

## EU Commission - Consultation on a New Competition Tool

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Consultation response from the

### Centre for Competition Policy

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This consultation response has been drafted by the named academic members of the Centre, who retain responsibility for its content.

As an academic research centre, we welcome explicit citation and sharing of this consultation response and the research cited within it. If you would like to discuss the evidence in more detail, please feel free to contact the centre or the named academics.

#### **The Centre for Competition Policy (CCP)**

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## **Additional CCP comments: EU consultation on New Digital Tool and New Digital Regulation.**

In light of the nature of the possible changes in EU legislation and potential new regulatory structure, and the stated indication that there might not be a second opportunity for open comment, the UEA's Centre for Competition Policy provides the following observations. These draw out key points for which we did not feel able to express responsive points in the questionnaire format. We note also a recent 2020 paper by Amelia Fletcher "Market Investigations for Digital Platforms: Panacea or Complement?" (attached and available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3668289](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668289)) and another by Elias Deutscher (attached).

The Centre for Competition Policy is a leading inter-disciplinary research centre focused on competition and regulation based at the University of East Anglia. This response was prepared by Andrea Calef, Elias Deutscher, Sean Ennis, Amelia Fletcher and Bruce Lyons, though not all views are attributable to each person.

We proceed with comments by theme, with an emphasis on brevity and focus, and without suggesting that these points provide a complete coverage of important topics:

***Structure, location and funding of body for new competition tool.*** DG Competition, as currently constituted, is mainly set up for casework. Although it has performed occasional market studies, any addition of responsibilities to the European Commission, such as those outlined, would require that the body handling those powers (if pre-existing) would receive an additional budget sufficient to ensure that balanced and procedurally fair conclusions can be drawn. This issue is particularly relevant if remedies need ongoing monitoring. If the competition tool and digital regulation go to one or more existing DGs, then the budget of the DG(s) would need to be raised concomitantly. We note that often the funding of competition authority work may come from general taxation (though there are exceptions within the EU, such as in Greece) while regulators are very often financed by a levy from the industry they oversee, given that the focus is so much more specific on a limited area of economic activity. To the extent that these powers focus very much on one sector, the question of how to finance their application is relevant.

**Remedies.** With the described powers in hand, it will be important to devise checks and balances to aid in resisting the temptation to enter directly into structural remedies when behavioural remedies are possible. Demand side remedies can be valuable in many circumstances, particularly when structural remedies are inappropriate; for example, in the presence of strong network externalities or when consumer behaviour results in lack of competition despite an apparently competitive market structure.<sup>1</sup> When designing such remedies, it is important to consider how consumers really behave, with a particular focus on relative salience and relative consumer engagement.<sup>2</sup> Moreover, intuitively sensible remedies may sometimes have unexpected effects, as might occur with price disclosure requirements.<sup>3</sup> When remedies are adopted, there needs to be an appropriate body (e.g. DG) that has the capacity for on-going monitoring and review.

**Coordination.** Coordination between EC and EU national regulators will be important, as well as coordination between regulators and competition authorities. The governance challenges and benefits from coordination between sector and competition authority regulators are described in Ennis (2019) which includes a discussion of the merits and disadvantages of combining regulators and competition authorities.<sup>4</sup> It will be particularly valuable to find appropriate mechanisms for sharing confidential information from investigations and ensuring that comparable information is provided to different authorities with legitimate interest and with powers that enable gathering and sharing the type of information shared. In particular for digital companies, information needed in one jurisdiction may commonly be found in another. The signing on 2 September 2020 of the Mutual Assistance and Co-operation Framework for Competition between five competition authorities outside the EU is a positive development and it may be useful for the EU to take those steps necessary to ensure it has access to relevant confidential information wherever it may be held in the world.

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<sup>1</sup> See Amelia Fletcher (2016) *The Role of Demand-Side Remedies in Driving Effective Competition: A Review for Which? CCP Report*, [http://www.regulation.org.uk/library/2016-CCP-Demand\\_Side\\_Remedies.pdf](http://www.regulation.org.uk/library/2016-CCP-Demand_Side_Remedies.pdf).

<sup>2</sup> See Amelia Fletcher (2018) "Disclosure and Other Tools for Enhancing Consumer Engagement and Competition", CCP Working Paper 18-13, <http://competitionpolicy.ac.uk/documents/8158338/24898393/CCP%2BWP%2B18-13%2Bcomplete.pdf>.

<sup>3</sup> Further thoughts on proposals for broad or narrow disclosure requirements related to price discrimination on the internet, can be found in Sean Ennis and Wynne Lam (2020) "Personalised Pricing and Disclosure" (forthcoming) BEIS Research Paper.

<sup>4</sup> Sean Ennis "Independent Sector Regulators and their Relationship with Competition Authorities" (2019) [https://one.oecd.org/document/DAF/COMP/WP2\(2019\)3/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2(2019)3/en/pdf).

In addition to the new mutual assistance framework, examples of ways to share information, investigative and decision-making powers include:

- European Competition Network;
- Dual powers in the UK between the competition authority and regulators (concurrency). We note that in the UK, if CMA writes a report, it may send the design of remedy to the regulator or monitoring to the regulator.

We note in particular that it may be worth looking to experience with other domains of regulation. For example, the experience of cooperation in the Single Supervisory Mechanism (SSM) at ECB may illustrate alternative mechanisms for ensuring that activities are overseen both at national and ECB level. We note that DG Competition may not have the direct pseudo-legislative power of the SSM at the ECB (even if that power is not used by the ECB).

One of the authors of this note believes that even if cross-jurisdiction mandatory coordination is possible, differentiated enforcement across geographies can permit comparative studies to help determine which policy options are most effective, which may be valuable if the corporate cost from implementing different local versions of their product is moderate. Uniform and coordinated action can make such evaluation more difficult. But such evaluation is particularly important in a context in which unexpected regulatory consequences are possible and the evidence base for specific regulatory approaches is somewhat limited.<sup>5</sup>

***Monitoring and subsidiarity.*** As already pointed out, the monitoring of commitments by private companies on their behaviour may be a major future activity. For monitoring elements on the demand side, related to perceived retail activity, national authorities may be well-suited to such monitoring. On the other hand, monitoring of behaviour behind the retail-customer interface (including business customers) may involve examination of algorithms or examinations of multi-country related business documents. In some respects, this type of monitoring may be particularly well-suited to a large authority with multi-country competence, suggesting some monitoring may be best performed by the EC.

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<sup>5</sup> See Sean Ennis (2017) “Disruptive innovation and cross-border co-operation” (Prepared for EUI conference of 29 May, 2017, mimeo).

**Checks and balances.** We note that the UK government has given UK competition authority strong powers that amount to quasi-legislative authority around market investigations (e.g. break-up or price regulation of firms that have not broken any law). Giving such authority to an entity in the European Union context may be more of a political concern than it is in the UK.

**Powers.** The distribution of powers would be an important aspect of forthcoming legislation, considering whether member states would be required to set up a comparable digital tool and regulatory apparatus to that at the European Union level, on the one extreme, or having the powers for review handled exclusively at the central level. In the energy sector, for example, EU policies tend to be operationalised via the mechanism of national regulators. While it might be unwise to require putting in place of such regulation in all member states, given the limited size and budget of smaller states and complexity of the digital field at the moment, there may be benefits that come from regulatory diversity that ultimately allows for a better assessment of alternative policy options at the EU level.

When comparable powers exist at Member State and EU level, a mechanism is needed to prevent inconsistent outcomes. We note that, while the UK had market investigation powers that could potentially overlap with those of the EC, no UK market investigations are performed in areas that would potentially intervene with EC competences.

**Limiting focus to digital.** Moreover, there is a risk that if new powers are justified for digital purposes, but are actually much broader, they will then be used later for purposes beyond the initially envisioned legislative remit, and that they could be used for broader political intervention in corporate structuring. However, it will be increasingly difficult to distinguish separate digital and non-digital markets as transactions move online and consumer durables become part of the 'internet of things'. Placing the powers within DG Competition would ensure that other investigations can take priority over a given market study (e.g., cartel or abuse of dominance), both limiting scope of market studies and ensuring that market investigations are not stopping enforcement against otherwise illegal acts for which classic competition law enforcement would be the preferred outcome.