# ETNO-GSMA Position Paper on a New Competition Tool

September 2020



**About the GSMA**

The GSMA represents the interests of mobile operators worldwide, uniting more than 750 operators and nearly 400 companies in the broader mobile ecosystem, including handset and device makers, software companies, equipment providers and internet companies, as well as organisations in adjacent industry sectors. The GSMA also produces the industry-leading MWC events held annually in Barcelona, Los Angeles and Shanghai, as well as the Mobile 360 Series of regional conferences.

For more information, please visit the GSMA corporate website at **gsma.com**

Follow the GSMA on Twitter:
**@GSMA**
**@GSMAEurope**

**About ETNO**

ETNO is the European Telecommunications Network Operators' Association. We proudly represent Europe's main telecom operators, who innovate and invest in the continent's digital backbone. Our companies are the providers of Europe's most advanced digital networks and services. ETNO's mission is to develop a positive policy and regulatory environment empowering the delivery of world-class services for European citizens and businesses.

**www.etno.eu** | **@ETNOAssociation**

# 1. Executive Summary

ETNO & GSMA associations, which represent the vast majority of telecom operators in the European Union, welcome the opportunity to provide input to DG Competition on the possibility to introduce a New Competition Tool (NCT). In summary, ETNO & GSMA European mobile and fixed telecom operator's position on the matter and response to the Commission's Inception Impact Assessment and questionnaire is as follows:

• The existing competition framework is fit for purpose; however, it needs to be revised in order to be able to address the challenges brought by the digital economy. Both associations welcome the Commission's efforts and ongoing reviews and believe that the Commission should focus on such revisions before introducing any additional tools;

• In order to ensure a smart and faster enforcement process, DG COMP could make an increasing use of existing measures, such as sector enquiries and interim measures;

• Structural competition problems mentioned in the questionnaire relate to large digital actors and should therefore be addressed by imposing specific measures to such actors when competition law has proven to be insufficient. This is being tackled currently by the DSA proposal on ex-ante rules for large platforms acting as gatekeepers. Therefore, there is no need for a NCT. However, we do not exclude the possibility that competition policy should be able to issue targeted actions towards digital gatekeepers;

• Articles 103 and 114 TFEU do not seem to provide the adequate legal basis for introducing a tool following the options expressed by the Commission in its IIA;

• If the Commission decides nevertheless to propose the introduction of a NCT:

- it should be limited to address the structural problems deriving from large online platforms acting as gatekeepers and therefore limited in scope;
- it should include an adequate system of checks and balances to provide market actors with the appropriate certainty and rights of defence.

# 2. Need to Update Current Competition Law Framework Rather than Introducing a New Competition Tool

ETNO & GSMA believe that the current competition principles and toolbox are fit for purpose and encourage DG COMP to continue first with the ongoing review of the competition law framework before considering introducing any additional tools. As both associations have proposed in their responses to previous consultations[1], there is a need to evaluate and an opportunity to update and adapt existing tools and methodologies to the new digital environment. The ex-post intervention has in fact shown at times new challenges due to the specific characteristics of these actors.
We believe that the following suggestions would help DG COMP to ensure a faster and smarter ex-post intervention.

On the one hand, Regulation 1/2003[2] establishes wide-range powers that DG COMP can more systematically use in order to tackle competition problems related to the presence of digital players, in particular:

**• Use of sector enquiry powers (Article 17):** a further use of sector inquiries would help understand market failures, as well as provide crucial input to potential revisions or introduction

1. Please refer to the joint response to the NCT questionnaire and/or to www.gsma.com/gsmaeurope/ and etno.eu/

2. 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

of legislation, having DG COMP making suggestions to regulators with the "ex-ante remedies" power left to the discretion of the sector specific regulator;

• **Imposition of behavioural or structural remedies** (Article 7 and recital 12) in an ex-post intervention; and

• **Wider use of interim measures** (Article 8), limited in scope and time, like those imposed in October 2019 for the first time in nearly two decades, to ensure fast intervention and avoid irreparable damages to the market, consumers and competitors.

On the other hand, the ongoing reviews of the Horizontal and Vertical rules, the Market Definition Notice and the merger control framework should be carefully carried out taking into consideration the increasing digitalisation and globalisation of the economy as well as the competitive dynamics described in this document and our response to the NCT consultation as examples of structural competitive problems.

Both associations have in their responses to DG COMP's questionnaires mentioned what this should mean with regard to vertical agreements (a stricter approach towards agreements contributing to the extension of market power in neighbouring markets) and horizontal agreements (a more lenient approach and enhanced legal clarity vis-à-vis cooperative agreements between traditional actors seeking to create sufficient scale). These forms of cooperation are in general pro-competitive as they allow to achieve the necessary scale for the European firms to be competitive vis-à-vis global actors.

Furthermore, we kindly invite the Commission to also review the Communication on the Commission's Enforcement Priorities in Applying Article 102 TFEU to address the challenges created by the digital economy.

In relation to a more efficient use of existing tools, the Commission should speed up antitrust processes and make more use of its existing powers (e.g. to impose interim measures) as highlighted above.

## 3. Structural Competition Problems Relate to Large Digital Platforms Acting as Gatekeepers and Should be Tackled by Specific Measures Targeting Such Actors

As said, the Commission should make use of its existing powers to intervene where there has been or might be a breach of competition rules. We highly believe that an updated competition framework, in combination with targeted intervention in relation to digital gatekeepers could allow the Commission to address structural competition problems mentioned in this consultation.

Indeed, we recognise that there might be limits to what the current way of applying existing competition rules can achieve to address the gatekeeper role that large online platforms play in certain markets, in particular, those characterised by extreme economies of scale and scope, strong network effects and access to large volumes of data. The current way of applying existing competition rules might not always be sufficient to

tackle competition issues arising from large digital platforms with cross-market activity in an efficient and timely manner, due to the specificities of these platforms. Therefore, dedicated measures targeted at large online platforms acting as gatekeepers might be necessary to prevent and/or address competition distortions, before entrenched and durable dominance materialises in digital markets.

More specifically, as mentioned in our responses to the NCT and DSA consultations, an intervention framework, adopted in the context of the DSA, allowing for the possibility to impose tailored remedies on individual large online platforms with gatekeeper power, on a case- by-case basis would be the most suitable instrument to ensure competition and contestability in dynamic digital markets. This framework could be complemented by a list of prohibitions generally applicable to all large online platforms with gatekeeper power as a baseline safeguard against certain abusive behaviours. However, the latter option alone would be insufficient to address market failures related to large online platforms with gatekeeper role in a targeted and proportionate manner. Therefore, we have strongly supported the option 3b of the IIA of the DSA consultation allowing for the possibility to impose tailored remedies on individual large online platforms with gatekeeper power, on a case-by-case basis. Moreover, a combination of option 3b with option 3a as a complement could also be suitable.

In light of the above, there is an overlap and potential inconsistency between the regulatory framework allowing for a case-by-case imposition of targeted remedies under option 3b of the DSA IIA, and the New Competition Tool. We believe that only one instrument, if properly defined in its scope and through an efficient institutional setup, is necessary to tackle asymmetries and competition issues raised in the markets where digital platforms with a gatekeeper role operate.

In conclusion, DG COMP should only consider introducing a New Competition Tool if the combination of the above mentioned tools together with an update of the way of applying existing competition rules will prove to be insufficient to address the structural competition problems identified in the consultation. Such tool would therefore be limited to tackle the outstanding problems and would have a much narrower scope of application than the one presently envisaged in the ongoing consultation.

## 4. Legal Basis to justify the Need for a New Competition Tool

It is not clear whether articles 103 and 114 TFEU provide an adequate legal basis for introducing such a tool. In this regard, we doubt that article 103 TFEU could be the legal basis for a competition tool operating outside 101 and 102 TFEU (i.e. options 3 and 4 in the Inception Impact Assessment).

As regards options 1 and 2, as the tool would apply (according to the questionnaire and the IIA) in the absence of a competition law breach, we have some difficulties in understanding how 103 TFEU would be an adequate legal basis for these solutions. 103 TFEU is in fact specifically aimed at ensuring compliance and defining the scope of application of Articles 101 and 102 TFEU[3].

As regards Article 114 TFEU, this would be the adequate legal basis should the new tool be an internal market investigation tool aimed at harmonising national laws rather than introducing additional powers for the implementation of general principles of the Treaty.

In this regard, the fact that in parallel the Commission is working on introducing other tools

3. Aside of other non-substantial roles such as defining the functions of the Commission and the European Courts or determining the relationship between EU and national competition rules.

(i.e. the DSA regulatory tools) whose legal basis is clearly linked to the harmonisation process and to the completion and protection of the internal market, makes it at least questionable to use the same legal basis for a competition law tool serving the same or similar purposes.

In conclusion, as it is clear from this questionnaire as well as from the IIA that the new tool would deal with structural competition problems, we believe that article 114 TFEU does not seem to be the adequate legal basis for it.

Last, even if Articles 103 and 114 TFEU would constitute an adequate legal basis (quod non!) a thorough application of the Proportionality Principle should be at the basis of the scope of application of a new tool. Accordingly, a new tool should be applied only to situations and enforcement gaps which cannot be adequately tackled by using other less invasive measures.

## 5. No Need for a New Competition Tool. If Needed, the NCT Should Focus on Digital Actors. In Any Case, Check & Balances are Crucial to Avoid Legal Uncertainty and Regulatory Overreach

As expressed, ETNO & GSMA members believe that there is no need at the present stage to introduce additional competition tools as defined in the Inception Impact Assessment for NCT unless and until the existing tools as well as the other, less invasive measures listed above have proven to be insufficient to address the structural competition problems described in the questionnaire.

**If a new tool were to be introduced, we strongly believe that it should be limited to address the structural problems deriving from large online platforms acting as gatekeepers**. Its intervention should therefore be tailored to address only exceptional situations where alternative instruments have demonstrated being ineffective (burden of proof on the Commission) and be based on strict triggering criteria. The intervention should therefore be limited to some predetermined digital actors based on a thorough analysis of the recurrence of the above mentioned, pre-defined elements.

Once again, we consider that all alternative possibilities should be explored (modifying guidelines, interim measures, DSA-style ex ante regulation, etc.). Once all the alternatives have been considered, if there are still some structural competition problems that cannot be addressed by alternative, less intrusive measures, a new tool can be taken into consideration that will be applicable only to those situations where these problems are present (i.e. structural problems deriving from large online platforms acting as gatekeepers presenting the characteristics described in the questionnaire).

In this case, **the new tool should be drafted respecting the letter and spirit of the principle of Proportionality as laid down in Article 5 of the Treaty on European Union**. According to Article 5, *"the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties"*. Accordingly, the characteristics and scope of application of the new tool, if required, will need to be designed taking in the utmost account the need to only address situations which: (a) respond to the specific need to achieve the objectives of the Treaties and; (b) cannot be addressed through existing or less intrusive measures. This tool shall therefore address structural competition problems related to specific characteristics of large digital platforms acting as gatekeepers.

Furthermore, we do not consider that any new tool should be extended to oligopoly markets. We

do not believe that oligopolistic market situations are per se problematic. Indeed, competitive issues related to the functioning of oligopolies have little or nothing to do with the structural competitive problems that the new tool allegedly should address (tipping, monopolisation, gatekeeping, etc.)

Additionally, despite that these "oligopolistic" markets have maintained the same or similar structure along many years, there are few examples of collusive behaviour successfully tackled by competition authorities in such markets, for example when looking at telecommunication markets.

Last but not least, we consider that Articles 101 and 102 TFEU and existing case law are sufficiently effective to address anti-competitive behaviour in oligopolistic markets and do not believe there is any justification for any additional intervention going beyond a thorough application of the relevant case law on collective dominance and concerted practices.

In the event that the Commission nevertheless decides to introduce a new tool, to ensure legal certainty and avoid regulatory overreach, we strongly believe that procedural safeguards must be at the heart of its deployment:

• A new tool should not give the Commission an indiscriminate power to intervene in markets on the basis of indicative economic indicators (e.g. UPP – GUPPI – HHI – etc.)

• In addition, if a particular market is subject to **existing regulation**, this should be considered **as a first port of call to address any identified competition problems**. This is to ensure that any new tool is not be applied unless the existing regulation is not addressing or is not capable to effectively address the problem. This is necessary to ensure there is no duplication or inconsistency, and to avoid double jeopardy scenarios. In case the market is already subject to asymmetric sector-specific regulation it should be assessed whether an existing sector-specific regulator will be best placed to address any competition problems.

• **Checks & balances**: there must be additional controls on the trigger of this power to provide more certainty to market actors; there needs to be a mechanism to ensure that the selection of markets for investigation are not perceived as arbitrary or politically motivated.

• The **geographic dimension** of markets in the scope should **go beyond the national dimension**: DG COMP's current competence to intervene regards cases having an European dimension and/or Union interest[4]. A new competition tool should follow the same approach.

• **Possibility for the targeted company(ies) to express views during the whole process**: the CMA's MI tool sets out a continuous dialogue between the firm and the CMA, mainly by means of formal hearings and remedies hearings when the Market Study turns to a Market Reference. DG COMP should allow for this continuous feedback during the procedure until the final result when the Market Study turns to the Market Reference where there is a higher likelihood that remedies might be imposed.

• DG COMP's decisions after a market investigation procedure should **focus on recommendations to policymakers and sectorial regulators** and where necessary remedies on market actors. Furthermore, a tool should be allowed only as a last resource to impose structural remedies as divestiture remedies can be drastic and fundamentally change market structure. Stopping company's business strategies or models when there is no breach of competition rules should in any case be considered as an intrusive penalty even if the monetary implications are indirect.

• Remedies should apply also to **adjacent markets** where no dominance is yet established, or which are still untipped but where certain forms of tying has led to leveraging of market power from the market under review in adjacent markets.

4. The European Commission (based on European Courts' case-law since Automec) has been given great discretion to reject, shelve or prioritize cases on the basis of Community/EU interest and/or Community Dimension of the cases.

• **A potential tool should not be able to impose fines or penalties when there is no infringement of competition rules**. In addition, we believe that structural remedies should only be considered as a last resort and would be disproportionate in circumstances where no infringement of competition law would need to be demonstrated. Moreover, if the Commission is ultimately given power to impose structural remedies under a NCT (if any), as structural remedies are very severe sanctions they should only ever be used as a last resort and subject to a very strict burden of proof (i.e. necessity, proportionality).

• In terms of **remedies** following any subsequent intervention via a new tool, where the relevant market is already regulated, these should be limited to recommendations to the relevant regulator or acceptance of voluntary commitments, rather than the imposition of behavioural or structural remedies.

• **Quick appeal procedure before the Courts** (in order to lessen as much as possible, the uncertainty and the reputational impact of the targeted undertaking).