

CCBE comments for a “New Competition Tool” as part of a future legislation to be proposed by the European Commission

14/10/2020

1 Introduction

The CCBE is happy to present its comments on the “New Competition Tool” as part of a future legislative package (linked with a proposal for a Digital Services Act) which is being prepared by the European Commission (hereafter the Commission). While we lay out our concerns in relation to the Commission’s rationale in section two, in section three we set out the possible legal framework and legal basis for this tool. We go on to compare and contrast the Commission’s New Competition Tool with other jurisdictions’ similar regimes already in place in section four, and ahead of our conclusion, we aim to emphasise some suggestions, should the Commission decide to introduce this new competition tool.

Summary : The CCBE is particularly concerned that the introduction of a “New competition tool” as outlined would drastically change the nature of competition law instruments and equilibrium of powers, while lowering the standard of proof and putting at risk in a disproportionate manner parties’ right of defence. The CCBE does not believe that the Commission requires a tool which goes beyond its existing ability to perform sector inquiries.

If such tool were to be introduced, the Commission should clarify the legal and economic tests that it would apply before intervening in a market or imposing remedies. In particular, the exact test and standard of proof which the Commission requires to meet before it can intervene in any market will need to be defined. The Commission should also outline exactly what its new investigatory powers would entail. The CCBE would also suggest that the Commission sets out clear ground rules and introduces robust procedural safeguards (like those in the UK).

In any event, suitable and rigorous safeguards need to be put in place, such as proportionality checks, procedural guarantees and thorough judicial review. Another potential difficulty the Commission could face with such tool, is in balancing Member states’ interests: there is a risk of the becoming politicised and the Commission’s political independence therefore being undermined.

2 Rationale

- 2.1 The Commission’s rationale behind this proposal is that a new competition tool is necessary to enable the Commission to deal with structural competition problems across markets that the Commission has identified, which cannot be tackled or addressed in the most effective manner on the basis of the current competition rules (e.g. preventing markets from tipping).
- 2.2 Although the Commission’s inception impact assessment cites several research reports on which it bases its current proposal, all of them state the plausible and potential dangers that may arise, and nothing more. Even though there appears to be a wider consensus among academics in what dangers could potentially exist, most of these reports admit themselves to lacking empirical

evidence. They do not identify real examples of this already taking place, something that has often times been recognised as necessary to know how to proceed¹.

- 2.3 Thus, no concrete and compelling evidence has been put forward, proving that a new tool is needed to deal with the challenges at hand. The Commission would indeed be in a more favourable position if it could clearly delineate the gaps that this competition tool is trying to address. Instead, we are left with expert reports² referring to no real examples that reason away into mere plausibility, making the ultimate goal of the tool unclear, only leaving us informed of a desired outcome which is not what competition law exists for, and without a fact-based assessment. This is contrary to the EU principles of better regulation - promoted by the Commission - which require that EU actions are based on evidence and understanding of the impacts.
- 2.4 More specifically, the OECD report³ is based on a hypothetical undesired outcome, and is positing that this outcome is a problem. The nature of competition as it has been traditionally viewed in an EU context is not solely to control or improve market outcomes, it is to ensure a fair process. The reports on which the inception impact assessment is based do not address how that can be achieved.
- 2.5 There is no agreed standard by which to measure such problems. In fact, the reports seem to focus on outcome rather than methodology: this is not helpful when attempting to create a legal solution to a problem. Indeed, the aforementioned OECD report cites Kaplow in saying that the current approach might be too “formalistic” to tackle the harm done in an attempt to justify a more “*economically-based approach to competition law*”⁴, which disregards the emphasis put on the exact methods used to generating the aforementioned harmful outcome. **Adopting such an approach would, in effect, allow the Commission to bypass established evidentiary standards, as there is no need to find an infringement, and intervene for lack of desired market outcomes under the guise of consumer protection.**
- 2.6 It has been stipulated by the Commission that current competition rules remain the “*bread and butter of competition policy*”⁵, and the CCBE concurs. Competition law authorities already have a wealth of tools available to them to address potential new realities. These tools have stood previous tests of time, and if there is a problem that needs to be addressed, it might rather be a question of more thorough enforcement and targeting resources to ensure that evidentiary standards are met in order to prove that there has been infringement. The CCBE welcomes the increased use of the Commission’s current toolbox such as interim measures, sector inquiries, and investigations under Articles 101 and 102 of Treaty on the Functioning of the European Union (TFEU).
- 2.7 Furthermore, the CCBE would like to express its concerns with regards to competition law transforming into a cure-all for every policy concern. The scope of interference that comes with a tool of such high flexibility brings about questions of how enforcement could remain proportionate and effective. The CCBE believes that the unique governing structure of the EU institutions is not sufficiently equipped to deal with questions of accountability and transparency should this be added to the Commission’s toolbox.
- 2.8 The OECD’s reasoning in its report on algorithms and collusion advocates too freely for replacement of legal benchmarks for economisation in order to substantiate the Commission’s new objectives. The CCBE holds the conviction that this could result in both legal uncertainty and

¹ The OECD Tacit Collusion report clearly admits to its ideas’ hypothetical nature. See OECD (2017), Algorithms and Collusion: Competition Policy in the Digital Age www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm

² OECD (2017), Algorithms and Collusion: Competition Policy in the Digital Age www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm

³ OECD (2017), Algorithms and Collusion: Competition Policy in the Digital Age www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm

⁴ Kaplow, L. (2011), “On the Meaning of Horizontal Agreements in Competition Law”, California Law Review, Vol. 99, No. 3, pp. 683-818, https://www.jstor.org/stable/23014697?seq=1&page_scan_tab_contents.

⁵ Statement by Commissioner Vestager to the U.S. Committee on the Judiciary Subcommittee on Antitrust, Commercial and Administrative Law, August 3, 2020 [online] Available at: <<https://eacny.com/news/chapternews/statement-by-executive-vice-president-of-the-eu-commission-margrethe-vestager-to-the-u-s-committee-on-the-judiciary-subcommittee-on-antitrust-commercial-and-administrative-law/>> [Accessed 6 August 2020].

questions of the Commission's threshold for intervention. Similarly, the OECD stipulated that the "inclusion of multiple objectives [...] increases the risks of conflicts and inconsistent application of competition policy"⁶.

3 Current legal framework and legal basis

- 3.1 **While, in practice, the introduction of this new competition tool may mean that the Commission is held to lower evidentiary standards than under the current competition rules, this tool would also raise issues with regards to whether those powers would fit in with the current EU framework, as the Commission would almost be granted legal capacity to push on market regulation while causing companies' due process rights to be less legally certain. The CCBE does not believe that the Commission is in need of powers which go beyond its existing ability to perform sector inquiries.**
- 3.2 In addition, there is also potential overlap with other regulations such as the expected gatekeeper regulation and the recently introduced platform-to-business regulation ([Regulation \(EU\) 2019/1150](#)). As the Commission has already clarified that the new competition tool and the gatekeeper regulation will be overseen by DG CNECT and DG COMP, it has been rightly pointed out that companies could be subject to two different regulatory agencies, increasing compliance burden while having the ability to impose analogous remedies. **As with platform-to-business regulation, the Commission's should focus attention on fairness of process rather than fairness of outcome, while recognising platforms' value creation for platform users and consumers.**
- 3.3 Furthermore, the CCBE finds the legal basis for this tool questionable. As rightly pointed out, It appears that this new competition tool would unavoidably circumvent the Commission's established intervention requirements, especially where an overlap can be found between the new competition tool and behaviour contrary to Articles 101 and 102 TFEU. However, Article 103 TFEU would not provide an adequate legal basis, as it "*would need to be consistent with the provisions of the Treaty as interpreted by the Courts (regarding, for example, the burden of proof, the notion of restriction of competition, dominance, anticompetitive effects...)*. *The Treaty provisions deal with restrictions of competition, but can arguably not be the legal basis for measures that seek to create new competition*".⁷
- 3.4 **Finally, we would urge the Commission to clarify the legal and economic tests that it would apply before intervening in a market or imposing remedies. In particular, the exact test and standard of proof which the Commission requires to meet before it can intervene in any market will need to be defined. The Commission should also outline what its new investigatory powers would exactly entail. The CCBE would also suggest that the Commission discloses a format of ground rules and puts into place elaborate procedural safeguards like those in the UK.**

4 Comparing and contrasting with other jurisdictions

- 4.1 With the Commission looking to advance towards a setting where both ex-post and ex-ante tools are integrated, countries such as Greece, Iceland, Mexico, Romania, South Africa, and, most notably, the UK, already have such market investigatory schemes in place. These systems are highly discretionary in nature, allowing authorities to drastically undertake action in case of any findings of a market failure, like asset divestiture and structural separation.
- 4.2 It is interesting to note that Greece has two kinds of powers (since 2005): (i) to examine a specific sector of the Greek economy that falls under its jurisdiction; and if it concludes that there are no conditions for effective competition in this sector and considers that the application of the rest of its competition tools is not sufficient to create conditions for effective competition, it may, by

⁶ See also OECD Global Forum on Competition, 2003. THE OBJECTIVES OF COMPETITION LAW AND POLICY. [online] Organisation for Economic Co-operation and Development. Available at: <<http://www.oecd.org/daf/competition/2486329.pdf>> [Accessed 5 August 2020].

⁷ See also Lamadrid, A., 2020. Can This Be the New Normal? 10 Questions on the Proposed New Competition Tool. [Blog] Chillin' Competition, Available at: <<https://chillingcompetition.com/2020/06/11/can-this-be-the-new-normal-10-questions-on-the-proposed-new-competition-tool/>> [Accessed 5 August 2020].

reasoned decision, take all necessary and proportionate measures in this regard, including a reasoned legislative proposal submitted to the relevant Minister and to the Minister of Economy, Competitiveness and Shipping; and (ii) to conduct an inquiry into a specific sector of the economy or specific type of agreements in various sectors, when pricing or other circumstances raise suspicions of possible restriction or distortion of competition. In relation to the latter, there are no deadlines but the Hellenic Competition Commission (HCC) may publish a report on the results of its inquiry and ask interested parties to comment. However, in relation to the former, the HCC must notify its opinion on the market being anti-competitive within 90 days after the procedure is commenced, followed by at least 30 days of public consultation. The next step is to issue a reasoned opinion laying out the proposed measures, which is also put to a public consultation for at least 30 days. The subsequent HCC Decision is enforceable and can also be appealed, with a penalty for non-compliance by natural or legal persons of minimum €15,000 and maximum 10% of total turnover in the previous year of the Decision. If in the following 2 years the HCC finds the measures were insufficient, it shall reinitiate the procedure. Both of these powers entail a substantial effort and time commitment both on the part of the authority and of the market players concerned, as illustrated for example by the HCC's inquiry into basic consumer goods started in 2011, amassing allegedly nearly 300 pages of information, and the public consultation launched in April of this year. Note that the HCC is also currently running inquiries into e-commerce and fintech respectively, with a potential future inquiry into taxis.

- 4.3 In Romania there is a one-step procedure targeted at both private and public actors, which results in the adoption of a decision. The Romanian Competition Council is obliged to notify the investigated parties under a Preliminary Investigation Procedure but there is no fixed term for the investigation. Once the report is drafted, a copy has to be submitted to the parties at least 30 days before the hearings, where parties can present their allegations. Subsequently, the Romanian Competition Council will submit its decision but there is no deadline specified for this stage either. The Romanian Competition Council has been quite actively using this power in the past few years.
- 4.4 **The CCBE has two primary concerns regarding the Commission's potential adoption of the new competition tool. The framing suggested would allow the Commission far broader interference such as, as mentioned by Executive Vice-President Vestager, a duty "to make data available to others, for instance. As a last resort, it could even mean breaking up companies, to protect competition."⁸ Additionally, where the Commission would be unable to articulate harm under conventional tools under Articles 101 and 102 TFEU, the CCBE worries these powers would be employed to further policy objectives and exclusively target specific sectors or companies.**
- 4.5 With almost twenty market investigations undertaken in the UK since the tool's first introduction, it is worth noting that the CMA (UK Competition & Markets Authority) has opted against using their market investigations instrument for digital affairs. While the CMA has the ability to remedy any "*adverse effect on competition*"⁹, there is no need to find an infringement. Similar to the effects encountered in the UK following a market investigation, if this new competition tool will be implemented, substantial time and resource commitments on personnel's part form one of the many challenges faced by companies.
- 4.6 In the UK, there have also been concerns that, where government prefers not to interfere openly or competition tools are not optimal to resolve policy, market investigations are conducted as a means to reach political ends. In this regard, the CMA has previously discreetly commented on government support of its important position as an independent regulator.
- 4.7 Given time pressure and the scope of investigations, there is consensus among some parties that the scrutiny performed is not sufficiently vigorous in character and paired with disproportionate remedies, especially since the market activities in question merely meet adverse effects on

⁸ Speech by Commissioner Vestager. Competition in a Digital Age: Changing Enforcement for Changing Times, ASCOLA Annual Conference, June 26, 2020 [online] Available at: < https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-digital-age-changing-enforcement-changing-times_en>[Accessed 6 August 2020].

⁹ Section 138(2) of the Enterprise Act 2002.

competition¹⁰ requirements, and are thereby not “illegal”. Considering the above, market investigations in the UK have at times been deemed disproportionately troublesome. Since the shortened timeframe for market investigations¹¹, delays are increasingly evolving into a main pain point for investigations’ procedures. Due to lack of time to respond to issue statements, working papers or requests, it could reasonably be argued that parties’ right to a defence is compromised, and for all intents and purposes conclusions of the investigation are distorted.

- 4.8 The Commission has clearly drawn its vision from the UK regime, a system Executive Vice-President Vestager regularly commended, but whether EU courts would be able to hold the Commission to the same standard of accountability the same way the Competition Appeal Tribunal (CAT) does, is yet to be established. In the UK, parties may, during the two months following the notification of the Final Report, lodge an appeal with the CAT against the CMA’s decisions. If a judgment of the CAT upholds an aspect of an appeal, this could lead to the investigation or a part of it being remitted to the CMA for reconsideration¹². Appeals against CAT judgments can, if allowed, go forward to the Court of Appeal or, in Scotland, the Court of Session and, ultimately, to the Supreme Court. The system in the UK is subject to rigorous safeguards, with a detailed and transparent procedure in place to hold authorities accountable by means of meticulous plans containing working papers, issues statements hearings, and consultation on remedies. The EU needs to ensure it is institutionally at a stage where it is able to implement that degree of answerability and transparency, especially with regards to EU courts. They must have the ability to perform the same level of meticulous and strict judicial review the way UK courts do. For example, the appeal mechanisms that might be available do not look as robust as those that are available in a UK context, where the CAT holds the CMA to a high standard.
- 4.9 Indeed, such a tool would be in need of the most stringent of safeguards, and include uncompromising participation by the parties concerned in the course of an investigation, site visits, timely communication of hearings and consultations on remedies, and close follow-ups after remedies have been imposed. Moreover, the enforceability of the remedies and the intensity of the control by the Court of Justice from an interim measure and suspensory perspective should also be particularly taken into consideration. In this new scheme, the issue of immediate enforcement of Commission’s decisions and of the control by the Court of Justice in a precautionary capacity would have to be reviewed.
- Currently, the regime works well for fines, but if it is a question of placing obligations on companies to try to restructure the market, the situation would be quite different. The enforcement of these measures while they are subject to an appeal would have to be reviewed since, with the current regime, the Commission’s decisions are almost always immediately enforceable and it is very difficult to obtain precautionary relief at the Court of Justice. As these are structural issues, the damage that can be caused to companies is irreversible and it is rather uncertain whether the current state of EU law on precautionary measures is well suited to this new practice.
- 4.10 In France, there were plans by the public authorities to give the Competition Authority (*Autorité de la concurrence*) a structural injunction power, but these attempts were eventually abandoned.
- 4.11 This structural injunction power was first introduced into French law for retail sector in certain overseas territories (Law no. 2012-1270 of 20 November 2012) and in New Caledonia and then in French Polynesia. However, given the limited results of this introduction, the system was finally repealed in French Polynesia.

¹⁰ The following three issues are examined when applying the AEC test: (i) the characteristics of the market and the outcomes of competition within it; (ii) the definition of the market; and (iii) the state of competition in the market; specifically, whether there are any features harming competition.

¹¹ On 7 March 2016, the CMA announced it was extending the timeline in the Retail Banking market investigation by three months (see https://assets.publishing.service.gov.uk/media/56d9b770e5274a036e000000/Notice_of_extension_of_the_inquiry_statutory_period.pdf). On 21 September 2015, the CMA announced that it was extending the timeline in its Energy market investigation by six months from 25 December 2015 to 25 June 2016 (see www.gov.uk/government/news/cma-extends-energy-investigation-timetable)

¹² For example, following appeals against CMA decisions, the CAT ordered the CMA to reconsider parts of the remedies packages in the Final Reports on Groceries (April 2008) and Payment Protection Insurance (PPI) (January 2009). These aspects were, respectively, the competition test applied to grocery retail planning applications and the inclusion of a prohibition of the issuing of PPI at the point of sale.

- 4.12 Following a request from the Competition Authority¹³, the law of 6 August 2015 (*Loi Macron*) provided for the introduction of a structural injunction in metropolitan France. However, this project was rejected by the Constitutional Council, which considered that this instrument was excessively prejudicial to the freedom of enterprise and the right of ownership insofar as it could lead to the questioning of prices or margins or lead to asset disposals whereas the dominant position could have been acquired on the merits and no abuse had been found¹⁴. As seen from the several options proposed, merely addressing particular sectors can be interpreted as discriminatory, yet leaving the scope completely undefined can be considered disproportionate. Clarification of any kind of threshold or criteria would be welcomed by the CCBE.
- 4.13 Certainly the Commission's intervention in situations where it deems it necessary would demand proportionality. The CCBE would like to see a proposal for safeguards to ensure this.

5 Suggestions

- 5.1 **As aforementioned, the CCBE contends that suitable and rigorous safeguards need to be put in place, such as proportionality checks, procedural guarantees and thorough judicial review. Another potential hazard the EU Commission could face if it decides to implement this tool is the balance it needs to strike between Member states' interests, at the risk of becoming politicised. As the EU is an Union of Member States (that confer competences to that Union to reach common objectives as referred by the Treaties), it is substantially more exposed to this potential risk than individual Member states who opt for such a market investigation tool, and the Commission will need to adopt a proactive approach in conserving its political independence over national interests.**
- 5.2 There have been many that request close and active participation when investigatory proceedings take place, in order to ensure a fairer and perhaps more efficient outcome. It has previously been suggested that the Commission should propose a clear set of criteria for both launching an investigation and imposing remedies so as to provide companies with at least some legal certainty. Furthermore, the Commission should not have the "*power to impose arbitrary remedies*" and companies in a sector subject to a market investigation should have the ability to undertake voluntary commitments early on in the investigation procedure.
- 5.3 Even if the Commission decides to adopt a new tool, the CCBE would like to add that they should nevertheless be subject to (i) a burden of proof with a need for meeting legal evidentiary standards, and (ii) the onus would have to be on the Commission to demonstrate how its interference would benefit the market it is seeking to aid. As not all markets have features of a similar nature (some anti-competitive effects in certain markets can be deemed pro-competitive in others), it would be vital for there to be both the legal standard, and the requirement for justification.
- 5.4 While it appears the Commission is seeking a lower evidentiary standard in order to be able to intervene sooner, the CCBE would like to emphasise that this standard should be in line with developed case-law under existing competition legislation. Plausible effects or a mere risk of those effects should not be sufficient, as this would leave quasi any market open to an investigation. Considering existing case-law, anticompetitive effects need to be directly linked to market elements under consideration, and the Commission should be able to put forward proof that the anticompetitive effects considered are more inclined to taking place than not, rather than it just being probably.
- 5.5 With part two of this proposal, the onus would be on the Commission to show that their remedies would positively benefit competition conditions in the market under investigation. If there would be multiple remedial options, the CCBE contends that the Commission should go with the least restrictive one. Given the theoretical stage this new competition tool is currently at, these are crucial considerations. With the potential to radically modify markets' functioning through a

¹³ Opinion of the French Competition Authority No 12-A-01 dated 11 January 2012 on the competitive situation in the food distribution sector in Paris.

¹⁴ Decision of the French Constitutional Council No 2015-715 dated 5 August 2015.

multitude of likely remedies, including divestitures, and information/interoperability obligations, there is great urgency for procedural clarity.

- 5.6 Another point which we would like to raise in conjunction with the need for more robust appeal mechanism, is the impact of delays in going through the appeal process which can mean regulatory issues hang over companies for a long time even if the companies are successful at the end of the proceedings.

6 Conclusion

- 6.1 Though the CCBE commends the Commission for the inception impact assessment's expert reports in reaching their conclusion, we believe that the Commission should work on demonstrating and legitimising this tool's urgency. As stipulated before, there is a need for more empirical evidence of definite consumer harm. The Commission should test the waters more for the need of this tool before further proceeding with the adoption of such a tool.
- 6.2 If the Commission decides to go ahead with the new competition tool's implementation, it should ensure that its use is limited in scope and clearly demarcated. As this tool has the potential to be considerably burdensome both with regards to time and costs for all parties involved, the Commission must take on board lessons from other jurisdictions to introduce unambiguous guidance regarding procedure, with rigorous safeguards.

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