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Position Paper on a new competition tool („NCT“)

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1. Preliminary remarks

In the summer of 2020, the European Commission evaluated European competition law. In view of digitization and the new digital markets associated with it, the European Commission raises the question of whether European competition rules today still offer sufficient protection against anti-competitive activities, especially in digital markets. The European Commission bases its concerns on structural competition problems that it has noticed in recent years and especially during the COVID-19 pandemic.

Against this background, the European Commission proposes to introduce a new competition tool that will enable it to intervene and take decisions in digital markets. In addition, the Commission plans to improve the enforcement of competition law and to adopt sector-specific ex-ante rules for digital markets. The European Commission consulted stakeholders on these aspects in a public consultation held this summer. The German Federal Bar (Bundesrechtsanwaltskammer, BRAK) participated in the consultation with the following responses.

2. Statements and questions from the European Commission

Section C: Structural competition problems

Definitions by the EU Commission:

Structural risks for competition refer to scenarios where certain market characteristics (e.g. network and scale effects, lack of multi-homing and lock-in effects) and the conduct of the companies operating in the relevant markets create a threat for competition, arising through the creation of powerful market players with an entrenched market position. This applies notably to tipping markets. The ensuing risks for competition can arise through the creation of powerful market players with an entrenched market and/or gatekeeper position, the emergence of which could be prevented by early intervention. Other scenarios falling under this category include unilateral strategies by non-dominant companies to monopolise a market through anti-competitive means.

Structural lack of competition refers to a scenario where a market is not working well and not delivering competitive outcomes due to its structure (i.e. structural market failures). These include (i) markets displaying systemic failures going beyond the conduct of a particular company due to certain structural features, such as high concentration and entry barriers, customer lock-in, lack of access to data or data accumulation, and (ii) oligopolistic market structures characterised by a risk for tacit collusion, including markets featuring increased transparency due to algorithm-based technological solutions.

6. Please indicate to what extent each of the following market features/elements can be a source or part of the reasons for a structural competition problem in a given market in your view.

Please, give examples of sectors/markets or scenarios you are aware of in the follow-up question.

	No knowledge/ No experience	No importance/ No relevance	Somewhat important	Important	Very important
A - One or few large players on the market (i.e. concentrated market)				X	
B - High degree of vertical integration ('Vertical integration' relates to scenarios where the same company owns activities at upstream and downstream levels of the supply chain)				X	
C - High start-up costs (i.e. nonrecurring costs associated with setting up a business)			X		
D - High fixed operating costs (i. e. costs that do not change with an increase or decrease in the amount of goods or services produced or sold)			X		
E - Regulatory barriers ('Regulatory barriers' refer to regulatory rules that make market entry or expansion more cumbersome or extensively expensive)			X		
F - Importance of patents or copyrights that may prevent entry				X	
G - Information asymmetry on the customer side ('Information asymmetry' occurs when customers (consumers or businesses) in an economic transaction possess substantially less knowledge than the other party so that they cannot make informed decisions)				X	
H - High customer switching costs ('Switching costs' are onetime expenses a consumer or business incurs or the inconvenience it experiences in order to switch over from one product to another or from one service provider to another)				X	
I - Lack of access to a given input/asset which is necessary to compete on the market (e.g. access to data)				X	

J - Extreme economies of scale and scope (‘Extreme economies of scale’ occur when the cost of producing a product or service decreases as the volume of output (i.e. the scale of production) increases. For instance serving an additional consumer on a platform comes at practically zero cost. ‘Economies of scope’ occur when the production of one good or the provision of a service reduces the cost of producing another related good or service)			X		
K - Strong direct network effects (Where network effects are present, the value of a service increases according to the number of others using it. For instance in case of a social network, a greater number of users increases the value of the network for each user. The more persons are on a given social network, the more persons will join it. The same applies e.g. to phone networks)				X	
L - Strong indirect network effects (Indirect network effects, also known as cross-side effects, typically occur in case of platforms which link at least two user groups and where the value of a good or service for a user of one group increases according to the number of users of the other group. For instance, the more sellers offer goods on an electronic marketplace, the more customers will the marketplace attract and vice versa)				X	
M - Customers typically use one platform (i.e. they predominantly single-home) and cannot easily switch				X	
N - The platform owner is competing with the business users on the platform (so-called dual role situations, for instance the owner of the e-commerce platform that itself sells on the platform)			X		
O - Significant financial strength		X			
P - Zero-pricing markets (‘Zeroprice markets’ refer to markets in which companies offer their goods/services such as content, software, search functions, social media platforms, mobile applications, travel booking, navigation and mapping systems to consumers at a zero price and monetise via other means, typically via advertising (i.e. consumers pay with their time and attention)		X			
Q - Data dependency (‘Data dependency’ refers to scenarios where the operation of			X		

companies are largely based on big datasets)					
R - Use of pricing algorithms ('Pricing algorithms' are automated tools that allow very frequent changes to prices and other terms, taking into account all or most competing offers on the market.)		X			

Please explain your answers above and give examples of the features/elements you indicated if possible. Please specify the letter of the row of the feature /elements you are referring to.

In our view, none of the aspects listed above will on its own create structural competition problems, but rather the interaction between some of them. Some are more relevant for market results, others are of lesser relevance. This fact is clearly demonstrated by recent dominance abuse decisions in the digital sector (cf. the EU Commission's decisions in *Google Shopping,* case AT.39740, para. 271 et seqq; *Google Android,* case AT.40099, para. 431 et seqq.; as well as the German FCO's *Facebook* decision*,* case B6-22/16, para. 422 et seqq.).

The often oligopolistic, or even duopolistic, market structures in digital markets may lead to reduced levels of competition due to the limiting factors in oligopolistic rivalry (*Reaktionsverbundenheit*). However, oligopolistic market structures alone do not allow to draw this conclusion (see the 4-to-3 mobile telecoms mergers, see the recent CFI statement in *Hutchison/Telefonica*, case T-399/16, para. 97: "(…) *that the mere effect of reducing competitive pressure on the remaining competitors is not, in principle, sufficient in itself to demonstrate a significant impediment to effective competition* (…)").

Rather, in digital markets, it is typically the combination of narrow market structures with substantial barriers to entry which may dampen competition (see German Monopolies Commission, XXIII. Biennial Report (2020), "**Monopolies Commission (2020)**", para. 52 et seqq.). For example, the European Commission, in its *Google Shopping* decision (case AT.39740 para. 287) qualified the control of large volumes of data, combined with network effects, and the ability to leverage existing market dominance into neighboring markets, as market conditions substantially contributing to entry barriers. Further market conditions typically ascribed to the digital sector are extreme economies of scale and scope, rapid growth, frequent market tipping by first-movers (aided by single-homing), gatekeeping and rule-making by market leading platforms (leaving little competition "on the market"), platform control of entire ecosystems, information asymmetries - and on the positive side strong innovation dynamics, competition "for the market" triggered by the entry of new technologies, and consumer benefits based on zero-pricing (see the German Federal Ministry of Economics, Commission 'Competition Law 4.0', Report, 2019 ("**Commission 'Competition Law 4.0' (2019)**") p. 13 et seq.; UK Government, Unlocking digital competition, Report of the Digital Competition Expert Panel, 2019, "**Furman Report (2019)**", p. 17-40). For a more detailed discussion we refer, *inter alia*, to the questions below at 16.4, 18.4, and 23.1.

By contrast, as indicated by our rating in the table, significant financial strength (O), the fact that zero-pricing markets are concerned (P), or the application of pricing-algorithms (R) will in our view not create structural risks or even a structural lack of competition. The first element is not directly related to structural competition problems as there is no economic evidence supporting this assumption (see DoJ, https://www.justice.gov/sites/default/files/atr/legacy/2015/01/26/9550.pdf, p. 15). The fact that there is no monetary price for a product or service simply indicates that monetisation shifts to another market side and or non-monetary goods, typically data (see also *Google Shopping*, case AT.39740 para. 319 et seqq.; see also the *Facebook* case, cited above), which means

that the analysis of market definition needs to employ other means (replacing the SSNIP test, for example, by analysing user reactions to a small but significant non-transitory decrease in quality (SSNDQ), see Mandrescu, D., *The SSNIP test and zero-pricing strategies: Considerations for online platforms*, CoRe (2018) 2(4), 244-257). Finally, pricing algorithms afford their users a faster adaptation to changing market conditions, without necessarily creating structural competition problems. We elaborate below in replying to questions 14.4, 15.1 and 15.3.

The main question that needs to be answered is whether a new "ad hoc" interventionist regime (the proposed New Competition Tool/"**NCT**") is the right approach, and can be introduced without defeating its own purpose of upholding competition, or whether ex-ante regulation is the better avenue, and will suffice, to solve structural problems in the digital sector. We advocate the second approach as we set out in more detail below (in particular in the last section from Question 24 onwards).

6.1
Can you think of any other market features/elements that could be a source or part of the reasons for a structural competition problem in a given market?

☐ Yes

☒ No

6.2
Please indicate which are these other market features/elements that can be a source or part
of the reasons for a structural competition problem in a given market and rate them according to their importance from 0 to 4 (0 = no knowledge/no experience; 1 = no importance/no relevance; 2 = somewhat important; 3 = important; 4 = very important).

Not applicable

7. Please indicate what market scenarios may in your view qualify as structural competition problems and rate them according to their importance.

	No knowledge/No experience	No importance/No relevance	Somewhat important	Important	Very important
A (not necessarily dominant) company with market power in a core market extends that market power to related markets.			X		
Anti-competitive monopolisation, where one market player may rapidly acquire market shares due to its capacity to put competitors at a disadvantage in the market unfairly.			X		
Highly concentrated markets where only one or few players are present, which allows to align their market behaviour.			X		

The widespread use of algorithmic pricing that allows easily to align prices.		X			
Gatekeeper scenarios: situations where customers typically predominantly use one service provider/platform (singlehome) and therefore the market dynamics are only determined by the gatekeeper.				X	
Tipping (or 'winner takes most') markets ('Tipping markets' refer e.g. to markets where the number of customers is a key element for business success: if a firm reaches a critical threshold of customers, it gets a disproportionate advantage in capturing remaining customers. Therefore, due to certain characteristics of that market, only one or very few companies will remain on those markets in the long term.)				X	

7.1
Please explain your answers above and give examples if possible.

Re the 1st element: In our view, structural competition problems cannot arise from the mere fact that an undertaking expands its business activities from its initial to a related market, if it is not in a dominant position on its home market. Moving into additional markets may be a sign of innovation, e.g. when mobile phone makers started adding cameras (which has over time disadvantaged digital camera makers). This may be different if a market dominant position is leveraged onto a second market by anti-competitive means, e.g. bundling or tying, margin squeeze etc., in order to foreclose competitors on that second market. These scenarios are already addressed by the existing rules (see also Monopolies Commission (2020), para. 81).

Re the 2nd element: While structural competition problems may obviously arise in monopolistic markets, the described scenario is, in our opinion, not an expression of a structural competition deficit but of a lack of effective enforcement. When a dominant undertaking does not compete on the merits (*leistungsfremder Wettbewerb*) but hinders market entry or expansion by competitors, even extracts an unfair monopoly rent, abusive behaviour should be pursued by the competition authorities, or – if this is prevalent in a sector – sector regulation should be enacted. If by contrast, the behaviour issues from a non-dominant company, a "monopolisation" theory of harm (indicating a potential future monopolist) would not meet the test of either Art 101 or 102 TFEU and would seriously undermine the very goal of market economies, namely competition for the most customers or sales, by offering the best price, highest quality and product innovation. There are no clear boundaries for distinguishing pro-competitive behaviour from anti-competitive behaviour below the market dominance threshold, nor good from bad growth.

Re the 3rd element: A reduced number of players in the market may lead to parallel market behaviour without the need for anti-competitive coordination (a well-known result in oligopolistic markets, see below at 11.2, and Green, E., Marshall, R., & Marx, L. (2014), *Tacit Collusion in Oligopoly*, *The Oxford Handbook of International Antitrust Economics, Vol. 2*, Chapter 19) and may discourage maverick activity. Actual coordination between undertakings, by contrast, depends on additional elements, such in particular market transparency, market entry barriers, and the possibility to deter deviating behaviour (see General Court in re *Airtours,* T-342/99).

Re the 4th element: As indicated in our explanatory notes to question 6, we see algorithm pricing as a tool to automate adaptation to changing market conditions in real time, which in itself cannot qualify as a structural competition problem. Where algorithms are employed as a means of price coordination, the existing rules should be able to deal with the resulting behavioural infringement.
Addressing the 5th element: Finally, markets which have tipped (a term that is not clearly defined) may count as markets with structural competition problems. Such markets will be challenged in due course, as a matter of "competition for the market", but an ex-ante regulation may be chosen in order to revive competition, if the time horizon for a challenge appears too long and market outcomes in the meantime unacceptable. Such sector regulation could in particular seek to re-introduce contestability of the relevant market by data portability for users and interoperability for complementary services (cf. Commission 'Competition Law 4.0' (2019), p. 54 et seq). -- Gatekeeper scenarios may be prone to tipping if platforms act as so-called 'unavoidable trading partner' between two market sides and multi-homing does not take place (*Spiecker*, Digitale Mobilität: Plattform Governance, GRUR 2019, 342). There is ample evidence for strong innovation dynamics having led to the fall of internet platforms: In Germany the search engine Altavista was replaced by Yahoo! and Yahoo! by Google. Regarding social networks Facebook has replaced MySpace and StudiVZ (Immenga/Mestmäcker/*Körber,* competition law, Art. 2 ECMR, recital 24), Procato was replaced by Amazon Business. (https://t3n.de/news/b2b-procurement-779549/). Similar "competition for the market" took place in network industries: traditional phone service providers (including the incumbents) in the retail supply of fixed telephone services and fixed internet access services markets were challenged by the market entries of TV cable networks (see the merger clearance, with remedies, *Vodafone/Liberty Global*, COMP/M.8864). In these markets, sectoral regulation helped to overcome incumbent market power.

7.2
Can you think of any other market scenarios that qualify as structural competition problems?

☐ Yes
☒ No

7.3
Please indicate which are these other market scenarios that in your view qualify as structural competition problems and rate them according to their importance from 0 to 4 (0 = no knowledge/no experience; 1 = no importance /no relevance; 2 = somewhat important; 3 = important; 4 = very important).

not applicable

8. Structural competition problems may arise in markets where a (not necessarily dominant) company with market power in a core market may apply repeated strategies to extend its market position to related markets, for instance, by relying on large amounts of data.

8.1
Do you have knowledge or did you come across such market situation?

☒ Yes
☐ No
☐ Not applicable/no relevant experience or knowledge

8.2
In which sectors/markets did you experience repeated strategies to extend market power to related markets?

Leveraging strategies have been observed in network-based markets, based on prior regulatory protection enjoyed by incumbents. Besides, in the digital economy conglomerate structures are experiencing a revival as on the supply side, economies of scope are particularly important when developing different products, since many digital products or services require similar input factors. These include cloud services, identification and payment services as well as software development capacities or, in particular, data. In addition to these supply-side factors, demand-side factors can be a reason for conglomerate activities. On the one hand, consumption synergies are pointed out: Consumers can benefit if they purchase different products from the same supplier (e.g. through product bundling). In addition, each additional digital service from a provider strengthens its brand in the digital arena and thus tends to increase consumer confidence. On the other hand, companies may have the incentive to build up their own ecosystems by linking individual products or services in order to bind users to their own company. One example is Amazon who is not only a trader and marketplace operator, but also one of the world's most important cloud computing providers. (Commission 'Competition Law 4.0' (2019), p. 17 et seq.). As stated by the German monopoly commission the prohibition of abuse in Article 102 TFEU seems to be sufficient in principle when it comes to the problem of newly developed digital ecosystems (Monopolies Commission (2020), p. 34).

It remains to be seen whether positions are similarly entrenched given that innovation cycles are faster and infrastructure not a barrier to entry. In order to deal with seemingly entrenched positions, a sector regulation would seem the right approach.

8.3
Please list and explain instances where a company with market power has used its position to try to enter adjacent/neighbouring markets to expand its market power.

Not applicable

8.4
Do you consider that strategies to extend market power to related markets are common in digital sectors/markets?

- ☐ No
- ☐ Yes, to some extend
- ☒ Yes, common
- ☐ Yes, very much
- ☐ Not applicable/no relevant experience or knowledge

8.5
Please explain your answer and identify the sectors/markets concerned.

Dominant undertakings will frequently seek to export entrenched market positions to adjacent markets or develop entirely new offerings (markets), especially where the existing platform allows such leveraging by addressing the same user groups (consumers, online advertisers etc.). Typically, the markets concerned are subject to substantial entry barriers based on network effects and on substantial economies of scale and scope. Examples are Microsoft moving from the Windows OS into middleware and application software markets, search engine moving into browser markets etc. This does not constitute a problem as long as the new markets

remain accessible to third parties (i.e. contestable) and no anti-competitive means are employed to foreclose that competition (see also our answers to questions 10.2, 18.4, an 18.8 below).

8.6

In your experience, does a repeated strategy by a company with market power to extend its market power to related markets raise competition concerns?

yes	no	Not applicable/no relevant experience or knowledge

8.7

Please explain your answer and indicate the competition concerns that may arise in case of leveraging strategies.

In our view, dominance is required to consider leveraging anti-competitive and allow a competition authority to issue a cease-and-desist order, or another remedy. Leveraging strategies could lose their attraction for the dominant platform and their competitive impact if sector regulation were adopted to establish market contestability (e.g. via requiring data portability for users and interoperability for complementary services) should be adopted (cf. Commission 'Competition Law 4.0' (2019), p. 54 et seq.).

9. Do you think that there is a need for the Commission to be able to intervene in situations where structural competition problems may arise due to repeated strategies by companies with market power to extend their market position into related markets?

- ☐ Yes
- ☒ No
- ☐ Not applicable/no relevant experience or knowledge

9.1

Please explain your answer. If you replied yes, please also indicate the type of intervention that would be needed.

In principle, we do not consider it as a *structural* competition problem when a company with market power (without being dominant) tries to export its market position to related (or new) markets. As already discussed in question 7.1, such a market behaviour demonstrates the ability to innovate; as a business strategy it may provide first-mover advantages and/or economies of scale and scope.

In our view, preventing a strong, but non-dominant, market player from entering adjacent markets risks to undermine the competitive process, namely its innovation function. If there are nevertheless overriding reasons to prevent leveraging by non-dominant companies, which in effect would require separation of market activities (similar to rules applicable in the telecoms and energy markets), such a rule should not be imposed by an ad hoc intervention (i.e. a decision, even if without incriminating effect), but instead become part of a long-term sector regulation. As stated above, where a dominant undertaking exports its position by anti-competitive means, this must be stopped to keep markets open. We are sceptical that the same effect can result from the actions of an undertaking with "some degree of market power". Such a lose test for allowing an intervention creates a threshold problem, therefore legal uncertainty, and accordingly barriers to growth and innovation. Competition law needs to act as a dependable regulatory framework (*Ordnungsrahmen*) which undertakings can rely on (and need to comply with) to design their business strategies.

Taking this perspective, in our view, the instruments provided under Article 102 TFEU are sufficient to address leverage by anti-competitive strategies. We will elaborate on this in our answer to question 9.3 below.

9.2
Do you consider that Articles 101 and 102 of the EU Treaty are suitable and sufficiently effective to address those market situations?

- ☒ Yes
- ☐ No
- ☐ Not applicable/no relevant experience or knowledge

9.3
Please explain your answer.

As we have explained in our answer to question 9.2, there are situations where leveraging a dominant market position can amount to a restraint of competition, namely if it effectively forecloses competition on the second market. In our view, the foreclosure problem is sufficiently addressed under Article 102 TFEU (*Mestmäcker/Schweitzer*, *European Competition Law*, chapter 4, § 18, para. 28; for an example from the case practice see COMP/M.3304 - *GE/Amersham*, para. 31). Enforcement has expanded to the digital sector (see the case against Microsoft in re *Windows Media Player*, T-201/04: the Commission found Microsoft to have leveraged its position on the OS market into the market for media players by pre-installing the media player together with its Windows software, a case of tying/bundling). The more recent Google cases, *Shopping* and *Android*, are further examples of the Commission's enforcement against leveraging strategies (by self-preferencing and exclusivity payments), although still subject to court review.

In our opinion, the active enforcement of Art 102 TFEU produces a sufficient level of deterrence. In addition, the correct market definition may help to frame the problem: Where an undertaking controls an indispensable input for accessing an up- or downstream market, it may be appropriate to apply a narrower market definition for the access market and, accordingly, to consider the respective undertaking as dominant (cf. e.g. the FCO's *Scandilines* decision of 27.01.2010, B9-188/05, p. 30; re the market definition point, see the Commission 'Competition Law 4.0' (2019), p. 31 et seqq.).

The question whether ex-post enforcement provides a sufficient level of protection also in the digital sector, has nevertheless been raised (cf. Commission 'Competition Law 4.0' (2019), p. 50 et seq.). If ex-post enforcement is seen as too slow, interim measures can be used (see below, 35.1). The interim measures imposing on *Broadcom* an obligation to cease and desist the use of certain contractual provisions until a final decision on the merits is taken (valid for a maximum period of 3 years) provide an example of such, to-date rarely used, powers (EU Commission, case AT.40608, press release IP/19/6109 of 16 Oct. 2019).
By contrast, spare resources should not be fielded as a valid argument; resources could be added. This applies to the NCAs under the *effet utile* principle (see ECJ, C-326/88 - *Hansen*, para. 17; see also Articles 6 to 13 ECN+ Directive (EU) 2019/1) and should apply to the European Commission as well.

10. Anti-competitive monopolisation refers to scenarios where one market player may rapidly acquire market shares due to its capacity to put competitors at a disadvantage in the market unfairly, for instance, by imposing unfair business practices or by limiting access to key inputs, such as data.

10.1
Do you have knowledge or did you come across such market situations?

- ☒ Yes
- ☐ No
- ☐ Not applicable/no relevant experience or knowledge

10.2
In which sectors/markets did you experience anti-competitive monopolisation strategies?

We understand the term “anti-competitive monopolisation” to refer to the rule-making character of platforms, or other “non-desirable” market behaviour, although this is not clearly stated. Where platforms are dominant, this behaviour would be within the scope of Art 102 TFEU. Where they are not dominant, unfair business practices will be subject to the laws against unfair trade practices (UWG in Germany) and may in Germany be investigated by the FCO’s new powers of a consumer protection related sector investigation (§ 32e Abs. 5 GWB). We are not aware of incidences where neither of these sets of rules was available to curb such behaviour. On the contrary, the FCO did investigate Amazon’s unfair rulemaking regarding agreements with third-party sellers for the Amazon marketplace and achieved improved terms, applicable globally (see press release and case report of 17 July 2019, B2-88/18). Should “unfair” rule-making behavior not be caught by Art 102 TFEU, there are arguably competitors in place to which platform users can turn if they wish to trade under different (better) terms of business.

10.3
Please provide examples and explain them.

Not applicable

10.4
Do you consider that anti-competitive monopolisation is common in digital sectors/markets?

- ☒ Not applicable (no relevant experience or knowledge
- ☐ No
- ☐ Yes, to some extend
- ☐ Yes, common
- ☐ Yes, very common

10.5
Please explain your answer and identify the sectors/markets concerned.

See above at 10.2.

10.6
In your experience, does anti-competitive monopolisation raise competition concerns?

- ☐ Yes

☐ No
☒ Not applicable/no relevant experience or knowledge

10.7
Please explain your answer and indicate the competition concerns that may arise in case of anticompetitive monopolisation.

not applicable

11. Do you think that there is a need for the Commission to be able to intervene in situations where structural competition problems may arise due to anti-competitive monopolisation?

☐ Yes
☐ No
☒ Not applicable/no relevant experience or knowledge

11.1
Please explain your answer. If you replied yes, please also indicate the type of intervention that would be needed.

As under Question 10.2, we understand the term “anti-competitive monopolisation” to address “unfair” rule-making (see above) and other “undesirable” market behaviour not caught by Articles 101, 102 TFEU, although this is again not explicitly stated.

Given the existence of relevant national laws, we do not think that there is a need for the European Commission to gain additional powers in order to intervene against unfair business practices. From our point of view, an appropriate level of protection can be secured by national authorities and national courts. If the European Commission sees a need for more of a level playing field regarding the regulation of unfair trade practices, the European Commission could issue (additional) internal market directives, following the earlier Unfair Commercial Practices Directive.
Besides, a number of directives / regulations have already been issued which regulate business practices in the digital sector, both B2B and B2C (such as the Directive (EU) 2019/770 regulating certain aspects of contracts for the supply of digital content and digital services and the Directive (EU) 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector). And the Commission has published plans to issue further ex-ante regulations governing digital markets (see Press release IP/20/962 of 2 June 2020 on launching the consultation to seek views on the Digital Services Act package). There is no need for a new competition tool, in addition.

An oligopoly is a highly concentrated market structure, where a few sizeable firms operate. Oligopolists may be able to behave in a parallel manner and derive benefits from their collective market power without necessarily entering into an agreement or concerted practice of the kind generally prohibited by competition law. In those situations, rivals often ‘move together’ to e.g. raise prices or limit production at the same time and to the same extent, without having an explicit agreement. Such so-called coordinated behavior can have the same outcome as a cartel for customers, e.g. price increases are aligned.

12. An oligopoly is a highly concentrated market structure, where a few sizeable firms operate. Oligopolists may be able to behave in a parallel manner and derive benefits from their collective market power without necessarily entering into an agreement or concerted practice of the kind generally prohibited by competition law. In those situations rivals often ‘move together’ to e.g. raise prices or limit production at the same time and to the same

extent, without having an explicit agreement. Such so-called coordinated behaviour can have the same outcome as a cartel for customers, e.g. price increases are aligned.

12.1
Do you have knowledge or did you come across such market situations?

☒ Yes

☐ No

☐ Not applicable/no relevant experience or knowledge

12.2
Please identify the markets concerned and explain those market situations.

Markets in which undertakings depend for their business activities on infrastructure that cannot, or at least not without unreasonable effort, be duplicated. This applies to network-based industries such as a railroad network or a mobile network. In both cases, access is a pre-condition to do business in those markets and the initial establishment of such networks comes with substantial sunk cost and regulatory barriers. Thus, at the infrastructure level (i.e. excluding MVNO), and often at the wholesale level as well, those markets tend to be oligopolistic.
Certain digital markets are equally concentrated, however, such market positions have not developed based on infrastructure, but rather follow a first-mover advantage and possibly, in platform markets, markets tend to tip towards the platform with the largest user base ("winner takes most"). (See Commission 'Competition Law 4.0' (2019), p 49).

12.3
In your experience, what are the main features of an oligopolistic market with a high/substantial risk of tacit collusion?

	No knowledge/No experience	No importance/No relevance	Somewhat important	Important	Very important
High concentration levels				X	
Competitors can monitor each other's behaviour				X	
Oligopolists competing against each other in several markets		X			
Homogeneity of products				X	
High barriers to enter (e.g., access to intellectual property rights, high marketing costs, global distribution footprint, strong incumbency advantages, network effects...)				X	
Strong incumbency advantages due to customers' switching costs and/or inertia			X		

Lack of transparency for customers on best offers available in the markets		X			
Vertical integration into key assets of the vertical supply chain			X		
Existence of a clear price leader, resulting in leader-follower behaviour		X			

Please explain your answer and your rating above.

The risk of tacit collusion is, to our understanding, most common on markets which are transparent and lack competitive pressure from the outside, due to barriers to entry (e.g. high sunk costs, difficulty to replicate infrastructure, data, etc.) and customer inertia (based on switching costs, including lack of data portability, or lack of alternative offers)**.** As the General Court has pointed out in *Airtours* (case T-342/99), there is risk for tacit collusion when transparency and barriers to entry are coupled with the possibility to deter deviant behaviour. Based on this finding, we have identified the elements above.

12.4

Can you think of any other features of an oligopolistic market with a high/substantial risk of tacit collusion?

☐ Yes

☒ No

12.5

Please indicate which are these other features of an oligopolistic market with a high/substantial risk of tacit collusion and rate them according to their importance from 0 to 4 (0 = no knowledge/no experience; 1 = no importance /no relevance; 2 = somewhat important; 3 = important; 4 = very important).

not applicable

12.6

In your experience, what are the main competition concerns that arise in oligopolistic markets prone to tacit collusion?

Oligopolistic rivalry may dampen price competition and incentives for innovation and, thus, for dynamic efficiencies. But the opposite may also be true as the mobile telecoms markets show (see above at Question 6).

12.7

Do you consider that oligopolistic market structures are common in digital sectors/markets?

☐ Not applicable (no relevant experience or knowledge

☐ No

☒ Yes, to some extend

☐ Yes, common

☐ Yes, very common

12.8
Please explain your answer and identify the sectors/markets concerned.

In the past, European courts have stated that coordinated effects are less likely to occur where markets are not transparent, the homogeneity of the products is low, e.g. because they are customised for customers, and there is competitive pressure from potential competitors which might enter the market at any time (see e.g. General Court,T-282/06 - *Sun Chemical,* para. 119).
Based on this finding, digital markets may invite coordination as they are often transparent, concern homogeneous products and can come with substantial barriers to entry as investments into technology development, marketing, and data accumulation, may be required. This is, however, not a given. For example, the market for online dating platforms is, according to the findings of the FCO, rather transparent, but it concerns inhomogeneous products – each dating platform addresses a very specific user group – and barriers to entry are low, which is illustrated by the number of market players that are active on the German market alone (see FCO, case B6-57/15 - *Online-Dating-Plattform*, para. 17 et seqq.).

13. Do you consider that there is a need for the Commission to be able to intervene in oligopolistic markets prone to tacit collusion in order to preserve /improve competition?

☐ Yes

☒ No

☐ Not applicable/no relevant experience or knowledge

13.1
Please explain your answer.

We acknowledge that oligopolistic markets may show a lower level of effective competition than more fragmented markets with a higher number of active players (although as stated above at Question 6), this depends on a number of elements such as the possibility to anticipate competitor behaviour based on market transparency, market concentration and product homogeneity, as well as barriers to entry, see for another example ECJ, case C-413/06 - *P Sony/BMG JV*, where the ECJ rejected the idea that tacit collusion would occur on the recorded music market and the wholesale market for licences of online music). We, however, do not see a need for intervention below the benchmark for anticompetitive behaviour as defined by the provisions of Article 101 and in particular Article 102 TFEU.

From our point of view, it is, of course, appropriate for the European Commission, as well as for national competition authorities, to pay particular attention to oligopolistic markets if they present a high risk of anticompetitive behaviour (see Petit, N, *The Oligopoly Problem in EU Competition Law, Research Handbook in European Competition Law* (2013), p. 261 et seqq.). However, this

does not, in our opinion, justify precautionary measures in addition to the instruments already available, e.g. sector investigations (cf. Monopolies Commission (2020), para. 121). Should the digital sector be considered to require additional rules to guard against parallelism (or tacit collusion) in oligopolies it will be important to create a framework of rules (*Ordnungsrahmen*) and can be relied on by undertakings for business creation and planning. We, therefore, disagree with the notion of ad hoc interventions into oligopolistic markets outside of Art 101/102 TFEU, but strongly propose to adopt ex ante sector regulation, if the EU Commission sees a need to curb coordinated effects in oligopolistic market structures.

Moreover, asymmetric regulation could be applied to undertakings found to have significant market power (as has been the case in the telecoms sector regulation, sec. 19-21 TKG). This approach has been proposed for the digital sector as well, namely by the Furman Report (2019), p. 41/42, 55 ("*strategic market status*") and the 10th amendment bill for the German Antitrust Act ("*paramount cross-market significance*"/ "*überragende marktübergreifende Bedeutung*", cf. the proposed § 19a GWB, Referentenentwurf of 24 January 2020). This approach allows to fashion specific rules for oligopolistic markets subject to a structural risk, without jettisoning legal certainty; and the regulatory onus would be based on a prior market investigation and imposed for a limited time only.

13.2
Do you consider that Articles 101 and 102 of the EU Treaty are suitable and sufficiently effective instruments to address oligopolistic market situations prone to tacit collusion?

☒ Yes

☐ No

☐ Not applicable/no relevant experience or knowledge

13.3
Please explain your answer.

We have presented our position in our answer to question 13.1 above. To reiterate briefly, we do consider that Articles 101, 102 TFEU provide sufficient power for the European Commission, and/or the respective national competition authorities, to address such oligopolistic markets. In addition, sector regulation may be added which could lower the threshold for interim measures and could address certain rules to undertakings with "significant market power" (see above).

14. Relying on digital tools, companies may easily align their behaviour, in particular retail prices via pricing algorithms. (Pricing algorithms are automated tools that allow very frequent changes to prices and other terms taking into account all or most competing offers on the market.)

14.1
Do you have knowledge or did you come across such market situations?

☒ Yes

☐ No

☐ Not applicable/no relevant experience or knowledge

14.2

Please list and explain those situations and in which markets you encountered them.

B2B and B2C digital market platforms.

14.3

In your view, what are the main features of markets where pricing algorithms are used?

	No knowledge/ No experience	No importance/ No relevance	Somewhat important	Important	Very important
The market is highly transparent (i.e. competitors can easily observe and understand the market behaviour of other players, and align their conduct), even without using the pricing algorithms				X	
The market is not transparent (i. e. without the pricing algorithms, competitors would not be able to observe and understand market behaviour of other players)	X				
Prices might be aligned, without market players explicitly agreeing their prices			X		
The goods and services offered in the market where the pricing algorithms are used are digital		X			
The goods and services offered in the market where the pricing algorithms are used are not digital		X			

14.4

Please explain your answers above. Please also use this space to mention any other features of markets where pricing algorithms are used and rate their importance.

Pricing algorithms can automate the adaptation of prices to changing market conditions, in particular price competition from third parties. In order to work, competitor pricing needs to be transparent and pricing to customers must be adjustable in very short cycles. To-date, authorities have prevented the risk of price alignment via price algorithms by requiring a layout of transaction platforms which avoids “super transparency” by ring fencing transactions from competitors’ (algorithmic) eyes and by raising thresholds for platform access which diminishes transparency. By way of example, the German FCO assessed the B2B trading platform for steel products operated by *XOM Metals GmbH* (27 March 2018, case B5-1/18-001) requiring the implementation of measures preventing platform users from deriving competitively sensitive (i.e. price offers or transactional price) information.

At the same time, pricing algorithms may also be relevant on non-platform markets. The European Commission has recently fined four producers for implementing such vertical restraints (cases COMP/AT.40465 *Asus*, COMP/AT.40469 *Denon & Marantz*, COMP/AT.40181 *Philips*, and COMP/AT.40182 *Pioneer*). In all four cases, the producers used, internal and external, price crawlers in order to monitor the resale pricing of their distributors.

The use of algorithms and their relevance for competition law enforcement has recently been investigated by the German and French competition law authorities as well (see German Federal Cartel Office and French Autorité de la Concurrence, working paper “Algorithms and Competition”, November 2019). This study identifies potential risks for competition law infringements with the help of algorithms, namely the initiation of collusion and the implementation of collusion, via third parties, and directly between competitors, and discusses enforcement measures prohibiting such algorithmic collusion (p. 26 et seqq.).

14.5
Do you consider that pricing algorithms are common in digital sectors/markets?

- ☐ Not applicable (no relevant experience or knowledge
- ☐ No
- ☒ Yes, to some extend
- ☐ Yes, common
- ☐ Yes, very common

14.6
Please explain your answer and identify the sectors/markets concerned.

Concerns may exist where B2B or B2C transactional platforms are also active up-/downstream and therefore compete with platform users.

14.7
In your experience, what are the main competition concerns that arise in markets where pricing algorithms are used? [Multiple choice possible]

- ☐ Alignment of prices / less competition between market players
- ☐ Prices increase
- ☐ Less choice for customers
- ☒ Others

14.8
Please explain.

Please refer to the discussion above at 14.4.

15. Do you consider that there is a need for the Commission to be able to intervene in markets where pricing algorithms are prevalent in order to preserve/improve competition?

- ☐ Yes
- ☒ No
- ☐ Not applicable/no relevant experience or knowledge

15.1
Please explain your answer.

We do not see an increased need for the European Commission to be able to intervene in markets in which pricing algorithms are used. Rather, the current level of intervention based on the application of Articles 101, 102 TFEU appears sufficient.

We arrive at this conclusion primarily based on the consideration that pricing algorithms change the speed of a market behaviour in response to changing conditions but not the behaviour itself. This means, the same business conduct, i.e. following publicly available price setting decisions by competitors, could be adopted without using algorithms. The ECJ's decision in re *Eturas* (case C-74/14) can serve as an example: the system administrator of a cloud-based booking software had announced a standard limitation applicable to discounts offered by the travel agencies connected via this platform; the fact that these travel agencies had not objected to this discount limitation, was considered an illicit price coordination.

We are, further, unconvinced that algorithmic pricing needs to be addressed by additional ex-ante regulation. The use of algorithms may reduce the disadvantages of smaller enterprises allowing them to implement a system of fast reactions to changing market conditions at lesser cost (see: German Federal Cartel Office and French Autorité de la concurrence, working paper "*Algorithms and Competition*", November 2019, p. 1). On the contrary, competitive and transparent online markets facilitate the allocative function of competition: they reduce search costs (the lower price is just one click away), leave consumers better informed and create downward pressure on prices (*Göhsl*, Algorithm Pricing and Article 101 TFEU, WuW 2018, 123; *Salaschek/Serafimova*, *Preissetzungsalgorithmen im Lichte von Art. 102 AEUV*, WuW 2019, 118).

15.2
Do you consider that Articles 101 and 102 of the EU Treaty are suitable and sufficiently effective instruments to address all scenarios where algorithmic pricing can raise competition issues?

☒ Yes

☐ No

☐ Not applicable/no relevant experience or knowledge

15.3
Please explain your answer.

As already indicated in our answer to question 15.1, we consider that Articles 101, 102 TFEU provide a sufficient level of protection for competition as regards the use of algorithmic pricing.

In general, we would expect Articles 101, 102 TFEU to apply to pricing algorithms in the same way as those provisions have been applied to pricing decisions so far. We acknowledge that there may be a risk of potential concealment but consider this as an issue which can be addressed by investigations, potentially adding resources to improve the authorities' ability to detect algorithms operating in the market (see Monopolies Commission (2020), para. 206 et seqq.).

16. So-called tipping (or 'winner takes most') markets are markets where the number of users is a key element for business success: if a firm reaches a critical threshold of customers, it

gets a disproportionate advantage in capturing remaining customers. Therefore, due to certain characteristics of that market, only one or very few companies will remain on those markets in the long term.

16.1
Do you have knowledge or did you come across such market situations?

☒ Yes

☐ No

☐ Not applicable/no relevant experience or knowledge

16.2
Please list and explain those situations and in which markets you encountered them.

Not applicable

16.3
Please indicate what are in your view, the main market features of a tipping market. Please rate each of the listed competition concerns according to its importance.

	No knowledge/ No experience	No importance/ No relevance	Somewhat important	Important	Very important
Direct network effects				X	
Indirect network effects				X	
Economies of scale			X		
Users predominantly single-home (i.e. they use typically one platform only)				X	

16.4
Please explain your answer, indicating why you consider the above features relevant for a tipping market and describe any other feature that you consider important.

Network effects, whether direct or indirect effects, can cause a market to tip (see Schweitzer, H. et al., *Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen,* Endbericht, (29 August 2018), p 12). Network effects are a key feature of the platform economy (Commission 'Competition Law 4.0' (2019), p. 16 et seq.).

Network effects describe a scenario in which platform users benefit when their number increases, on the same market side (direct) or on another market side (indirect). If network effects are coupled with a lack of effective platform competition (e.g. due to single homing) this will favour market tipping (see FCO, case B6-57/15 - *Online-Dating-Plattform*, para. 139 et seqq.). This type of development, however, occurs only in very specific market conditions (see Immenga/Mestmäcker/*Thomas*, Competition Law, § 36 para. 229), namely a first-mover effect, together with economies of scale which, may facilitate market tipping as they reduce cost for

the platform which has attracted most users, and raises costs for all rival platforms which may eventually exit the market.

Innovation dynamics (new technologies superseding older ones, so called “competition for the market”) counter tipping tendencies and more generally contestability of markets. For example, Facebook as one of the first social networks is today challenged by a number of operators like Snapchat and TikTok. Those challengers offer a somewhat different type of service, but do replace Facebook, at least regarding the demand of certain (younger) user groups (see https://www.cnbc.com/2018/02/12/facebook-is-losing-younger-users-to-snapchat-according-to-a-study.htm).
However, the timeframe for innovation dynamics may be too long (see above at 7.1). To counteract strong network effects in the meantime, users must be empowered to multi-home, or at least to easily switch platforms, which in a B2C context requires user data portability, and in a B2B context potentially an open data standard. An introduction of such drastic steps would require substantial investment as well as standard setting by the industry and for these reasons will need to be enshrined in an ex-ante regulation for platforms in the digital sector (Furman Report (2019), p. 57)

16.5
In your view, is tipping common in digital sectors/markets?

☐ Not applicable (no relevant experience or knowledge

☐ No

☒ Yes, to some extend

☐ Yes, common

☐ Yes, very common

16.6
Please explain your answer and identify the sectors/markets concerned.

Please refer to our discussion at 16.4 above. In our view, tipping is a common occurrence in technology driven markets, be this digital technology or other technology.

16.7
In your experience, what are the main competition concerns that arise in tipping markets? Please rate each of the listed competition concerns according to its importance.

	No knowledge/No experience	No importance/No relevance	Somewhat important	Important	Very important
Efficient or innovative market players will disappear			X		
There will not be sufficient				X	

competition on the market in the long run					
Customers will not have enough choice				X	
Customers may face insufficient innovation		X			
Customers may face higher prices				X	

16.8
Please explain your answers above. Please also use this space to mention any other competition concerns that arise in tipping markets and rate their importance.

As in any market dominated by one or two players, competition concerns arise and enforcement will seek to ensure or revive market contestability. The goal must therefore be to keep such markets open from the start. For the digital sector, we believe the existing competition rules (Article 102 TFEU) and possibly additional ex-ante sector regulation could deal with scenarios where contestability appears to be at risk or the time horizon appears to be too long. In addition, we have proposed to study ex-ante sector regulation that secures contestability, via user data portability, and potentially open data standards (see above at 16.4 and below at 31.1).

17. Do you consider that there is a need for the Commission to be able to intervene early in tipping markets to preserve/improve competition?

☐ Yes

☒ No

☐ Not applicable/no relevant experience or knowledge

17.1
Please explain your answer.

Even though we agree that tipping markets may cause competitive concerns, we do not agree with the assumption that ad hoc interventionist tools should be adopted to prevent markets from tipping.

First, we are not convinced market tipping itself constitutes a problem which requires a novel approach. Instead, it is essential that the dominant position which has arisen does not remain unchallenged. In fact, there may still be enough potential for new competition in the market which would allow to still qualify such a market as effective (see Haucap, J and Heimeshoff, U, *Google, Facebook, Amazon, eBay: Is the Internet driving competition or market?*, DICE Discussion Paper No. 83, January 2013). There is clear evidence that dominant positions in digital markets will be attacked (see Gutiérrez, G. and Philippon, T., *Fading Stars,* NBER Working Paper No. 25529 (2019), who have analysed that “super-star firms”, whose number, measured by their share of the input to overall productivity, has diminished in importance over the past 60 years in the US). This is even true in case of very strongly entrenched quasi

monopolies: Google's otherwise dominant position in search has been successfully challenged by the Korean search engine Naver (see https://www.link-assistant.com/blog/google-vs-naver-why-cant-google-dominate-search-in-korea/).

Second, to prevent tipping by intervention would require predicting the tipping action itself, the relevant player, and the means by which it would arrive there. In other words, to call for a proactive intervention against tipping means to replace the "*invisible hand of the market*" (Adam Smith) by a regulator's foresight. This would mean to limit an undertaking's internal growth, which is the engine of market activity itself. The danger of false positives, resulting in harm to competition, rather than protection of competition, appears very high.

Third, the dominant undertaking will still be subject to the restraints of Article 102 TFEU. Where necessary, additional ex-ante sector regulation should ensure contestability, and additional asymmetric rules for undertakings with "significant market power" may be considered (see above at 13.1). It is then, however, the legislator which creates a level playing field for all market participants in the digital sector.

17.2
Do you consider that Articles 101/102 of the EU Treaty are suitable and sufficiently effective instruments to intervene early in 'tipping markets', to preserve/improve competition?

☐ Yes

☐ No

☒ Not applicable/no relevant experience or knowledge

17.3
Please explain your answer.

Please refer to our reply to 17.1 above.

18. So called 'gatekeepers' control access to a number of customers (and/or to a given input /service such as data) that – at least in the medium term – cannot be reached otherwise. Typically, customers of gatekeepers cannot switch easily ('single-homing'). A gatekeeper may not necessarily be 'dominant' within the meaning of Article 102 of the EU Treaty.

18.1
Have you encountered or are you aware of markets characterised by 'gatekeepers'?

☐ Yes

☐ No

☒ Not applicable/no relevant experience or knowledge

18.2
Please list which companies you consider to be 'gatekeepers' and in which markets.

Dominant B2B and B2C platforms.

18.3
Do you consider that gatekeeper scenarios are common in digital sectors/markets ?

☐ Not applicable (no relevant experience or knowledge

☐ No

☒ Yes, to some extend

☐ Yes, common

☐ Yes, very common

18.4
Please explain your answer and identify the sectors/markets concerned.

Gatekeeper scenarios may arise if platforms become an unavoidable trading partner for their users (the Commission 'Competition Law 4.0' (2019), p. 31/32), and govern the terms and conditions under which their users may access or trade on the platform and may compete with the platform. This phenomenon has been discussed under the term platforms as "rule-makers" or "regulators" (Commission 'Competition Law 4.0' (2019), p. 49; EU Commission, Competition Policy for the Digital Era, (2019), Report, p. 60). The anti-competitive goal can be foreclosure of competitors, in platforms cases on a different market side than the one on which the platform is the gatekeeper, the pro-competitive goal the avoidance of free-riding (see MüKo-Eilsmansberger/*Bien*, Art 102, 3d ed. 2020, para. 505).

Examples are app stores on mobile operating systems (e.g. Apple's app store, see the Commission's press release of 16 June 2020 about opening an investigation into the app store rules) or the Amazon Marketplace (governed by Amazon's rules imposed on third-party vendors using Amazon Marketplace, which the FCO regarded as partially intransparent and unfair, see German Federal Cartel Office, decision of 17 July 2019, B2-88/18; now followed by a separate EU Commission investigation, opened on the same date the FCO's was closed). These providers would not be dominant on a wider app store or marketplace market, unless market definition is reduced to the access market or platform they control. This was the position taken by the FCO in the Amazon case and equally by the German Federal Court in the adblocker case: adblockers control access to websites by their users through blocking ads, but also maintaining "whitelists" if websites adhere to certain rules and pay for unblocking their services. The Court considered the adblocker dominant on the access market it created (decision of 8 October 2019, KZR 73/17 - *Werbeblocker III*). Platforms may also control the conditions of competition by their users, on their own websites and third-party platforms (so-called price parity or most favoured nation clauses, investigated in the series of *booking.com* cases by the German, the UK, the French, Italian and Swedish authorities; the German case ended with the Appellate Court's decision allowing narrow MFNs, OLG Düsseldorf, Urt. v. 4.6.2019 – VI-Kart 2/16 (V)).

18.5
Do you consider that gatekeeper scenarios also occur in non-digital sectors/markets?

☒ Yes

☐ No

☐ Not applicable/no relevant experience or knowledge

18.6

Please explain your answer and identify the sectors/markets concerned.

The term “gatekeeper” does not denote a clear legal concept, but is typically understood to mean a bottleneck or gateway position (or other input) which a company controls (see Furman Report (2019), p. 55 and 81).

The issue in such cases can be the refusal to grant access altogether, or grant access only based on discriminatory or unfair conditions. If an undertaking controlling the input is dominant on its market, Article 102 TFEU provides remedies. The problem the EU Commission cites has to do with market definition: not in all cases are such gatekeeper undertakings dominant (unless markets are confined to the access market, see above). The Furman Report (2019), which focusses on the digital sector (titled “Unlocking Digital Competiton”), has therefore proposed a designation of relevant digital platforms to have “*strategic market status*”, if they have “*enduring market power over a strategic bottleneck market*”, allowing a digital regulator to impose special obligations (p. 55, 81). See the discussion at 13.1 above related to this type of ex-ante regulation.

18.7

Please indicate what are, in your view, the features that qualify a company as a ‘gatekeeper’. Please rate each of the listed features according to its importance. (0 = no knowledge/no experience; 1 = no importance/no relevance; 2 = somewhat important; 3 = important; 4 = very important).

	No knowledge/ No experience	No importance/ No relevance	Somewhat important	Important	Very important
High number of customers/users			X		
Customers cannot easily switch (lack of multi-homing)				X	
Business operators need to accept the conditions of competition of the platform - including its business environment - to reach the customers that use the specific platform				X	

18.8

Please explain your answer, indicating why you consider the indicated features relevant for qualifying a company as a gatekeeper. Please also add any other relevant features that qualify a company as a gatekeeper and rate their importance.

Under the traditional essential facility doctrine, indispensability of the input, e.g. platform access, to compete in the market, is decisive, further the inability to substitute such input, or access by alternate, even if less advantageous, means, be this for legal or factual reasons (see, inter alia,

ECJ, case C-7/97 - *Bronner*; case C-418/01 - *IMS Health*). When a company has attracted a substantive number of users to one side of a transaction platform, access to the platform may be 'indispensable' for users on the other market side in order to conduct their business, if they cannot switch to a substitute platform to reach the same users. Under the essential facilities doctrine, the input or access market must be dominated, while the number of users on the downstream market does not play any role – even the first offering on a new market, i.e. without a prior user base, would be within the scope of that doctrine (see *IMS Health*).

This should be the same for gatekeeping platforms: where the platform market is dominated, access must be granted, and on non-discriminatory terms. Whether gatekeeping platforms can exist without being dominant, appears unclear. The solution may lie in concluding dominance, and requiring access, where users can be reached via that transactional platform alone, due to single-homing (similar to call termination on fixed or mobile telecom network), or users depend on the services of a non-transactional platform in the absence of a substitute. A recent example for the latter type is provided by the German FCO's Facebook case which considered Facebook's terms regarding the use of off-Facebook user data as breaching GDPR and therefore abusive (see FCO, case B6-22/16, confirmed by the German Federal Supreme Court, in preliminary proceedings, however as an exploitative abuse, see judgement of 23.06.2020, KVR 69/19). For transactional platforms, a minimum number of users may therefore be a threshold issue.

18.9

In your experience, what are the main competition concerns that arise in markets featuring a gatekeeper? Please rate each of the listed competition concerns according to its relevance.

	No knowledge/ No experience	No importance/ No relevance	Somewhat important	Important	Very important
Gatekeepers determine the dynamics of competition on the aftermarket/platform				X	
As customers/users cannot easily switch, they have to accept the competitive environment on the aftermarket /platform				X	
Business operators can only reach the customers that use the specific platform/aftermarket by adapting their business model and accepting their terms and conditions				X	

18.10

Please explain your answers above. Please also use this space to mention any other competition concerns that arise in markets featuring a gatekeeper and rate them in importance.

Please refer to our answer to question 18.8.

19. Do you consider that there is a need for the Commission to be able to Intervene in gatekeeper scenarios to prevent/address structural competition problems?

☒ Yes

☐ No

☐ Not applicable/no relevant experience or knowledge

19.1
Please explain your answer.

In our opinion, the European Commission will be able to intervene in gatekeeper scenarios, if undertakings in gatekeeper positions are dominant. In case they are not (yet) dominant, because competing platforms exist, the definition of "gatekeeper" becomes a threshold question.

Concerns about market players in gatekeeping positions refusing to provide upstream input or access have been dealt with under the doctrine of refusal to deal (for input, *Commercial solvents*), the essential facilities doctrine (for infrastructure, German FCJ decision in re *Fährhafen Puttgarden*, KVR 15/01; ECJ, C-241/91 – *Magill* and C-242/91 - *IMS Health*), the case law requiring FRAND licenses for standard-essential patents (ECJ, C-170/13 - *Huawei/ZTE*), and finally sector regulation with regard to infrastructure held by former state monopolies in the railroad, energy, postal and telecom services markets (see the reference in the Furman Report (2019) to the asymmetric telecoms regulation based on "significant market power", p. 81).

In early digital cases, interventions relied on the essential facilities doctrine, in order to force vertically integrated operators to grant access to their infrastructure, via interoperability information (*Microsoft v Comm.*, T-201/04 (2007); Andreangeli, A., *Interoperability as an "essential facility" in the Microsoft case - encouraging competition or stifling innovation?* (2009) European Law Review, 34(4), p. 585 et seqq.) More recently, the EU Commission has gone further and issued a prohibition of self-preferencing by a dominant platform (see the EU Commission's *Google Shopping* case, AT.39740) which is however a new theory of harm, not directly based on the traditional essential facility doctrine, and currently before the EU courts (see critical review by P.I. Colomo, *Self-Preferencing: Yet Another Epithet in Need of Limiting Principles*, 17 July 17 2020, available at SSRN).

The condition under which access must be provided by a dominant platform or other gatekeeper, is "indispensability", i.e. that certain user groups / customers may not otherwise be reached. The access remedy in digital cases will usually require a change of technology or business model (as e.g. in *Google Shopping*).

We are not convinced that non-dominant market players should be qualified as gatekeepers subject to onerous access rules. The access issue can (partly) be resolved by resorting to a market definition that defines access to consumers/services/data as a separate market under Article 102 TFEU (see the above-cited German Federal Court of Justice's *Werbezeitblocker III* case). Should this be considered insufficient, an ex-ante regulation may be needed to introduce a clear legal standard and avoid harming innovation competition – also in view of typically onerous "restorative" remedies.

19.2
Do you consider that Articles 101 and 102 of the EU Treaty are suitable and sufficiently effective instruments to intervene in markets characterised by 'gatekeeper platforms' in order to preserve/improve competition?

☒ Yes

☐ No

☐ Not applicable/no relevant experience or knowledge

19.3
Please explain your answer.

From our point of view, Article 102 TFEU provides sufficient powers to address gatekeeping situations. But please see our answer to question 19.1 above for a more measured approach.

20. In which sectors/markets do you consider that structural competition problems may occur?

☐ Structural competition problems may occur in all sectors/markets
☒ Structural competition problems may occur in some specific sectors/markets (including but not only digital sectors/markets).
☐ Structural competition problems only occur in digital sectors/markets
☐ Structural competition problems mainly occur in digital sectors/markets
☐ Not applicable / no relevant experience or knowledge

20.1
Please explain your answer and identify the sectors/markets your reply refers to.

As we have explained above, for example in our answer to question 7., we consider that there are certain markets in which structural competition problems are more likely to occur. We have elaborated on the relevance of certain market characteristics especially in our answers to questions 6.1, 8.5, 13.1, 14.4, 16.4 and 18.4.

For completeness' sake, we add that special risks of structural competition problems predominantly exist on markets where business activities depend on the access to a certain input (data), platform or infrastructure, see at 18. and 19. above.

21. If in response to question 7 you indicated that other forms of structural competition problems in addition to the ones listed above exist, do you consider that there is a need for the Commission to be able to intervene in order to address these other forms of structural competition problems in order to preserve/improve competition?

☐ Yes

☐ No

☒ Not applicable/no relevant experience or knowledge

21.1
Please explain your answer.

not applicable

21.2
Do you consider that Articles 101 and 102 of the EU Treaty are suitable and sufficiently effective instruments to address these other forms of structural competition problems?

☐ Yes

☐ No

☒ Not applicable/no relevant experience or knowledge

21.3
Please explain your answer.

not applicable

22. Article 101 of the EU Treaty prohibits agreements between companies which prevent, restrict or distort competition in the EU and which may affect trade between Member States (anti-competitive agreements). These include, for example, price-fixing or mArket-sharing cartels. Is Article 101 of the EU Treaty, in your view, a suitable and sufficiently effective instrument to address structural competition problems?

☒ Yes

☐ No

☐ Not applicable/no relevant experience or knowledge

22.1
Please explain your answer. If you replied 'no', please indicate the types of conduct and situations that in your view, Article 101 of the EU Treaty does not sufficiently or effectively address, and why.

In our opinion, Article 101 TFEU is the right instrument to address structural competition problems that arise from coordinated market behaviour between undertakings. In fact, the decision practice has extended Art 101 TFEU far beyond traditional cartels including over time information exchange with regard to almost every market parameter and even signalling scenarios where the problems arise from artificial market transparency. This flexibility, which the courts have supported, should allow the Commission to deal with similar issues in the digital sector. In our best understanding, the scenarios discussed under the label "structural competition problems" mainly address scenarios within the scope of Article 102 TFEU as they primarily refer to unilateral conduct.

We understand that especially the digitisation of goods, services and delivery channels, offers certain new challenges to the application of Article 101 TFEU. This includes, *inter alia*, the creation of artificial market transparency and the application of Art 101 TFEU to algorithm-based pricing.

As explained above, i.a. in our answers to questions 17.1 and 17.3, the EU Commission is right in pushing to translate competition law enforcement to the digital age. As regards Article 101 TFEU this could mean, *inter alia*, to clarify the ultimate responsibility for algorithm activity as there are, for example, uncertainties about the scope of user tracking by digital platforms. Even though users agree to tracking in terms and conditions and are made aware of tracking by the

mandated cookie consent on individual websites, the information harvested could potentially be used for covert price discrimination as well as more overt personalizing of offers. (Coyle, Antitrust Law Journal No. 3 (2019), *Practical competition policy implications of digital platforms*, p. 24 et seq.). Given the flexibility to-date, we are confident that this challenge can be overcome even, by issuing notices and guidelines, without introducing new competences and tools for the regulating agencies.

22.2
Please explain in which markets the market situations and problematic conducts you have identified manifest themselves.

Please see our answer to question 22.1 above.

23. Article 102 of the Treaty prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it. Is Article 102 of the Treaty, in your view, suitable and sufficiently effective to address structural competition problems?

☒ Yes

☐ No

☐ Not applicable/no relevant experience or knowledge

23.1
Please explain your answer. If you replied 'no', please indicate the types of conduct and situations that in your view, Article 102 of the EU Treaty does not sufficiently or effectively address, and why.

As discussed above, we consider that Article 102 TFEU provides sufficient powers and tools to effectively address structural problems (see at 9.1, 11.1, 13.1, 19.1 and 22.1). We do, however, also acknowledge that certain scenarios are not without risk for effective competition, in particular gatekeeper settings.

In order to properly address such scenarios using the powers provided under Article 102 TFEU, it is important to develop and apply market definitions which suit today's business environment as it has been shaped by the digitisation and take account of market power based on data access, "unavoidable" intermediation, and conglomerate positions across ecosystems (cf, e.g. Alexiadis, P and de Streel, A, *Designing an EU Intervention Standard for Digital Platforms*, EUI Working Paper RSCAS 2020/14 (2020), p. 22 et seqq.; Commission 'Competition Law 4.0' (2019), p. 28-32). Moreover, ex-ante sector regulation could introduce rules to support contestability of markets, namely user data portability and interoperability requirements. Whether special rules for undertakings with strategic (or paramount cross-) market power for not clearly dominant, but unavoidable trading partner platforms with gatekeeper function, should be introduced will require more thorough examination (see the Commission 'Competition Law 4.0' (2019), p. 32/33; see above at 19.1).

In EU competition law, self-preferencing behaviour has been adequately covered by Article 102 TFEU. However, this case group presupposes the existence of a dominant position on one of the markets affected by the conduct. (ECJ, C-7/97 – *Bronner*). Furthermore indispensability is necessary when the lawfulness of a given practice is assessed (see P. I. Colomo, *Self-Preferencing: Yet Another Epithet in Need of Limiting Principles*,17 July 2020, SSRN, p. 36; ECJ, C-418/01 - *IMS Health*; ECJ, T-65/98 – *Van den Bergh Foods*).

In our opinion these strict criteria for proactive measures are necessary as they may come with unintended and unpredictable consequences. European authorities have taken proactive measures pursuant to Article 102 TFEU in cases of self-preferencing, e. g. in *Google Android* (EU-Com., Case AT.40099 - *Google Android*) where the Commission concluded that Google's commercial practice forces business partners to make use of multiple Google services. In *Google Shopping* (EU-Com, Case AT.39740 – *Google Shopping*), the European Commission appears to have adopted a lower burden of proof compared with traditional refusal to deal/essential facility cases but rather adopted a different approach which is more in line with leveraging cases (tying, bundling, margin squeeze) and avoided the need to directly address the issue of indispensability. Also the Commission has opened investigations against Amazon and Apple for practices that were deemed to favour their activities at one level of the value chain (EU-Com, 16.07.2019, IP/19/4291; EU-Com, 16.06.2020, IP/20/1073; EU-Com, 16.06.2020, IP/20/1075). Therefore, European case law shows that Article 102 TFEU in its present scope is effective to address structural competition problems.

23.2
Therefore, European case law shows that Article 102 TFEU in its present scope is effective to address structural competition problems. Please explain in which markets the market situations and problematic conducts you have identified manifest themselves.

As we have especially identified gatekeeping scenarios as potentially problematic, we would like to refer to our answer to question 18.4 above.

Section D: Assessment of policy options

24. In light of your responses to the questions of Section C, do you think that there is a need for a new competition tool to deal with structural competition problems that Articles 101 and 102 of the EU Treaty (on which current competition law enforcement is based) cannot tackle conceptually or cannot address in the most effective manner? (Article 101 of the EU Treaty prohibits agreements between companies which prevent, restrict or distort competition in the EU and which may affect trade between Member States (anti-competitive agreements). These include, for example, price-fixing or market-sharing cartels. Article 102 of the Treaty prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it.)

☐ Yes

☒ No

☐ Not applicable/no relevant experience or knowledge

24.1
Please explain your answer. Please indicate which structural competition problems the new tool should tackle or address.

We generally consider the existing toolbox, i.e. Articles 101, 102 TFEU as sufficient. Even though we acknowledge that new developments, and the digitisation in particular, produce new challenges for regulatory authorities, it is our understanding that certain adaptions in the way the existing rules are applied would bring a sufficient level of protection for effective competition.

Also, we would like to point out that a new tool relying on predictions of market developments, in particular market tipping, appears difficult to square with the overall approach of competition

law operating as a regulatory framework. We do not believe that market outcomes can be predicted with any degree of certainty, certainly to such a degree that remedial measures could be imposed on companies before any abuse in the traditional sense has actually taken place. Moreover, an assessment and regulatory action taken based on 'desirable market outcomes' might open the gates to political influence on competition law enforcement. To-date, EU competition practice has avoided politics interfering with competition law enforcement which has done the European internal market a great service – traditions across member states are too diverse to agree on the right steering.

First of all, the development of a decision practice particular to the digital sector is in full swing and it would appear wise to await the outcomes, including judicial review, of a number of cases before undertaking a paradigm change by installing a new threshold of intervention below market dominance.

Beyond that, a phased approach would seem warranted, namely updating the market definition notice, and the Commission's guidance on its enforcement priorities under Art 102 TFEU by adding chapters on digital markets (see the Commission 'Competition Law 4.0' (2019), p. 51 et seq.). Furthermore studies could be undertaken to prepare ex-ante sector regulation with a view to ensuring contestability of markets (cf. Coyle, Antitrust Law Journal No. 3 (2019), Practical competition policy implications of digital platforms, p. 23 et seqq.) and to better understand leveraging strategies and available remedial action, as advocated by the Furman Report (2019) (retrospective evaluation into enforcement against dominance abuse, p. 103) and the Commission 'Competition Law 4.0' Report (2019) (evaluation cross-market foreclosure strategies, p. 32/33, and remedial actions, p. 77-79). After all there is ample experience with sector regulation in Europe. If it appears necessary to create an interventionist regime for non-dominant gatekeeper positions, the UK or German path of designing a "*strategic market status*" could be followed which would offer more legal certainty than the contemplated "NCT" by (i) defining the conditions for such an asymmetric declaratory status and (ii) enumerating the "remedies" which may be imposed (see the most recent *Guidelines*, 2018/C 159/01, which detail market definition, para. 24 et seq., and SMP criteria, para. 58 et seq.).

25. Do you think that such a new competition tool (that would not establish an infringement by a company and would not result in fines) should also be able to prevent structural competition problems from arising and thus allow for early intervention in the markets concerned?

☐ Yes

☐ No

☒ Not applicable/no relevant experience or knowledge

25.1
Please explain your answer. Please indicate which structural competition problems the new tool should prevent.

not applicable

26. What are in your view the most important structural competition problems that should be tackled with such a new competition tool?

As explained above, at Question 24.1, we do not consider the introduction of a new competition tool warranted at this time.

27. In your view, what should be the basis for intervention for the new competition tool?

- ☒ The tool should be dominance-based (i.e. it shall only be applicable to dominant companies within the meaning of Article 102 of the EU Treaty)
- ☐ The tool should focus on structural competition problems and thus be potentially applicable to all undertakings in a market (i.e. including dominant but also non-dominant companies).
- ☐ Other
- ☐ Not applicable /no relevant experience or knowledge

If you indicated "Other", please explain.

not applicable

27.1
Please explain your answer. Please indicate what type of situations would be covered by the scope of application you suggested.

As explained above, we do not consider the introduction of a new competition tool warranted at this time. If such a tool should be introduced nevertheless, we would emphasise that such an instrument should take the form of an ex-ante regulation proper, which addresses market dominant platforms, or at most platforms with a "*strategic market* status" (or similar), to be closely defined and with an enumerated list of remedies (see above at Question 24.1).

Moreover, we fail to see a valid legal basis for the introduction of a new competition tool which would rely on a lower threshold than a dominant position. The enabling rule in primary law, Article 103 TFEU, can only be used for regulations or directives that "give effect to the principles set out in Articles 101 and 102 TFEU". Accordingly, the requirements for application of a potential new competition tool would have to be based on the same requirements, for the purposes here on the conditions for application of Article 102 TFEU. By way of example, the German Monopolies Commission supports the EU Commission's proposal to add ex-ante regulation of market dominant platforms, e.g. to prohibit self-preferencing (Monopolies Commission (2020), p. 38 et seqq., para. 85, 90 et seqq.). See above at (22.1, 23.1).

According to the Federal Ministry of Economics and Energy, only market-dominant companies have a special responsibility to ensure that their conduct does not further impair the remaining competition and accordingly new rules of conduct should apply to all platforms which are market-dominant (Commission 'Competition Law 4.0' (2019), p. 53.). The Furman Report (2019), on the other hand, has proposed that platforms with "*strategic market status*" should be subject to special regulatory rules of conduct, thus linking regulation to an independent regulatory concept of market power. The special rules of conduct would then only apply to those platforms whose addressees are determined in a separate procedure (Furman Report (2019), p. 58 et seqq.).

28. In your view, what shall be the scope of the new competition tool?

- ☐ It shall be applicable to all markets (i.e. it should be horizontal in nature)
- ☐ It shall be limited in scope to sectors/markets where structural competition problems are the most prevalent and/or most likely to arise
- ☒ Other
- ☐ Not applicable / no relevant experience or knowledge

If you indicated "Other", please explain.

Applicable to the digital sector only.

28.1
Please explain your answer. If you indicated 'limited in scope', please indicate what sectors/markets should be covered by the new competition tool, and why.

As pointed out before, we generally do not support a new competition tool in terms of an ad hoc regulatory tool.

If such a tool would be introduced nevertheless, it should be applicable exclusively to the digital sector, and within that, to defined scenarios, in particular market dominant gatekeeper platforms, or at most platforms that carry a "*strategic market status*", e.g. with regard to their rule-making nature across an entire ecosystem ("*paramount cross-market significance*", see the proposed § 19a in the Germany's 10th amendment bill to the German Antitrust Act).

28.2
Do you consider that the new competition tool should apply only to markets/sectors affected by digitisation?

☒ Yes

☐ No

☐ Not applicable/no relevant experience or knowledge

28.3
Please explain your answer, indicating what markets/sectors you would consider as affected by digitisation.

We refer to our answer to question 28.1.

29. If a new competition tool were to be introduced, how should a smooth interaction with existing sector specific legislation (e.g. telecom services, financial services) be ensured?

More specific sector regulation would have to be carved out.

30. Do you consider that under the new competition tool the Commission should be able to:

	yes	no	Not applicable/no relevant experience or knowledge
Make non-binding recommendations to companies (e.g. proposing codes of conducts and best practices)			X
Inform and make recommendations/proposals to sectorial regulators			X

Inform and make legislative recommendations			X
Impose remedies on companies to deal with identified and demonstrated structural competition problems			X

30.1
Please explain your answers indicating why you consider that the new competition tool should include or not include the options above.

While we do not advocate the introduction of an interventionist "NCT" we have recommended the introduction of notices/guidelines that deal with market definition and market dominance criteria as well as application of Art 102 TFEU to the digital sector. The Furman Report (2019) (p. 58/59) has instead proposed the establishment of a code of conduct for digital platforms, in liaison with digital sector industry and stakeholders, a type of "soft law" which has to-date not been used in EU Commission practice.

31. Do you consider that in order to address the aforementioned structural competition problems, the Commission should be able to impose appropriate and proportionate remedies on companies? If yes, which?

	yes	no	Not applicable/no relevant experience or knowledge
Non-structural remedies (such as obligation to abstain from certain commercial behaviour)	X		
Structural remedies (for instance, divestitures or granting access to key infrastructure or inputs)		X	
Hybrid remedies (containing different types of obligations and bans)		X	

31.1
Please explain your answer and why you indicated or not indicated the remedies listed above.

As explained in our answers to several questions above, we do not consider the introduction of a new competition tool warranted at this (early) stage. Therefore, we discuss below only measures based on the current rules, i.e. remedies imposed under Article 102 TFEU.

Under Article 102 TFEU, the European Commission may impose behavioural (non-structural) remedies. For example, it might order a dominant "gatekeeper" platform to grant access to users, under non-discriminatory terms. If the EU courts condone a wider scope for cease-and-desist orders against self-preferencing behaviour under Article 102 TFEU, and even "restorative

remedies, or if a future ex-ante regulation prohibits self-preferencing in defined circumstances, these would, again, constitute behavioural (non-structural) remedies.

The German Commission 'Competition Law 4.0' has advised that in markets where strong and rapid concentration tendencies require rapid action against anti-competitive behaviour by dominant companies, a transition to clear, relatively simple rules of conduct make sense because they can give the market clear signals on the "rules of the game" and can simplify and speed up the application of the law. Other measures such as the obligation of market-dominant companies to grant access to data, are currently not suitable for a transition to simple generalizing rules of conduct in the view of the the Commission 'Competition Law 4.0': The constellations of facts are too diverse and the effects on competition too complex. (Commission 'Competition Law 4.0' (2019), p. 25).

By contrast, structural remedies have been used in the telecoms and energy regulatory frameworks, namely accounting and ownership separation between networks and services. This was based on, i.a. the fact that the incumbents had enjoyed state monopolies and had funded their historic networks with taxpayer money. It is not clear, at this stage, that digital sector undertakings, and be it dominant platforms, even those controlling entire ecosystems, should be subjected to structural remedies. However, an ex-ante regulation demanding data portability, interoperability, and even open data rules, will come quite close to a structural remedy given that interoperability information and sharing of (non-personal) data accumulated over time will mean access to "crown jewels" of these undertakings (see Microsoft's reaction to the CFI's 2007 decision T-201/04 confirming the Commission's order to release of server interoperability information for Windows Server 2003, quoted from the Microsoft 2008 Annual Report: "*The … impact on product design may limit our ability to innovate … (and) may enable competitiors to develop software products that better mimic the functionality of our own products*", quoted from the Wikipedia article "Microsoft Corp. v. Commission").

32. Do you consider that certain structural competition problems can only be dealt with by structural remedies, such as the divestment of a business?

- ☐ Yes
- ☒ No
- ☐ Not applicable/no relevant experience or knowledge
- ☐ Other

If you indicated "Other", please explain.

not applicable

32.1
Please explain your answer.

As explained in our answer to question 31.1, we do not consider that structural remedies are an appropriate tool to address competition issues at this stage. The question is thus not relevant to us.

Section E: Institutional set-up of a new competition tool

33. Do you consider that enforcement of the new competition tool by the Commission would require adequate and appropriate investigative powers in order to be effective?

☒ Yes

☐ No

☐ Not applicable/no relevant experience or knowledge

33.1
Please explain your answer.

In case a new competition tool would be introduced it would be of high importance that decisions taken under an ex-ante regulation as envisaged here are based on a full investigation, equally securing full rights of defence. As set out above (see at 24.1, 27.1 and 28.1) we propose to adopt a phased approach, namely (i) develop the decision practice under Art 102 TFEU in digital markets, (ii) publish guidelines on market definition, market dominance criteria and enforcement priorities in digital markets, (iii) run retroactive evaluation as proposed in the Furman Report (2019) as well as further cross-market leveraging and remedy studies as proposed in the Commission 'Competition Law 4.0' (2019), before turning (iv) to adopting ex-ante sector regulation, including potentially a "strategic market status" / "paramount cross-market significance" type of declaratory decision for special rules to apply below a clear dominant threshold.

33.2
Please indicate what type of investigative powers would be adequate and appropriate to ensure the effectiveness of the new competition tool. Please rate each of the listed investigative powers according to its importance.

	No knowledge/ No experience	No importance/ No relevance	Somewhat important	Important	Very important
Addressing requests for information to companies, including an obligation to reply				X	
Imposing penalties for not replying to requests for information				X	
Imposing penalties for providing incomplete or misleading information in reply to requests for information				X	
The power to interview company management and personnel		X			
Imposing penalties for not submitting to interviews		X			
The power to obtain expert opinions				X	
The power to carry out inspections at companies				X	
Imposing penalties for not submitting to inspections at companies				X	

33.3

Please explain your answer. Please also list here any other investigative powers that you would consider appropriate to ensure the effectiveness of the new competition tool.

We have replied above based on current practice under Art 102 TFEU and a potential ex-ante regulation, to be adopted at a later stage, in order to subject dominant platforms to additional rules (e.g. a prohibition of self-preferencing).

As explained in our answer to question 33.1 above, we consider that it would be important for the Commission to be able to make its decisions following a full investigation, and a full defence as well. The right to request information is a key instrument in order to gather the required information.

The possibility to impose fines in cases of non-compliance would potentially be necessary in order to make the instrument effective. As false and misleading information could result in inaccurate assessments of market developments and, ultimately, could result in inadequate actions taken. Thus, there is a need for deterrence as regards such illicit behaviour, which could potentially be best achieved through the power to impose fines in cases of misconduct. The German Monopolies Commission has instead recommended tightening the procedural obligations for undertakings to cooperate with the Commission; if companies do not disclose certain information on their own initiative, the Commission should be allowed to draw conclusions from a lack of cooperation in the context of their free consideration of evidence. (Monopolies Commission (2020) p. 35). This type of procedural rule, however, shifts the burden of proof and should therefore not be considered.

Rights to interview management and personnel should not be adopted beyond current rules. EU competition rules address undertakings, not individuals. They must accordingly be enforced against undertakings. The right to inspect undertakings premises and documents, in particular virtual documentation, should suffice
Inspections at the companies are a powerful tool to access confidential company information. However, this would apply to investigations of illicit behaviour only, i.e. suspected behaviour subject to Articles 101, 102 TFEU.

34. Do you consider that the new competition tool should be subject to binding legal deadlines?

- ☐ Yes
- ☐ No
- ☒ Not applicable/no relevant experience or knowledge

34.1

Please explain your answer, including the resulting benefits and drawbacks. If you replied yes, please specify the type of deadlines.

In our view, ex-ante regulation once adopted should apply to dominant platforms, or at most, to those with “strategic market status”/”paramount cross-market significance” and in that case follow the two-step approach set out above, namely (1) defining conditions for such a declaratory decision, and (2) enumerating special rules. The declaratory decision should apply for a limited time only.

35. Do you consider that the new competition tool should include the possibility to impose interim measures in order to pre-empt irreparable harm?

☐ Yes

☐ No

☒ Not applicable/no relevant experience or knowledge

35.1
Please explain your answer.

Once ex-ante regulation of dominant (SMS) platforms would be introduced, we consider it appropriate, in line with current law, to include the power to impose interim measures. We note, however, that the EU Commission has so far adopted interim measures in extremely few cases (the first in 20 years was the recent *Broadcom* decision, press release IP/19/6109 of 16 October 2019), and accordingly has very limited experience. We therefore recommend to develop such practice under the existing rules (Art 102 TFEU/Art 8 (1) Regulation 1/2003) first before proposing to do the same under a new ex-ante regulation. There is for the same reason no case for lowering the threshold for interim measures (see also the Commission 'Competition Law 4.0' (2019), p. 76).

36. Do you consider that the new competition tool should include the possibility to accept voluntary commitments by the companies operating in the markets concerned to address identified and demonstrated structural competition problems?

☒ Yes

☐ No

☐ Not applicable/no relevant experience or knowledge

36.1
Please explain your answer.

Commitment decisions under Art 9 Reg. 1/2003 have proven a helpful tool, especially where new legal territory is explored (see e.g. the first signalling case under Article 101 TFEU, AT.39850 - *Container shipping*), and should therefore be introduced if and when an ex-ante platform regulation is adopted.

37. Do you consider that during the proceedings the companies operating in the markets concerned, or suppliers and customers of those companies should have the possibility to comment on the findings of the existence of a structural competition problem before the final decision?

☒ Yes

☐ No

☐ Not applicable/no relevant experience or knowledge

37.1
Please explain your answer.

Third-party rights are enshrined in current procedural law, namely in Art. 27 Reg. 1/2003 and should apply to any subsequent ex-ante platform regulation as well.

38. Do you consider that during the proceedings the companies operating in the markets concerned, or suppliers and customers of those companies should have the possibility to comment on the appropriateness and proportionality of the envisaged remedies?

☒ Yes

☐ No

☐ Not applicable/no relevant experience or knowledge

38.1
Please explain your answer.

As above (37.1).

39. Do you consider that the new competition tool should be subject to adequate procedural safeguards, including judicial review?

☒ Yes

☐ No

☐ Not applicable/no relevant experience or knowledge

39.1
Please explain your answer.

Any decision imposed on a private undertaking as addressee of an ex-ante regulation should, of course, have the right to judicial review. This is mandatory under both the Charter of Fundamental Rights (Art. 47-50) and the European Convention on Human Rights (Art. 6), though the latter has not been recognized as a source of law applicable to the EU institutions.

39.2
Please indicate which further procedural safeguards you would consider necessary.

	Not applicable/No relevant Experience or knowledge	Not effective	Somewhat effective	Sufficiently effective	Very effective	Most effective
1.Current competition rules are enough to address issues raised in digital markets					X	
2.There is a need for an additional regulatory				X		

framework imposing obligations and prohibitions that are generally applicable to all online platforms with gatekeeper power						
3. There is a need for an additional regulatory framework allowing for the possibility to impose tailored remedies on individual large online platforms with gatekeeper power on a case-by-case basis.			X			
4. There is a need for a New Competition Tool allowing to address structural risks and lack of competition in (digital) markets on a case-by-case basis		X				
5. There is a need for combination of two or more of the options 2 to 4.		X				

Under the position adopted here, should an ex-ante platform regulation be adopted that includes "strategic market status" type rules, judicial review should be available to both, first, the declaratory designation of a "strategic market status", and second, the actual remedy imposed.

Section F: Concluding questions and document upload

40. Taking into consideration the parallel consultation on a proposal in the context of the Digital Services Act package for ex-ante rules to ensure that markets characterised by large platforms with significant network effects acting as gatekeepers remain fair and contestable for innovators, businesses, and new market entrants, please rate the suitability of each option below to address market issues raised by online platform ecosystems.

	Not applicable/No relevant Experience or knowledge	Not effective	Somewhat effective	Sufficiently effective	Very effective	Most effective
1.Current competition rules are enough to address issues raised in digital markets					X	

2.There is a need for an additional regulatory framework imposing obligations and prohibitions that are generally applicable to all online platforms with gatekeeper power				X		
3. There is a need for an additional regulatory framework allowing for the possibility to impose tailored remedies on individual large online platforms with gatekeeper power on a case-by-case basis.			X			
4. There is a need for a New Competition Tool allowing to address structural risks and lack of competition in (digital) markets on a case-by-case basis		X				
5. There is a need for combination of two or more of the options 2 to 4.		X				

40.1

Please explain which of the options, or combination of these, in your view would be suitable and sufficient to address the contestability issues arising in the online platforms ecosystems.

As we have explained in detail in our answers to the questions in the previous sections, we consider that, in general, the current competition rules, i.e. Article 101, 102 TFEU as well as merger control provisions, are sufficient to address competition issues in the digital sector. We have also pointed out that it might be necessary to adapt the application of these rules to the digital sector by issuing guidance on market definition, market dominance criteria and enforcement priorities.

We have further acknowledged that, especially in gatekeeper scenarios, additional rules in terms of an ex-ante regulation may be called for which applies to dominant platforms. If experience with decision practice yet to be gathered should show that further rules, e.g. against self-preferencing, will be necessary to apply even below the dominance threshold (e.g. if dominance is uncertain in a duopoly scenario), we have advocated a case-by-case declaratory decision of "*strategic market status*"/"*paramount cross-market significance*" which allows to impose additional rules/remedies in a second step. Hence, the choice of the above three options #1.-#3 with top priority for #1, second priority for #2, and third priority for #3.

41. Please feel free to upload a concise document, such as a position paper, explaining your views in more detail or including additional information and data. Please note that the uploaded document will be published alongside your response to the questionnaire which is the essential input to this open public consultation. The document is an optional complement and serves as additional background reading to better understand your position.

None

42. Do you have any further comments on this initiative on aspects notcovered by the previous questions?

No.

43. Please indicate whether the Commission services may contact you for further details on the information submitted, if required.

☒ Yes
☐ No