets

has heavily influenced its approach to the new initiative. However, the Commission also makes clear its view that these characteristics can also exist in non-digital markets, and that the increasing digitalisation of the economy will inevitably result in the differences between digital and non-digital markets becoming increasingly blurred. In this context, it may come as a surprise to businesses in more traditional sectors that the most wide-ranging option currently proposed would give the Commission the power to intervene in any market (where it was of the view that competition issues exist preventing that market from functioning properly), and to impose behavioural, and even structural remedies. The Commission would not be required to establish any actual competition law infringement has occurred and would not be required to establish the dominance of any single competitor.

According to the Commission, digital markets display typical characteristics that can result in outcomes that are not competitive but that are beyond the reach of the current competition rules.

The [inception impact assessment document](#) contains a brief summary of the Commission’s arguments for the introduction of the NCT, in addition to a summary of the expected impacts in a number of areas including economic impacts, social impacts and impacts on fundamental rights. Particular market characteristics that the Commission highlights as being problematic relate to what they term as “structural risks for competition” and a “structural lack of competition”. Structural risks for competition, as the Commission sees them, relate to markets where early entrants (often online platforms) may have built up an entrenched position resulting in those market players possessing a “gatekeeper” role. In simple terms, online platforms (benefitting from network effects, extreme returns to scale and data advantages etc.) are key enablers of digital trade. Businesses are increasingly more dependent on them to reach their customers resulting in those platforms wielding market

power over those businesses (whose success depends on access to markets and consumers). Structural lack of competition, as the Commission sees it, may not be the result of the conduct of any particular player in the market. However, the market is still not achieving competitive outcomes due to, for example, high concentration, high entry barriers, consumer lock-in, lack of access to data or data accumulation. Under this heading, the Commission also highlights an increased risk for tacit collusion (even in markets with numerous competitors), where market transparency is greater than ever due to the increasing prevalence of algorithm-based technological solutions.

Four options are proposed for the form the NCT might take, differing in threshold for application and scope of application.

Central to the Commission’s initiative are its four proposed options outlining the form that the NCT might take. Each option outlines varying iterations of both the requirements and scope for application of the NCT. From a business perspective, the impact that the NCT will have is dependent on which of the four options of the NCT (as currently proposed) is eventually adopted. These options are outlined below. Two important aspects common to all four options (regardless of which option is adopted) are: (a) the application of the NCT will not require any prior finding of an infringement (for example, pursuant to Article 102 TFEU); and (b) the application of the NCT would not result in the imposition of fines (meaning no follow-on damages claims could be brought), nor any finding of an infringement of the EU competition rules.

Option 1



A dominance-based competition tool with a horizontal scope:

Option 1 would address competition concerns arising from unilateral conduct by dominant companies (without any prior finding of an infringement pursuant to Article 102 TFEU). Similar to the existing EU competition rules, it would be generally applicable across all sectors of the economy.

- If your business could be considered to be dominant on any market that the Commission considers is exhibiting characteristics typical of digital markets (without having to be a digital market), option 1 could affect you.

Option 2



A dominance-based competition tool with a limited scope:

Option 2 would address competition concerns arising from unilateral conduct by dominant companies (without any prior finding of an infringement pursuant to Article 102 TFEU). Under Option 2, the use of the tool would be limited in scope to sectors in which the problematic characteristics identified by the Commission are most prevalent (e.g., in digital or digitally-enabled markets, but also other sectors identified as being especially prone to such concerns due to entrenched dominance, high entry barriers, etc.).

- If your business could be considered to be dominant on a market more prone to exhibiting characteristics typical of digital markets, option 2 could affect you.

Option 3



A market structure-based competition tool with a horizontal scope:

Option 3 would allow the Commission to identify and remedy structural competition problems that it sees cannot be addressed (at all or as effectively) under the EU competition rules. Unlike Options 1 and 2, it would not be limited only to companies that are already dominant. Similar to already existing competition tools of this kind, this tool would be based on a test allowing the Commission to intervene when a structural risk for competition or a structural lack of competition prevents the internal market from functioning properly. The Commission could also recommend legislative action to improve the functioning of the market concerned. Similar to the existing EU competition rules, the tool would be generally applicable across all sectors of the economy.

- If your business operates on a market that the Commission considers is exhibiting characteristics typical of digital markets (without having to actually be a digital market), option 3 could affect you.

Option 4



A market structure-based competition tool with a limited scope:

Option 4 would address structural competition problems. Under Option 4, however, the use of the tool would be limited in scope to sectors in which the problem characteristics mentioned are most prevalent. These could include certain digital or digitally-enabled markets and/or other sectors identified as being especially prone to such concerns due to entrenched dominance, high entry barriers, etc.

- If your business operates on any market more prone to exhibiting characteristics typical of digital markets, option 4 could affect you.

Likely impacts of the NCT

According to the Commission, options 1 and 2 would be more challenging to apply effectively as they would necessarily involve an investigation and the application of the legal test for a finding of dominance. The Commission comments that this would affect the overall timeliness of intervention. Options 3 and 4 would cover all identified structural competition problems, including scenarios involving dominant companies, but also structural competition problems that are not necessarily related to dominance (e.g. tipping markets and oligopolistic market structures). In terms of scope, options 2 and 4 would be limited in that they would only permit the application of the NCT to markets most prone to the problematic characteristics highlighted by the Commission. While the Commission accepts that these characteristics have most recently been identified in digital or digitally-enabled markets, it does not rule out the application of the NCT (under options 2 and 4) in other sectors (highlighting that the entire economy is increasingly digitised). Options 1 and 3 would be applicable across all markets, similar to how Articles 101 and 102 TFEU are currently applied. In terms of social impacts, not surprisingly, the Commission identifies option 3 – the least restrictive and most wide-ranging option – as likely to have the biggest impact in terms of safeguarding consumer welfare in the long term. In terms of the likely impact on fundamental rights, the Commission acknowledges that – as all policy options will have an impact on the way in which companies can act on any given market – account will have to be taken the rights of defence and the right to judicial review of companies subject to intervention under the NCT

Next stages

The Commission’s [public stakeholder consultation](#), which aims to gather views from relevant stakeholders on the perceived impact of the options proposed, is now open with the deadline for responses being 8 September 2020. Groups the Commission is encouraging to submit their views include:

- a. companies with business operations in the EU
- b. law firms, consultancies
- c. industry associations
- d. consumer organisations

- e. public authorities and
- f. academics and research institutions with a focus on EU competition law.

According to the Commission, the objective of the consultation is to collect stakeholder views on:

- a. whether there is a need for a NCT to ensure fair and competitive markets (with a view to improving European consumer welfare) and
- b. the characteristics that such a NCT should have in order to address structural competition problems in a timely and effective manner.

Following the outcome of the consultation (in addition to other evidence and data collection exercises), the Commission has signalled its intention to publish a legislative proposal regarding the NCT in Q4 of 2020. From an Irish perspective, the Irish Department of Business, Enterprise and Innovation is also seeking the views of parties interested in the [proposed NCT](#) by 24 July 2020 on the Commission’s proposals.

Comment

Perhaps the businesses that will find the Commission’s new NCT initiative the least surprising are those who’s names immediately spring to mind when phrases like “the digital economy” and “Big Tech” are used. Against a backdrop of years of enforcement action involving many of these companies, the Commission has not been shy in signalling its intention to work to ensure that EU competition policy and rules were fit for (and could keep pace with) the digital economy (particularly with the release of the Commission commissioned April 2019 independent Special Advisers report on “[Competition policy for the digital era](#)”). Businesses operating on (traditionally) non-digital markets, however, may be surprised to learn that the reach of whatever NCT is adopted will have (at least) the potential to disrupt their industry. Such businesses may not have been paying too much attention the Commission’s online travails, and understandably so. Much of the Commission’s focus in recent years has been on the unique competition issues borne out by the digital economy. The Commission, however, is looking towards the future and is acutely aware that more traditional sectors of the economy are inevitably going to adopt more digitally enabled outlets to connect with customers.

A&L Goodbody's EU, Competition & Procurement Group is widely recognised as the leading and most experienced team in its field.

If you require advice on the possible impacts of the proposed New Competition Tool on your business or if you require advice on the European Commission's various initiatives relating to the future regulation of digital markets please do not hesitate to contact [Thomas O'Donnell](#) or any member of the [EU, Competition and Procurement team](#).

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