



# Computer & Communications Industry Association

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## CCIA Views on European Commission Proposal for a “New Competition Tool”

### I. Introduction

The Computer & Communications Industry Association (“CCIA”) welcomes this opportunity to provide feedback to the Department of Business, Enterprise and Innovation on the European Commission’s Inception Impact Assessment (“IIA”) for the New Competition Tool (“NCT”) and to the measures proposed and policy options identified by the European Commission (“EC”).<sup>1</sup>

CCIA represents large, medium, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services. CCIA is committed to protecting and advancing the interests of our members, the industry as a whole, as well as society’s beneficial interest in open markets, open systems and open networks.

The proposal of the EC potentially infringes upon the principle of subsidiarity by entrusting the EC with a duty which could be carried out more effectively by the Member States (“MS”). Furthermore, the proposed scope and substance of NCT enforcement appears overbroad, given that the IIA misidentifies potentially pro-competitive behavior as a competition concern. In this context, CCIA believes that any proposal should ensure minimum procedural guarantees and rights of defence for the undertakings subject to it. We expand on each of these points below.

### II. The NCT As Proposed May Infringe the Principle of Subsidiarity

CCIA believes that the IIA, as formulated, may infringe upon the principle of subsidiarity and the sovereign competences of MS because reallocating these powers to the EC does not clearly bring sufficient added value rather than entrusting MS with this task where national markets are concerned.

The duty to comply with the principle of subsidiarity applies to acts which fall under the shared competences of the EU and the MS. The legal test to be fulfilled is whether the objective of the

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<sup>1</sup> <https://dbe.gov.ie/en/Consultations/European-Commission-Proposal-New-Competition-Tool.html>

act could be better achieved at EU level.<sup>2</sup> In the case of the NCT proposal, the EC has stated that the legal basis “would be Article 103 TFEU in combination with Article 114 TFEU.”<sup>3</sup> However, as some commentators have noted, “[t]here seems to be a consensus that Art. 103 TFEU cannot be a legal basis for conduct falling outside Arts. 101 and 102 TFEU.”<sup>4</sup> Since the proposal explicitly addresses conduct falling outside Arts. 101 and 102 TFEU,<sup>5</sup> the underlying legal basis therefore appears to be Art. 114 TFEU, Article 114 TFEU,<sup>6</sup> which governs acts necessary to create the internal market, is an area of shared competence.<sup>7</sup> Therefore, the proposed NCT must comply with the principle of subsidiarity.

The principle of subsidiarity is enshrined in Article 5 TEU<sup>8</sup> and further detailed in the protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty.<sup>9</sup> When undergoing “the judicial review of compliance with the substantive conditions laid down in Article 5(3) TEU, the Court must determine whether the EU legislature was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better achieved at EU level.”<sup>10</sup> The purpose of the subsidiarity analysis which the EC has undertaken to carry out for every act is twofold:

- “1. To assess whether action at national, regional or local level would be sufficient to achieve the objectives pursued; and
2. To assess whether action at EU level would provide added value compared to action at national level.”<sup>11</sup>

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<sup>2</sup> Case C-547/14 *Philip Morris*, available [here](#), para 219.

<sup>3</sup> European Commission, “Single Market: new complementary tool to strengthen competition enforcement”, available [here](#).

<sup>4</sup>A. Lamadrid, “The Proposed New Competition Tool: A Follow-up” (ChillingCompetition, 29 June 2020), available [here](#).

<sup>5</sup> According to the IIA, the problem the initiative aims to tackle is to address “certain structural problems that [Articles 101 and 102 TFEU] cannot tackle (e.g. monopolisation strategies by non-dominant companies with market power) or cannot address in the most effective manner (e.g. parallel leveraging strategies by dominant companies into multiple adjacent markets).” Commission IIA on the NCT, available [here](#), pg. 2

<sup>6</sup> “Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.”

<sup>7</sup> Article 4(2) TFEU: “Shared competence between the Union and the Member States applies in the following principal areas: (a) internal market.”

<sup>8</sup> Article 5(3) TEU, “The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.”

<sup>9</sup> Case C-58/08 *Vodafone* available [here](#), paras 72, 73.

<sup>10</sup> Case C-358/14 *Poland v Parliament and Council*, available [here](#), para. 114.

<sup>11</sup> Commission, “Annual Report 2019 on the Application of the Principles of Subsidiarity and Proportionality and on the Relations with National Parliaments” COM(2020) 272 final (30 June 2020), available [here](#), pg. 3.

The Court of Justice has stated that the EC is under a duty to explain why the principle of proportionality is satisfied when implementing an act.<sup>12</sup>

The EC has stated that the principle of subsidiarity is complied with because “*even if in some cases relevant markets are defined as national under EU competition law, intervention at national level would not effectively address the cross-border dimension of competition related issues. This would likely lead to diverging rules, thus creating legal uncertainty for companies operating in the internal market, whether at national or on a pan-European basis.*”<sup>13</sup> The EC, therefore, assumes that national markets share exactly the same competition problems, which, in turn require a uniform solution. This contradicts the concept of national markets, which are thus defined due to differences between each-other and barriers between them. Where national markets are concerned, remedies may be more easily addressed and accounted for by national authorities, in line with the principle of subsidiarity. For example, every MS has a national regulator tasked with the enforcement of national and EU laws, with the support and coordination of an EU authority.<sup>14</sup> Hence, it may be incorrect to assume that action at EU level would provide sufficient added value compared to action at national level.

We note that, with regards to digital products and services, market conditions may vary significantly as between MS. For example, with regards to licensing requirements for drivers on mobility platforms, hate speech on social media, health and safety requirements for accommodation platforms, etc. In these circumstances, where national markets are concerned, granting the EC the ability to intervene in national markets may infringe the principle of subsidiarity.

### **III. Scope and Substance of Proposed NCT Appears Overbroad**

CCIA supports the EC’s continued focus on strengthening the Digital Single Market (“DSM”). The EC Staff Working Document to the Single Market Performance Report 2019 (SWD(2019)444 final) cites several divergences amongst MS that are hampering European DSM performance including varying levels of digital skills, digitisation in companies, digital infrastructure, and availability of venture funding. While there may also be “structural competition problems” hampering the DSM which would be best addressed at EU level, the “structural competition problems” identified by the IIA do not by themselves appear to be competition problems at all. In particular:

- “Tipping markets” are not problematic. Many investments are made in start-ups on the basis that they can be recovered once sufficient scale is achieved. The characteristic of “tipping” is itself related to the increased value that users derive from the network effects. Where such characteristics are present, preventing tipping would mean worse outcomes

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<sup>12</sup> Case C-233/94, *Germany v. Parliament and Council*, available [here](#).

<sup>13</sup> European Commission, “Single Market: new complementary tool to strengthen competition enforcement”, available [here](#).

<sup>14</sup> Regulation (EU) 2018/1971, available [here](#).

for consumers. Furthermore, tipping can occur in either direction, causing firms to lose market share as quickly as they have gained it.<sup>15</sup>

- “Leveraging” into adjacent markets is not inherently problematic. Where a firm has transferable skills and resources, leveraging those for market entry leads to increased efficient competition in those adjacent markets and hence better outcomes for users. Any intervention should carefully distinguish between pro-competitive and anti-competitive leveraging.
- Unilateral strategies by non-dominant companies are unlikely to be problematic. The concept of dominance is inherently flexible. It applies where a company has the ability to distort competition, and is increasingly applied to narrow market segments. By definition, a non-dominant company is unlikely to have the market power sufficient to produce an anticompetitive effect on the market.
- High entry barriers are a characteristic common to several industries. The question should be whether a competitor with a superior business model or product could contest an incumbent, and/or whether the threat of such entry is sufficient pressure to ensure efficient market outcomes.
- To the extent that issues are related to consumer behaviour (e.g. the prevalence of multi-homing), consumer focused interventions that address root causes, like lack of digital skills, are likely more effective than industry-level interventions.

If the EC presumes that each of the above are inherently problematic and must be addressed by competition intervention, then Europe’s DSM performance will likely be hampered further. CCIA is therefore concerned that the scope and substance of interventions envisaged under the proposed NCT appear overbroad and are likely to result in increased risk of Type I errors. Absent further evidence of harm to justify the creation of an NCT, the case for it has simply not been made.

#### **IV. The Need for Safeguards**

The fact that the NCT would not involve a finding of infringement implies that the EC will be able to intervene and impose remedies under lower evidentiary standards and rights of defence. This is particularly troubling in light of the significant impact on market players and competitive incentives that structural and behavioural remedies would entail. Evidence shows that competition in the digital world is highly dynamic and the entrance of new competitors is frequent.<sup>16</sup> Accordingly, future counterfactuals are harder to predict, and structural or

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<sup>15</sup> See e.g. UK Department for Business, Energy and Industrial Strategy Report, “Dynamic Competition in Online Platforms” (March 2017), available [here](#), pg. 29 (“After all, network effects cut both ways. If a platform starts to lose market share, the loss of network effects might turn a slow decline into a rapid collapse. Potential entry could overturn settled markets quickly.”)

<sup>16</sup> See e.g. UK Department for Business, Energy and Industrial Strategy Report, “Dynamic Competition in Online Platforms” (March 2017), available [here](#), pg. 6, (“Entry is common and tends to materially affect the market – in most of the markets studied there has been frequent entry with new platforms which materially affect the market share of incumbent platforms, e.g. Spotify and other streaming services in the music sector, TripAdvisor and Airbnb and other Sharing Economy services in the accommodation sector;

behavioural remedies are harder to craft and have a particularly distorting effect in digital markets.

CCIA submits that any solution chosen by the EC should include strong procedural guarantees and set a clear legal standard to begin an investigation and to impose remedies on market participants. For instance, the UK markets regime, which is a source of inspiration of the envisaged NCT,<sup>17</sup> provides for a number of safeguards. UK investigations are subject to a strict 2-year statutory deadline, designed to avoid any overly burdensome and speculative “fishing expeditions”. At the end of “Phase I”, the CMA is required to consult on its decision to refer a market for in-depth investigation and to specify which problematic “features” it intends to investigate. The subsequent referral decision can be appealed to the UK Competition Appeal Tribunal and thereafter to the UK Court of Appeal. These consultation and appeal rights provide an important guarantee of companies’ rights of defense. The decision to impose remedies at the end of a market investigation must be linked to the problematic features identified, and is also subject to judicial review. The “Phase II” decision itself is made by a panel of independent CMA members retained for that purpose rather than by the CMA hierarchy or more generally those conducting the investigation. These protections are important safeguards against overreach, and there are several examples of successful appeals that have resulted in a decision being quashed (in whole or part) and/or remitted to the CMA for reconsideration (e.g., Groceries (2009),<sup>18</sup> Payment protection (2009),<sup>19</sup> Private healthcare (2013)).<sup>20</sup> Furthermore, the CMA is subject to a very strict standard of “double proportionality” whereby “the depth and sophistication called for in relation to any particular relevant aspect of the inquiry needs to be tailored to the importance or gravity of the issue within the general context of the Commission’s task.”<sup>21</sup>

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comparethemarket.com and GoCompare in the car insurance price comparison sector; and first Facebook, then Twitter, Instagram and Pinterest, among others, in the social network sector. Effective entry does not appear to be less likely in more concentrated digital markets – while the social network sector appears to be the most concentrated of those for which we have data, it also saw the recent and innovative entry, for example.”)

<sup>17</sup> M. Vestager confirmation hearing, answer to question 1-039-0000 (8 October 2019), available [here](#), pg. 17 (“We look at what has been proposed in the Netherlands, what they have been able to have in the UK, why they have different ways of trying to reorganise a marketplace if the competition authority finds that the way it is working is not beneficial for fair competition, and those are tools that could be considered in order to reorganise before harm is done.”)

<sup>18</sup> Competition Appeal Tribunal, Case No: 1104/6/8/08, *Tesco Plc. v Competition Commission*, available [here](#).

<sup>19</sup> Competition Appeal Tribunal, Case No: 1109/6/8/09, *Barclays Bank Plc. et al. v Competition Commission*, available [here](#).

<sup>20</sup> UK Court of Appeals, Case No: C3/2015/0628 *HCA International Ltd. v The Competition and Markets Authority*, [2015] EWCA Civ 492, available [here](#).

<sup>21</sup> Competition Commission, “Guidelines for market investigations: Their role, procedures, assessment and remedies” (April 2013), available [here](#), pg. 12, citing Competition Appeal Tribunal, Case No: 1104/6/8/08, *Tesco Plc. v Competition Commission*, available [here](#), para 139.

The objectives of the EC appear to focus on “structural competition problems”, not the conduct of undertakings as such.<sup>22</sup> Given the dynamic nature of digitally enabled markets in particular, remedies are more prone to unintended and unforeseen consequences. The mere deployment of the tool, or even the threat to use the tool would dramatically impact incentives to innovate and invest in a sector. It is therefore critical for legal certainty that the conditions under which such an inquiry would be launched are clearly spelled out, and that both the launching of an investigation, and the imposition of remedies are subject to sufficient challenge and both institutional and judicial review. Furthermore, there should be a clear separation between the investigative and remedial phases. These minimum guarantees would protect not only market participants, but the legitimacy of the tool itself.

## V. Concluding Remarks

Notwithstanding that the case for a NCT has not been made, CCIA submits that from the policy options presented by the EC, the one most likely to preserve incentives to invest, innovate and vigorously compete on the merits in Europe is Option 3: a market structure-based competition tool with a horizontal scope.

- 1) Option 1 and 2 are inappropriate because of overlaps with existing tools.

Firstly, the tool utilised should be based on the assessment of the market structure, rather than on dominance. Dominance is already covered by existing competition powers both at EU and national level. An NCT proposal based on Option 1 or 2 therefore would not address any gap in the existing competition framework. Rather, it would overlap with existing tools, but effectively grant the EC additional powers to intervene under lower evidentiary standards and rights of defence (given the absence of a finding of infringement).

- 2) Option 4 is inappropriate because it would arbitrarily limit the tool

Limiting the scope of the tool to digital or digitally enabled markets does not seem appropriate because the distinction is rather arbitrary. The IIA itself acknowledges this, stating that “*[w]ith the increasing digitalisation of the economy, more and more markets will exhibit these characteristics, and the differences between digital and non-digital markets will become increasingly blurred.*”<sup>23</sup> Furthermore, as shown in the UK practice, structural issues often arise in traditional markets such as private health insurance,<sup>24</sup> energy,<sup>25</sup> cement and ready-mix

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<sup>22</sup> Commission IIA on the NCT, available [here](#), pg. 2 The Commission distinguishes between “Structural risks for competition” where “market characteristics (...) and the conduct of the companies operating in the markets concerned create a threat for competition” and “Structural lack of competition” where “a market is not working well and not delivering competitive outcomes due to its structure (i.e. a structural market failure).”

<sup>23</sup> This contradicts the underlying assumption of the IIA for the NCT, available [here](#), pg. 1.

<sup>24</sup> CMA, Private Healthcare Market Investigation (2016), available [here](#).

<sup>25</sup> CMA, Energy Market Investigation (2016), available [here](#).

concrete,<sup>26</sup> and funerals.<sup>27</sup> In the UK the Competition and Markets Authority (CMA) “*may launch a market investigation if it has reasonable grounds for suspecting that any feature, or combination of features, of a market in the UK for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of goods or services in the UK or a part of the UK.*”<sup>28</sup> The EC’s proposed Option 3 would come closest to that example.

Nevertheless, given the issues related to subsidiarity, the problematic assumptions underlying the NCT IIA, and in the absence of sufficient procedural safeguards, CCIA submits that the EC’s proposed NCT is likely to reduce incentives to innovate, invest and compete vigorously. We encourage the Department of Business, Enterprise and Innovation to consider these points as the consultation process proceeds.

Respectfully submitted,

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<sup>26</sup> CMA, Aggregates, Cement and Ready-mix Concrete Market Investigation (2016), available [here](#).

<sup>27</sup> CMA, Funerals Sector Market Investigation (2019), available [here](#).

<sup>28</sup> Section 131(1) of the Enterprise Act 2002 as amended by the ERR13 (EA02), available [here](#).